



## Australian National Preventive Health Agency Bill 2010

This Bills Digest should be read in conjunction with the Digest previously prepared for the 42<sup>nd</sup> Parliament

This also replaces a Digest published on 25 October 2010. It incorporates additional material in relation to a 2009 report by the Senate Scrutiny of Bills Committee.

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# Australian National Preventive Health Agency Bill 2010

**Date introduced:** 29 September 2010

**House:** House of Representatives

**Portfolio:** Health and Ageing

**Commencement:** Section 1 and 2: on Royal Assent

Sections 3–56: on a date to be fixed by proclamation. If any provision does not commence within six months of Royal Assent, it commences after the end of that six month period.

**Links:** The links to the [Bill, Explanatory Memorandum and second reading speech](#) can be found on the Bills homepage, or through <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at the ComLaw website, which is at <http://www.comlaw.gov.au/>.

## Re-introduction of Bill

The Australian National Preventive Health Agency Bill 2009 (the original Bill) was first introduced into Parliament on 10 September 2009, but lapsed when the 42<sup>nd</sup> Parliament was prorogued in July 2010.

The Australian National Preventive Health Agency Bill 2010 (the current Bill) was introduced into the 43<sup>rd</sup> Parliament on 29 September 2010 with some changes. In short, the strategic and operational plans were extended from three to five years and the social marketing campaigns to be conducted by the Australian National Preventive Health Agency (ANPHA), are to be directed towards alcohol, tobacco and other substance abuse, and obesity programs.

## Purpose

This Bill establishes the Australian National Preventive Health Agency (ANPHA). Its purpose is to support the Australian Health Ministers' Conference and Council of Australian Governments (COAG) in creating a framework for a national approach to preventive health.<sup>1</sup> At the outset, it should be stated that the establishment of the ANPHA was one of several strategies proposed by the Preventative Health Taskforce (the Taskforce) in its National Preventative Health Strategy.<sup>2</sup>

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1. Explanatory Memorandum, Australian National Preventive Health Agency Bill 2010, p. 1.

2. See Preventative Health Taskforce, *Australia: the healthiest country by 2020 – National Preventative Health Strategy– Overview*, Canberra, 2009, viewed 12 October 2010, <http://www.preventativehealth.org.au/internet/preventativehealth/publishing.nsf/Content/nphs-overview>

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## Background

This digest draws heavily on the Bills Digest prepared for the 42<sup>nd</sup> Parliament.<sup>3</sup>

Three major inquiries into the health system have been completed over the past three years— the National Health and Hospitals Reform Commission, the Preventative Health Taskforce (the Taskforce) and, through the Department of Health and Ageing, the External Reference Group on primary health care. Their respective reports to Government all reinforced the view that more vigorous efforts in the field of prevention are needed.

Unsurprisingly, the Taskforce outlined the most comprehensive plan to advance the prevention agenda in Australia. It made numerous recommendations on prevention, focusing particularly on obesity, and tobacco and alcohol use. It also outlined a comprehensive strategy and set four ambitious prevention targets that align with interim targets previously outlined by COAG. One of the Taskforce's recommendations was to establish a National Prevention Agency. This had also been foreshadowed in the National Partnership Agreement on Preventive Health.

## National Health and Hospitals Network

Since the introduction of the original Bill, progress has been made on the Government's health reform agenda. In April 2010, COAG agreed to the National Health and Hospitals Network (NHHN) and subsequent changes to the financing of hospitals, primary care and aged care as well the introduction of 'Local Hospital Networks' (LHN) and Medicare Locals (primary care organisations). With the exception of Western Australia, all States and Territories are part of the NHHN.

A number of agencies are to be established under the NHHN: Independent Hospital Pricing Authority, National Performance Authority, and Australian Commission on Safety and Quality in Health Care. These are all subject to legislative passage and due to commence from 1 July 2011.<sup>4</sup>

Changes were also agreed to the financing arrangements for health care. As part of the NHHN, the Commonwealth will fund 60 per cent of hospitals and have full funding responsibility for aged care and primary care. However, the arrangements for the National Partnership Agreements with the state and territory governments will continue. As part of the National Partnership Agreements on Preventive Health, the Commonwealth Government committed to provide \$872.1 million in funding over six years for a range of preventive health activities, including the establishment of a national prevention agency.

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3. Am Boxall and S Scully, *Australian National Health Preventive Bill 2009*, Bills digest, no. 34, 2009–2010, viewed 1 October 2010, <http://www.aph.gov.au/library/pubs/bd/2009-10/10bd034.pdf>

4. Commonwealth of Australia, *A National Health and Hospitals Network – Delivering better health and better hospitals*, Commonwealth of Australia 2010, viewed 14 October 2010, p. 127, [http://www.health.gov.au/internet/yourhealth/publishing.nsf/Content/report-redbook/\\$File/HRT\\_report3.pdf](http://www.health.gov.au/internet/yourhealth/publishing.nsf/Content/report-redbook/$File/HRT_report3.pdf)

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## The original Bill—parliamentary debate and proposed amendments

The original Bill was subject to considerable debate in the Parliament. Both the Greens and Senator Xenophon moved amendments but these were not agreed to at that time.

In her second reading speech for the current Bill, Nicola Roxon, the Minister for Health and Ageing, noted that the Government has agreed to some of the proposed amendments. For example, the Government has agreed to the targeting of APHA's social marketing campaigns towards alcohol, tobacco, other substance abuse and obesity programs. The Government has also agreed to the extension of the strategic plans from three years to five years.<sup>5</sup> The additional timeframe may create opportunity for an iterative process (with respect to social marketing campaigns) to develop. Continuous monitoring and revision of social marketing campaigns are an important aspect of gauging responses to an intervention and considered integral to their overall success.<sup>6</sup>

However, the Greens' proposed amendments also contained provisions to define the objects and functions of the ANPHA, as follows:

- (a) to effectively monitor, evaluate and build evidence in relation to preventive health strategies;
- (b) to facilitate a national health prevention research infrastructure
- (c) to generate new partnerships for workplace, community and school interventions;
- (d) to assist in the development of the health prevention workforce;
- (e) to coordinate and implement a national approach to social marketing for preventive health programs.<sup>7</sup>

These have not been included in the current Bill. The function of the ANPHA is to support the CEO of the ANPHA in the performance of his or her functions.

The function of the CEO is prescribed in the legislation in extensive detail in proposed section 11. It could be argued that a specific focus on building partnerships across a range of sectors, as proposed by the Greens, may be more effective than 'to encourage initiatives relating to preventive health matters through partnerships with industry, non-governmental organisations and the community sector' (see **proposed subclause 11 (h)** in the current Bill). The proposed text does not appear to

5. N Roxon (Minister for Health and Ageing), 'Second reading speech: Australian National Preventive Health Agency Bill 2010', House of Representatives, *Debates*, 29 September 2010, p. 3.

6. S Grier & A Bryant, 'Social marketing and public health', *Annual Review of Public Health*, 26, 2005, pp. 319-39, <http://rds.epi-ucsf.org/ticr/syllabus/courses/66/2009/10/15/Lecture/readings/annurev.publhealth.26.021304.pdf>

7. Australian Greens, Amendment to the Australian National Preventive Health Agency Bill 2009, Sheet 5964 – revised, 27 October 2009, viewed 5 October 2010 [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;orderBy=customrank;page=0;query=national%20preventive%20health%20agency%20Dataset\\_Phrase%3Abillhome%20ParliamentNumber%3A42;rec=0;resCount=Default](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;orderBy=customrank;page=0;query=national%20preventive%20health%20agency%20Dataset_Phrase%3Abillhome%20ParliamentNumber%3A42;rec=0;resCount=Default)

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adequately account for the inter-sectoral nature of health (see discussion elsewhere in the Digest) or provide adequate incentive to actively build partnerships across a range of sectors.

There were some difficulties associated with the definition and development of some of the suggested amendments, for instance the 'health prevention workforce'. However the substantive issue has not been addressed and the absence of health workforce initiatives or measures that re-orient the health care system to a more preventive approach is a notable omission from the proposed functions of the CEO.

The Greens also proposed at least two, but no more than three, consumer members on the Advisory Council of the ANPHA. These members would either represent consumers or consumer health organisations. It appears that this has also not been adopted by Government. The Minister has suggested that that the ANPHA will 'benefit all Australians ...and will play a significant role in putting Australia on the path to becoming a healthier country'.<sup>8</sup> Without an adequate process to ensure consumer representation, questions may arise about the effectiveness of proposed strategies and campaigns of the ANPHA. As noted in the Digest prepared for the original Bill, the proposed arrangements for the Advisory Council potentially limit the extent to which the partners (for example State and Territory governments) can sustain a collaborative and co-operative approach.<sup>9</sup>

The original Bill was broadly welcomed by stakeholders and many urged its quick passage through Parliament.<sup>10</sup> There were however, some criticisms of the proposed agency and it was suggested that the government had adopted an overly paternalistic approach without encouraging individuals to take greater responsibility for their health.<sup>11</sup> Others criticised the Agency for ignoring social inequalities and the social determinants of health.<sup>12</sup> The reintroduction of the Bill was met with widespread support from stakeholders.

## Funding

Although the total resource allocation for the ANPHA remains unchanged, the Explanatory Memorandum to the current Bill does not include an annual breakdown of how the funds will be spent over the Forward Estimates, which was included Explanatory Memorandum to the original Bill.<sup>13</sup>

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8. N Roxon, op. cit., p. 9.

9. See, Am Boxall and S Scully, *Australian National Health Preventive Health Agency Bill 2009*, Bills digest, no. 34, 2009–2010, pp. 6, 11-12, viewed 12 October 2010, <http://www.apn.gov.au/library/pubs/bd/2009-10/10bd034.pdf>

10. Ibid, pp. 8-10

11. Ibid, pp. 8-10

12. E Cox, *Social inequality is toxic to our health*, www.crikey.com.au, 8 September 2009, viewed 22 October 2010, <http://www.crikey.com.au/2009/09/08/social-inequality-is-toxic-to-our-health/>

13. See also, Financial Implications, pp. 11-12 of this Digest.

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## Prevention and the social determinants of health

In her second reading speech, the Minister noted the importance of the social determinants of health and reflected upon the disparity between lowest income group and the most wealthy. The Minister also noted that prevention effort, to date, has been ‘fragmented and lacked cohesion and focus’.<sup>14</sup> Yet despite this, it is not clear how the ANPHA will address these issues. The work of the ANPHA is largely focussed on social marketing campaigns, yet it is generally accepted that they have limited effectiveness in influencing behavioural change if they do not take into account broader social issues.<sup>15</sup> Furthermore, social marketing campaigns are considered most effective when integrated with other programs such as information about specific interventions, telephone counselling or online tools.<sup>16</sup>

The Catholic Health Australia (CHA)—NATSEM Report on Health Inequalities recommends preventive health programs be targeted towards the lowest income quintile groups and delivered through community development initiatives that build social capacity. It also recommends funding of non-government organisations to provide health promotion. The proposed social marketing campaigns of the ANPHA will be directed towards alcohol, tobacco and other substance abuse and obesity. It is not clear if they will be integrated with existing strategies and programs or delivered in partnership with the non-government sector, or if they will be targeted in any way.

The National Partnership Agreement on Preventive Health, under which the ANPHA is established, adopts a ‘settings based’ approach with intervention being directed towards pre-schools, schools, workplaces and communities to support behavioural change. It remains to be seen whether such an approach will be effective across all income groups and the extent to which the activities of the ANPHA can facilitate change. Furthermore, it is not clear whether the ANPHA will also adopt a settings based approach in the delivery of social marketing campaigns.

As the Minister recognises in her second reading speech, there is conclusive evidence to suggest that the health of working aged Australians is affected by socio-economic status.<sup>17</sup> Many of the social determinants of health are beyond the influence of the health care system, for example, education, income and employment conditions, housing tenure and social connectedness. The proposed structure and work plan of the ANPHA would do little to influence the social determinants of health. Time will tell whether the Minister’s vision of the ANPHA playing a significant role in making Australia a ‘healthier country’ will be realised in the absence of systemic change and collaboration across a range of sectors.

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14. N Roxon, op. cit., p. 6.

15. See L Wallack, L Dorfman, D Jernigan, M Themba, *Media advocacy and public health: power for prevention*, Sage Publications, Newbury Park, 1993 and L Wallack, ‘Public health, social change, and media advocacy’, *Social Marketing Quarterly*, vol. 8, 2002, pp. 25–31.

16. For example, the Quit campaign uses a variety of tools including social marketing, practical information on smoking cessation, online tools such as the ‘Quitcoach’ and telephone counselling. See [Quit](#) for further details. See also Grier & Bryant for a detailed explanation of an integrated social marketing strategy.

17. Catholic Health Australia (CHA)-NATSEM, *Health lies in wealth: health inequalities in Australians of working age*, Policy paper, September 2010, viewed 30 September 2010, <http://www.cha.org.au/site.php?id=1045>

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## Structure, function and operations of the Australian National Health Preventive Health Agency

Under the current Bill, the ANPHA would continue to be a statutory agency made up of a CEO, an Advisory Council, and staff employed under the *Public Service Act 1999*.

### Chief Executive Officer

The main responsibilities of the CEO would be to:

- advise and make recommendations to the Minister for Health and Ageing (the Minister) on matters relating to preventive health
- develop five year strategic plans that specify the main prevention objectives and strategies for achieving them (not a triennial strategic plan as proposed in the original Bill)
- if requested, advise the Australian Health Ministers' Conference (the Ministerial Conference); state and territory governments; and the Australian Local Government Association on preventive health
- collect, analyse, interpret, and disseminate information on preventive health
- publish a report on the state of preventive health in Australia every two years, starting from 2013 (not 2011 as proposed in the original Bill)
- conduct educational, promotional and community awareness programs on preventive health, which now specifically includes programs relating to alcohol and tobacco use, other substance use and obesity
- make grants of financial assistance on behalf of the Commonwealth to the states and territories for preventive health
- encourage preventive health initiatives through partnerships with industry, non-government organisations and the community sector, and
- develop national standards and codes of practice on preventive health.

The CEO of the ANPHA would continue to be full-time and appointed by the Minister, in consultation with the Ministerial Conference, for a five year period with the possibility of re-appointment.

### Advisory Council

The purpose of the Advisory Council would continue to be providing advice and recommendations, but not directions, to the CEO on preventive health.

Members would be appointed on a part-time basis by the Minister, in consultation with the Ministerial Council for a maximum period of three years with the possibility of re-appointment.

The Advisory Council would have a minimum of seven and maximum of 11 members, which would include:

- one member representing the Commonwealth

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- at least one, but no more than two members, representing the governments of the States and Territories, and
- at least five, but no more than eight, other members with expertise relating to preventive health.<sup>18</sup>

The Chair may convene meetings of the Advisory Council in a particular period of time immediately following the ANPHA's establishment, but must convene four such meetings in every subsequent financial year.

In addition to the Advisory Council and ANPHA staff, the CEO would still be able to establish committees; and engage consultants and officers or employees of other State or Territory governments to provide advice on prevention initiatives.

## Developing strategic and operational plans for preventive health

One of the most important functions of the ANPHA would be producing its five year strategic plans.

Under the current Bill, the first plan would need to be prepared by the end of a four month period after clause 44 commences. This would be a maximum of ten months after Royal Assent.

The CEO will develop the strategic plan in consultation with the Advisory Council. This is unchanged from the original Bill.

The current Bill continues to make it clear that the strategic plan would not be a legislative instrument and would have to be given to the Minister for approval. The Minister in turn would have to seek the agreement of the Ministerial Council.

The current Bill also gives the Minister the power to approve an interim strategic plan if the Ministerial Council cannot agree on a plan by the end of a six month period following commencement of clause 44.

Variations to a strategic plan once it has been approved also require the approval of the Minister with agreement of the Ministerial Council. However if the Ministerial Council takes six months or longer to agree to the variations, the current Bill allows the Minister to approve them by him or herself. This is unchanged from the original bill.

The Bill proposes that the ANPHA develop annual operational plans outlining the CEO's intended actions relating to the strategic plan for that financial year. Operational plans would include performance indicators that could be used to evaluate the performance of the ANPHA. Similar to the arrangements regarding strategic plans, annual operational plans must be given to the Minister for approval, who must then seek agreement from the Ministerial Council. If the Ministerial Council does not agree to the operational plan within a specific timeframe, the Minister would have the power to approve an interim annual operational plan.

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18. The proposed membership is unchanged from the original Bill.

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## Reporting

The current Bill proposes that the CEO present a copy of the Annual Report to the Minister, for presentation to Parliament, as soon as practicable after the end of each financial year. That report must provide information on particular matters including:

- the extent to which the CEO's operations have contributed to the objectives outlined in the strategic and operational plans for the year
- details on variations from the strategic and operational plans for the year
- an evaluation of the ANPHA's performance against performance indicators set out in the operational plan, and
- financial statements and an audit of those statements.

## Committee consideration

On 30 September 2010, the Senate Standing Committee for the Selection of Bills resolved not to refer the current Bill to a parliamentary committee.<sup>19</sup> The House of Representatives Selection Committee did likewise at its meeting of 21 October 2010.<sup>20</sup>

It is noted that the Senate Standing Committee for the Scrutiny of Bills (the Scrutiny of Bills Committee), on reviewing the original Bill, requested that the Government explain (with respect to items that have remained unchanged):

- in relation to a provision specifying that a document is not a legislative instrument—'whether the provision is merely declaratory of the law (and included for the avoidance of doubt) or expresses a policy intention to exempt an instrument (which *is* legislative in character) from the usual tabling and disallowance regime set out in the Legislative Instruments Act', and
- in relation to the proposed establishment of the ANPHA Special Account—'the reason for the standing appropriation, whether any limitation could be placed on the amounts to be appropriated, and how parliamentary scrutiny of expenditure under the appropriation will be secured'.<sup>21</sup>

However, it is also noted that the Minister responded to those questions in a letter dated 23 October 2009, as attached to the Scrutiny of Bills Committee's *Twelfth Report of 2009*.<sup>22</sup> In relation to the first point, the Minister explained that:

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19. Senate Standing Committee for the Selection of Bills, *Report No. 11 of 2010*, 30 September 2010, p. 5, viewed 12 October 2010, [http://www.aph.gov.au/senate/committee/selectionbills\\_ctte/reports/2010/report1110.pdf](http://www.aph.gov.au/senate/committee/selectionbills_ctte/reports/2010/report1110.pdf)

20. House of Representatives Selection Committee, *Report no. 3*, 21 October 2010, p. 1, viewed 25 October 2010, [http://www.aph.gov.au/house/committee/selc/reports/43rd\\_parliament/referrals\\_21\\_october\\_2010.pdf](http://www.aph.gov.au/house/committee/selc/reports/43rd_parliament/referrals_21_october_2010.pdf)

21. Senate Standing Committee for the Scrutiny of Bills, *Alert Digest*, no. 12 of 2009, 16 September 2009, pp. 5–7, viewed 12 October 2010, <http://www.aph.gov.au/senate/committee/scrutiny/alerts/2009/d12.pdf>

22. See Senate Standing Committee for the Scrutiny of Bills, *Twelfth Report of 2009*, 28 October 2009, pp. 502–506, viewed 26 October 2010, <http://www.aph.gov.au/senate/committee/scrutiny/bills/2009/b12.pdf>

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Subclauses 41(8) and 42(5) are merely declaratory of the law and included for the avoidance of doubt. They do not refer to a policy intention to exempt an instrument which is legislative in character from the usual tabling and disallowance regime set out in the *Legislative Instruments Act 2003*.<sup>23</sup>

In the second point, the Minister stated:

...the purpose for which the Special Account has been set up is to provide the Agency with the capability to manage pooled funds, as other organisations such as the State and Territory Governments, industry, nongovernmental organisations and the community sector may wish to contribute financially to the Agency's operations.

The States and Territories have indicated a willingness to contribute to the Agency's operations in the future if appropriate provisions are made so that their funds could be transparently managed.

Paragraph 11(1)(h) of the Bill outlines that one of the functions of the Chief Executive Officer of the Agency is to encourage initiatives relating to preventive health matters through partnerships with industry, non-governmental organisations and the community sector. In forming partnerships, these bodies may want to contribute financially to joint projects, but as noted above, would require appropriate safeguards to ensure that the funds contributed would only be available for their agreed purpose.

It is not possible to place boundaries on the credits to the Special Account under clause 51 as contributions from other organisations may be one-off in nature, time limited or vary significantly from year to year.

The amounts to be credited and debited to the Special Account will be subject to parliamentary scrutiny through the Senate Standing Committee on Community Affairs, and disclosed annually in the Health and Ageing Portfolio Budget Statement, the Australian National Preventive Health Agency Annual Report, the Consolidated Financial Statements and Budget Paper No. 4: Agency Resourcing.<sup>24</sup>

The Committee thanked the Minister for these responses.<sup>25</sup>

## Financial implications

The Financial Impact Statement notes that the allocated funds be spent on establishment and maintenance of the ANPHA (\$17.6 million), social marketing campaigns (\$102 million), preventative

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23. Ibid., p. 503.

24. Ibid., p. 505.

25. Ibid.

health research fund (\$13.1 million) and an audit of the preventive health workforce (\$0.5 million).<sup>26</sup> This is unchanged from the original Bill.

Little detail is provided about the preventive health research fund, apart from it being focussed on 'translational research' to support policy development. Although the term is perhaps well-known in the clinical research and health policy fields<sup>27</sup>, it is not defined in the legislation or the Explanatory Memorandum. Presumably the research will be directed by the strategic and operational plans and approved by the Minister for Health. The disparity between expenditure on social marketing campaigns and research raises questions about the Government's commitment to a systemic approach to prevention.

In line with the original bill, the ANPHA would also still be able to establish and operate a Special Account. Funds for this account would be raised by charging the State and Territory governments or Local Government Association fees for advice or recommendations on preventive health. Other organisations would be able to make financial contributions into this Special Account. The Special Account would be used to carrying out the functions of the ANPHA.<sup>28</sup>

The capacity to charge fees for commissioned advice is at the discretion of the ANPHA. The charging of fees may limit the extent to which information could be freely shared between governments and the ANPHA. Furthermore, questions could be asked about the extent to which this encourages a collaborative and comprehensive approach, as envisaged by the Minister. In addition, it also raises questions about the appropriateness of a national body billing State and Territory governments, especially when these governments have considerable influence in the delivery of health services. It is interesting to note that only State and Territory governments or Local Government Associations can commission the ANHPA. Presumably, there may be other bodies, such as Medicare Locals,<sup>29</sup> that might wish to commission the ANPHA.

There also is provision in the legislation for the ANPHA to make grants to States and Territories or an individual or body corporate for preventive health (clause 54). The Explanatory Memorandum notes that grants might be made through a competitive process to support research or provide sponsorship for preventive health activities.<sup>30</sup> The initial allocation for the research fund is relatively limited and it could be suggested that additional funding is required to support more extensive research projects.

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26. Explanatory Memorandum, op. cit., p. 3.

27. See National Institute of Health (NIH) Common Fund for an [overview](#) of translational research

28. Ibid.

29. Independent primary care organisations to be established under the National Health and Hospitals Network. These will be responsible for improving primary health care services, reducing service gaps and improving access to primary care, at the local level.

30. See, Key Provisions, p 22 for further detail.

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## Main issues

Despite the amendments made since the introduction of the original Bill, many of the main issues remain the same.

The main issues relate to elements of the Bill which may function to hinder successful collaboration and co-operation. These elements are:

- the process of approving or varying the ANPHA's strategic and operational plans, which may rely entirely on the Commonwealth Minister, if agreement cannot be reached by the Australian Health Ministers Conference
- the membership structure of the ANPHA's Advisory Council, which do not reserve a place for consumer representatives and have a limited number of State/Territory representatives, and
- funding arrangements whereby the ANPHA would be able to charge a fee to State and Territory governments, as well as the local Government Association, when they have sought and received advice or recommendations on preventive health measures.<sup>31</sup>

## Collaboration under the National Health and Hospitals Network

As noted previously, several structures and agencies will be established under the NHHN. The current Bill is silent on the extent to which the ANPHA will collaborate with these agencies, the LHNs and Medicare Locals. The Minister noted in her second reading speech that:

The Agency will also be an important part of our overall health reform efforts, and will work with Medicare Locals to reinvigorate preventative health efforts at the local level.<sup>32</sup>

Despite this, the functions of the CEO<sup>33</sup> do not specifically mention, or appear to support, collaborative arrangements with Medicare Locals or any of the proposed agencies under the NHHN. It could be argued that this would be essential to the development of 'national infrastructure'<sup>34</sup> for preventive health and ensuring a cohesive focus.<sup>35</sup> The extent to which collaborative relationships can be developed may also be hindered by the financial arrangements of the ANPHA, as the majority of the funding is to be directed to social marketing campaigns.

Although the ANPHA is able to 'collect, analyse and interpret and disseminate information relating to preventive health' (see **proposed subsection 11 (d)**), it appears that the onus is on State and Territory governments to request advice and recommendations on preventive health (see **proposed subsection 11(c)**). As noted above, the arrangements which allow ANPHA to charge other government agencies for their services may impair the smooth flow of information and assistance.

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31. For an in-depth discussion of these issues, see the Bills Digest prepared for the original Bill, Am Boxall and S Scully, op. cit., pp. 11–12.

32. N Roxon, op. cit., p. 9

33. The function of the ANPHA is to assist the CEO in the performance of the CEO's function: **clause 8** of the Bill.

34. N Roxon, op. cit., p. 3.

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This may limit the extent to which the ANPHA is able to be an ‘important part’ of the health reform effort.

## Key provisions

The current Bill contains nine parts.

### Part 2

**Part 2** of the current Bill sets out provisions relating to the establishment, constitution, function and immunities of the ANPHA.

The ANPHA, established by **clause 6**, would consist of the Chief Executive Officer (CEO) and ANPHA staff (**clause 7**). Under **clause 8**, the function of the ANPHA would be to assist the CEO in the performance of his or her functions (as set out in **clause 11**).

The Note to **clause 7** makes clear that the ANPHA will not have a legal identity separate from the Commonwealth and the Explanatory Memorandum states:

The ANPHA will be a prescribed agency for the purposes of the *Financial Management and Accountability Act 1997*. This means that the ANPHA will be subject to that Act.<sup>36</sup>

The Review of the Corporate Governance of Statutory Authorities and Office Holders (the Uhrig review) was released on 12 August 2004.<sup>37</sup> One of the recommendations of the Uhrig review was that the legislative basis for statutory agencies should be simplified—the *Financial Management and Accountability Act 1997* should be applied to budget funded statutory authorities.

It is stated in the Explanatory Memorandum:

The governance structure of the ANPHA is broadly modelled on that of several other statutory authorities within the Health and Ageing portfolio, including the Australian Organ and Tissue Donation and Transplantation Authority and the National Health and Medical Research Council. Functions and powers will be conferred on the CEO and the CEO will be advised by an Advisory Council drawn from government representatives (including Australian, State and Territory governments) and experts in preventive health (refer to Part 4 for details on the Advisory Council).<sup>38</sup>

It is also noted that under **clause 9**, the ANPHA will have all of the Crown’s privileges and immunities.

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35. Ibid., p. 6.

36. Explanatory Memorandum, op. cit., p. 4.

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## Comment

It is arguable that the proposed legal identity of the ANPHA is not entirely consistent with what was proposed by the Taskforce in its report *Australia: the healthiest country by 2020*. The Taskforce proposed that the ANPHA be an incorporated Commonwealth statutory authority—an independent agency, but working closely with government.<sup>39</sup>

It is also noted that concerns about the proposed arrangements have been expressed. According to the Consumers Health Forum of Australia (CHF):

If the Agency is to fall within the Health and Ageing portfolio and be answerable to Health Ministers, it is extremely unlikely to be truly independent and able to provide frank and possibly uncomfortable advice.<sup>40</sup>

## Part 3

### Part 3 Division 1

**Division 1 of Part 3** of the current Bill contains provisions on matters relating to the CEO, which include the appointment, conditions of employment, functions and powers of the CEO.

Under **clauses 10** and **11**, there will be a CEO of the ANPHA, whose functions will include:

- either at the Minister's request or on the CEO's own initiative, to advise and make recommendations to the Minister on preventive health matters
- if the Chair of the Ministerial Conference requests in writing and confirms the Ministerial Conference's agreement to that request, to advise and make recommendations to the Ministerial Conference on preventive health matters
- if requested in writing by a state or territory government; or the Australian Local Government Association, to advise and make recommendations to the relevant body, on preventive health matters
- to collect, analyse, interpret and disseminate preventive health information

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37. J Uhrig, *Review of the corporate governance of statutory authorities and office holders*, Commonwealth of Australia, June 2003, viewed 6 October 2010, <http://www.finance.gov.au/financial-framework/governance/docs/Uhrig-Report.pdf>

38. Explanatory Memorandum, op. cit., p. 5.

39. National Preventative Health Taskforce, *Australia: the healthiest country by 2020 – National Preventative Health Strategy – Overview*, op. cit., pp. 25, 41; National Preventative Health Taskforce, *Australia: the healthiest country by 2020 – National Preventative Health Strategy – the roadmap for action*, 30 June 2009, p. 72, viewed 6 October 2010, [http://www.preventativehealth.org.au/internet/preventativehealth/publishing.nsf/Content/nphs-roadmap/\\$File/nphs-roadmap.pdf](http://www.preventativehealth.org.au/internet/preventativehealth/publishing.nsf/Content/nphs-roadmap/$File/nphs-roadmap.pdf)

40. Consumers Health Forum of Australia, CHF Consultation Paper on the National Health and Hospitals Reform Commission Final Report – *A Healthier Future for All Australians*, August 2009, viewed 6 October 2010, <https://www.chf.org.au/pdfs/cns/cons-544-nhhrc-final-report.pdf>

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- on behalf of the Commonwealth, to make financial assistance grants relating to preventive health
- to develop national standards and codes of practice on preventive health matters
- publish a report on the state of preventive health in Australia every 2 years starting in 2013, and
- conduct educational, promotional and community awareness programs relating to preventive health, specifically including programs relating to alcohol and tobacco use, other substance use and obesity.

In performing these functions, the CEO would be able to do whatever was necessary or convenient relating to performing his or her functions. It is stated in the Explanatory Memorandum that this would include day-to-day operations such as entering into contracts.<sup>41</sup> However, in doing so, under **clause 13**, the CEO must consider advice and recommendations given by the Advisory Council established by **clause 28** (see below). The CEO must also take into account existing strategic and operational plans, interim or otherwise, when performing his or her functions (**clause 49**). See below for discussion on proposed provisions relating to these plans.

It is also noted that the CEO may charge fees for performing certain functions as long as the fee charged does not amount to a tax (**clause 12**).

## Comment

As previously mentioned, the ability to charge fees to states, territories and the Australian Local Government Association for seeking advice and recommendations on prevention initiatives could have a prohibitive effect on attempts to build and maintain strategic partnerships in addressing preventive health measures.

It is also noted that the Bill is silent as to how fees will be calculated and the range of fees that may be charged. It is envisaged that this would be a matter of great interest and debate for stakeholders.

The CEO is appointed by the Minister for a term not to exceed five years (**clauses 14 and 15**). The CEO may not engage in any other paid employment without the Minister's approval (**clause 18**) and must make full disclosure of any pecuniary or other interests to the Minister, involving an actual or potential conflict of interest (**clause 19**). The Minister may terminate the appointment for standard reasons, such as misbehaviour, incapacity and bankruptcy (**clause 22**).

It is noted that the Minister may appoint a person to act as CEO and if the acting CEO does something in accord with his or her appointment and the appointment is invalid for a reason, the acting CEO's action remains valid irrespective of the irregularity in their appointment (**clause 23**).

The CEO may delegate any his or her functions and powers, except the function of developing national standards and codes of practice, to a staff member of the ANPHA, who must comply with any written direction of the CEO when exercising delegated powers (**clause 24**).

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41. Explanatory Memorandum, op. cit., p. 7.

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**Subclause 11(5)** sets out the constitutional limits of the CEO's functions, which include the following constitutional powers:

- corporations
- statistics
- trade and commerce
- health and associated benefits
- making laws for people of a particular race
- granting financial assistance to a state, and
- implied nationhood power.

## Part 3 Division 2

**Division 2 of Part 3** of the current Bill contains provisions relating to the employment of ANPHA staff and consultants.

ANPHA staff members are engaged under the *Public Service Act 1999* (**clause 25**). **Clause 26** sets out what staff may assist the CEO, such as:

- officers and employees of Agencies as defined in the *Public Service Act 1999* and of Commonwealth authorities whose services are made available to the ANPHA, and
- officers and employees of state and territory government and government authorities under a specific arrangement, whereby the Commonwealth may reimburse the state or territory for that person's services.

The CEO may also engage a consultant with suitable qualifications and experience under terms and conditions as determined by the CEO in writing (**clause 27**).

## Part 4

**Part 4** of the current Bill contains provisions on matters relating to the Advisory Council. These matters still include the Advisory Council's establishment, membership and function; as well as the terms and conditions of the Advisory Council's membership, which are largely unchanged.

The Advisory Council of the ANPHA, established by **clause 28**, would consist of:

- one Commonwealth member
- one but no more than two members representing the state and territory governments, and
- five to eight members with preventive health expertise (**clause 29**).

## Comment

It is noted that in the Explanatory Memorandum, it is stated that the Advisory Council will have a maximum of 11 and a minimum of seven members, which effectively means that there would not be

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members representing each state and territory.<sup>42</sup> It would be interesting to know how the states and territories respond to the proposed arrangement that there would be only one to two members representing all of their interests, in light of the *National Partnership Agreement on Preventive Health* and the National Preventive Health Strategy.<sup>43</sup>

According to the Taskforce:

The Taskforce believes that health is a shared responsibility, with *individuals, families* and *local neighbourhoods* being at the centre of the Strategy ...

*Local governments* play a pivotal role in providing local amenities, and can partner with local organisations in areas such as exercise, active recreation and sport, food security, managing alcohol outlets and tobacco regulations. They can also assist with planning to increase physical activity and active use of the local government area ...

*State and territory governments* are key leaders, funders, legislators, regulators, service providers and employers across a range of sectors that underpin the nation's capacity to promote health and prevent illness; for example, health, education, alcohol licensing, law enforcement, urban planning, transport and housing.

Non-government organisations play a vital role at the national and state levels as providers of research and development, advocacy, social marketing and primary care

Whether as producer, marketer or employer, the private sector has a profound influence on the health of Australians. The most relevant are the food, beverage and alcohol industries, media, advertising, private health insurance, workplace insurance, self-medication, fitness and weight-loss industries.<sup>44</sup>

As mentioned previously, failure to provide adequate representation for states and territories could be detrimental to any attempt at promoting partnerships. This is especially so given that fees could be charged for the CEO's advice or recommendations to a state or territory government, or to the Australian Local Government Association in relation to preventive health matters under **proposed paragraph 11(1)(c)**.

It is also noted that although the Bill does not specify what knowledge or expertise is required of Advisory Council members (beyond expertise relating to preventive health), it is stated in the Explanatory Memorandum that:

... it is anticipated that the following expertise would be represented amongst members: public administration, business/employer groups, education, intersectoral collaboration, sports and recreation, preventive health including health promotion,

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42. *ibid.*, p. 13.

43. See Council of Australian Governments, *National Partnership Agreement on Preventive Health*, December 2008, viewed 20 October 2010, [http://www.coag.gov.au/intergov\\_agreements/federal\\_financial\\_relations/docs/national\\_partnership/national\\_partnership\\_on\\_preventive\\_health.pdf](http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/national_partnership_on_preventive_health.pdf).

44. National Preventive Health Taskforce, *Australia: the healthiest country by 2020 – National Preventive Health Strategy – Overview*, p. 28.

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community and non-government organisations, consumer issues, social inclusion and disadvantage (including Indigenous Australians), local government, legal/regulatory, and finance.<sup>45</sup>

The Minister would appoint part-time members for up to three years, as well as the Chair and Deputy Chair of the Advisory Council, only after consulting the Ministerial Conference (**clauses 31 and 32**). In order to be eligible for appointment as a member, a person would have to be an Australian resident. Interestingly, a defect or irregularity relating to a person's appointment to the Advisory Council would not negate that person's appointment per se. Such a provision, however, is not uncommon in Commonwealth legislation.

The Minister may also make acting appointments in certain circumstances (**clause 40**). However, interestingly, as with the CEO, it is also noted that if someone does something in accord with their acting appointment, but for some reason their appointment is invalid, that person's action remains valid despite the irregularity in the appointment (**subclause 40(5)**).

Advisory Council members must not engage in other paid employment involving an actual or potential conflict of interests and must disclose all actual and potential conflicts of interests to the Minister (**clauses 35 and 36**). Failure to comply could result in the Minister terminating the member's appointment (**paragraphs 39(1)(d)–(e)**).

The Minister would be also able to terminate an Advisory Council member's appointment for other usual reasons, which include misbehaviour, incapacity or bankruptcy (**clause 39**).

Under **clause 30**, the Advisory Council's functions would be to advise and make recommendations to the CEO about the CEO's functions either generally under the Act (at the CEOs request) or specifically under section 11 of the Act (on the Advisory Council's own initiative). It is important to note that the Advisory Council's power is restricted to advising or making recommendations to the CEO—it could not actually give any directions to the CEO.

Under **subclause 30(3)**, in performing its functions, the Advisory Council would be able to do whatever was necessary or convenient, but under **subclause 30(2)**, when acting on its own initiative, the Advisory Council must do so in a manner consistent with the existing strategic or annual operational plan of the ANPHA (see below for discussion on proposed provisions relating to these plans).

The only change to **Part 4** in the current Bill is in **clause 41**, which sets out requirements relating to Advisory Council meetings. In the current Bill, the Chair of the Advisory Council has discretion as to whether to convene meetings of the Council during the period of time beginning on commencement of this provision and ending on the last day of the financial year in which this provision commences.

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45. Explanatory Memorandum, op. cit., p. 14.

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## Part 5

**Part 5** of the current Bill sets out the CEO's powers relating to establishing committees.

Under **clause 42**, the CEO would have discretionary power to establish committees to assist him or her; or the Advisory Council in performing their functions. Such committee would comprise of persons as determined by the CEO, who must also determine the terms and conditions (presumably including pay and/or allowances) of appointment of those committee members. In addition, it is proposed that the CEO would have discretionary power to determine a committee's terms of reference and procedures.

The CEO's written instrument establishing a committee would not be a legislative instrument and would therefore not be disallowable by Parliament.

## Comment

However, it is noted that the Government explains that:

Subclause 42(5) clarifies that an instrument made under subclause (1) is not considered a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*. This provision is merely declaratory and included for the avoidance of doubt.<sup>46</sup>

## Part 6

**Part 6** of the current Bill contains provisions relating to ANPHA strategic and operational plans.

Under **clause 43**, the CEO must develop and prepare a five-year strategic plan in consultation with the Advisory Council, not a triennial strategic plan as proposed in the original Bill. The strategic plan must state what the CEO's main objectives are, in performing his or her functions over that period of time; and broadly outline how the CEO will achieve those objectives.

**Clause 44** sets out the requirements of approval relating to the strategic plan. The CEO must give the Minister a copy of the plan for approval within a particular timeframe. It is noted that the changes in the current Bill relating to timeframes for completing certain tasks in this provision relate to the change from triennial to five year plans and the change in expected commencement of the Act.

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46. Explanatory Memorandum, op. cit., p. 18.

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## Comment

Although the Bill states that the Minister cannot approve the strategic plan without the Ministerial Conference's agreement, it does allow the Minister to approve an interim strategic plan if the Ministerial Council fails to agree within a specific time frame.

The Explanatory Memorandum states that:

This provision will ensure the ANPHA is able to continue functioning in the case that Health Ministers cannot come to agreement on a set of objectives and activities that the ANPHA should be tasked with.<sup>47</sup>

Yet the Bill and the Explanatory Memorandum are silent as to what should be done in relation to achieving Ministerial Conference agreement for the purposes of a final strategic plan. This raises the question about the importance of the Ministerial Conference's agreement. A similar question arises in relation to approval of variation of the strategic plan in **clause 45**.

As previously mentioned, these proposed provisions would also grant the Federal Minister for Health substantially more power in determining the agenda for preventive health than his or her state and territory counterparts, if there is disagreement. This is likely to affect attempts to foster and maintain strategic partnerships.

Similar requirements are proposed in relation to annual operational plans in **clauses 46–48**. Such plans must set out details of what the CEO intends to do to operationalise objectives set out in the strategic plan, including performance indicators (**subclause 46(2)**).

## Part 7

**Part 7** of the current Bill relates to financial and reporting requirements for the ANPHA.

An ANPHA Special Account is established under **clause 50** and is a Special Account for the purposes of the *Financial Management and Accountability Act 1997*. The aims of the Special Account are:

- settling the Commonwealth's costs and other expenses related to the CEO performing his or her functions
- paying remuneration or allowances under the Act, and
- meeting expenses of the Special Account's administration (**clause 52**).

The following amounts would be credited to the Special Account:

- fees charged for the CEO's advice or recommendations made to a state or territory government, or to the Australian Local Government Association in relation to preventive health matters under **proposed paragraph 11(1)(c)**; and any other preventive health function set out by the Minister in a legislative instrument under **proposed paragraph 11(1)(k)**

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47. *ibid.*, p. 19.

- money that the Commonwealth receives relating to the CEO's functions under the Act
- money that the Commonwealth receives in relation to property paid for with money debited from the Special Account, and
- gifts given or bequests made for the purposes of the Special Account (**clause 51**).

## Comment

It is noted that the Explanatory memorandum states that paragraph 51(b) would consist of:

amounts equal to those received by the Commonwealth in connection with the performance of the CEO's functions under this Act. For instance, in performing his or her functions the CEO may be required to have the capability to manage pooled funds, as other organisations such as State and Territory governments, industry, non-governmental organisations and the community sector may wish to contribute financially to the ANPHA's operations;<sup>48</sup>

It is also noted that the note at the end of **clause 51**, states that an Appropriation Act enables for amounts to be credited to a Special Account if the Account's purposes are covered in the Appropriation Act itself.<sup>49</sup>

**Clause 53** continues to provide for the requirements relating to the ANPHA annual report,<sup>50</sup> however there is now also a requirement that an annual report on the CEO's operations be given to the Minister for presentation to Parliament.

## Part 8

**Part 8** of the current Bill contains particular requirements of financial assistance grants made by the CEO to a state; territory; or individual or body corporate, in relation to preventive health.<sup>51</sup>

Under **clause 54**, there must be a written agreement between the Commonwealth and state; territory; or individual or body corporate (as the case may be) setting out the terms and conditions on which such financial assistance may be granted. The CEO or delegate (**clause 24**) would be able to enter into such agreement on the Commonwealth's behalf.

The Government states that examples of such grants would include:

- administer research grants from the preventive health research fund through a competitive process to universities, academics, State and Territory governments and maybe NGOs (similar to National Health and Medical Research Council grant rounds);

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48. Explanatory Memorandum, op. cit., p. 22.

49. See *ibid.*, p. 22. As to the Commonwealth's appropriations power under the Constitution, see the *Australian Constitution* section 81; *Combet v Commonwealth* [2005] HCA 61 at [5].

50. For further explanation of these requirements, see Explanatory Memorandum, op. cit., pp. 23–24.

51. 'Person' refers to individual or body corporate: see *ibid.*, p. 24; *Acts Interpretation Act 1901* paragraph 22(1)(a). 'Individual' means a natural person: *ibid.*, paragraph 22(1)(aa).

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- provide the equivalent of a sponsorship, example. provide funding to an NGO or industry group (such as a sports organisation) on the proviso that they will not allow advertising by alcohol or tobacco groups at an event or for their organisation. This would also be through a competitive process.<sup>52</sup>

## Part 9

**Part 9** of the current Bill sets out miscellaneous provisions relating to how the Ministerial Conference gives agreement and the Governor-General's regulation making powers.

Under **clause 55**, for purposes of the proposed legislation, the Ministerial Conference gives its agreement by resolution of the Conference passed according to procedures determined by the Conference.

Under **clause 56**, the Governor-General may make regulations prescribing:

- anything as required or allowed by the proposed legislation, and
- what is necessary or convenient to be prescribed in order to carry out or give effect to the proposed legislation.

## Recent amendments

On 21 October 2010, the Greens circulated amendments to the proposed Bill. These amendments largely reflect what was put forward when the Bill was first introduced but have been expanded to ensure that the ANPHA has the capacity to monitor, evaluate and build evidence.

The relevant section of the amendments is as follows:<sup>53</sup>

(2) The Agency established by this Act:

- (a) should have the capacity to effectively monitor, evaluate and build evidence; and
- (b) should facilitate a national prevention research infrastructure to answer the fundamental research questions about effectiveness and best practice; and
- (c) should provide resources and advice for national, state and local policies; and
- (d) should generate new partnerships for workplace, community and school

52. Explanatory Memorandum, op. cit., p. 23.

53. Australian Greens, Amendment to the Australian National Preventive Health Agency Bill 2010, Sheet 6178, 21 October 2010, viewed 25 October 2010, [http://parlinfo.aph.gov.au/parlInfo/download/legislation/amend/r4455\\_amend\\_8e7e98c0-a837-4987-b830-06558adae359/upload\\_pdf/6178\\_Aust\\_National\\_Preventative\\_Health\\_AG.pdf;fileType=application%2Fpdf](http://parlinfo.aph.gov.au/parlInfo/download/legislation/amend/r4455_amend_8e7e98c0-a837-4987-b830-06558adae359/upload_pdf/6178_Aust_National_Preventative_Health_AG.pdf;fileType=application%2Fpdf)

interventions; and

(e) should assist in the development of the prevention workforce; and

(f) should coordinate and implement a national approach to social marketing.

## Concluding comments

The establishment of the ANPHA is one of the strategies put forward by Government to create a national approach to preventive health. However the proposed structure and arrangements of the Bill do not alleviate the concerns previously raised about the original Bill. Furthermore, the Bill does not address the arrangements between the ANPHA and the various agencies, LHNs and Medicare Locals to be established under the NHHN. This may undermine the extent to which a national approach towards preventive health can be adopted.

Concerns about collaborative arrangements and proposed structures of the ANPHA aside, perhaps of greater concern is the lack of clarity about how the social determinants of health will be addressed by the ANPHA and the proposed emphasis on social marketing campaigns. These are not without merit, however, social marketing campaigns are considered to be of most benefit when delivered in conjunction with other programs and when they consider the broader social context. As noted previously, many of the social determinants of health are beyond the influence of the health care system. The proposed Bill does not appear to have established appropriate frameworks to ensure a collaborative, or holistic, approach to prevention and the promotion of health.

The evidence about the disparity in health outcomes from the wealthy to the lowest income is not new and the growing burden of chronic disease would suggest that action is required sooner rather than later. The ANPHA has the potential to be a dominant player in the preventive health field but the proposed Bill does not appear to fully exploit this opportunity.



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