National Health Reform Amendment (Administrator and National Health Funding Body) Bill 2012
Rebecca de Boer
Social Policy Section

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National Health Reform Amendment (Administrator and National Health Funding Body) Bill 2012

Date introduced: 22 March 2012
House: House of Representatives
Portfolio: Health and Ageing
Commencement: Royal Assent

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose

This Bill establishes the National Health Funding Body and appoints the Administrator of the National Health Funding Pool and the Chief Executive Officer of the Funding Body. It details the power and functions of the Administrator and the establishment and functions of the Funding Body.

Background

National Health Reform Agreement

The National Health Reform Agreement (NHRA) was agreed by the Council of Australian Governments (COAG) in August 2011. One of the main features of the Agreement was the changes to public hospital financing and the mechanisms for paying the states.¹ Payments to public hospitals will be based on ‘activity based funding’² (ABF) for inpatient services. Block funding arrangements would apply to public hospital functions such as teaching and research and to some smaller public hospitals (such as those in rural and regional areas).³

1. In this Digest, ‘states’ refers to state and territory governments.
2. In short, hospitals are funded for the activities they undertake. In the first instance this will apply to in-patient services. For further explanation see: Centre for Health Service Development, ABF information series no. 1: what is activity-based funding?, University of Wollongong, March 2010, viewed 29 May 2012, http://ahsri.uow.edu.au/chsd/content/groups/public/@web/@chsd/documents/doc/uow082633.pdf

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It was agreed that a National Health Funding Pool would be created with separate bank accounts for each state. The Funding Pool would receive all Commonwealth and state contributions for public hospital funding and provide greater transparency in relation to these contributions. The Pool will also receive any funding for public health activities from both the Commonwealth and state governments. Each state will have a separate Reserve Bank of Australia account within the Pool. This account will include a Funding Pool and a State Managed Fund. The Funding Pool will receive payments from ABF. Block funding for some public hospitals and other public health activities will be paid to State Managed Funds.

The respective contributions will be publicly reported. Funding flows to Local Hospital Networks (LHNS) for public hospitals and state health departments for public health activities will also be reported. It is intended that there will be ‘complete transparency and line-of-sight of respective contributions into and out of Pool accounts’.

**Administrator and National Health Funding Body**

This Bill amends the *National Health Reform Act 2011* (the Reform Act). This Act established the three governance agencies agreed under the NHRA: the Australian Commission on Safety and Quality in Health Care, the National Health Performance Authority and the Independent Hospital Pricing Authority. When the Reform Act was introduced it was envisaged that it would be amended from time to time as various bodies outlined in the NHRA were established.

The NHRA outlines the functions of the Administrator to be prescribed in legislation by the Commonwealth and states. It also sets out details about the operation of the Funding Pool and the Administrator, including a clause that prohibits a Commonwealth Minister from directing the Administrator in the performance of any of the functions outlined in the Agreement.

These provisions have been reflected in the Bill. It details the Commonwealth framework so that the Administrator and the National Health Funding Body (Funding Body) can be established. The Administrator will be responsible for calculating the Commonwealth’s contribution to the Pool, overseeing payments of Commonwealth Funding into state accounts and publicly reporting on Commonwealth and state contributions. The Administrator will also be assisted by the National Health Funding Body, a prescribed agency that will be established as part of this Bill.

5. Ibid., clause B21.
6. Ibid., clause B21.
7. Ibid., clause B26-27.
8. Ibid., clause B32.
10. Ibid., clause B42.

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As it is a body that has both Commonwealth and state functions, each state will also pass identical legislation which empowers the Administrator to act on behalf of the state. State-related functions of the Administrator will be prescribed in state legislation. At the time of writing, the following states had introduced proposed legislation into Parliament: New South Wales, Queensland, South Australia, Tasmania, Victoria and the Northern Territory.

Committee consideration

The Bill was referred to the Senate Finance and Public Administration Legislation Committee for inquiry and report by 9 May 2012. Details of the inquiry are at the inquiry webpage.

The Committee reported on 10 May 2012 and recommended that the Bill be passed subject to the ability to make payments from State Pool Accounts being removed from the role of the Administrator under the Bill.\(^1\) The Committee noted that this function would be conferred on the Administrator under the complementary state legislation. There was no dissenting report from the Coalition and the Greens. Only four submissions to the inquiry were received, three from governments.

Financial implications

Funding of $38.0 million over five years was allocated for the establishment and ongoing operation of the Administrator and the Funding Body in the 2012–13 Budget.\(^2\) Some of this money was spent in the current financial year (2011–12).

During debate in the House of Representatives the Minister for Health noted that around 20 people will be required to support the Administrator and the operation of the Funding Body.\(^3\) This will not contribute to an increase in bureaucracy as the Department of Health and Ageing has commenced a staff reduction process.\(^4\)

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14. Ibid.

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Main issues

This Bill is largely administrative in nature and details the establishment and operation of the Administrator and Funding Body. Much of the content of the legislation was negotiated with the states prior to being tabled in Parliament and reflects the NHRA. Additional amendments were sought by two jurisdictions and these were circulated prior to debate on the Bill. The amendments addressed many of the issues canvassed in the Senate inquiry and accepted the recommendation of the Senate Committee to remove the state-related functions from the role of the Administrator.

Issues raised by state governments

Only two states, New South Wales (NSW) and Western Australia (WA) made submissions to the Senate inquiry. The NSW Government acknowledged that it did not wish to make a substantial submission to the inquiry. The WA Government raised concerns about consistency of the Bill with the NHRA and states’ rights in relation to the Funding Pool.

The WA government argued that the functions of the Administrator as set out in proposed section 238 of the National Health Reform Act 2011 (the Act) were inconsistent with the spirit of the NHRA. This was also raised by another jurisdiction. It was argued that it was not possible for an Administrator established under Commonwealth legislation to exercise state powers and functions. Concerns were raised that this may, inadvertently, confer functions and powers on a Commonwealth appointed Administrator in relation to the control of funds in the State Pool Account. The WA Government considered it to be important for functions of the Administrator in relation to Commonwealth and state governments to be clearly delineated.

The WA Government also considered proposed section 248 of the Act to be unnecessary and inconsistent with the NHRA. It did not believe it necessary, or appropriate, for the WA Parliament to confer powers on the Administrator or the Commonwealth. It was also suggested that this might

17. Plibersek, op. cit., p. 46. The jurisdiction was not named.
19. Ibid., p. 2.
20. Ibid., p. 2.
21. Ibid., p. 3.

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lead to other states conferring powers to the Administrator that might be contrary to the cooperative structures agreed under the NHRA.\textsuperscript{22}

During the Senate inquiry, it was acknowledged that the Commonwealth had circulated amendments to the states concerning the conferral of powers to the Commonwealth Administrator but these had not yet been tabled.\textsuperscript{23} It appears that the concerns of the WA Government have been addressed as it indicated its support for the amendments.\textsuperscript{24} These amendments were tabled in the House of Representatives prior to debate of the Bill.

Key provisions

This Bill has one Schedule containing two chapters to be inserted in the Act, together with some minor technical amendments to other parts of the Act. Proposed chapter 5 provides for the appointment of the Administrator of the National Health Funding Pool and sets up the National Health Funding Body to assist the Administrator. Proposed chapter 6 sets out miscellaneous provisions that substantively reproduce the provisions in current chapter 5 of the Act. The Government amendments tabled on 22 May 2012 have been incorporated in the Digest.\textsuperscript{25}

National Health Funding Pool and Administrator

Proposed Division 1 of Part 5.2 of Chapter 5 of the Act details the establishment and functions of the office of the Administrator of the National Health Funding Pool. Proposed subsection 231(2) of the Act notes that the same individual will perform the role of the Administrator on behalf of the Commonwealth and states. The appointment of the Administrator is detailed in proposed section 232 and must be agreed by the Standing Council of Health (proposed subsection 232(3)). The Standing Council on Health consists of all Ministers with a portfolio responsibility for health in Australia (see proposed section 230). Remuneration of the Administrator will be determined by the Remuneration Tribunal or prescribed in regulations if a determination has not been made by the Tribunal (proposed section 233).

Suspension, removal and resignation, and acting arrangements for the Administrator are outlined in proposed sections 234, 235 and 236 respectively. The Chair of the Standing Council on Health must

\textsuperscript{22} Ibid., p. 3.
\textsuperscript{23} Senate Committees on Finance and Public Administration, National Health Reform Amendment (Administrator and National Health Funding Body) Bill 2012 [Provisions], H\textsuperscript{\textregistered}ansard, 1 May 2012, p. 4, viewed 21 May 2012, \url{http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=fapa_ctte/national_health_funding_body/hearings/index.htm}
\textsuperscript{24} Ibid., p. 3.

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suspend the Administrator if requested to do so by either three state Ministers or a Minister of the Commonwealth (being Ministers who are members of the Standing Council on Health) (proposed subsection 234(1)). The grounds to request suspension are set out in proposed subsection 234(2) and relate to matters of: physical and mental incapacity, failure to comply with obligations and duties of the role, being accused or convicted of an offence that carries a penalty of imprisonment, or bankruptcy or the possibility of bankruptcy.

Proposed section 237 of the Act allows for the provision of staff to assist the Administrator. However, it is not possible for the Administrator to delegate a function under proposed part 5.2 of the Act (proposed sections 231 to 250) to a staff member or any other person (proposed subsection 237(2)). Presumably this is to protect the integrity of the role of the Administrator. Staff are to assist the Administrator but the primary functions of the Administrator as set out in proposed section 238 are to be undertaken by the Administrator.

The functions of the Administrator prescribed in proposed section 238 are to:

- calculate and advise the Commonwealth Treasurer of the amounts to be paid by the Commonwealth into each State Pool Account of the National Health Funding Pool
- monitor the Commonwealth payments into each State Pool Account
- report publicly on the payments made into and out of each State Pool Account, consistent with legislative requirements and
- perform any other functions conferred on the Administrator under the Act. 26

The amendments insert a note at the end of proposed subsection 238(1), stating that the corresponding state legislation will provide for the Administrator to monitor state payments into each State Pool Account.

The Administrator and officials of the Funding Body are not subject to the control or direction of any Commonwealth Minister (proposed subsection 238(2)) but the Administrator must comply with directions from COAG (proposed subsection 238(3)). Directions from COAG are to be made publicly available and must be made in accordance with agreed processes and procedures (proposed subsection 234(4)).

The Bill expressly states that the Commonwealth does not have ownership or control over money in a State Pool Account (proposed subsection 238(5)). This is consistent with the provisions of the NHRA and possibly reflective of ongoing tension between the Commonwealth and states about health financing and administration of these funds.

Proposed Division 2 of Part 5.1 of the Act details the financial management and reporting obligations of the Administrator. In short, the Administrator must provide monthly and yearly

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26. See proposed subsection 238(1) of the Act. The Bill originally included a provision to make payments into each State Pool Account in accordance with the direction of the state (proposed paragraph 238(1)(c)). This provision has been removed by the Government amendments to the Bill.

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reports to the Commonwealth and each state (see proposed sections 240 and 241). These reports are to be publicly available but the legislation does not prescribe a timeframe in which this is to occur (apart from ‘as soon as practicable’ after the Minister receives the report, for the annual report).  

Monthly reports are to include:

- the amounts paid by each state into the State Pool Account and the State Managed Fund and the basis for payment
- the amounts paid by the Commonwealth into each State Pool Account and the basis for payment
- the amounts paid from each State Pool Account to local hospital networks, a State Managed Fund or other organisations and the basis for payment
- the amounts paid from each State Managed Fund to local hospital networks or other organisations and funds and the basis for payment
- the number of public hospital services funded for each local hospital network according to activity based funding arrangements, including the number of services undertaken to date in the financial year and
- the number of public hospital services and functions funded from each State Pool Account or State Managed Fund.

The monthly reports for each jurisdiction are to be provided to the responsible Minister or to an authorised body or officer (proposed subsection 240(2)).

Proposed subsection 240(3) of the Act requires monthly reports to be made publicly available. The legislation is silent on the manner and timeframe in which this should occur. However, as set out above, the annual report for each account must be tabled in the relevant Parliament ‘as soon as practicable’ after it is received by the relevant Minister (proposed subsection 241(4)). The annual report includes information that is identical to that contained in the monthly report and is accompanied by audited financial statements for each State Pool Account (see proposed section 241).

Under proposed subsection 245(3) of the Act the Administrator is required to provide to each Minister a copy of the advice provided to the Commonwealth Treasurer about how the Administrator has calculated the payments to be made by the Commonwealth into State Pool Accounts. The Administrator is also required to provide the responsible Minister with any information requested relevant to their jurisdiction (proposed subsection 245(1)). The Administrator is able to provide a jurisdiction with any information that relates to that jurisdiction (proposed subsections 245(1)). However, information that the Administrator provides to a jurisdiction that relates to another jurisdiction can’t be publicly released by that other jurisdiction except with the

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27. See proposed subsection 241(4) of the Act.
28. Such as teaching and research.
29. See proposed section 240 of the Act.

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approval of the Minister in the state to which the information relates (proposed subsections 245(5)).

The Government has proposed a number of amendments to proposed section 248 of the Act, which relates to state laws that confer functions and powers, or impose duties, on the Administrator. These amendments aim to address the concerns (mentioned above) raised by two jurisdictions about conferral of state functions in Commonwealth legislation. It was agreed that state functions of the Administrator would be conferred in state laws and removed from Commonwealth legislation.30 Both Commonwealth and state law will require monthly and annual reports from the Administrator.31

National Health Funding Body

Proposed part 5.3 of the Act sets out the functions and establishment of the National Health Funding Body, including the appointment of the Chief Executive Officer (proposed section 255). There is provision in the legislation to enable decisions to be made in the event that an Administrator has not been appointed.32 It appears that this provision is for contingency purposes only and to be used in the instances where there is a delay in the appointment of the Administrator. For example, it will still be possible for the Minister to appoint the Funding Body CEO despite the Administrator not being appointed.

Proposed sections 257 to 263 of the Act concern the operation of the role of the Funding Body CEO, such as remuneration and allowances, disclosure of interests, resignation and termination of appointment. These provisions are similar to other appointments under the Act.

The Funding Body constitutes a statutory agency and staff will be employed under the Public Service Act 1999 (proposed section 264). The Funding Body is able to be assisted by employees of other Commonwealth and state government agencies or authorities and to engage consultants (proposed sections 265 and 266). An annual report must be produced by the Funding Body and tabled in Parliament and provided to responsible Ministers in states and territories (proposed section 267). The legislation does not prescribe a specific timeframe for the public release of the annual report apart from ‘as soon as practicable’ after receipt by the Minister.

Proposed part 5.4 of the Act is largely administrative and is about secrecy, non-disclosure and when disclosure can take place by the Administrator and Funding Body officials (of the Act).

Current chapter 5 of the Act contains a number of miscellaneous provisions. As the Bill will create a new chapter 5 dealing with the Administrator of the Funding Pool, the miscellaneous provisions will be moved to proposed chapter 6 of the Act. Proposed sections 279 to 281 of the Act substantively

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30. Plibersek, op. cit., p. 46
31. Ibid.
32. See, for example, proposed amendments to proposed subsection 255(1) and proposed subsection 256(2).

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reproduce current sections 228 to 230 of the Act, with appropriate amendments to ensure that the Administrator and the Funding Body are included in the requirements to protect patient confidentiality.

**Proposed section 282** of the Act expands the regulation-making power at current section 231 of the Act. The current provision gives general power to make regulations prescribing matters required or permitted to be prescribed by the Act, or necessary or convenient to give effect to the Act. **Proposed subsection 282(2)** will allow regulations to also be made to modify the operation of a number of Commonwealth administrative law Acts in relation to the Administrator, the Funding Body CEO or the Funding Body.³³ Under **proposed subsection 282(3)**, such regulations may only be made with the agreement of all the members of the Standing Council on Health.

The Explanatory Memorandum explains the need for these provisions as follows:

These provisions are necessary to ensure that the Administrator is subject to only one set of administrative law and related requirements. As an officer appointed severally by the Commonwealth and all eight states, the Administrator would potentially be required to comply with nine different sets of archives, freedom of information, ombudsman and privacy regimes. The simple solution of the states adopting the Commonwealth legislation as it stands would not be acceptable to the states, as Commonwealth legislation would not contain appropriate references to state entities. For example, if the Administrator was to be given a copy of state Cabinet material, this would not fall under the absolute exemption from disclosure afforded to Commonwealth Cabinet documents under the *Freedom of Information Act 1982*.

It is envisaged that the regulations will modify the Commonwealth Acts so that they could apply effectively as laws of the states, conferring appropriate rights and obligations on state responsible Ministers and referring appropriately to state entities.³⁴

**Concluding comments**

One of the mantras associated with the Government’s health reform efforts has been ‘ending the blame game’ about health financing in Australia. While this Bill requires the public reporting of funding flows into state pool accounts from Commonwealth and state governments, the legislation does not prescribe the timing and manner in which this is to occur (apart from tabling of the annual report in the Commonwealth Parliament ‘as soon as practicable’ after receipt by the Minister). The timely availability of this information is critical to improving accountability of health financing.

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³³ The relevant Commonwealth Acts are: the *Archives Act 1983*; the *Australian Information Commissioner Act 2010*; the *Freedom of Information Act 1982*; the *Ombudsman Act 1976*; and the *Privacy Act 1988*.

³⁴ Explanatory Memorandum, National Health Reform Amendment (Administrator and National Health Funding Body) Bill 2012, p. 11, viewed 29 May 2012, [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr4789_ems_97f7d839-853f-4e94-a6e5-e58785f81cf2%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr4789_ems_97f7d839-853f-4e94-a6e5-e58785f81cf2%22)

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arrangements. Also important is the presentation of this information and the legislation does not specify if the states and the Commonwealth will be required to report in a consistent manner.\(^{35}\)

As has been noted in previous digests about the establishment of various health governance agencies, the legislation is silent about how these agencies will work together to deliver improvements to Australia’s health care system.\(^{36}\) Similarly, this Bill does not reveal if, or how, the Administrator will work with the Independent Hospital Pricing Authority, the agency which has been set up to determine the ‘efficient price’ for ABF. The efficient price will be used to calculate the Commonwealth’s contribution to the states for public hospitals.

The lack of clarity about these issues could possibly undermine the operation of the Administrator and the Funding Body and may result in the ‘blame game’ continuing to be played for some time to come.


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