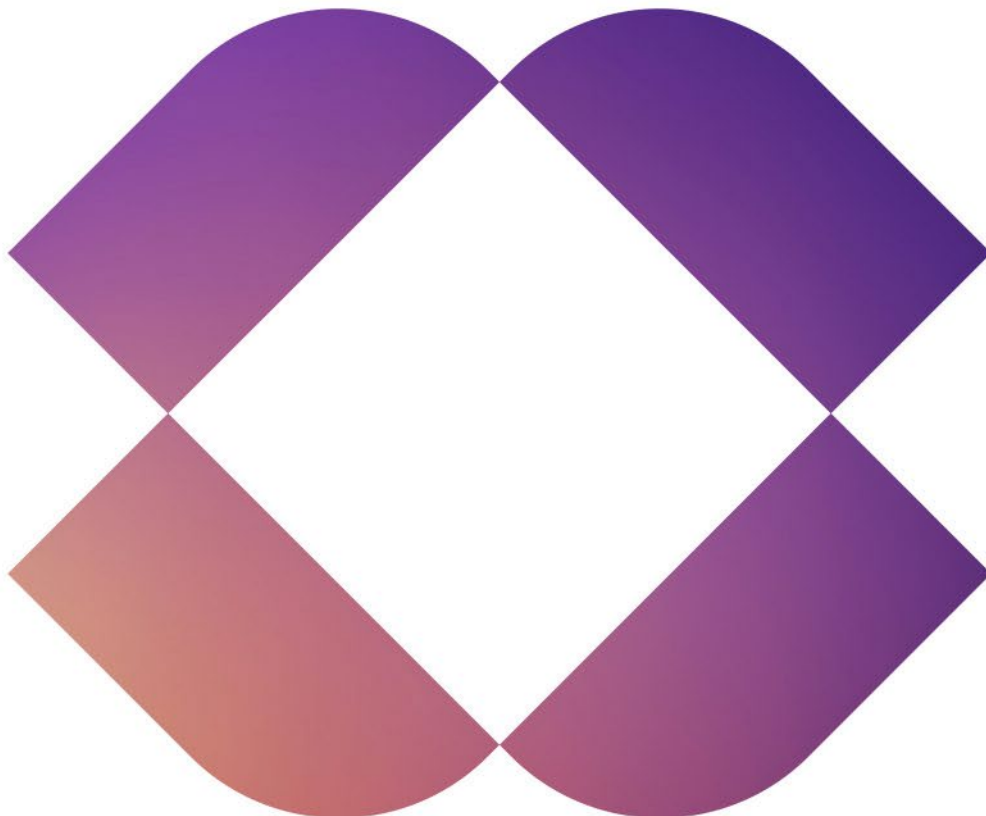




# **Information gathered by the Director of Professional Services Review**

## **Guidelines for notices to produce**

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# 1. Summary

1.1 The Professional Services Review (PSR) is established under the *Health Insurance Act 1973* (HI Act). The HI Act confers a range of functions and powers on the Director of PSR in relation to reviewing the conduct of prescribed health practitioners.

1.2 The Director of PSR reviews the provision of services for which benefits have been paid under the Medicare Benefit Schedule (MBS), the Pharmaceutical Benefit Scheme (PBS), and the Child Dental Benefits Schedule (CDBS). For the purposes of such reviews the Director may issue a notice to produce (notice).

1.3 If the Director issues a notice to a person, that person must comply with that notice by producing the specified documents. Failure to comply with a notice may be an offence. A notice may only be issued if the Director considers the person has possession, custody or control of documents relevant to the review, being documents that are relevant to an assessment of whether an individual has engaged in inappropriate practice.

1.4 These notice guidelines provide information about notices to produce for recipients and their legal representatives. Unless otherwise indicated, all section references in these guidelines are to the HI Act.



Generic medical image

## 2. Background

- 2.1 In 1999, the Professional Services Review (PSR) scheme was amended to introduce a power for the Director of PSR to be able to require the production of documents. This recognised that the Director needed to be able to examine medical records, and practice and other relevant documents, as part of conducting reviews under the PSR scheme.<sup>1</sup>
- 2.2 The Director has broad discretion about how to conduct a review, including in relation to investigative methods and procedures, and what documents may be relevant will depend on the circumstances of this review. There are some matters which are likely to be of interest across many reviews and these are set out here to assist an individual under review to understand the review process.
- 2.3 While there is general information about notices within these guidelines which may be of assistance to a company under review, the vast majority of PSR reviews to date have related to individuals, and the information here is intended for individual practitioners under review.
- 2.4 Reviews of companies are considered to fall outside the scope of these guidelines and the details of any review of a company will guide decisions regarding the Director's use of information gathering powers in those circumstances.

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<sup>1</sup> The Report of the Review Committee of the Professional Services Review Scheme (March 1999), p 27.

### 3. Part VAA of the HI Act and its objects

- 3.1 Part VAA of the HI Act establishes the PSR scheme. The object of part VAA is to protect the integrity of the Commonwealth Medicare benefits, dental benefits and pharmaceutical benefits programs and, in so doing:
- a. protect patients and the community in general from the risks associated with inappropriate practice
  - b. protect the Commonwealth from having to meet the cost of services provided as the result of inappropriate practice.<sup>2</sup>

### 4. The Director of PSR

- 4.1 The PSR agency is headed by the Director of PSR. Under the Act, the Director has a range of powers and functions in relation to conducting reviews.
- 4.2 The Director only has the power to conduct a review if the Chief Executive Medicare (CEM) has made a request to them to review the provision of services by a person (the person under review) during the period specified in the request (the review period). The Director has a month after receiving the request in which to decide whether to conduct a review.

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<sup>2</sup> Section 79A.

## 5. Reviews

- 5.1 If the Director decides to conduct a review, the Director has formed the view that there was a possibility that the person under review engaged in inappropriate practice in providing services during the review period.<sup>3</sup>
- 5.2 In conducting the review itself, the Director has to apply a higher bar. Under the Act, the Director is required to consider whether there are insufficient grounds on which a Committee could reasonably find that the person under review has engaged in inappropriate practice in providing services during the review period.<sup>4</sup>
- 5.3 The Director may undertake the review in such manner as they see fit,<sup>5</sup> subject to practical considerations like having to complete that review within 12 months<sup>6</sup> and taking appropriate steps to give the person under review procedural fairness. Generally the Director chooses to collect sufficient information to get a detailed and accurate picture of the conduct of the person under review during the review period.
- 5.4 One of the ways that the Director may collect information for a review is by issuing a notice to produce under section 89B of the Act.

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<sup>3</sup> Section 88A.

<sup>4</sup> For information about the role of Committees in the PSR scheme, please see the *Your Guide to the Professional Services Review Process* at <https://www.psr.gov.au/publications-and-resources/publications/resources-regarding-psr-process/your-guide-professional-services-review-process>.

<sup>5</sup> Section 88B(b) of the Act.

<sup>6</sup> Section 94 of the Act.

## 6. Issuing a notice to produce

### Who can receive a notice?

- 6.1 For the purpose of undertaking a review of a medical practitioner, the Director may require documents relevant to the review to be produced to them by:
- a. the individual under review, or
  - b. any other person (including a company) who the Director believes to have possession, custody or control of, or to be able to obtain, relevant documents.<sup>7</sup>

### Form of a notice to produce

- 6.2 The Director can require the production of these documents by giving a written notice to the person. The notice has to allow the person at least 14 days to produce the documents, and include important information about how to comply with the notice and the consequences of non-compliance. The notice may specify that original documents are required by the Director,<sup>8</sup> but the Director will usually be satisfied with copies.

### How many notices will be issued for each review?

- 6.3 How many notices the Director issues, and to whom, varies from review to review. This can be affected, for example, by the number of different settings at which a practitioner provided services during the review period, and who holds relevant records for each setting. Information in the request for review about where the practitioner provided services during the review period, and information provided by the practitioner about who holds records for the services provided at each location, can assist the Director to identify who is the custodian of relevant documents.

### At which point in the process will a notice be issued?

- 6.4 The Director generally prefers to issue notices early in the review process, which allows the most time for relevant documents to be examined, and for any issues they raise to be put to the practitioner for their consideration and response. This means that a notice may be issued when the Director's inquiry is still broad, and the relevant documents may then assist to refine the scope of the review. In some cases, relevant documents may identify new lines of inquiry which the Director may pursue through further information gathering, including by issuing further notices.

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<sup>7</sup> Section 89B of the Act.

<sup>8</sup> Item 36, Schedule 1, *Electronic Transactions Regulations 2020*.

## 7. Scope of reviews and notices to produce

### Notices in the context of inquisitorial proceedings

7.1 The Director of PSR does not perform a judicial function or make findings in regard to civil or criminal liability. Notices are part of an investigation process, with the purpose of enabling the Director to be informed on relevant matters in order to properly discharge their statutory function.

### The threshold for the Director to issue a notice

7.2 The Director forms a view about whether documents are relevant and whether it is appropriate to issue a notice by reference to their task of inquiring into whether a practitioner under review may have engaged in inappropriate practice in connection with the provision of services during the review period. 'Inappropriate practice' is defined in section 82 of the HI Act and covers a broad range of conduct<sup>9</sup> and the categories of what might constitute inappropriate practice are not closed. At a high level, however, it is conduct in connection with rendering or initiating a service that a Committee could reasonably conclude would be unacceptable to the general body of the practitioner's profession or specialty.

7.3 Some kinds of conduct are expressly addressed in the definition of inappropriate practice, that is:

- a. in forming a view about whether a practitioner has engaged in inappropriate practice, a Committee is required to have regard to whether or not they kept adequate and contemporaneous records of the rendering or initiation of the services
- b. where the practitioner has rendered or initiated a 'prescribed pattern of services', they have engaged in inappropriate practice unless a Committee reasonably concludes that there were relevant exceptional circumstances.

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<sup>9</sup> *Selia v Commonwealth of Australia* [2017] FCA 7 at [79]–[89].



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- 7.4 Other conduct which has been found to be inappropriate practice in relation to a service includes:
- a. not meeting the relevant legislative requirements for the service<sup>10</sup>
  - b. rendering or initiating a service that was not clinically relevant<sup>11</sup>
  - c. inappropriate billing of a service<sup>12</sup>
  - d. not providing an adequate level of clinical input.<sup>13</sup>
- 7.5 More practical examples of conduct constituting inappropriate practice can be found in the Director's outcomes report on the PSR website as published from time to time at <https://www.psr.gov.au/case-outcomes>.

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<sup>10</sup> *Health Insurance Commission v Grey* [2002] FCAFC 130 at [189].

<sup>11</sup> *Sevdalis v Director of Professional Services Review* [2017] FCAFC 9.

<sup>12</sup> *Selia v Commonwealth of Australia* [2017] FCA 7 at [83].

<sup>13</sup> *Traill v McRae* [2002] FCAFC 235.

## 8. Examples of relevant documents

- 8.1 Section 89B of the Act makes it clear that clinical or practice records of services rendered or initiated during the review period by a practitioner under review are relevant documents.<sup>14</sup> These allow the Director to consider a range of matters, including whether there is an adequate and contemporaneous record for a service provided during the review period.
- 8.2 When issuing a notice to the practitioner, the Director is likely to require the records of services they provided during the review period as part of the complete clinical file held by the person under review for the patient. When the Director requires a full patient record they are having regard to the kinds of information that allow them to get a clear understanding of services provided during the review period.
- 8.3 For example, information in the patient file from outside the review period:
- a. shows the Director the information about the patient available at the time of the service during the review period
  - b. puts the service in the context of the patient's medical history and courses of treatment.
- 8.4 In most cases, having the complete patient record available as part of the review enables the Director (or a consultant engaged under section 90) to step into the shoes of the individual who provided the service. This ensures the Director or a consultant understands the clinical context in which the service was provided when making an assessment of whether the individual's conduct in connection with the service constituted inappropriate practice.
- 8.5 Without the full record being available there may be insufficient information available to explain the service under review provided by the individual. For example an individual may have ordered pathology on a date of service, which based on the record of the year under review did not have a reasonable clinical indication. However, the full record may disclose relevant clinical history such as previous diagnoses, previous surgery or previous family history which could justify the ordering of such investigations.
- 8.6 Eligibility for some services is also dependent on things that may have happened outside of the review period. For example, whether an MBS rebate is payable:
- a. for certain chronic disease management services depends on the patient having at least one medical condition that has been present (or is likely to be present) for at least 6 months
  - b. for a review of a general practitioner management plan depends on a plan having been prepared at least 3 months earlier
  - c. for services rendered by a specialist, may depend on when the patient was referred to the specialist

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<sup>14</sup> Section 89B(1).

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- d. for skin excision items, may depend on the pathology results only available after the date of service
  - e. for mental health services depends on the patient having a diagnosis of a mental disorder.
- 8.7 When issuing a notice to a hospital or medical practice where services were rendered during the review period, the Director is also likely to require the production of the complete patient file, having regard to the same matters.
- 8.8 For residential aged care facilities (RACFs), the Director is more likely to request the patient's clinical file for only a specific period proximate to and covering the review period, rather than the complete clinical file. This is because of the volume of information collected about the health of residents on a daily basis in a RACF setting and the decreasing likelihood of the relevance of information in RACF records as they are less proximate to the review period.
- 8.9 The Director recognises that health practitioners, and the businesses they work with, are routinely required to produce documents to courts and regulators, and often have software and other systems to manage this. However, the Director takes into account the administrative load likely to be caused by a notice when determining the scope of a notice to produce. Generally, this balancing by the Director is reflected in the number of patients for whom the complete patient file is required and (for RACFs) the period of time for which records are required.
- 8.10 Just like the kinds of conduct that may be inappropriate practice, the categories of documents which could potentially be relevant documents are not closed.

## 9. Complying with a notice to produce

### Privacy considerations

- 9.1 A notice from the Director creates a requirement to disclose information under an Australian law, within the meaning of the *Privacy Act 1988*.<sup>15</sup> This means that complying with the notice is consistent with privacy requirements, including those that apply to businesses that provide health services.

### Practical considerations

- 9.2 When the Director sends out a notice, they also send a letter which provides direct contact details for PSR staff who can assist with the collection or electronic transfer of the required documents.
- 9.3 Generally, the Director prefers to receive documents electronically and PSR maintains a secure document sharing platform for this purpose. If hard copy documents are being produced, the PSR will provide tamper evident containers for the records, and arrange for their collection by courier.
- 9.4 Where PSR receives all documents required by a notice, PSR will provide written acknowledgement of receipt of these materials. If PSR is not satisfied there has been full compliance, PSR will write advising of what information has been received and which information covered under the notice remains outstanding. In such a case the notice recipient is encouraged to contact the PSR staff member identified in the notice.

### Time allowed for compliance

- 9.5 A notice will specify a time period in which the notice must be complied with, which must be at least 14 days from the date the notice is given to the person. Subject to the comments below, strict adherence to this deadline is expected and immediate consideration will be given to pursuing cases of non-compliance.
- 9.6 The Director can decide not to take action for non-compliance for a specific period, if satisfied there are good reasons for doing so. Requests for the Director to delay taking compliance action should set out in full the reasons why the notice cannot be complied with within the specific period and indicate a date when compliance will be achieved.

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<sup>15</sup> Australian Privacy Principle 6.2(b), Schedule 1, Privacy Act.

- 9.7 Difficulties meeting the deadline should be raised with PSR as early as possible in order to allow time for the Director to give proper consideration to the request to delay compliance action. Requests received on or after the date the documents are due should be accompanied by an explanation of why it was not practicable to have brought these issues to the attention of the Director earlier.
- 9.8 All such requests will be considered within the overarching framework of the PSR scheme, which provides the Director a strict 12 month deadline within which to complete a review.

### **No requirement to seek documents from third parties**

- 9.9 A person who is issued with a notice must produce the required documents that are in their possession, custody or control, or that they are able to obtain.
- 9.10 The Director understands that most practitioners will have clear arrangements with the practices they work with about what records they may obtain from practice systems and for what purpose. If the person who receives the notice does not have the right to obtain the relevant documents, then they need to give the Director the name and address of a person who does (if they know it).<sup>16</sup>
- 9.11 When the Director issues notices to third parties, care is taken, as far as is practical, not to disclose the identity if the person under review.
- 9.12 It may be that while a person can take steps towards obtaining a document (for example, they can contact a pathology laboratory and ask them to send a copy of a test result for a patient), this is at the discretion and subject to the priorities of someone else. In those circumstances, the Director asks that the person contact PSR to discuss this in the first instance, as it may be more appropriate for a notice to be issued to another party, or for those documents to be excluded from the review.

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<sup>16</sup> See section 89B(2)(d).

### **No requirement to obtain information from My Health Record**

9.13 The Director does not expect a person to obtain any information from a patient's My Health Record<sup>17</sup> for the purposes of complying with a notice. Access to the My Health Record system is subject to significant restrictions and the system is likely to hold information that simply duplicates what is otherwise available in the patient's clinical file maintained by the practitioner.

### **Requirement not to provide false or misleading documents**

9.14 It is an offence to produce a document in response to a notice if a document is false or misleading in a material particular and the person knows that the document is false or misleading in that particular, and the person intentionally fails or refuses to identify to PSR the respects in which the document is false or misleading.<sup>18</sup>

9.15 Examples of the production of false or misleading documents can include producing patient files, either electronically or in handwriting, that have been prepared or modified for the purposes of responding to the notice, and representing that such documents reflect the contemporaneously prepared patient file.

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<sup>17</sup> For more information about the My Health Record, please see <https://www.digitalhealth.gov.au/initiatives-and-programs/my-health-record>.

<sup>18</sup> See 106ZPP of the Act.

## 10. Non-compliance with a notice to produce

- 10.1 Intentional failure or refusal to produce documents required under a notice can have serious consequences. For a practitioner being reviewed, this can result in Medicare or dental benefits not being payable in respect of services they provide.<sup>19</sup> For other notice recipients, there are criminal and civil penalties that may apply in those circumstances.<sup>20</sup>
- 10.2 If a person is having difficulty producing documents by the date specified in the notice, then they should contact PSR as early as possible before the due date. Engaging early and explaining the circumstances assists the Director to understand what the person's intent is, and to consider whether to refrain from commencing compliance action at that time.
- 10.3 If a person does not produce the required documents by the due date on the notice, then the 12 month period to complete the review can be extended by the period of the delay.<sup>21</sup>
- 10.4 PSR recommends all persons the subject of a review contact their medical defence organisation (or other professional indemnity insurer), or otherwise engage legal assistance, to help them through the PSR process, including responding to any notices that may be issued. For third parties not under review receiving notices, there is no requirement for them to seek legal advice prior to responding to a notice, although they may choose to do so.

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<sup>19</sup> See section 106ZPM of the Act.

<sup>20</sup> See, for example, sections 106ZPN and 106ZPNA.

<sup>21</sup> See section 94(3) of the Act.

## 11. Rules of self-incrimination do not apply

- 11.1 A person cannot decline to produce documents required under a notice because the documents may incriminate them.<sup>22</sup> However, if an individual does produce documents to the Director, those documents and information derived from them cannot be used against them in any criminal proceedings, other than proceedings about the provision of false or misleading records to the Director.<sup>23</sup>
- 11.2 The HI Act provides for certain disclosures of information which can include materials obtained by the Director under a notice being provided to third parties. In particular, sections 106XA and 106XB require certain information to be provided to Ahpra and section 89A requires certain information to be provided to the Chief Executive Medicare.

## 12. Handling of produced documents

- 12.1 Information in documents produced by the Director is protected by secrecy obligations in the Act,<sup>24</sup> as well as the restrictions that apply to handling personal information in the Privacy Act.
- 12.2 PSR stores and disposes of personal information in accordance with the *Archives Act 1983*. PSR's disposal schedule under this legislation means that it destroys patient information it has gathered as part of a review as soon as practicable after the review is finalised.

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<sup>22</sup> Section 106ZPQ(1) of the Act.

<sup>23</sup> Section 106ZPQ(2)(a).

<sup>24</sup> See section 130 of the Act.





Professional  
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