



MEDIA RELEASE

Federal Court rejects challenges to the PSR process

The Federal Court has comprehensively rejected Dr Karmakar’s challenges to each stage of the Professional Services Review (PSR) process, in which a PSR Committee found that she had engaged in inappropriate practice in providing Medicare services.

The Director of PSR, Professor Julie Quinlivan, said,

‘It is especially encouraging to note that the content of Justice Logan’s detailed judgment contradicted recent *Medical Republic* articles, which had taken him out of context comparing PSR to a ‘Star Chamber’. Justice Logan put that comparison to Counsel for the Minister, who rejected the comparison, to which His Honour immediately responded, “And I would have to accept that, in all fairness.” *Medical Republic* did not seek comments from PSR before publishing their recent articles about PSR.’

Justice Logan found that at no stage was there any unfairness. Indeed, His Honour praised the PSR Committee’s performance in investigating Dr Karmakar’s conduct in connection with providing services, in taking into account all the matters put to the Committee by Dr Karmakar, and in the assistance given to Dr Karmakar by PSR to help her understand the process.

In dismissing Dr Karmakar’s application, Justice Logan found no breaches of procedural fairness or any errors of law by the Chief Executive Medicare, the Director of PSR, the PSR Committee, or the Determining Authority.

The judgment can be accessed at:

<https://austlii.edu.au/au/cases/cth/FCA/2021/916.html>

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Analysis of the Federal Court judgment

Dr Karmakar challenged a number of steps in the process leading up to, and throughout the PSR process, namely:

- the action of a delegate of the Chief Executive Medicare to request the Director of PSR to review Dr Karmakar's provision of services;
- the decision of the Director of PSR to review Dr Karmakar's provision of services;
- the decision of the Director of PSR to refer Dr Karmakar to a PSR Committee to investigate her conduct on connection with her provision of services;
- the decision of the PSR Committee that Dr Karmakar had engaged in inappropriate practice in connection with the provision of services;
- the final determination of Determining Authority imposing sanctions on Dr Karmakar.

She also challenged the Constitutional validity of section 106ZR of the *Health Insurance Act 1973 (HIA)* on the ground that it was invalid because it unreasonably burdens political communications.

Challenge to the delegate's request and the Director's decision to review

The challenges to the request of the delegate and the decision of the Director to conduct the review were dismissed on the basis that those actions are merely procedural steps in a process that might lead to adverse action, but, in themselves are not substantive determinations and do not affect any substantive rights of the person. Justice Logan noted that this was consistent with the judgment of Justice Rangiah, a few weeks earlier, in *Yoong v Chief Executive Medicare* [2021] FCA 701.

Challenge to Director's decision to refer to a PSR Committee

In Dr Karmakar's challenge to the decision of the Director to refer her to a Committee, Dr Karmakar submitted that the Director should have provided her with details of the consultant General Practitioner that the Director had engaged to assist in her review. Dr Karmakar's also submitted that the Director had not used any set standard in her review such that Dr Karmakar did not know and could not know the standard against which she was being assessed.

Justice Logan noted that s.90 of the HIA permits the Director to consult with PSR Panel members, other consultants and relevant professional bodies. He also noted that Panel members are appointed by the Minister after consultation with the AMA and other professional bodies. He observed that the purpose of permitting the Director to consult with Panel members is to afford the Director, if the Director chooses to take up the option, of having a professional sounding board who can, if occasion requires, challenge any idiosyncratic thinking by the Director. Section 90 also authorises the Director to consult more widely but for like purposes. His Honour stated that it was not alleged that the Director abrogated to the consultant her duty to make the decision. The decision was clearly the Director's, not that of the consultant. His Honour said:

'[50] Whether any consultation as envisaged by s 90 occurs at all is entirely a matter for the Director. If it does, the Director's obligation is not to disclose the assistance, if any, received or the author of any advice but rather, as s 89C(1)(b)(i) of the HIA dictates, to furnish the practitioner concerned with "a written report setting out the reasons why the Director has not made a decision under section 91". The reasons in that report must be those of the Director, not of such person or body, if any she may have chosen to consult for assistance. There is nothing to indicate that the reasons in the report were other than those of the

Director. It is to that report containing those reasons that the practitioner is expressly afforded an opportunity by invitation to respond. If those reasons reflect idiosyncratic views within the profession, that will be apparent on the face of the report itself.’

The Director set out her concerns in a Report made under s.89C of the HIA that was sent to Dr Karmakar for her response. The Court recited some of the detail in the s.89C Report, stating:

‘[43] The Director then detailed in her report, at length, particular areas of concern adopting these headings:

- Clinical records (areas of concern as to adequacy were detailed);
- Urgent Attendance – After Hours (MBS item 597) (adequacy of records as to whether attendance was after hours and appropriateness of prescribed medication detailed);
- Chronic Disease Management (CDM) Services – GP Management Plan (GPMP) (MBS item 721), team care arrangement (TCA) (MBS item 723) and review of a GPMP or TCA (MBS item 732) (apparent use of “template” rather than individualised care plans and adequacy of records as to consistent practice of identification of the chronic disease, consultation with at least two collaborating health service providers and rational for ordering pathology tests);
- Professional attendance at consulting rooms of more than 25 minutes (MBS item 54) (absence of record supporting length of attendance detailed);
- Multidisciplinary Case Conferences (MBS item 735) (absence on occasion of record of such a conference detailed).

[44] The Director summarised at the conclusion of her report her various concerns in this way:

Following the review of your records and my meeting with you, I have concerns in relation to your rendering of MBS items 597, 721, 723, 732, 54 and 735 services during the review period.

My concerns include that:

- the MBS requirements were not met for all items that you rendered;
- you have billed items that were not clinically necessary;
- your prescription of first line antibiotics may be inappropriate;
- you have ordered pathology without clinical indication; and
- your notes were an inadequate clinical record’.

The Court noted that Dr Karmakar responded to the report in a detailed submission, but that the Director still held concerns regarding Dr Karmakar’s conduct and decided to refer her to a PSR Committee. Justice Logan said:

‘[51] This is a case where no injustice, practical or otherwise, was visited upon Dr Karmakar by the Director.

[52] As to the “objective standard” issue, both as alleged in relation the Director and, for that matter, the Committee, it is, with respect, a confected issue, an archetypical “straw man”. The standard with which Pt VAA is concerned is, for better or for worse, “inappropriate practice”, as defined by s 82 of the HIA, nothing more and nothing less. That is the standard adopted by Parliament.’

The Court dismissed the challenge to the Director's decision to refer Dr Karmakar to a PSR Committee.

Challenge to the PSR Committee's decision

There were two grounds of challenge to the decision of the Committee:

- "subjective comparison" rather than "objective standard"; and
- failure to take into account incompleteness of medical records and Dr Karmakar's inability to obtain the complete records.

The Court rejected both stating 'there is no substance in the grounds of review', noting:

[61] ... a committee can only make a finding of inappropriate practice if the proposed finding and the reasons for the finding were included in the draft report prepared and furnished to Dr Karmakar under s 106KD of the HIA. The Committee observed this requirement. The Committee's final report makes explicit it took into account the resultant submissions in reply made by Dr Karmakar. In particular, the Committee took into account views expressed by Dr Turnbull in a report relied upon by Dr Karmakar. The Committee was not obliged to accept Dr Turnbull's opinions. The Committee's final report discloses a reasoned, rational basis for the findings which it made.

[62] As to the second, the Committee's report of 30 January 2019 makes plain that it took into account the completeness of medical records, the reasons for that and the extent to which there was inability to obtain complete records. The Committee's report reveals that it explored the subject of the adequacy of Dr Karmakar's record keeping in meticulous detail. The Committee's report discloses that it was well seised with, and took into account, all of the explanations offered by Dr Karmakar in relation to the adequacy of her recordkeeping and the completeness of the records available to the Committee. Some of these explanations were accepted by the Committee, others were not.

The Court also rejected the allegation that 'the processes of the Committee entailed a denial of natural justice, because she was not legally represented at the hearing which she attended'. Justice Logan said:

[67] ... There is no substance in this allegation. ... the absence of legal representation was a matter of choice by her. ...

[68] An alternative way in which Dr Karmakar put her allegation that she was denied natural justice was that she had neither received prior notice nor disclosure of material relating to the processes of the Committee. In respect of this allegation, too, there is no substance. The evidence establishes that the prior notice of hearing requirements specified in s 102 of the HIA were observed. Dr Karmakar attended the hearings concerned. It also establishes that prior to the Committee's hearings, Dr Karmakar's then lawyers and, on behalf of the Committee, the ... Professional Services Review Agency corresponded about the hearing arrangements, the MBS items to be examined, the clinical records to be referred to, the ability of witnesses to give evidence and the rights afforded to Dr Karmakar in respect of a hearing. It also discloses that inquiries Dr Karmakar made personally, whether in the course of a hearing or otherwise, were substantively answered by or on behalf of the Committee. Yet further, it discloses that the Committee observed the requirements of s 106KE of the HIA in relation to the furnishing to Dr Karmakar of a draft of its report for such submissions, if any, as she may care to make.'

The Court also rejected an allegation that the Committee had been unfair in relation to what she alleged were missing records. Justice Logan said:

[70] ... Contrary to a submission on her behalf that she was at the Committee's hearings, "examined and criticised for incomplete records", all that the transcripts disclose is that the Committee took her through records which had been produced to it and afforded her an opportunity to offer an explanation about the records. ... Dr Karmakar's account of her record keeping practices was taken into consideration by the Committee. Indeed the Committee did this on a record by record basis. The Committee accepted that certain records may not have been scanned but stated, at [59] – [60], that none of its findings turned on an absence of documentation that could have been scanned. All of this is apparent from the meticulous, individual consideration of, and related reasons given by the Committee in respect of, each of the permissibly randomly selected sample services provided by Dr Karmakar, as found in the tables which are annexed to and form part of the Committee's report.

Challenge to the Determining Authority's final determination

Dr Karmakar's only challenge to the final determination of the Determining Authority was that it was based on the findings of the Committee, which she said were invalid. Having dismissed the challenge to the Committee's findings, the Court dismissed the challenge to the final determination of the Determining Authority.

Challenge to the validity of section 106ZR

Section 106ZR makes it a criminal offence to disclose to another person any of the deliberations or findings of a Committee or any information or evidence given to the Committee in the course of its deliberations, unless the disclosure is required or permitted under the HIA. There was no allegation that Dr Karmakar had breached the section, rather she alleged that the section operated so as to deny her a reasonable opportunity to present her case before the Committee. The Court rejected that proposition and also rejected the challenge that it unreasonably burdens political communications.

The Court noted that the purpose of the section is to protect the identity of the person under review and to protect the privacy of their patients. It did not prevent Dr Karmakar from presenting evidence at the hearing. As the section is subject to other provisions of the Act, which permit a person under review to call witnesses, it does not prevent them disclosing evidence given at a hearing to an expert for the purpose of having that expert give evidence.

In relation to the allegation that it unreasonably burdens political communication, Justice Logan said,

'[102] ... That section does not prevent any communication about the regime in Pt VAA itself and its fairness or otherwise to practitioners of the processes for which it provides. The regime itself is a matter of public record.'

The application to the Court was dismissed.

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