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SENATE

HEALTH LEGISLATION (POWERS OF INVESTIGATION) AMENDMENT BILL 1993

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Health,
Senator the Hon Graham Richardson)



HEALTH LEGISLATION (POWERS OF INVESTIGATION) AMENDMENT BILL 1993

OUTLINE

This Bill proposes new arrangements for the investigation of fraudulent activities under Medicare.

Amendments to the Health Insurance Commission Act 1973 are proposed to give the Health Insurance Commission powers to obtain evidence where it has grounds for believing that a person has committed fraud.

The proposed amendments empower the Commission to:

- . require that a person provide information and produce such documents as required;
- . inspect premises and equipment used in the provision of services attracting claims for Medicare benefits; and
- . seek a warrant from a magistrate to search for and seize material evidencing fraud.

The Bill also provides for the retention and production of pathology records to bring the pathology services provisions in the Health Insurance Act 1973 in line with those applying to diagnostic imaging services.

FINANCIAL IMPACT STATEMENT

The 1993 Budget forecast that savings of \$25.0M were anticipated in 1993-94 and \$64.9M in 1994-95 from a combination of measures to reduce medical fraud and overservicing. This Bill is part of those measures to achieve those savings.

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NOTES ON CLAUSES

PART 1 - PRELIMINARY

Clause 1 - Short title

This is the formal provision that specifies the short title of the Act as the Health Legislation (Powers of Investigation) Amendment Act 1993.

Clause 2 - Object of this Act

This clause specifies that the object of the legislation is to give the Health Insurance Commission powers to monitor compliance with, and to investigate breaches of, the Medicare scheme, and to make certain other changes to the Health Insurance Act to aid such investigations.

PART 2 - AMENDMENTS OF THE HEALTH INSURANCE ACT 1973

Clause 3 - Principal Act

This clause is a formal provision identifying the Health Insurance Act 1973 as the Principal Act referred to in this Part.

Clause 4 - Insertion of new section

This clause inserts a new section 23DKA which provides for the retention and production of records of pathology services. It is modelled on existing section 23DS which applies to the retention and production of records of diagnostic imaging services.

New subsection 23DKA(1) provides for the making of regulations imposing specific requirements for the preparation and maintenance of records of pathology services. New subsection 23DKA(2) requires that approved pathology authorities comply with any requirements imposed by such regulations.

New subsection 23DKA(3) provides that records mandated by regulations for the purposes of subsection 23DKA(1) must be retained for a period of 18 calendar months from the date of the service and new subsection 23DKA(4) requires that such records be produced within 7 days of a request to do so by the Managing Director of the Health Insurance Commission.

New subsection 23DKA(5) empowers officers of the Commission to make and retain copies, or take and retain extracts of such records. New subsection 23DKA(6) makes it an offence for an approved pathology authority, without reasonable excuse, to contravene subsections 23DKA(2), 23DKA(3) or 23DKA(4) and imposes a penalty for such an offence.

New subsection 23DKA(7) provides:

- . that an approved pathology authority does not have to produce a record containing clinical details relating to an individual patient unless it is to a Commission officer who is a medical practitioner; and
- . that a Commission officer who is not a medical practitioner has no powers under subsection 23DKA(5) in relation to such a record.

Clause 5 - Other records of diagnostic imaging services

This clause provides for the substitution of an existing subsection in, and the addition of a new subsection to, section 23DS. They make the provisions of section 23DS relating to records of diagnostic imaging services consistent with those in new section 23DKA applying to records of pathology services. New subsection 23DS(4) adds the requirement that a request for the production of a record must specify the place where the record is to be produced. New subsection 23DS(7) specifies that, in respect of the production of records of diagnostic imaging services that contain clinical details of an individual patient, only a Commission officer who is a medical practitioner has the power to make and retain a copy or extract from the record.

Clause 6 - Prohibited practices in relation to the rendering of pathology services

This clause inserts two new subsections in section 129AAA. New subsection 129AAA(3A) provides that an approved pathology practitioner may not enter into an arrangement with a practitioner or medical entrepreneur for the use or occupation of premises or space in a building for a purpose other than use as a licensed collection centre or an accredited pathology laboratory.

New subsection 129AAA(4A) providing that the normal commercial rate for sharing, using or occupying space in a building is the rate -

- . that has not been adjusted to reflect any additional value attributed to that space by any party to the arrangement because of its proximity or convenience to any source of pathology requests; or

- . that is not determined or varied to take into account the volume of pathology requests made between the parties.

Clause 7 - Repeal of section 129AB

This clause repeals the existing provisions of section 129AB in the Act relating to the search of premises etc.

PART 3 - AMENDMENTS OF THE HEALTH INSURANCE COMMISSION ACT 1973

Clause 8 - Principal Act

This clause identifies the Health Insurance Commission Act 1973 as the Principal Act referred to in this Part.

Clause 9 - Definitions

This clause amends subsection 3(1) of the Act by inserting definitions for "authorised officer", "evidential material", "medicare benefit", "occupier", "officer", "pharmaceutical benefit", "premises", "relevant offence", "seize", "thing", and "warrant premises".

Clause 10 - Heading to Part IIC

This clause amends the heading of Part IIC of the Act to read "General Powers of the Commission" instead of "Powers of the Commission".

Clause 11 - Insertion of new Part

This clause inserts a new Part IID providing the Commission with investigative powers. The provisions of the proposed new Part are set out below.

New Division 1 - Preliminary

New section 8K - Crown to be bound

This section specifies that the new Part IID binds the Crown, but does not make it liable to prosecution.

New section 8L - Authorised officers

This section allows the Managing Director of the Commission to appoint, by signed instrument, an officer of the Commission to exercise the powers of an authorised officer under the Act or such powers as specified in the instrument.

New section 8M - Identity cards

This section allows the Managing Director to have issued to each authorised officer an identity card that must be in a form approved by the Managing Director (subsection 8M(1)) and must incorporate a recent photograph of the authorised officer (subsection 8M(2)).

Subsection 8M(3) requires that a person who ceases to be an authorised officer must return the identity card to the Managing Director as soon as practicable. Subsection 8M(4) makes it an offence to fail, without reasonable excuse, to return an identity card as required by subsection 8M(3).

Division 2 - General power to obtain information

New section 8N - Managing Director may obtain information etc.

Subsection 8N(1) empowers the Managing Director to require, by notice in writing (subsection 8N(2)), that a person give information or produce a document in his or her possession or under his or her control to the Commission if the Managing Director considers that the information or document may be relevant to the question of whether a medicare or pharmaceutical benefit is or was payable, or the amount of such a benefit.

New section 8P - Content of notices

Subsection 8P(1) provides that the notice under subsection 8N(2) must specify:

- . how the information is to be given or how the document is to be produced;
- . the period within which it is to be given or produced;
- . the officer to whom it is to be given or produced; and
- . that the notice is given under section 8N.

Subsection 8P(2) requires that the period within which information is to be given or documents produced must end 14 days after the notice is given.

Subsection 8P(3) provides that the notice may require the person to whom it is directed to give information by appearing before a specified Commission officer.

Subsection 8P(4) specifies that a notice requiring a person to appear before an officer must specify the time and place for the person to appear, being a time at least 14 days after the notice is given.

New section 8Q - Offences

Subsection 8Q(1) makes it an offence for a person, without reasonable excuse, to refuse or fail to comply with a notice under section 8N to the extent that the person is capable of complying.

Subsection 8Q(2) makes it an offence to give false or misleading information or evidence.

New section 8R - Exemption

This section provides that a person is not required to give information or produce a document, if in so doing, the person would contravene a law of the Commonwealth.

Division 3 - Searches to monitor compliance

New section 8S - Authorised officers may conduct searches for the purposes of monitoring compliance

Subsection 8S(1) provides that, for the purposes of ascertaining whether the Health Insurance Act 1973 and/or Part 7 of the National Health Act 1953 are being complied with, an authorised officer may enter at any reasonable time any premises to exercise his or her powers of entering premises under section 8T. If the premises are a residence, entry is not permitted unless the occupier of the premises has consented to entry (subsection 8S(2)).

Subsection 8S(3) specifies that the power to enter premises only applies to premises at which activities associated with the rendering of services, for which medicare or pharmaceutical benefits have been paid or may be payable, have been or are being carried out.

New section 8T - Powers on entering premises

Subsection 8T(1) allows an authorised officer, having entered premises, to exercise any of the following powers:

- . search the premises;
- . take photographs or make sketches of the premises or any substance or thing on the premises;
- . inspect, examine and take samples of any substance or thing;

- . take extracts from, or make copies of, any document, book or record;
- . take on to the premises any equipment or material reasonably necessary for exercising the above powers; and
- . to exercise, in relation to certain documents, any or some of the powers specified in subsections 8T(2) and 8T(3).

Subsection 8T(2) empowers an authorised officer to operate equipment at the premises to see if the equipment, or a disk, tape or other storage device that can be used with or is associated with the equipment, contains information relevant to determining whether there has been compliance with the Act.

Subsection 8T(3) provides that if an authorised officer, having exercised the powers under subsection 8T(2), finds relevant information, he or she may operate the facilities to put the information in documentary form and copy the documents so produced. Alternatively, if the information can be transferred to a storage device that is brought on the premises or is at the premises (and in the latter case its use is agreed to in writing by the occupier of the premises) the authorised officer may operate the equipment or other facilities to copy the information to the storage device and remove that device from the premises.

New section 8U - Authorised officers to produce evidence of identity

This section specifies that an authorised officer is not entitled to exercise any powers to conduct searches to monitor compliance if the officer fails to produce his or her identity card for inspection when required to do so by the occupier of the premises.

Division 4 - Offence related searches and seizures

New section 8V - Offence related searches and seizures

Subject to certain requirements outlined below, subsection 8V(1) provides that, if an authorised officer has reasonable grounds for suspecting that there may be on a premises evidential material, the officer and an officer assisting may enter the premises and search for the evidential material and, if he or she finds it, may seize it.

Subsection 8V(2) provides for such entry only if the occupier of the premises has consented thereto or if the entry is made under a search warrant.

New section 8W - Search warrants

Subsection 8W(1) provides that a magistrate may issue a search warrant if an authorised officer suspects on reasonable grounds that there may be at or in any premises evidential material. The information setting out those grounds must be laid before the magistrate on oath.

Subsection 8W(2) specifies that the warrant must authorise an authorised officer (named in the warrant) with such assistance, and by such force, as is necessary and reasonable, to enter and search the premises for the evidential material and, if the officer finds it, to seize it.

Subsection 8W(3) stipulates that the magistrate is not to issue the warrant unless the informant or some other person has given the magistrate any further information that the magistrate may require concerning the grounds for seeking the warrant, and unless the magistrate is satisfied that there are reasonable grounds for issuing the warrant.

Subsection 8W(4) requires that the warrant state:

- . the purpose for issuing the warrant and the nature of the offence in relation to which the entry and search are authorised;
- . whether entry is to be made at any time of day or night or during specified hours;
- . a description of the evidential material to be seized; and
- . a day upon which the warrant ceases to have effect.

New section 8X - Warrants may be issued by telephone or other electronic means

Subsection 8X(1) provides that an authorised officer may apply, when he or she thinks it is urgent and necessary, to a magistrate for a search warrant by telephone, telex, fax or other electronic means.

Subsection 8X(2) specifies that, before applying, the authorised officer must prepare information setting out the grounds for seeking the warrant, but may, if necessary, make the application before the information has been sworn.

Subsection 8X(3) provides that a magistrate may complete and sign the warrant if he or she is satisfied that a warrant should be issued urgently or the delay that would occur if an application were made in person would frustrate the effective execution of the warrant.

New section 8Y - Formalities relating to warrant issued by telephone or other electronic means

Subsection 8Y(1) requires that a magistrate signing a warrant issued by electronic means must inform the authorised officer of:

- . the terms of the warrant;
- . the day and the time the warrant was signed; and
- . the day the warrant ceases to have effect.

In addition, the magistrate must record on the warrant the reasons for issuing it.

Subsection 8Y(2) specifies that the authorised officer must complete a form of warrant in the same terms as the warrant completed and signed by the magistrate, and write on it the magistrate's name and the day and time of the warrant's signing.

Subsection 8Y(3) provides that the authorised officer must send to the magistrate, by no later than the day after the date of expiry or execution of the warrant (whichever is the earlier), the form of warrant completed by the authorised officer and the information duly sworn in connection with the warrant.

Subsection 8Y(4) specifies that, upon receiving those documents, the magistrate must attach them to the signed warrant and deal with the documents in the way he or she would if the application for the warrant had not been made by electronic means.

Subsection 8Y(5) provides that a form of warrant duly completed by an authorised officer under subsection 8Y(2) is authority for any entry, search, seizure or other exercise of power that the signed warrant authorises.

Subsection 8Y(6) requires that in any court proceedings concerning the exercise of a power under the warrant, if the warrant signed by the magistrate is not produced, the court is to assume (unless the contrary is proved) that the exercise of power was not authorised by the warrant.

Division 5 - Provisions relating to execution of search warrants

New section 8Z - Announcement before entry

Subsection 8Z provides that before any person enters premises under a warrant the authorised officer or an officer assisting must announce that he or she is authorised by warrant to enter and give any person at the premises an opportunity to allow entry (subsection 8Z(1)) unless there are reasonable grounds for the authorised officer or officer assisting to believe that immediate entry to the premises is required to ensure the safety of a person or that the effective execution of the warrant is not frustrated (subsection 8Z(2)).

New section 8ZA - Availability of assistance and use of force in executing a warrant

This section provides that an authorised officer may obtain such assistance and use such force as is necessary and reasonable in the circumstances. Only an officer assisting who is a constable may use force against persons. An authorised officer and an officer assisting who is not a constable may use force only in relation to things.

New section 8ZB - Details of warrant to be given to occupier etc.

This section provides that if a warrant in relation to premises is being executed, a copy of the warrant must be made available to the occupier of the premises or another person apparently representing the occupier if present at the premises (subsection 8ZB(1)). In either case, the authorised officer must identify himself or herself (subsection 8ZB(2)).

Subsection 8ZA(3) provides that a copy of the warrant need not include the signature of the magistrate or the seal of the court.

New section 8ZC - Specific powers available to executing warrants

Subsection 8ZC(1) permits the taking of photographs (including video tapes) of premises or of things at the premises in certain circumstances.

Subsection 8ZC(2) allows for a limited interruption in the execution of the warrant. The authorised officer and the assisting officer may, if the warrant is still in force, complete its execution after ceasing the execution and leaving the premises for not longer than one hour, or longer if the occupier consents in writing.

Subsection 8ZC(3) provides that where execution of a warrant is stopped by order of court, which is later revoked, or reversed on appeal, its execution may be completed provided the warrant is still in force.

New section 8ZD - Use of equipment to examine or process things

Subsection 8ZD(1) empowers the authorised officer and an officer assisting to bring to the warrant premises any equipment reasonably necessary for the examination, or processing, of things found at the premises to determine whether they are liable to seizure.

Subsection 8ZD(2) provides that, if it is not practicable to examine or process things at the warrant premises, or if the occupier of the premises agrees in writing, things at the premises may be moved to another place so that the examination or processing can be carried out.

Subsection 8ZD(3) provides that if things containing electronically stored information are moved to another place for examination or processing, the authorised officer must, if practicable, inform the occupier of the place and time at which the examination or processing will be carried out and allow the occupier or a representative to be present during the examination or processing.

Subsection 8ZD(4) enables the authorised officer or the officer assisting to operate equipment already at the warrant premises to carry out the examination or processing to determine whether the thing is liable to seizure, if the officer believes on reasonable grounds that the equipment is suitable and the examination can be carried out without damage to the equipment or thing.

New section 8ZE - Use of electronic equipment at premises

Subsection 8ZE(1) provides that the authorised officer or the officer assisting may operate equipment at the premises to see whether evidential material is accessible if he or she believes that the equipment may be operated without damaging it.

Subsection 8ZE(2) provides that, if evidential material is accessible, the authorised officer or the officer assisting may seize the equipment and any disk, tape or associated device, or operate the equipment to obtain a printout and seize documents produced, or copy the records to another storage device.

Subsection 8ZE(3) provides that equipment may be seized under subsection 8ZE(2) only if it is not practicable to put the material into documentary form or copy them to a storage device.

Subsection 8ZE(4) provides that the authorised officer or an officer assisting may secure the equipment by locking it up or guarding it if he or she believes on reasonable grounds that evidential material may be accessible by operating the equipment at the premises but expert assistance is needed to operate the equipment and the evidential material may be destroyed or otherwise interfered with if the equipment is not secured in the meantime. This is necessary to ensure that where the equipment is more sophisticated than expected and cannot be accessed or moved, then the opportunity to obtain expert assistance and to preserve evidential material is not lost.

Subsection 8ZE(5) requires the giving of notice to the occupier in cases where equipment may be secured for a period not exceeding 24 hours.

Subsection 8ZE(6) allows the equipment to be secured for either 24 hours or until the expert assistance is obtained, whichever happens first.

Subsection 8ZE(7) allows the authorised officer to apply to the magistrate for an extension of the time needed for securing the equipment if he or she believes on reasonable grounds that the expert assistance will not be available within that period. The occupier must be given notice under subsection 8ZE(8) and has the right to be heard in relation to the application. Subsection 8ZE(9) provides that Division 4 (sections 8V - 8Y of this Act) applies, with any necessary modifications, to the issuing of an extension.

New section 8ZF - Compensation for damage to electronic equipment

This section provides that if damage is caused to equipment as a result of it being operated as provided for under sections 8ZD or 8ZE and the damage resulted from insufficient care being exercised either in selecting the person to operate the equipment or by the person operating it, compensation is payable to the owner (subsection 8ZF(1)).

Compensation is payable out of money appropriated by the Parliament for the purpose (subsection 8ZF(2)).

In determining the amount of damages payable, regard is to be had to whether the occupier had provided any warning or guidance as to the operation of the equipment (subsection 8ZF(3)).

New section 8ZG - Seizure of things not covered by warrants

This section provides that if, in the course of a search authorised by warrant, an authorised officer or an officer assisting finds evidential material not specified in the warrant that he or she believes to be evidential material in relation to the offence to which the warrant relates, or to another relevant offence, the warrant may be taken to authorise the officer to seize that evidential material. To satisfy this provision, the officer has to have reasonable grounds for believing that it was necessary to seize the substance or thing to prevent its concealment, loss destruction, or its use in committing, continuing or repeating the offence or a relevant offence.

New section 8ZH - Copies of seized things to be provided

Subsection 8ZH(1) requires an authorised officer or an officer assisting to give, on request, a copy of a thing or information seized that can readily be copied, to the occupier of the warrant premises or another person apparently representing the occupier. This does not apply if no original material was seized (subsection 8ZE(2)).

New section 8ZI - Retention of things seized

Subsection 8ZI(1) allows an authorised officer or an officer assisting to retain evidential material that he or she seized for 60 days after seizure or until any proceedings instituted within those 60 days (including any appeal to a court) are completed.

Subsection 8ZI(2) provides that the Commission may authorise in writing the release of the seized substance or thing to its owner or the person from whom it was seized. The release may be unconditional or on such conditions as the Commission thinks fit.

Division 6 - Miscellaneous

New Section 8ZJ - Offence for making false statements in warrants

This section makes it an offence of knowingly making a false or misleading statement in the application for a warrant under this Part.

New section 8ZK - offences relating to telephone warrants

This section makes it an offence to name a magistrate in a form of warrant as having issued the warrant unless the magistrate did so, or to knowingly state in a warrant something materially different from that authorised by the magistrate.

It is also an offence to purport to execute an unauthorised or false form of warrant or to send to a magistrate a form of warrant that is not the form that the person purported to execute.

New section 8ZL - Delegation

This section allows the Managing Director of the Commission to delegate, by instrument in writing, any of his or her powers under this Part.

New section 8ZM - Actions under this Part taken to be in performance of certain functions

Subsection 8ZM(1) provides anything done under this Part for a purpose related to the Health Insurance Act, is taken to have been done in the performance of the Commission's medicare functions.

Subsection 8ZM(2) provides anything done for a purpose related to Part VII of the National Health Act is taken to have been done in the performance of the Commission's functions relating to the provision of pharmaceutical benefits.

PART IV - AMENDMENTS OF THE NATIONAL HEALTH ACT 1953

Clauses 12 - Principal Act

This clause specifies the National Health Act 1953 as the Principal Act in this Part.

Clause 13 - Repeal of section 104

This clause repeals the current section dealing with the powers of authorised persons in relation to the investigation of matters relating to pharmaceutical benefits.