

Chapter 1

Introduction

Referral of inquiry

1.1 On 6 July 2011, the Senate referred the following matter to the Community Affairs References Committee for inquiry and report:

A review of the Professional Services Review (PSR) Scheme provided for under the Health Insurance Act 1973 (the Act) which is responsible for reviewing and investigating the provision of Medicare or Pharmaceutical Benefits Scheme services by health professionals, with particular reference to:

- (a) *the structure and composition of the PSR, including:*
 - (i) *criteria for selection of the executive and constituent members encompassing their experience in administrative review proceedings,*
 - (ii) *the role of specialist health professionals in assisting in cases where members lack relevant specialist expertise, and*
 - (iii) *accountability of all parties under the Act;*
- (b) *current operating procedures and processes used to guide committees in reviewing cases;*
- (c) *procedures for investigating alleged breaches under the Act;*
- (d) *pathways available to practitioners or health professionals under review to respond to any alleged breach;*
- (e) *the appropriateness of the appeals process; and*
- (f) *any other related matter.*

1.2 The reporting date for the inquiry was originally set as 22 September 2011; this date was subsequently extended to 12 October 2011.

Conduct of inquiry

1.3 The inquiry was advertised in *The Australian* and on the internet. The committee also wrote directly to a number of organisations and individuals inviting submissions to the inquiry. The committee received submissions from 52 individuals and organisations. The committee held two public hearings, the first in Canberra on 22 September 2011 and the second in Canberra on 23 September 2011.

1.4 The committee thanks all those who contributed to the inquiry by making submissions, providing additional information or appearing before it to give evidence.

1.5 The committee also wishes to mention the contribution of those health and medical practitioners who, through sharing their experiences with the PSR Scheme, brought many of the issues discussed in this report to the fore.

Context for the PSR Scheme

1.6 The PSR Scheme:

...was introduced in 1994 to replace the previous Medical Services Committees of Inquiry (MSCI) scheme. A report by the Australian National Audit Office (ANAO) in 1992-93, entitled *Medifraud and excessive servicing: Health Insurance Commission* found that MSCIs were not operating satisfactorily and needed to be strengthened.¹

1.7 The primary purpose of the PSR scheme is to:

...protect the integrity of the Commonwealth Medicare benefits and pharmaceutical benefits programs and, in doing so:

- (a) protect patients and the community in general from the risks associated with inappropriate practice; and
- (b) protect the Commonwealth from having to meet the cost of services provided as a result of inappropriate practice.²

1.8 The scheme:

...provides for the examination of an individual health practitioner's conduct by a committee of peers to ascertain whether inappropriate practice under Medicare is involved and, if so, to provide for action to be taken.³

The current PSR Scheme

1.9 The PSR is made up of 3 separate elements: the Director, the committee of peers, and the Determining Authority. The Director's main role is to decide whether or not the case should proceed, and if so whether it is appropriate to enter into an agreement with the practitioner which may include repaying some or all of the Medicare benefits received. This agreement has to be ratified, or rejected by the Determining Authority. If the Director does not consider an agreement to be appropriate, or one cannot be reached, the Director will then refer the case to the committee of peers. This panel will then examine the case in detail with the

1 *The Report of the Review Committee of the Professional Services Review Scheme*, March 1999, p. 9, available at: <http://www.psr.gov.au/docs/publications/PSR%20Review%20Report%20March%201999.pdf> (accessed on 28 September 2011).

2 *Health Insurance Act 1973*, s. 79A.

3 *The Report of the Review Committee of the Professional Services Review Scheme*, March 1999, p. 9, available at: <http://www.psr.gov.au/docs/publications/PSR%20Review%20Report%20March%201999.pdf> (accessed on 28 September 2011).

practitioner and report to the Determining Authority. If inappropriate practice has been found the Determining Authority will decide on appropriate sanctions.

1.10 The three stages in detail are as follows:

Review by the Director

Medicare Australia requests the Director of the PSR to undertake a review of the provision of services by a practitioner over a specified period.

The Director considers the Medicare Australia request and, if the Director forms the opinion that the person may have engaged in inappropriate practice, they undertake a review.

The Director examines the data received from Medicare Australia and may also direct the practitioner to produce complete and original patient records. The records are examined, the Director may meet with the practitioner, a report on the findings is made and any submission received from the practitioner is considered. After this, the Director must decide to:

- take no further action;
- offer the practitioner the opportunity to negotiate an Agreement under section 92 of the Act where the practitioner acknowledges inappropriate practice and agrees specific actions which may include repaying a part or all of the Medicare benefit that has been received; or
- refer the practitioner to a peer review Committee.

If the Director considers that the conduct of the practitioner needs further investigation, or the practitioner chooses not to enter a section 92 Agreement, a Committee of the practitioner's peers is established.⁴

Review by a Committee

Members are drawn from the Panel appointed by the Minister.

The Committee will consider whether the practitioner's clinical decisions were inappropriate for the patient, whether the services provided did not meet the requirements of the Medicare item descriptor and / or any PBS restrictions as well as assessing the adequacy of clinical records. The Committee will use clinical records and any other material provided by the practitioner. The Committee determines whether the practitioner's conduct in connection with the rendering or initiation of services would be acceptable to the general body of their peers.

If, after considering the information provided, the Committee forms a preliminary view that the practitioner may have engaged in inappropriate practice, a hearing will be held.

4 Professional Services Review, *Your Guide to the PSR*, p. 14, available at: <http://www.psr.gov.au/docs/publications/Your%20Guide%20to%20the%20PSR%20Process%20012July2011.pdf> (accessed on 5 October 2011).

The hearing will provide the practitioner with the opportunity to present both oral and written evidence to support their case. After considering all the evidence, the Committee produces a Draft Report containing its findings. The practitioner is given a copy of this Report.

If the Committee finds that no inappropriate practice has occurred, the matter is closed.

If the Committee finds that inappropriate practice has occurred, the practitioner will be given time to make submissions on the Draft Report. The Committee will then consider the Practitioner's submissions and may or may not change their findings. The Committee will then issue a Final Report to the practitioner, and the Determining Authority.⁵

The Determining Authority

The Determining Authority is an independent body within the Professional Services Review which has two main functions:

decide whether to ratify section 92 Negotiated Agreements reached between the Director of PSR and a practitioner; and

determine what sanctions to apply whenever practitioners have been found to have engaged in inappropriate practice by a Committee.

When a Committee makes a finding of inappropriate practice against a practitioner, the Determining Authority will invite submissions from the practitioner on the sanctions it should impose. The Determining Authority will then draft a determination, including the sanctions it intends to impose.

The Determining Authority must impose one or more of the following sanctions:

- a reprimand;
- counselling;
- partial disqualification from claiming a Medicare benefit for no more than 3 years;
- full disqualification from claiming a Medicare benefit for no more than 3 years;
- an order for repayment of any Medicare benefits for services provided in the review period which have been found as being provided inappropriately; or
- a full disqualification from the PBS for no more than 3 years.

Practitioners are given an opportunity to make written submissions on the Draft Determination. The Determining Authority will consider this submission and then make a Final Determination. This Final Determination

5 Professional Services Review, *Your Guide to the PSR*, pp.14-15, available at: <http://www.psr.gov.au/docs/publications/Your%20Guide%20to%20the%20PSR%20Process%20012July2011.pdf> (accessed on 5 October 2011).

contains the final decision of PSR and is the end of the PSR process unless the practitioner appeals to the Federal Court or Federal Magistrates Court.⁶

Major changes to the PSR Scheme

1999 Review of the PSR Scheme

1.11 The PSR Scheme was reviewed in 1999 following the 1998 Federal Court decision in the case of *Anthony Adams v Steven Yung & Anor* [1998] FCA 506 (15 May 1998). According to the review report the case:

...highlighted deficiencies in the legislation and in the operation of the Professional Services Review Scheme, and necessitated a comprehensive review of the Scheme. In the *Yung* case, the PSRC relied on the legislative definition of inappropriate practice being conduct unacceptable to the general body of the profession. Consequently, the PSRC inquiry focussed on the general pattern of conduct, not on the provision of excessive services to individual patients as required by the previous Medical Services Committees of Inquiry (MSCI) process.⁷

1.12 A review committee was consequently established which comprised the AMA, the Health Insurance Commission, DoHA and the Director of the PSR. The remit of the review was to:

...address the deficiencies identified by the Court and to clarify the legislative intention of the Scheme to focus on professional conduct.⁸

1.13 The Review Committee concluded that the PSR Scheme ethos of peer review be maintained and made 45 recommendations in its report that were:

...necessary to improve the administration of the PSR process to meet the needs for legal effectiveness, transparency and natural justice, and to ensure the peer review process is maintained.⁹

6 Professional Services Review, *Your Guide to the PSR*, p. 15, available at: <http://www.psr.gov.au/docs/publications/Your%20Guide%20to%20the%20PSR%20Process%2012July2011.pdf> (accessed on 5 October 2011).

7 *The Report of the Review Committee of the Professional Services Review Scheme*, March 1999, p. 2, available at: <http://www.psr.gov.au/docs/publications/PSR%20Review%20Report%20March%201999.pdf> (accessed on 28 September 2011).

8 *The Report of the Review Committee of the Professional Services Review Scheme*, March 1999, p. 3, available at: <http://www.psr.gov.au/docs/publications/PSR%20Review%20Report%20March%201999.pdf> (accessed on 28 September 2011).

9 *The Report of the Review Committee of the Professional Services Review Scheme*, March 1999, p. 1, available at: <http://www.psr.gov.au/docs/publications/PSR%20Review%20Report%20March%201999.pdf>

1.14 The recommendations covered the following areas:

- the definition of inappropriate practice;
- processes to arrive at findings;
- determinations;
- expanding the agency;
- the Health Insurance Commission (HIC) and referral processes;
- the role and responsibilities of the Director of PSR;
- enhanced legal assistance and processes;
- referral of professional issues;
- the determining panel;
- revised time periods; and
- review rights.¹⁰

1.15 Recommendations of note included the publication of the names of practitioners who had been found to have practiced inappropriately, and the introduction of the 'deeming provision' that applies where a general practitioner provided 80 or more consultation services on 20 or more days in a 12 month period.¹¹

1.16 In ensuring these recommendations were considered and actioned, the Review Committee recommended that the government review the new PSR arrangements within three years after coming into effect.¹²

2006 Review of the PSR Scheme

1.17 The 1999 review had prompted a number of legislative changes to the PSR enabling legislation. The recommendation to review these changes within 3 years was not implemented because the government felt that not enough case law had developed to properly assess whether the changes had had the desired effect. The 2006 report explains the government's decision:

10 *The Report of the Review Committee of the Professional Services Review Scheme*, March 1999, p.p. 4-8, available at: <http://www.psr.gov.au/docs/publications/PSR%20Review%20Report%20March%201999.pdf> (accessed on 28 September 2011).

11 Department of Health and Ageing, *Review of the Professional Services Review Scheme – Report of the Steering Committee*, May 2007, p.p. 16-17, available at: <http://www.psr.gov.au/docs/publications/PSR%20Review%20Report-Final%20July%202007.pdf> (accessed on 28 September 2011).

12 *The Report of the Review Committee of the Professional Services Review Scheme*, March 1999, p. 2, available at: <http://www.psr.gov.au/docs/publications/PSR%20Review%20Report%20March%201999.pdf> (accessed on 28 September 2011).

...the proposed review was delayed because there was insufficient case law to effectively evaluate the 1999 legislative amendments. When further refinements to the PSR Scheme were made in 2002 in response to the decision in the *Pradhan* case, the decision was made to postpone the review until such time as an adequate case law history could be developed to inform the process.¹³

1.18 The 2002 amendments were intended to clarify the object and operation of the Scheme and the amendments included:

- the inclusion of a new objects clause (s.79A of the HIA), emphasising the public protective aim of the Scheme;
- the replacement of the investigative referral process with a request from Medicare Australia that the DPSR examine Medicare services rendered or initiated by a practitioner for whom a Medicare benefit had been claimed during a period (s.86). This amendment meant that the DPSR or a PSR committee was able to examine patient records relating to any or all specified services rendered or initiated by the practitioner during a specified period, and was not restricted by Medicare Australia's reasons for the request; and
- enhanced procedural fairness opportunities at various stages of the Scheme's review process.¹⁴

1.19 When established the 2006 review committee comprised the AMA, Medicare Australia, DoHA and a representative from the PSR. The committee's remit was to examine:

...the impact of the recommendations of the 1999 Review and the impact of the 1999 and 2002 legislative changes on the operation of the PSR Scheme.¹⁵

1.20 The report on the review broadly confirmed the continued support for the PSR Scheme and the concept of peer review and found that:

All of the 1999 Review recommendations have been implemented, except for recommendations 6, 10, 16, 40 and 44...(of which) recommendation 6

13 Department of Health and Ageing, *Review of the Professional Services Review Scheme – Report of the Steering Committee*, May 2007, p. 8, available at: <http://www.psr.gov.au/docs/publications/PSR%20Review%20Report-Final%20July%202007.pdf> (accessed on 5 October 2011).

14 Department of Health and Ageing, *Review of the Professional Services Review Scheme – Report of the Steering Committee*, May 2007, p. 14, available at: <http://www.psr.gov.au/docs/publications/PSR%20Review%20Report-Final%20July%202007.pdf> (accessed on 5 October 2011).

15 Department of Health and Ageing, *Review of the Professional Services Review Scheme – Report of the Steering Committee*, May 2007, p. 4, available at: <http://www.psr.gov.au/docs/publications/PSR%20Review%20Report-Final%20July%202007.pdf> (accessed on 5 October 2011).

has been partially implemented...recommendation 44 ... has been implemented (through the 2006) Review.¹⁶

1.21 The report described the 1999 and 2002 amendments to the scheme had clarified:

...the protective nature of the scheme in protecting both Commonwealth revenue and patients from inappropriate practice. The amendments also reinforced the 'procedural fairness' requirements necessary in the process, based on a strong system of peer review. The Steering Committee considers that these were important changes to ensure procedural fairness and protect the rights of the person under review (PUR).¹⁷

Recent context

1.22 The PSR recently lost two cases in the Federal Courts. The first was the decision on 7 June 2011 to quash the decision of the PSR against Dr Peter Tisdall in 2009¹⁸ with costs being awarded to Dr Tisdall. The court cited a lack of evidentiary support for the PSR Committee's conclusion in that case, though the PSR Director at the time, Dr Webber, noted that the finding 'does not go to the clinical behaviour' of the doctor in question.¹⁹ The second case, *Kutlu v the Director of PSR*,²⁰ concerned the appointment of a number of PSR Deputy Director and Panel members going back to 2005. The Court decided on 28 July 2011 that the appointments were made in contravention of the Minister's obligation under sections 84(3), and 85(3) to consult with the Australian Medical Association (AMA) prior to the appointments. The court deemed invalid the committees to which one or more of those named were members, as well as the reports of those committees. The committee understands that this has led to the dropping of a large number of reviews of medical professionals that were on foot at the time of the decision.²¹

1.23 The committee wrote to the minister on 30 August 2011 asking how the government intended to respond to both cases. A reply was received on 12 September 2011 saying that the Commonwealth had applied for special leave to appeal the decision of *Kutlu v Director of PSR* but did not outline the grounds on which it will

16 Department of Health and Ageing, *Review of the Professional Services Review Scheme – Report of the Steering Committee*, May 2007, p.p. 17-18, <http://www.psr.gov.au/docs/publications/PSR%20Review%20Report-Final%20July%202007.pdf> (accessed on 5 October 2011).

17 Department of Health and Ageing, *Review of the Professional Services Review Scheme – Report of the Steering Committee*, May 2007, p. 19, accessed on 5 October 2011 via <http://www.psr.gov.au/docs/publications/PSR%20Review%20Report-Final%20July%202007.pdf>

18 *Tisdall v Webber* [2011] FCAFC 76

19 Dr Webber, *Proof Committee Hansard*, 22 September 2011, p. 5.

20 *Kutlu v Director of Professional Services Review* [2011] FCAFC 94

21 Sean Parnell, 'Probe into medical watchdog', *The Australian*, 15 March 2011, p. 7.

do so. The Commonwealth has advised that it will not be appealing the decision of *Tisdall v Webber*.

1.24 The PSR submission states that on 27 October 2010 it requested that all current Panel Members and Deputy Directors of the PSR resign in response to 'potential issues with the 2009 appointment of Panel members and Deputy Directors'.²²

1.25 In March 2011 new guidelines were agreed by the PSR and AMA for the appointment of Panel Members and Deputy Directors, however the recruitment process has not yet commenced. This means that currently the PSR does not have any Panel Members and Deputy Directors.

22 PSR, *Submission 24*, p. 16.

