



Australian Government

Department of Health

Consultation Paper: Medicare Compliance – Shared Debt Recovery Scheme

December 2018

Introduction

The Department of Health (the Department) has a responsibility to protect the integrity of Australia's health payments system through prevention, identification and treatment of incorrect claiming, inappropriate practice and fraud by health care providers and suppliers. The overwhelming majority of Medicare providers aim to do the right thing, but in the small number of cases where non-compliance occurs, it is important that effective action is taken.

In the 2017-18 Budget, the Government announced that it would be introducing legislation to improve Medicare compliance. When the announcement was made only 20 per cent of Medicare debts raised were being recovered. While the debt recovery rate is now around 40 per cent, stronger powers were needed so that the Government could recover more of the funds overpaid due to incorrect claiming, inappropriate practice and fraud. In addition, different practitioners were subject to different rules for record keeping and different compliance arrangements.

The legislative changes introduced to support the 2017-18 measure include:

- strengthened debt recovery powers, including compulsory setoffs and garnishee notices;
- standardised administrative arrangements across the three Acts governing the provision of Medicare and dental benefits and the supply of pharmaceutical benefits; and
- the introduction of the Shared Debt Recovery Scheme (the Scheme) to address organisational billing of Medicare services.

On 1 July 2018, the *Health Insurance Legislation Amendment (Improved Medicare Compliance and Other Measures) Act 2018* ('the Improved Medicare Compliance Act') came in to force and gave effect to the first two changes.

The amendments to the *Health Insurance Act 1973* (HIA) that introduce the Scheme do not take effect until 1 July 2019 to allow for further consultation with stakeholders.

The Department acknowledges that organisations and health practitioners impacted by the Scheme are diverse and operate under various employment agreements, contractual arrangements and business models in distinct environments.

The purpose of this paper is to seek input from organisations, health practitioners and the public to inform the drafting of a legislative instrument which will govern elements of the operation of the Scheme.

How to Participate

The Department welcomes input via the Department's Consultation Hub at <https://consultations.health.gov.au/compliance-systems/sdrs-consultation>.

Individual practitioners, organisations as well as the public are invited to respond to this consultation paper.

The online submission process will open on Wednesday, 5 December 2018 and close on **Thursday, 31 January 2018 at 5pm.**

Background

Overview

The aim of the Shared Debt Recovery Scheme (the Scheme) is to apply a fair and reasonable approach to dealing with Medicare debts incurred as a result of incorrect billing. Organisations that engage or employ a practitioner to render professional services are already encouraged to ensure that all amounts claimed correspond with the service rendered. The Scheme is designed to encourage practitioners and organisations to work together to minimise incorrect billing and promptly repay Medicare compliance debts.

The Scheme acknowledges that there have been significant changes in the nature of health practice since Medicare was introduced in 1984.

The nature and structure of health practice has changed from solo and owner-operated practices to larger group practices and corporate practices. Health providers have, in many instances, indicated that they have given up control of their Medicare billing, and billing functions are often centralised or delegated to non-health practitioners within organisations. In some instances this has contributed to incorrect billing practices.

Primary responsibility for correct claiming will continue to rest with the practitioner, as the only person who can determine that the service has been delivered in accordance with the requirements of the Medicare Benefits Schedule (MBS). A practitioner is granted a provider number to access these benefits on the expectation that these services are billed correctly to Medicare.

Under the Scheme, where contractual or other arrangements exist between a health practitioner and an employer or organisation to render Medicare services, both the practitioner (referred to as the primary debtor) and the organisation (the secondary debtor) may be held responsible for the repayment of a respective portion of the debt following a Medicare compliance audit. A default percentage of the debt to be recovered from the secondary debtor will be set out in a legislative instrument and may be varied if evidence is produced that a different percentage should be applied.

In general, we expect that the majority of a compliance audit debt to which the Scheme applies will be recovered from the practitioner whose provider number was used to make the claim. However, the Scheme acknowledges that claiming can be influenced by an employing or contracting organisation which also receives a direct or indirect financial benefit from Medicare claiming and should also be responsible for repayment of a portion of the debt.

Individual practitioners and their employers (or other organisations) will be contacted about a possible compliance audit debt as early as possible in the process to allow both parties to provide information to the Department.

The Scheme has been designed to support fairness, by ensuring that any party who may have a debt to the Commonwealth as a result of an incorrect Medicare payment has the opportunity to provide documents and information relevant to the decision.

The Scheme will not apply to:

- debts owed to the Commonwealth as a result of inappropriate practice following referral to the Professional Services Review;
- claims adjustments that occur routinely as part of health practice, where a practitioner alerts the Department of Human Services to an error in claiming in order to correct the claims record;
- voluntary acknowledgements of incorrect payments, where a practitioner accepts the full amount of the debt; or
- debts arising where one party has, without knowledge of the other, engaged in criminal conduct in relation to Medicare claims or billing.

Medicare audits

An audit is a factual assessment of whether a claim for a Medicare benefit was correctly made. This assessment is undertaken by audit officers working in the Department of Health, on behalf of the Chief Executive Medicare.

This process is usually commenced with a request for information or documents from the practitioner to assist in determining whether the requirements of the item were met.

The most important provision in the Health Insurance Act relevant to an audit is Section 129AC(1).¹ Under this provision, a debt may be due to the Commonwealth if, as a result of a false or misleading statement, an incorrect Medicare benefit has been paid. The overpayment is recovered from the person who made the statement, or the person on whose behalf the statement was made, even if they did not directly receive the payment. This usually means the recovery of the benefit is from the practitioner.

When a practitioner issues an itemised invoice or receipt or makes a bulk bill claim for a Medicare service, the practitioner is stating that they have rendered a professional service that meets all of the elements of the MBS item descriptor.

A Medicare debt can arise from a 'false or misleading statement' even if there was no intention to defraud or to be dishonest when claiming a Medicare benefit or billing for a professional service.

¹ 129AC(1) reads: 'Where, as a result of the making of a false or misleading statement, an amount paid, purportedly by way of benefit or payment under this Act, exceeds the amount (if any) that should have been paid, the amount of the excess is recoverable as a debt due to the Commonwealth from the person by or on behalf of whom the statement was made, or from the estate of that person, whether or not the amount was paid to that person, and whether or not any person has been convicted of an offence in relation to the making of the statement.'

Debts can arise from unintentional errors in claiming and are determined in audit by a factual assessment of whether the correct amount was paid for the service, including whether the professional service rendered met all of the elements of the MBS item descriptor.

If a practitioner is not able to produce documents which show that the item was correctly claimed, or does not cooperate with the audit, then a notice to produce documents may be issued. Before a notice to produce can be issued, the audit officer must seek advice from a medical practitioner who is an employee of the Department on what documents can be used to determine that the item was correctly claimed, and have taken steps to consult with a relevant professional body. The audit officer must also have a 'reasonable concern', or a basis for believing that an incorrect claim may have been made.

A notice to produce may also be issued to a third party who may hold the documents. The audit officer will make an assessment of any evidence provided, and will decide based on the facts whether sufficient information has been provided to indicate that the service was provided. If an audit officer makes an adverse finding, then the practitioner can ask for a formal review of the decision within 28 days.

Shared Debt Recovery Scheme

The Shared Debt Recovery Scheme will be integrated into the Medicare audit process described above.

When a practitioner is first contacted about an audit, they will be asked if they would like to be considered for a shared debt determination. This means that the practitioner will be asked to not only produce documents in relation to the services claimed, but also provide information about relevant employment, contractual or financial arrangements.

If a possible secondary debtor is identified, this other person or organisation will also be asked to provide information.

A shared debt determination is the decision of the audit officer about whether there is an audit debt, whether it should be shared between the two parties, and what the split should be.

The effect of making a shared debt determination as part of a Medicare audit is that an amount, or part of an amount, can be claimed from two parties: the secondary debtor and the primary debtor.

Even if a practitioner applies to be part of the Scheme, the audit officer still needs to make a decision about whether or not there is sufficient evidence to hold another party responsible for the repayment of a proportion of the debt. This will depend on any employment, contractual, or financial arrangements in place.

The legislative instrument will provide for a 'default' percentage of the debt to be recovered that applies to each party. However, this may be varied if the audit officer determines that it is fair and reasonable to do so, for example, if a contract is provided which shows that the financial benefit from the incorrect claim was disbursed to the practitioner and the other party in a different ratio.

In making a shared debt determination, the Department must consider whether there was influence over the billing.

Under the Scheme, if either party applies for a review of the decision, it must be reviewed. This review will be undertaken by a separate review officer, working on behalf of the Chief Executive Medicare. Both the practitioner and the secondary debtor will be able to provide additional information before the review decision is made.

A document which details the process for the making of a shared debt determination can be found at **Attachment 1**.

Further information

Further information, including a copy of the Improved Medicare Compliance Act, the Explanatory Memorandum and other information is available for download at <https://consultations.health.gov.au/compliance-systems/sdrs-consultation>.

Issues for Consultation

Key elements of the Scheme will be prescribed by the Minister in a legislative instrument. The implementation of the Scheme was delayed until 1 July 2019 to ensure that stakeholders could be consulted on these elements.

Legislative instruments are laws on matters of detail made by the body authorised to do so by the relevant enabling legislation; in this case, the Minister. Examples of legislative instruments include regulations, rules and determinations. A legislative instrument does not require passage through parliament, but is a disallowable instrument.

The following issues relate to the legislative instrument, and stakeholder input is requested to inform the drafting of the instrument.

Consultation Issue 1

Classes of persons (or organisations) which may be considered a secondary debtor for the purposes of a shared debt and classes of persons (or organisations) who would be excluded from being considered a secondary debtor.

(Legislative reference sections 129ACA(9)(a) and 129ACA(9)(b) of the HIA)

The intent of the legislation is that the secondary debtor will, in most circumstances, be the person (or organisation) who employs or engages the health practitioner (the primary debtor) whose provider number was used to make the Medicare claim.

‘Classes’ of persons (employing or contracting organisations) may be included or excluded from the Scheme. These classes will be decided by the Minister and defined in the legislative instrument.

It is anticipated that almost all organisations that are employers or contractors of Medicare providers will be included in the Scheme.

Participants are asked to consider the following:

- What types of employment or contractual arrangements should the Minister be aware of when determining which classes of persons (or organisations) will be included in or excluded from the Scheme?

Consultation Issue 2

Matters which should be considered when making a shared debt determination.

(Legislation reference - section 129ACA(2)(c) of the HIA)

If the Chief Executive Medicare (or their delegate) reasonably believes a shared debt determination should be made, they must consider the following issues outlined in section 129ACA(2)(c) of the HIA:

- Whether the secondary debtor could have controlled or influenced the circumstances that led to the making of the ‘false or misleading’ statement to which the debt relates;
- Whether the secondary debtor directly or indirectly obtained a financial benefit from the making of the false or misleading statement;
- Whether any other factors in all the circumstances make it fair and reasonable for the determination to be made.

Participants are asked to consider the following:

- Under what circumstances could control or influence by a secondary debtor lead to the making of a ‘false or misleading’ statement?
- What forms of evidence could the Chief Executive Medicare or their delegate consider to determine whether a secondary debtor obtained a financial benefit from the making of a ‘false or misleading’ statement?

Consultation Issue 3

The default proportion of the debt that is recoverable from the secondary debtor.

(Legislative reference section 129ACA(9)(c) of the HIA)

A shared debt determination must include the proportion of a compliance debt that is recoverable from the secondary debtor. This amount is the percentage prescribed by the Minister in the legislative instrument. However, the proportion can be altered in an individual case if the Chief Executive Medicare or their delegate reasonably believes that it is fair and reasonable that a different percentage be determined. In practice, the Chief Executive Medicare or their delegate would look at the contract between the two parties and other documentation to determine what proportion of the debt is recoverable from the secondary debtor.

Early consultation on this aspect of the Scheme indicated that there was support for a prescribed 65/35 per cent split between the primary debtor and secondary debtor

respectively. This reflected common contractual arrangements between practitioners and employing organisations in the primary care sector.

Participants are asked to consider the following:

- Is 65/35 (primary/secondary) an appropriate prescribed percentage?
- If not, what would be an appropriate prescribed percentage and why?
- Under what circumstances might the Chief Executive Medicare or their delegate decide to vary the percentage of the debt that is recoverable from the secondary debtor?

Please provide submissions in relation to these issues and any other elements of the Scheme to <https://consultations.health.gov.au/compliance-systems/sdrs-consultation>. If you require any additional information please contact hc.consultation@health.gov.au.

ATTACHMENT 1 –Audit process including Shared Debt Recovery Scheme

Stage	Process
Preliminary Assessment	<ul style="list-style-type: none"> • The Department of Health routinely analyses Medicare data, receives tip-offs about possible incorrect claiming, and consults with the profession. • In some circumstances, cases of suspected inappropriate billing are referred for an 'audit'. • An audit commences with a preliminary request for documents, or for information to be provided voluntarily.
Information Gathering	<ul style="list-style-type: none"> • An audit officer, on behalf of the Chief Executive Medicare, may, as part of the Department's audit activities under the <i>Health Insurance Act 1973</i>, require a person to produce documents (a 'notice to produce') which are relevant to determining whether there is a debt arising from a 'false and misleading' statement, and if a shared debt determination should be made. • Before a notice to produce can be issued, an initial request for documents must be made, advice on what documents can substantiate the service must be sought from a medical practitioner who is an employee of the Department, and steps must be taken to consult with a relevant professional body. • A practitioner (primary debtor) may also tell the Department that they are in an employment or other contractual arrangement to render MBS services with a person or an organisation (a potential secondary debtor) and request consideration of a shared debt determination.

<p style="text-align: center;">Shared Debt Determination</p>	<ul style="list-style-type: none"> • The audit officer must give notice of their intention to make a shared debt determination decision to the primary debtor and the other person that they are considering specifying as the secondary debtor. • Both the primary and secondary debtor will have the opportunity to respond and make submissions about: <ul style="list-style-type: none"> ○ The reasons why a shared debt determination should, or shouldn't, be made; and ○ The percentage of shared debt that should apply to the primary and secondary debtors. • The audit officer may make a shared debt determination based on the following considerations: <ul style="list-style-type: none"> ○ Whether the secondary debtor employed or otherwise engaged the primary debtor to render the services and or whether they had an arrangement or agreement with the primary debtor relating to rendering MBS services. ○ Whether the secondary debtor is a person in a class of persons prescribed by the Minister in a legislative instrument. ○ Whether the secondary debtor could have controlled or influenced the circumstances that led to the making of the false or misleading statement to which the debt relates. ○ Whether the secondary debtor directly or indirectly obtained a financial benefit from the making of the false or misleading statement. ○ Whether any other factors in all the circumstances make it fair and reasonable for the determination to be made. • The audit officer must give notices of the determination decision to both the primary debtor and secondary debtor. • Before any final decision is made, the practitioner and the secondary debtor will be given information already provided by the other party. They will have the opportunity to make submissions on whether the debt should be shared and the percentage of debt that should be paid by each party.
<p style="text-align: center;">Review</p>	<ul style="list-style-type: none"> • Within 28 days of the determination decision, either the primary debtor or the secondary debtor can apply for a review of the decision. • If an application for review is received, a review officer, on behalf of the Chief Executive Medicare, must provide notice of the application and a copy of the application to the other person. • A person given notice of a review application may make written submissions to the review officer about whether the determination decision should be confirmed, varied or revoked, and the person's reasons for taking that position. • Taking into account the application for review and the submissions (if any) given by the other person, the review officer must review the debt determination decision and either confirm, vary or revoke the decision. • The review officer must give the applicant and the other person written notice of the decision on review.

Debt Decision	<ul style="list-style-type: none">• A notice claiming a debt can be served on a person 28 days after notice of the debt determination decision is given to that person.
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