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17 December 2021

Department of Health
Secretariat for the Review

Attn: Prof Robin Creyke

By email: hc.consultation@health.gov.au

Review of section 92 of the Health Insurance Act 1973

Thank you for the opportunity to provide a submission to the review of section 92 of the *Health Insurance Act 1973*. Thank you also for granting us an extension to make this submission.

Our submission is attached.

Please contact me on the details below if you require any further information or clarification of the matters raised in this submission.

Yours sincerely,

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Avant submission to the Review of section 92 of the Health Insurance Act 1973

Avant is Australia's largest medical defence organisation. Avant is a mutual organisation owned by its doctor members. We provide professional indemnity insurance and legal advice and assistance to more than 78,000 medical practitioners and students around Australia.

Avant provides legal advice, representation and support to many doctors each year who are involved in Medicare compliance activities. This includes audits conducted by the Department of Health and reviews by the Professional Services Review (PSR). We also answer members' queries about Medicare through our medico-legal advisory service (MLAS) and provide education to medical practitioners on Medicare and medico-legal risk.

Below we outline two concerns that we have with s.92 agreements and the PSR:

1. **Consultants**

A s.92 agreement requires that there be a genuine 'meeting of minds' between the Director and the PUR resulting, inter alia, in an acknowledgement of inappropriate practice.

That acknowledgement is key to a PUR accepting advice about the likely course of their appearance before a PSRC and hence their decision to seek to enter into a s.92 agreement.

True acknowledgement of inappropriate practice is sometimes easily achieved where the PUR more readily accepts the criticisms expressed by the Director but in some cases acceptance of criticism can be difficult.

It is understandable that a PUR would not wish to enter into a s.92 agreement lightly given the dramatic consequences of entering into a s.92 agreement financially, professionally and personally. The decision to enter into a s.92 agreement is often one in which the PURs family is involved because of the financial consequences for them also. It is essential that there be a solid and logical foundation to a decision with such important consequences for the PUR and their family.

A referral to PSR is a period of enormous stress to a PUR. The processes of PSR are not like any other legal system a person is likely to have previously encountered or about which they have real understanding. PURs are commonly fearful and can even express thoughts of self-harm at times. Dismissal under s.91 is commonly not a realistic option. The PUR therefore has a relatively short time period to come to accept the deficiencies identified by the Director or face the frightening prospect of a hearing at which they will give evidence for 6 or 8 days.

It is certainly to the advantage of both the PUR and the Commonwealth if there can be a genuine meeting of minds on the question of whether the PUR has engaged in some sort of inappropriate practice such that the acknowledgement necessary for a s.92 agreement can be given. We submit every reasonable effort should be made to facilitate that in an open and transparent manner which maximises the relevant information given to the PUR to assist her or him to process the options which remain open for the review.

The Director is only one person and is currently a practising obstetrician and gynaecologist. Those reviewed come from all specialties and sub-specialties of the profession. The Act

appropriately recognises the need for the Director to seek assistance from an appropriately qualified and experienced person to assist her to reach her view on the matters before her.

Since the first Director of PSR, Dr John Holmes, the Directors have taken the extra mural step of meeting with the PUR (or at least inviting such a meeting in almost all cases) prior to finalising a decision between the action allowed under s.91, s.92 or s.93 of the Act. This is a desirable and worthwhile practice. The first Director of PSR would often attend those meetings together with a deputy director who had actually conducted the review of the small sample of the PUR's medical records. We acknowledge that is more or less practicable depending upon the specialty of the PUR and other factors. However, that approach allowed a very direct interaction between, for example, a general practitioner and the general practitioner who had actually undertaken the review and whose criticisms the Director relied upon. It is notable that the first Director was also a GP but still took that approach. In our experience, that approach worked well in many cases in that it assisted a genuine peer-to-peer interaction in a forum less formal than that of a PSRC.

Whatever the current Director's training might be, the Director can be seen as approaching his or her task from the perspective of their own training and experience. To some extent that may be inevitable but it emphasises the importance of taking all reasonably available steps to ensure that where the PUR's medical record sample is reviewed by a similarly-qualified 'peer', the PUR is able to satisfy him or herself that the criticisms made of their practice are fairly based. The current practice avoids the opportunity to reassure the PUR of that for no apparent reason. The current practice allows some PUR's to entertain reasonable concerns about the veracity and reliability of the opinions which inform the Director. Such concerns may be able to be assuaged quite quickly with greater transparency Eliminating concerns of unfair criticism is likely to result in a proportion of PURs concentrating more on the substance of the criticisms of their practice rather than their own misgivings about the source of the criticisms.

Conversely, if there is some genuine reason why the Director should not take advice from a particular source, it is appropriate that the PUR have the opportunity to bring that to the attention of the Director so that she may take that into account in discharging her functions.

There are two broad categories of such circumstances which may be of relevance to the Director's reliance on a s.90 report.

Craft groups within some specialties in Australia are small and, sometimes, highly professionally and commercially competitive. Whatever assurance a reviewer/consultant might, in good faith, give of their impartiality in the review of a peer's practice, the small pool of prospective reviewers available to comment on the practice of some PURs makes it all the more important for the success of the s.92 process that the PUR have the opportunity to satisfy themselves of the objectivity of their detractor or to raise any concern about that with the Director.

Secondly, because of the increasing sub-specialisation of medical practice, it is increasingly common for PURs to feel that a consultant cannot fairly comment on the sample of their medical records of a particular type of service without having that specialist knowledge and experience. That may or may not be a reasonable position in any particular circumstance but is one which cannot be adequately addressed in the absence of knowing the source of the criticisms to which the PUR is invited to respond.

The review of the initial small sample of services is crucial to the outcome of the Director's review and the potential s.92 agreement. The greater trust a PUR can have that such review is conducted fairly the greater likelihood that the criticisms expressed by the Director based on the consultant's review will bring about the self-reflection and, potentially, the acknowledgement which is a necessary component of the s.92 agreement. Greater transparency around the s.90 consultant's reports relied upon by the Director will positively contribute to the s.92 negotiation process.

We note the decision of His Honour Logan J in Karmakar v Minister for Health (No 2) [2021] FCA 916 (at paragraphs 36-37, 49-51) where it was found that the Director is not obliged to disclose the identity of the consultant or otherwise to allow for the PUR to respond to the consultant report as a part of the Director's procedural fairness obligations.

In our submission greater transparency about the s.90 consultant's report is not merely a matter of fairness but an opportunity to genuinely improve the s.92 process for the benefit of both the Commonwealth and those under review by PSR.

2. Repayments

We are concerned about the application of section 92 agreements where the sole or main criticism is the quality of the medical record as opposed to the clinical content of the service. We recommend that there be a statutory limit on repayment where the sole or main criticism is the quality of the medical record as opposed to the clinical content of the service, of 50% of the value of a service.

Historically, the PUR was able to negotiate repayment of less than the full amount to account for 'mitigating factors' (such as changes to the PUR's practice and education). More recently, our experience is that this is less likely to be an available option. Allowing repayment for less than the full amount would be an incentive for practitioners to engage in education and to make improvements to their practice.

In our experience, there is often an alternative item number the PUR could have correctly billed in place of the item the subject of an acknowledgement of inappropriate practice. In other words, in many cases the PUR was entitled to claim Medicare benefits for a service, rather than not being entitled to claim Medicare benefits at all. In our view, it is unfair that the PUR be required to repay the entire amount of the services. Instead, the repayment should reflect the difference between the benefit paid for the impugned services and the amount to which the PUR would have been entitled had the correct/alternative item number been used.

The Director's position is that she only deals with the item number in question and the PUR can resubmit all their billings with the alternative number if they wish. In our view, that is administratively impossible in many cases because it requires the cooperation of a medical practice at which the PUR may no longer work and it requires that each patient be contacted, appropriate documentation issued to them and their signature obtained. The net result is that the Commonwealth unfairly profits from the recovery to a greater extent than the circumstances justify. A fairer process would have as a requirement that it take into account the net result of the repayment on the initial transaction and thereby achieve finality.

Conclusion

Referral to PSR is a highly stressful process for the PUR and the PUR's family. The PUR is called upon to reflect on criticisms of their practice which are intrinsically personal in nature. Even the term 'inappropriate practice' defined in s.82 of the Act is thought by many to connote conduct of a highly disreputable nature such as sexual misconduct or the like. Invariably the PUR feels confronted and a defensive reaction to that is understandable.

There are clear benefits for both the PUR and the Commonwealth of a well-functioning s.92 process. Part of its function should be to assist the PUR to reflect on the criticisms which are at the heart of the Director's decision not to deal with the referral under s.91 and to make an appropriately well informed decision about whether to seek to negotiate a s.92 agreement with the Director.

The reports of consultants engaged by the Director under s.90 are important documents used by the Director to inform her opinions and assist her to determine what the contents of a s.92 agreement should be. While we acknowledge the Director must ultimately exercise her powers under ss.91-93 independently, it would be unrealistic not to conclude that acceptance of at least some of the criticisms made in the consultant's report is necessary for the s.92 agreement to eventuate.

Greater transparency around the consultant's report should be legislated. Specifically, the Director should be required to disclose the following documents to the PUR for the purpose of the Director's discussions with the PUR and the PUR making submissions to the Director about the exercise of her powers under ss.91-93:

1) Curriculum vitae of the Consultant;
2) Statement of conflict of interest or similar by the Consultant;
3) Letter from PSR to the consultant commissioning the consultant's report;
4) Report(s) from the Consultant to the Director, PSR.

Avant would be pleased to discuss this submission with you or to address any matters of relevance to your review.

Avant Mutual
17 December 2021