

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Health

Health Insurance Act 1973

*Health Insurance (Medicare Participation Review Committee)
Guidelines 2020*

Authority

Subsection 124H(1) of the *Health Insurance Act 1973* (the Act) provides that the Minister may, by legislative instrument, make guidelines to be applied by a Medicare Participation Review Committee (Committee) with respect to the making of relevant determinations. The guidelines may specify circumstances in which ‘relevant determinations’ may be made.

Subsection 124H(7) of the Act provides that a ‘relevant determination’ is a determination by a Committee under the following subsections of the Act:

- subsection 124F(1), (2) or (6) (determinations regarding relevant offences and civil contraventions by a practitioner);
- 124FA(1) or (2), 124FB(1), 124FC(1) (determinations regarding breach of undertaking by an approved pathology practitioner or approved pathology authority)
- 124FE(1) or (2), 124FF(1), (2) or (5) (determinations regarding offences and civil contraventions involving prohibited practices in relation to pathology and diagnostic imaging services; or
- 124G(2) (determination, if no action to be taken against a person, not to hold a hearing).

These Guidelines follow the precedent of previous guidelines and do not address determinations relating to breach of an undertaking by an approved pathology practitioner or approved pathology authority.

Purpose

These Guidelines replace guidelines made in November 2009 which sunsetted on 1 April 2020. Committees are established on a case by case basis following a referral to the Chairperson of Medicare Participation Review Committees (MPRCs). No Committees have been established since the previous guidelines ceased.

These Guidelines are consistent with the previous guidelines, but now allow a Committee to take no further action where the Committee is satisfied the circumstances of the practitioner have or had a similar practical effect as a determination by a Committee that they are disqualified for an appropriate period.

For example, while a General Practitioner (GP) is imprisoned, they cannot render any professional services which would attract a Medicare benefit (Medicare services). Similarly, if the Medical Board of Australia cancels or revokes a GP’s professional registration they cannot practice and therefore cannot render Medicare services. Where a provider has been sentenced to imprisonment and/or is subject to an order of the Medical Board, and a period of disqualification from the Medicare program would be of little practical effect, the Guidelines now allow a Committee to avoid the expense and inconvenience of a hearing and determine that no further action be taken.

Background

MPRCs are independent statutory committees established when required under section 124E of the Act. The provisions relating to MPRCs are set out in Part VB [5B] of the Act. MPRCs assist to protect the integrity of the Medicare program including by ensuring that those who owe fines or civil penalties to the Commonwealth are not effectively earning income from the Commonwealth to repay those amounts.

Practitioners and providers of pathology and diagnostic imaging services who commit a relevant offence are referred to the Chairperson of MPRCs. A **relevant offence** is defined in subsection 124B(1) of the Act and includes offences involving: knowingly making false statements; bribery in relation to private hospital services; charging of fees for providers of public hospital services for public patients; the making of threats and failure to keep or provide records of medicare services to the Chief Executive Medicare in relation to pathology and diagnostic imaging services; furnishing false or misleading returns or information; and various offences against the *Crimes Act 1914* and the *Criminal Code*.

Similarly, providers of diagnostic imaging and pathology services who commit a criminal offence against, or civil contravention of, the prohibited practices provisions of Part IIBA [2BA] of the Act and Approved Pathology Providers and Approved Pathology Authorities suspected of breaching their undertaking are also referred to the Chairperson of MPRCs. The Chairperson is required to form a committee of peers to review the person who has been referred.

Where a practitioner or provider is found to have committed a relevant offence or civil contravention, the Committee reviews the practitioner's circumstances and makes a determination. The Committee's powers include a range of sanctions from counselling to full disqualification for a period up to five years. Any services rendered while a practitioner is disqualified will not attract Medicare benefits. A MPRC's determination in relation to a person is reviewable by the Administrative Appeals Tribunal (see section 124R of the Act).

Consultation

A consultation draft was provided to the Australian Medical Association (AMA), the Australian Dental Association (ADA) and Optometry Australia. These three organisations are expressly named in the Regulations as professional organisations for the purposes of the Part VB of the Act. Optometry Australia supported the proposed re-make of the Guidelines and the AMA and the ADA expressed no objections.

The Guidelines are a legislative instrument for the purposes of the *Legislation Act 2003*.

An item by item explanation of the Guidelines is set out in Attachment A.

The Guidelines commence the day after their registration on the Federal Register of Legislative Instruments.

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Section 1. Name

Section 1 provides that the name of this instrument is the *Health Insurance (Medicare Participation Review Committee) Guidelines 2020* (the Guidelines).

Section 2. Commencement

Section 2 provides that the Guidelines will commence the day after the instrument is registered.

Section 3. Authority

Section 3 provides that the Guidelines are made under subsection 124H(1) of the *Health Insurance Act 1973*.

Section 4. Definitions

Section 4 defines terms used in the Guidelines.

Section 5. Compliance with Guidelines

Section 5 requires a Committee to have regard to the matters set out in out in sections 7 to 12 of the Guidelines when making determinations in relation to a relevant offence or a pecuniary penalty order in respect of a relevant civil contravention by a provider of pathology or diagnostic imaging services, or a practitioner.

A **relevant offence** is defined in subsection 124B(1) of the Act and includes: knowingly making false statements; bribery in relation to private hospital services; charging of fees for provision of public hospital services for public patients; offering or providing prohibited benefits, the making of threats and failure to keep or provide records of medicare services to the Chief Executive Medicare in relation to pathology and diagnostic imaging services; furnishing false or misleading returns or information; and various offences against the *Crimes Act 1914* and the *Criminal Code*.

A **relevant civil contravention** is defined in subsection 124B(1) of the Act and means a contravention of a civil penalty provision in Division 2 of Part IIBA [2BA] of the Act. It relates to specified actions by providers or requesters of pathology and diagnostic imaging services including asking for or accepting prohibited benefits; offering or providing prohibited benefits; and making threats.

Section 6. Exercise of powers under the Act

While a Committee is required to take the Guidelines into account (paragraph 124(3)(b)), the Guidelines do not limit the powers conferred on the Committee (subsection 6(1) of the Act).

Subsection 6(2) provides that a Committee may take into account matters it considers relevant to making a determination, where those matters are not covered by the Guidelines, and may inform itself on any matter in such manner as the Committee considers appropriate (subsection 6(3) of the Act).

Subsection 6(4) provides that a Committee may not review a judicial decision regarding an offence or civil contravention committed by the subject of their determination.

Section 7. Making of determinations under subsection 124F(2)

Section 7 sets out the kind of information a Committee must consider when making a determination in relation to a relevant offence or civil contravention. Matters to be taken into consideration include whether the practitioner or provider has been convicted of any previous offence or been given a pecuniary penalty order in relation to a previous civil contravention and any comments made by the court regarding the reasons for its decision.

Section 8. Other relevant considerations

Section 8 provides that, in making a determination, a Committee may consider a range of other matters including the potential impact that any period of disqualification may have on the community the practitioner or provider serves. A Committee may also consider whether a practitioner's or provider's registration as a health practitioner under the National Registration and Accreditation Scheme (State and Territory law) has ceased and any period during which they are, or were, ineligible to reapply for registration and therefore medicare benefits were not payable.

Section 9. Disqualification periods

Section 9 provides a range of presumptions as to disqualification periods for practitioners who have been convicted of a relevant offence or ordered by a Court to pay a pecuniary penalty order for a relevant civil contravention. There are six scenarios described with disqualification periods of between three months and five years depending on the type of offence or civil contravention and whether it is a first or subsequent offence or civil contravention by the practitioner. The presumptions about disqualification periods are the same as the previous 2009 Guidelines.

Section 10. Payment of medicare benefits

Section 10 relates to providers of pathology and diagnostic imaging services who are not practitioners, who have been convicted of a relevant offence against, or civil contravention of, the prohibited practices provisions set out in Part IIBA of the Act. There are six scenarios described with disqualification periods of up to five years depending on the type of offence and the previous conduct of the provider.

Section 11. Making of determinations under subsection 124G(2)

Section 12 sets out the matters which a Committee is required to consider when making a determination under subsection 124G(2) as to whether or not a hearing should not occur, including whether no further action is appropriate in accordance with the exception in section 12.

Section 12. Exception to a disqualification period

Section 12 provides an exception to the presumptions about disqualification periods set out in section 9. This section allows a Committee to take no further action against a practitioner or provider if the Committee is satisfied that a determination would have little impact on the practitioner because their circumstances, such as imprisonment or an order of the Medical Board of Australia, is having (or has had) a similar practical effect to a determination that the practitioner is disqualified. If the Committee is satisfied that the practitioner is not able to bill Medicare for appropriate period after their conviction, whether due to imprisonment, being unregistered or otherwise, the Committee can proceed to determine that no further action be taken without holding a hearing.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

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The Guidelines are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Guidelines

The Guidelines are a legislative instrument made under subsection 124H(1) of the *Health Insurance Act 1973* (the Act) to assist a Medicare Participation Review Committee (Committee) to make a determination under the Act.

Part VB of the Act provides for Committees to make a determinations regarding practitioners who have been convicted of a relevant criminal offence or have received a pecuniary penalty order for a relevant civil contravention of the Act, and regarding providers of diagnostic imaging and pathology services who have engaged in prohibited practices or breached pathology undertakings. A Committee must hold a formal hearing (but may decide not to proceed to a formal hearing if no action is to be taken), and may take no action, counsel, reprimand, or partially or fully disqualify services from attracting a Medicare benefit. A disqualification may be for a period of up to 5 years. The Guidelines assist a Committee to decide when a formal hearing may not be necessary, and to decide whether and for how long disqualification from Medicare may be appropriate.

The Guidelines remake the former Guidelines which sunsetted on 1 April 2020, with one change to allow a Committee to take no further action where the Committee is satisfied that the circumstances of the practitioner have (or had) a similar practical effect as a Committee determination that the practitioner is disqualified for an appropriate period.

A separate Committee is established to review each person referred to the Chairperson of Medicare Participation Review Committees. No Committees have been established since the previous Guidelines ceased.

Human rights implications

The Guidelines engage Articles 6 and 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), specifically the right to health and the right to work.

Right to Health

The right to the enjoyment of the highest attainable standard of physical and mental health is contained in Article 12(1) of the ICESCR. The UN Committee reports that the '*highest attainable standard of health*' takes into account the country's available resources. This right may be understood as a right of access to a variety of public health and health care facilities, goods, services, programs, and conditions necessary for the realisation of the highest attainable standard of health.

The Guidelines promote and maintain the right to health by assisting Committees to make determinations to support the integrity of the Medicare program. The program is a subsidy scheme for health services which supports the health of Australians. It is important not only that patients have access to health services, but also that the program has a method to counsel, reprimand, or

exclude, the services of particular practitioners or providers from generating Medicare benefits when necessary and appropriate. A Committee takes into account a number of matters in making a determination, including the potential effect on the patients of the practitioner or provider and/or the community they serve.

Right to Work

The right to work is recognised in Article 6(1) of the ICESCR, which includes the right of everyone to have the opportunity to gain a living by work freely chosen or accepted, and for appropriate steps to be taken to safeguard this right.

The registration of health practitioners occurs via the National Registration and Accreditation Scheme (NRAS), under state and territory law. A Committee cannot deregister a health practitioner, and does not prevent a health practitioner from working in their profession. Not all health professional roles involve a Medicare benefit, for example, the treatment of public patients in hospitals.

Disqualification by a Committee can mean that patients are less likely to wish to be treated by a health provider, as their services are not eligible for a Medicare benefit. The significant impact of a disqualification determination is recognised under the Act in a number of ways to ensure that the issue is carefully handled in a reasonable and proportionate manner. A Committee is only formed for serious matters, after consideration of the behaviour is finalised. The Committee is a peer body (s.124E-124EB of the Act), there is a right to a formal hearing (s124G – together with the ability to make submissions no further action be taken and that no formal hearing be held – which is also covered by the Guidelines), and a determination may be reviewed by the Administrative Appeals Tribunal (s.124R of the Act). Disqualification may be partial (not all services), or full, and is for a maximum of 5 years. The Guidelines assist a MPRC by indicating the period of disqualification that may be appropriate, depending on the circumstances.

Conclusion

The Guidelines are compatible with human rights because they support the right to health, and to the extent that the right to work is affected, this limitation is reasonable, necessary and proportionate.

THE HON GREG HUNT MP
MINISTER FOR HEALTH