

Changed Powers of the Private Health Insurance Ombudsman

This fact sheet provided by Day Hospitals Australia is part of a suite of five fact sheets covering the following topics:

- **Second Tier Default Benefits**
- **Gold/Silver/Bronze/Basic tiers of private health insurance covering hospital treatment**
- **Standardisation of clinical categories under private health insurance tiers**
- **Changed powers of the Private Health Insurance Ombudsman**
- **Changes to Prostheses Benefits for Medical Devices**

1 Executive Summary

The *Ombudsman Act 1976* (Cth) (**Ombudsman Act**) has been amended to provide for additional powers for the Private Health Insurance Ombudsman (**PHIO**) in investigating private health insurance funds.

The existing powers of the PHIO apply to parties including healthcare providers (such as day hospitals and medical practitioners), but also private health insurance funds.

They include

- a broad power to seek relevant information and records (including personal information) in relation to a complaint or an own-motion investigation by the PHIO; and
- the power to compel a party to participate in mediation.

Day hospitals should do the following:

- No immediate action is required based on the changes. In view of the powers of the PHIO, day hospitals must ensure compliance with existing requirements under the Ombudsman Act, including compliance with requests for documents and information by the PHIO, and participation in any compulsory mediation where notified. Day hospitals should have policies and procedures in place to ensure such compliance.
- Following the PHIO's investigation of a private health insurance fund in accordance with the amended powers, day hospitals may receive a written recommendation to take a specific action under the new section 20SB(2)(b), and possibly a request for a report to be made to the PHIO within a certain time and prior to commencing such action. Where this is the case, they must comply with such a request.

2 Background

The functions of the Commonwealth Ombudsman under the Ombudsman Act include the functions of the PHIO, as set out in Part IID of that Act. Changes to the private health insurance regulatory framework through the *Private Health Insurance Legislation Amendment Act 2018* (**Amending Act**) provided for additional powers for the PHIO in relation to the investigation of private health insurance funds. The changes came into force on 22 September 2018.

Functions of the PHIO

The function of the PHIO is to protect the interests of persons covered by private health insurance. This may include assisting persons who have made a complaint, investigating the practices and procedures of private

Recent Changes to Private Health Insurance Regulation

April 2019

health insurance funds, brokers, and healthcare providers, and mediating between private health insurance funds and healthcare providers.

Broadly, the Ombudsman Act enables the PHIO to act where the matter concerns a private health insurance arrangement. This may be in relation to a complaint made by a healthcare provider such as a day hospital, but also in relation to a complaint against a healthcare provider by a patient or insurer.

In addition, the PHIO may on its own initiative investigate both a healthcare provider and a private health insurance fund in relation to a private healthcare arrangement.

3 Unchanged powers of the PHIO

Prior to the relevant parts of the Amending Act coming into force, the PHIO already had power to gather information from parties including healthcare providers such as day hospitals. Such powers applied in investigating a complaint (Division 3) as well as in the course of an own-motion investigation (Division 4) under Division 6 of the Ombudsman Act. Healthcare providers including day hospitals must comply where the PHIO exercises the powers as set out below.

“PHI Record” in the context of an investigation in relation to a complaint, or an own-motion investigation by the PHIO, is defined to mean:

- *the constitution and rules of the subject, if the subject is a private health insurer;*
- *the internal training manuals and related documents of the subject;*
- *any documents relevant to a private health insurance arrangement to which the subject is a party or that applies to the subject;*
- *to the extent that the complaint or investigation relates to the subject’s dealings with a particular person—the subject’s documents relating to its dealings with that particular person including correspondence, internal memoranda, emails, and recordings of taped conversations;*

whenever those documents came into existence.

Powers to seek information

The powers of the PHIO are broad. The PHIO may obtain such information and make such enquiries as he or she sees fit, including requesting information or PHI records (section 20ZD).

The PHIO may request PHI records or other information by providing notice in writing if the PHIO has a reasonable belief that a person is in possession of records that are relevant to:

- deciding if and how to deal with, mediating, or investigating a complaint; or
- an investigation or mediation by the PHIO (section 20ZE).

A person is not excused from providing such information or records on the grounds that they may tend to incriminate the person, or expose the person to a penalty.

Authorisation for laws dealing with personal information

Provision of such information or records in accordance with a notice, or in the reasonable belief that such information or the PHI Record would assist the PHIO in mediating or dealing with a complaint, referring a complaint, making a decision not to deal with a complaint, or in an own-motion investigation, is taken to be authorised by the Ombudsman Act. This is for the purpose of the *Privacy Act 1988* (Cth) or any other law of a

Recent Changes to Private Health Insurance Regulation

April 2019

State or Territory dealing with the provision of personal information (section 20ZF). This means that healthcare providers including day hospitals are not breaching privacy laws by providing personal information to the PHIO.

Information not admissible in other proceedings under certain circumstances

Where the information or PHI record is provided by an individual under specific circumstances as detailed below, the information or record given, the fact that it was given, and any information, document or thing obtained as a direct consequence of it having been given are not admissible in proceedings against the individual. This excludes proceedings for offences under section 137.1 (Providing false or misleading information), section 137.2 (Providing false or misleading documents), or section 149.1 (obstructing Commonwealth Officials) of the Commonwealth *Criminal Code*.

The relevant circumstances are:

- where the individual by providing the information contravenes any other enactment;
- where the individual by providing the information tends to incriminate the individual, or become liable to a penalty;
- where the subject of the investigation or complaint is an individual, discloses legal advice or privileged communications between the subject and another body;
- where the subject of the investigation or complaint is not an individual, discloses a privileged communication between an officer, employee or contractor of the subject and another body; or
- where the individual by providing the information or records generally acts against the public interest.

Power to compel participation in mediation

The PHIO may compel parties including healthcare providers such as a day hospital, and private health insurance funds, to participate in mediation in relation to a complaint or own-motion investigation.

The direction must be in writing and must be provided to any person named in it. It must also specify the subject matter of the complaint or investigation, and any officers of the entity subject of the complaint. It must also provide the time and place of the mediation, and provide no less than 14 days' notice (section 20Y).

4 Additional powers of the PHIO

The Amending Act inserts a number of new provisions relating to rights of inspection and audit of private health insurance funds by the PHIO into the Ombudsman Act. These amendments are intended to allow for more effective pursuit of investigations by the PHIO, as the PHIO will be able to ensure that private health insurers do not overlook relevant information that they hold in relation to an investigation matter. These provisions provide a right of entry and inspection with respect to private health insurance funds, but do not apply to healthcare providers.

Powers pertaining to private health insurance funds and associated parties

The key aspects of the amendments are as follows:

- The PHIO may at any reasonable time of day enter a place occupied by a private health insurance fund, private health insurance broker, or by a person predominately for the purpose of performing services for such a party, or a place where documents, or other records relating to a private health insurer, broker or carrying on of a health insurance business are kept. The PHIO may then inspect any documents or other records to verify evidence already provided, or take extracts from or copies of them (section 20SA).

Recent Changes to Private Health Insurance Regulation

April 2019

- The PHIO must provide the occupier with 48 hours' notice prior to such entry (section 20ZHA(1A)).

New powers for PHIO directions, including to healthcare providers

- Where the PHIO has exercised powers as above, it may recommend that a party takes a specific course of action (section 20SB).
 - It may recommend to a private health insurance fund that the fund takes a specific course of action or makes changes to its fund rules.
 - It may recommend to a healthcare provider such as a day hospital, or to an insurance broker, that the person take a specific course of action.
- Where the PHIO makes such a recommendation, it may also issue a further written request to the recipient, specifically that the recipient report to the PHIO within a certain time, and prior to taking the required action, about details of the action to be taken
- Under section 20SB(4), the PHIO may report to the Minister on any recommendations made to private health insurance funds or brokers, referring to the exercise of the inspection and audit powers. The relevant insurer or broker must be informed of this, unless doing so would or could reasonably be expected to prejudice an ongoing investigation.
- It is notable that recommendations made to health service providers are not specifically raised in section 20SB(4) of the Ombudsman Act, but presumably they could be included in such a report. However, if that is the case, there is no requirement to provide health service providers with any report that would raise recommendations made to them. In the event that health service providers may receive such recommendations, they may therefore wish to proactively ask the PHIO for any reports that may be provided to the Minister in that matter.

5 Contacting the Private Health Insurance Ombudsman

- The Private Health Insurance Ombudsman will consider complaints from health service providers, including in relation to private health insurance funds. Contact details and various resources can be found at:
<http://www.ombudsman.gov.au/How-we-can-help/private-health-insurance>
- The PHIO has an important mediation role in resolving issues between private hospitals and health insurance funds, particularly in relation to issues that may impact the rights of consumers. The PHIO's mediation guidelines can be found here:

https://www.ombudsman.gov.au/_data/assets/pdf_file/0030/29847/phiomediationguidelinesv1-2.pdf

6 Resources from the Department of Health

Relevant for day hospitals and other healthcare providers

- Department of Health short fact sheet (one page) relating to PHI reforms, addressing changed powers of Private Health Insurance Ombudsman.

- *Private Health Insurance Reforms: Strengthening the Powers of the Private Health Insurance Ombudsman*, available at:

<http://www.health.gov.au/internet/main/publishing.nsf/Content/private-health-insurance-reforms-fact-sheet-strengthening-the-powers-of-the-private-health-insurance-ombudsman>

For the general public

- The Department of Health has compiled a short (two pages) general fact sheet on the changes to private health insurance regulation. This fact sheet is also available in community languages other than English (Simplified Chinese, Traditional Chinese, Arabic, Vietnamese and Korean).

- Australian Government, *Making private health insurance simpler for everyone*, available at:

<https://beta.health.gov.au/resources/publications/making-private-health-insurance-simpler-for-everyone-fact-sheet>

Contact

General information about Day Hospitals Australia (**DHA**), including about membership, can be found at <https://www.dayhospitalsaustralia.net.au/>.

CONTENT PREPARED BY HEALTH LEGAL PTY LTD



www.healthlegal.com.au



www.lawcompliance.com.au