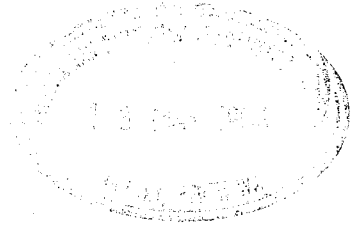


1993-94



THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

HEALTH LEGISLATION (POWERS OF INVESTIGATION) AMENDMENT BILL 1993

SUPPLEMENTARY EXPLANATORY MEMORANDUM

(Amendments to be moved on behalf of the Government)

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



HEALTH LEGISLATION (POWERS OF INVESTIGATION) AMENDMENT BILL 1993

GOVERNMENT AMENDMENTS

General Outline

These amendments have been prepared in response to suggestions raised in the course of the hearing of the Senate Standing Committee on Legal and Constitutional Affairs and after further discussions with representatives of the Australian Medical Association.

The amendments deal with two principal issues -

- . ensuring the use of the powers in Divisions 2 and 3 of the proposed new Part IID of the Health Insurance Commission Act 1973 is restricted to investigations of cases of suspected fraud against the Medicare Program, and
- . removing access under those same powers to patient clinical records maintained by doctors.

Other amendments are proposed to bring those provisions in Division 4 of the proposed new Part IID which are modelled on provisions in the Crimes (Search Warrants and Powers of Arrest) Bill 1994 into line with those provisions as they are proposed to be amended as a result of consideration of that Bill by the same Senate Standing Committee.

FINANCIAL IMPACT

These amendments are not expected to have any financial impact.

HEALTH LEGISLATION (POWERS OF INVESTIGATION) AMENDMENT BILL 1993

NOTES ON AMENDMENTS

Amendment (1)

This amendment to proposed paragraph 23DKA(7)(a) substitutes the words "a patient" for "an individual patient" in relation to a record containing clinical details to avoid the possible argument that a record containing the clinical details of more than one individual (for example, a family) is not protected.

Amendment (2)

This amendment to proposed paragraph 23DS(7)(a) is of the same effect as Amendment (1).

Amendment (3)

A redrafted subsection 129AAA(3A) is proposed to be inserted to clarify that -

- . the prohibition on entering an arrangement for use or occupation of premises or space in a building relates to that use or occupation by the approved pathology practitioner,
- . the exception to the prohibition applies to collection centres or accredited pathology laboratories that have been established or will be established within 30 days of entering the arrangement to use or occupy premises in a building. The exception only relates to premises or building space that will actually be used for the purpose of that exception, and
- . also exempted from the prohibition is the use or occupation of premises or space where the approved pathology practitioner is using the premises or space as consulting rooms to render professional services. This will ensure that approved pathology practitioners and approved pathology authorities who are also consulting specialists will not be prevented from making an arrangement that enables the provision of clinical services to patients, particularly those rendered on a sessional basis in rural areas.

Amendment (4)

This amendment would omit words from proposed subsection 129AAA(4A) so that the normal commercial rate for space in a building is not required to be that which is "for general commercial purposes". This allows the normal commercial rate to be determined on the basis of the actual use of comparable space in the building.

Amendment (5)

This amendment proposes to correct a drafting error by deleting the word "or" between paragraph (a) and paragraph (b) in proposed subsection 129AAA(4A) and substituting the word "and".

Amendment (6)

This amendment omits the currently proposed definition of "relevant offence" for new definitions substituted by Amendment (7).

Amendment (7)

This amendment proposes a new clause 9A in the Bill to add a new definition of "relevant offence" by way of a new section 3A in the Act.

For the purposes of Divisions 2 and 3 in proposed new Part IID, which deal with notices to require the giving of information and searches for monitoring compliance, "relevant offence" is limited essentially to those offences involving fraud which might result in a provider being excluded from the Medicare Program.

For the purposes of the other Divisions in proposed new Part IID, which deal with searches and seizures pursuant to a warrant issued by a magistrate, "relevant offence" covers any offence against the Medicare Program.

Amendment (8)

This amendment proposes to insert a new section 8KA empowering the Managing Director of the Commission to authorise in writing the use of the powers under proposed new Part IID in connection with an investigation. The powers may not be used in connection with an investigation unless there is an authorisation.

The authorisation under section 8KA will be a general authorisation for the particular case by the Managing Director personally - the proposed delegation power, section 8ZL, is to be deleted (see Amendment (34)). Moreover, it is expected that the Managing Director will only exercise the power to authorise the use of the new investigative powers in connection with an investigation on the advice of the Commission's National Case Management Committee after that Committee has considered the case. Once a case has been authorised for investigation under section 8KA, authorised officers will be able to use their standing authorisations under section 8L.

Amendment (9)

This amendment recasts propose subsection 8N(1) so that the power to require information or documents is limited to situations where there is a reasonable suspicion of a fraud offence against the Medicare Program.

Also, as the proposed delegation power, section 8ZL, is to be deleted (see Amendment (34)), the power is extended specifically to authorised officers. It is intended that the officers of the Commission who will be appointed as authorised officers under section 8L will be officers of the Professional Review Division of the Commission who have been employed and trained as investigators.

Amendment (10)

This amendment adds two new subsections to proposed section 8N.

The new subsection 8N(3) provides that the power to require information or documents does not include the power to require information in a patient's clinical record or the production of such a record. The purpose of this subsection is to make it clear that the provider's duty to maintain the confidentiality of his or her patient's clinical details is not overridden by the power in subsection 8N(1).

The new subsection 8N(4) provides that subsection 8N(3) does not apply to the subject of the clinical record where the clinical record relates to treatment in respect of which a claim for benefits has been made. The purpose of the subsection is to make it clear that a person can be required to reveal details of his or her treatment if a claim for benefit has been made and there is reasonable suspicion of fraud against the Medicare Program.

Amendment (11)

This amendment proposes to recast new subsection 8Q(2) to make more clear the offence of giving false information in relation to a section 8N notice, especially in relation to identifying any information known to be false in a document produced.

Amendment (12)

This amendment proposes to add subsection 8Q(3) which makes explicit that it is a reasonable excuse for refusing or failing to comply with a notice under section 8N if to do so would have the effect of disclosing the clinical details of a patient.

Amendment (13)

This amendment proposes to add a new section 8QA dealing with self-incrimination. As section 8N was modelled on section 129 of the Veteran's Entitlements Act, it was thought appropriate that section 129 of that Act also be adopted.

A person will not be excused from complying with a section 8N notice on the grounds that to do so may tend to incriminate him or her. However, in proceedings for offences other than offences against section 8Q, evidence from compliance with a section 8N notice directly or indirectly obtained as a result of such compliance cannot be used against the person.

Amendment (14)

This amendment proposes to substitute a new heading for Division 3.

Amendment (15)

This amendment recasts proposed subsection 8S(1) so that the power to enter and search premises to monitor compliance is limited to situations where there is a reasonable suspicion of a fraud offence against the Medicare Program.

Amendment (16)

This amendment proposes to insert a new subsection 8S(2A) requiring an authorised officer prior to exercising the power to enter premises under subsection 8S(1) to consider whether it is practicable to ascertain whether an offence has been or is being committed by access agreed with the occupier or by the occupier providing information.

Amendment (17)

This amendment proposes to make the use of the powers on entering premises under section 8S subject to the limitation in proposed new subsection 8T(4) that the powers in section 8T do not authorise any act in relation to a patient's clinical records.

Amendment (18)

This amendment makes explicit that the powers upon entering premises under section 8S are limited to the purpose of ascertaining whether the relevant offence, which was reasonably suspected and which formed the basis for the entry and search, has been or is being committed.

Amendment (19)

This amendment proposes the addition of the words "(other than a document)" to paragraph 8T(1)(b) to ensure that copying of documents during a monitoring search is not used as an alternative to obtaining documentary evidence pursuant to a search warrant.

Amendment (20)

This amendment proposes the addition of words to paragraph 8T(1)(c) to make explicit that sampling of things on the entered premises is limited to drugs and the like in respect of which pharmaceutical benefits may be claimed.

Amendment (21)

This amendment proposes the deletion from paragraph 8T(1)(d) of the words "or make copies of" for reasons similar to those for Amendment (15).

Amendment (22)

This amendment proposes to add words to subsection 8T(2) to make explicit that the power to operate equipment on the entered premises is subject to the limitations in subsection 8T(1).

Amendment (23)

This amendment is consequential upon Amendment (15) recasting subsection 8S(1) and the redefining of "relevant offence".

Amendment (24)

This amendment mirrors in relation to subsection 8T(2) Amendment (22) in relation to subsection 8T(2).

Amendment (25)

This amendment proposes a new subsection 8T(4) to make explicit that the powers in section 8T do not authorise any act in relation to a patient's clinical records.

Amendment (26)

This amendment recasts proposed section 8U so that there is an obligation on an authorised officer to identify himself or herself to the occupier of premises when exercising powers under proposed Division 2 rather than, as the provision is presently drafted, only to identify himself or herself on demand by the occupier.

Amendment (27)

This amendment proposes to recast the heading of Division 4 consequential upon the new heading proposed for Division 3 (see Amendment (16)).

Amendment (28)

This amendment proposes a new subsection 8W(1A) requiring that a magistrate not issue a warrant in respect of particular premises under the proposed new Part IID unless he or she has been advised what other (if any) warrants have been sought under the Part in respect of those premises in the preceding 5 years.

Amendment (29)

This amendment proposes a new paragraph 8W(3)(c) to create an additional requirement that a magistrate shall not issue a warrant under Part IID unless he or she is satisfied that execution of the warrant will not cause an unreasonable invasion of any patient's privacy.

Amendment (30)

This amendment proposes a new paragraph 8W(4)(e) to require that any warrant issued must state whether or not it authorises the exercise of warrant powers in relation to records containing clinical details relating to patients.

Amendment (31)

This amendment to proposed subsection 8ZD(3) makes it clear that when anything is taken from the premises to be examined or processed the occupier must, if practicable, be informed of the address, time and place of the examination and be allowed to attend the examination. Previously this provision was to only apply to "electronically stored information".

Amendment (32)

This amendment proposes that new sections 8ZGA and 8ZGB modelled on proposed sections 3NA and 3NB of the Crimes Act 1914 be inserted.

Proposed section 8ZGA provides that occupiers or their representatives may choose to observe the searching of the premises providing they do not impede the conduct of the search in any way.

As it is not proposed that authorised officers have a power of arrest, the reference to Part IC of the Crimes Act in proposed section 3NA of that Act is not required.

The right to observe the search should not preclude authorised officers from searching 2 or more areas of the premises at the same time. In those circumstances the person can move from one area to another or elect to observe particular parts of the search. In some cases it will be necessary to search different parts of the premises at once because of its size or where there is an opportunity for the destruction or concealment of evidentiary material.

Proposed section 8ZGB provides that receipts are to be issued to occupiers for things seized. Under this provision it will be possible for the items to be listed on the same receipt. It is not envisaged that authorised officers would be required to identify absolutely every item individually where those items can be adequately identified by a class description.

Amendment (33)

This amendment proposes the addition of a new section 8ZIA to require that patients be advised in writing where powers under Part IID have been exercised in relation to records containing their clinical details.

The section will not apply where to advise the patient would prejudice the investigation in connection with which the powers were exercised or the Commission is unable, after making reasonable inquiries, to locate the patient.

Amendment (34)

This amendment proposes to delete new section 8ZL, the power of delegation. It has been made redundant by the specific inclusion of authorised officers in section 8N and by the intention that the powers in sections 8KA and 8L, respectively to authorise the exercise of Part IID powers in connection with a particular investigation and to appoint authorised officers, should be exercised by the Managing Director of the Commission personally.