Private Health Facilities Act 2007

Report on the

Statutory Review of section 7(4)(c)(i)

Contents

REVIEW OF PLANNING POWERS AFFORDED BY SECTION 7(4)(C)(I) OF THE PRIVATE HEALTH FACILITIES ACT 2007

1. LEGISLATIVE CONTEXT

The Private Health Facilities Act 2007 (the Act) regulates the licensing and operation of private hospitals and health facilities, including certain day procedures in NSW. The Act, which replaced the Private Hospitals and Day Procedures Centres Act 1988, was passed by the NSW Parliament on 6 June 2007 and commenced on 1 March 2010.

The Act and the Private Health Facilities Regulation 2010 establishes a detailed licensing regime for private health facilities, including provision for:

- applications for private health facility licences, and approvals in principle;
- provision for soliciting public and community comment on applications;
- statutory criteria to be applied by decision makers when considering applications and approvals in principle;
- core licensing obligations in relation to the conduct of licensed facilities, including nursing requirements, establishment of medical advisory committees and root cause analysis of reportable incidents;
- establishing, through regulation, classes of private hospitals and health facilities and the licensing standards to be applied to those different classes;
- appeals in relation to licensing decisions, including (for application decisions) review by an external Committee of Review or (for suspension/cancellation decisions) review by the NSW Administrative Decisions Tribunal;
- enforcement of the Act, including powers of entry and issuing of improvement notices;
- offence provisions including conducting a private health facility without a licence; and
- ongoing consultation with the community and the industry through the Private Health Facilities Advisory Committee.

The objects of the Act, as set out in s3, are:

(a) to maintain appropriate and consistent standards of health care and professional practice in private health facilities, and

(b) to plan for and provide comprehensive, balanced and coordinated health services throughout New South Wales.

When the Act was passed in 2007, it did not include what is now the “standard” 5 year review clause. Instead, section 68 of the Act provides for review of one subsection, section 7(4)(c)(i) to determine “whether the policy objectives of the section remain valid and whether the terms of the section remain appropriate for securing those objectives”.

Section 7 of the Act sets out the actions the Director-General is required to take on receipt of an application. Section 7(4) sets out the circumstances in which the Director General can refuse an application. These include:

- the applicant (or where the application is a corporation, the director of the corporation) is not a fit or proper person;
- the applicant, a director of the applicant corporation or a person to be involved in the management of the facility has been previously convicted of an offence under the Act or a criminal offence punishable by imprisonment for a term of more than 12 months;
- the applicant has been bankrupt, or applied for the relief of bankruptcy or (where a corporation) has had a receiver appointed or has commenced to be wound up under official management;
- the facility is not capable of being conducted by the applicant in accordance with the relevant licensing standards.

Section 7(4)(c)(i) also allows the Director-General to refuse an application for a private health facility licence if the Director-General is satisfied that:

(c) having regard to any development guidelines approved by the Director-General and published in the Gazette:

(i) approval of the application will result in more than an adequate number of health services becoming available in a particular clinical or geographic area and will undermine the provision of viable, comprehensive and coordinated health services,

Section 7(4)(c)(i) was introduced to replace s9(3)(d) of the now repealed Private Hospitals and Day Procedures Centres Act. Under that provision, an application for a private hospital could be refused if the Director-General:

(d) .....is satisfied that the total number of patients who may be accommodated overnight at private hospitals in New South Wales will be increased.

The old s9(3)(d) imposed what was commonly known as the “bed cap” for private hospitals, but not for day procedure centres. The new approach adopted in the 2007 Act was primarily due to difficulties indentified with the way the “bed cap” operated and its relevance to the way in which services where delivered. This included recognition that the exclusion of day procedure centres made little sense due to the growth in complex treatment provided on a day-only basis. Further, a concern arose from the fact that:

> *The cap effectively (meant) … that an operator cannot open a new facility or expand an existing one unless he or she holds bed approvals in reserve or purchases those approvals from another operator. In this way a market in private hospital bed approvals has been created. These approvals have in the past changed hands for thousands of dollars each[1].*

As a result, s7(4)(c)(i) of the Act does not impose a bed cap. Instead it focuses more directly at availability of services by allowing the Director-General to reject an application for a private health facility licence on the basis of the adequacy of existing services, and the impact new services would have on the viability of existing services. This includes both public and private (including not for profit health) services. Section 7(4)(c)(i) is intended to help ensure a coordinated, comprehensive and balanced public and private health system across NSW and reduce the potential for a proliferation of duplicate and unsustainable health services within geographic or clinical areas.

2. History and Rationale of section 7(4)(c)(i)

As noted above, s7(4)(c)(i) of the Act is a variation of the previous s9(3)(d) of the old Private Hospitals and Day Procedures Centre Act which effectively imposed a bed cap on private hospitals in NSW.

The rationale for old bed cap was to:

- Facilitate orderly industry development:
- Promote equitable access to orderly private hospital services:
- Guard against supplier induced demand: and
- Contain health service costs by limiting access to expensive high technology equipment.[2]

Previous reviews of the Private Hospitals and Day Procedures Centres Act found that it was questionable whether the bed cap met its objectives. Further, as the bed cap only applied to private hospitals, but not day procedure centres, the subsequent technology developments and growth in the number of complex treatments that could be provided on a day only basis meant that any effectiveness from a planning perspective was compromised. While there was little benefit in the bed cap, it was found the bed cap increased costs to the community and significantly impacted on

[1] Second reading speech, Private Health Facilities Bill 2006, 22 November 2006, http://www.parliament.nsw.gov.au/prod/parlment/nswbills.nsf/d2117e6bba4ab3ebca256e68000a0ae2/c6748a329cb95762ca25722d0016a6a3?OpenDocument

[2] Interim Report on the Review of the Private Hospitals and Day Procedures Centres Act 1998, May 2002, NSW Department of Health, at part 7.2, http://www0.health.nsw.gov.au/pubs/2002/pdf/phir.pdf

the competition by increasing the costs of providing health care in a private hospital and setting barriers to entry into the private hospital market[3].

Given this, the Private Health Facilities Act proposed a new approach, introducing s7(4)(c)(i) into the licensing application process. The provisions of s7(4)(c)(i) effectively establishes a broader test of assessing the viability of health services across NSW, ensuring that any new private health facility does not have a detrimental effect on existing services in both the public and private systems, due to the creation of more services than can be sustained in a geographical or clinical area and undermining the viability of a comprehensive and coordinated health service.

Section (7)(4)(c)(i) serves two connected roles. One, it recognises that the public and private systems work together and, though the two systems may have different drivers and provide different services, the two systems form the greater NSW health system. Secondly, it recognises that the Government, via the Director-General, needs to have an oversight role over the entire NSW health system so as to ensure the effectiveness of the entire health systems for all persons in NSW.

3. THE OBJECTIVES OF SECTION 7(4)(C)(I)

The overall purpose of s7(4)(c)(i) is to give the Director-General an oversight role of the private health system so as to ensure that a proposed new facility will not undermine a viable, comprehensive and coordinated health service in NSW.

Other objectives of s7(4)(c)(i) are to:

- plan for and provide a comprehensive, balanced and coordinated health services throughout NSW;
- protect, so far as possible, the rights of patients to chose which health service to access;
- ensure access to health services; and
- consider the viability of new health services and existing health services.

In practice, some of these objectives may be, to some degree, in conflict with one another. In particular, any reliance on s7(4)(c)(i) in circumstances where a proposed new health service will detrimentally affect existing health services such that the proposed service would undermine a comprehensive, balanced and coordinated health services, may be in opposition to the need to ensure the community has access to, and choice of, a variety of health services.

Further, reliance on s7(4)(c)(i) has the potential to be anti-competitive in respect of new businesses (or the expansion of existing business) which was one of the

[3] Ibid

objections of the old bed cap. However, both objectives are valid. The ability of new health services to establish themselves within a community is important both for ensuring continued access to health services as well as ensuring that patients have a choice of health services. On the other hand, the viability of existing health services, in both the public and private sector, are necessary to provide for the health needs of the community.

Therefore, applying s7(4)(c)(i) would involve carefully balancing the different objectives with an overall aim of ensuring the effectiveness of the entire health system while not adversely affecting competition.

4. ARE THE POLICY OBJECTIVES OF SECTION 7(4)(C)(I) STILL VALID?

In considering whether the policy objectives of s7(4)(c)(i) remain valid, it is necessary to consider whether some oversight is necessary for the Government to retain a discretion to refuse an application for a licence on the basis that additional health services in a geographical or clinical area will undermine the provision of viable, comprehensive and coordinated health services. In relation to the provision of a viable, comprehensive and coordinated health services, it is important to note the NSW Government's health policy principles which include:

- Equitable access to timely quality healthcare regardless of financial status, background or place of residence;
- The right of the individual to make choices based on realistic expectations of the health system;
- Efficient and appropriate allocation of resources where they can do the most good on the basis of models of best practice which deliver best health outcomes;
- Openness of governance and accountability for performance;
- Greater patient involvement in decision-making about their healthcare to improve health outcomes and devolving decision making to improve patient care closer to the patient; and
- Greater community and clinician involvement in planning and delivery of efficient, world-class health services supported by world-class facilities, equipment and technology[4].

The Ministry of Health recognises the important role of the private health system within the greater health system in NSW. The private system can meet previously unmet demands, develop new models of care, assist in implementing the cost

[4] The NSW Government's policies are detailed in NSW Health's "*Future Arrangements for Governance of the NSW Health: Report of the Director-General*", http://www0.health.nsw.gov.au/resources/govreview/pdf/governance_report.pdf

effectiveness of service provision through competition, and assist NSW Health in service delivery goals and allows patients a choice of health services.

While valuing the important role the private health system plays in NSW, there are arguments that an interrelated relationship, and the potential for cross sector impacts (particularly in relation to, the use of resources, and the employment, training and education of health staff), exists between the two systems such that Director-General should retain an oversight role of the entire health system. The relationship between the public and private sector can be seen in a number of ways.

The operation, viability and geographical scope of health services, both in the public and private systems, are taken into account in planning of health services by NSW Health. Further, it is likely that private health facilities will consider the scope and impact of the public health systems (as well as other private facilities) in determining whether to establish (or expand) a new private health facility in a particular area.

Conversely, it is not desirable for there to be a concentration of health services in one area, or in an area where there are insufficient clients to utilize and support the services offered. Where a health service is proposed to be provided by a private health facility with no prospect of being financially sustainable, even as a not-for-profit business, an expectation for the continued provision of the service may be raised for the community. If the private health service fails, there may be considerable pressure on the Government to support the continued service, even when this is contradicted by rational resource allocation principles for the whole of the State. Although, in general a private operator would be expected to have an appropriate business plan for a new facility which would make it unlikely for a private operator to propose a business that was unlikely to be financially viable in the longer term.

If private health facilities are concentrated in one geographic area with public facilities, there can be adverse effects on the public health system. The competition for a limited supply of a skilled medical, nursing and allied health workforce can render both systems understaffed. Also, if the demand for health services does not meet the services offered, both private and public systems may suffer from underutilisation which may result in a reduced skill base of staff through a lesser amount of clinical practice.

The Ministry of Health sought submissions on the review of s7(4)(c)(i) of the Act from stakeholders. While, no formal submissions were received, the views of the Private Health Facilities Advisory Committee were sought on 18 October 2012.

The Committee, comprised of representatives of relevant industry and professional organisations, is a forum for the discussion of strategic issues and the regulatory framework for private health facilities. These discussions brought to light other

issues in how decision making occurs under the Private Health Facilities Act, with a particular interest in the need to ensure transparency and accountability in decision making. There was, in this regard, some support for the retention of the guidelines under section 7(4)(c)(i) in so far as they could provide a basis for providing greater transparency in decision making, ensuring that applicants for a licence have a better understanding of the matter decision makers will take into account and being in a position to be able to address these issues.

In light of these considerations, the Ministry is of the view that there exists a relationship between the public and private systems such that the operation of one impacts on the other. In addition, a proposed new private health facility has the potential to impact on existing private health services. While the relationship, and any impacts of proposed new facilities, will often be beneficial for the community, a proposed new private health facility does have the potential to adversely impact on the comprehensiveness and viability of the entire health system. To that end, the Ministry considers that the objectives of s7(4)(c)(i), being for the Director-General to having an oversight role so as to ensure a viable, comprehensive and coordinated health services for all persons in NSW, remain valid.

5. Are the terms of section 7(4)(c)(i) appropriate for securing the objectives

While it is important for the Director-General to have an oversight of the entire health system so as to ensure a viable, comprehensive and coordinated health services, the question arises whether the terms of s7(4)(c)(i) remain appropriate for securing this objective. Section 7(4)(c)(i) effectively allows the Director-General, having regard to any guidelines, to refuse an application, for a license if the Director-General is satisfied of two factors:

1) if approval of the application will result in more than an adequate number of health services becoming available in a particular clinical or geographic area and
2) the approval would undermine the provision of viable, comprehensive and coordinated health services.

Section 7(4)(c)(i) of the Private Health Facilities Act has not, to date, been relied upon to refuse an application for a private health facilities licence. Further, no guidelines in relation to s7(4)(c)(i) have been gazetted. Accordingly, there is a strong argument that s7(4)(c)(i) is not needed to regulate the private health system, or in fact the entire health system.

Further, as noted earlier, s7(4)(c)(i) has the potential to be anti-competitive in allowing an application to be refused if the proposed facility would impact on existing

services. While, as found earlier, there may be a legitimate need to protect existing health services, the potential for the anti-competitive effects via the application of s7(4)(c)(i) may stifle new private health service initiatives and thereby reduce innovation and efficiency in the health system.

As such, while the objective of s7(4)(c)(i) is valid, the provision itself should only be retained if there are no other options available under which the Director-General and the Ministry of Health can plan for and provide a comprehensive, balanced and coordinated health services throughout NSW.

In this regard, it is noted that s7(4)(c)(i) is not the only mechanism by which the Director-General works to ensure a viable, comprehensive and coordinated health services. The terms of the entire Private Health Facilities Act and general market principle work to that end.

The viability of proposed new private health facilities is generally assured by way of market principles in that a private operator is highly unlikely to seek, or to succeed in attracting investment in, the establishment of a financially unfeasible health service. Further, the Private Health Facilities Act allows an application to be refused (or for an existing license to be suspended or cancelled) on the basis that the applicant has been bankrupt or application for the relief of bankruptcy or, where a corporation, has had a receiver appointed or has commenced to be wound up under official management[5]. Market principles also work to ensure the comprehensiveness of the health system in that private providers will often meet unmet needs in the health sector.

There are also provisions for the Director General to refuse an application for a licence is that the Director-General is satisfied that the applicant is not a fit and proper person to be a licensee or, if the applicant is a corporation, a director or a person concerned in the management of the corporation is not a fit and proper person to be a licensee. (s7(4)(a) of the Act). This provision also gives the Director General an opportunity to assure herself as to the bona fides of an applicant. Fitness and propriety are not to be narrowly construed or confined. The fitness and propriety in question must be related to the holding of a licence and the running of a private health facility authorised by the licence. A person who lacks a proper appreciation of the responsibilities of holding a licence, or who lacks the capacity to discharge those responsibilities, may be regarded as being not a fit and proper person to conduct a private health facility.

Should the facility be unable to safely provide the service, for reasons which could include impending or actual financial collapse of the enterprise, the Act provides a number of avenues for regulatory remedy in Division 6 of Part 2. The Director-General can suspend or cancel a licence, after the observation of rules of procedural fairness and notification of the right of redress in the Administrative Decisions

[5] Section 7(4)(f) and (g) of the Private Health Facilities Act.

Tribunal, for reasons including the fitness and propriety of the licensee, if the licensee is insolvent, or if the facility is conducted in such a manner that the cancellation of the licence is otherwise in the public interest.

In terms of a coordinated health system, the licensing standards assist in ensuring relevant connections between the public and private systems by requiring:

- all private health facilities to have a sufficient number of qualified and experienced staff on duty, at all times, to carry out the services provided by the facility[6];
- all private health facilities to have procedures in place to transfer a patient to another health facility if the private health facility cannot provide care for the patient[7];
- emergency class facilities to have effective communication arrangements with the Ambulance Service of New South Wales, and written procedures for the transfer of patients requiring a higher level of care than is provided by the facility[8]; and
- cardiac catheterisation class facilities to comply with the *Guidelines on Support Facilities for Coronary Angiography and Percutaneous Coronary Intervention* (PCI) published by the Cardiac Society of Australia and New Zealand, which includes the requirement for arrangements for the transfer of patients to a facility capable of cardiac surgery or intensive care (levels 1 or 2) within 1 hour[9].

Coordination of health services often occurs via agreement between services. For example, some private health facilities are co-located with public facilities and service public patients. NSW Health also contracts with private health licensees to obtain health services for public patients. Co-operation between the private sector and NSW Health assists in ensuring a greater coordination of health services across the State.

From the above, and as evidenced by the fact s7(4)(c)(i) has not been relied upon to date, the Ministry's view is that the objectives of s7(4)(c)(i) can be meet without reliance on the potentially anti-competitive provision of s7(4)(c)(i). Therefore, the Ministry is of the view that s7(4)(c)(i) be removed from the Act.

6. OTHER MATTERS

Generally, statutory reviews are conducted to consider the objectives and terms of an entire Act. However, this statutory review has only considered the

[6] Clause 12, Schedule 1 of the Private Health Facilities Regulation 2010
[7] Clause 18, Schedule 1 of the Private Health Facilities Regulation 2010
[8] Clauses 18 and 19, Schedule 2 of the Private Health Facilities Regulation 2010
[9] Clauses 3 and 4, Schedule 2 of the Private Health Facilities Regulation 2010

appropriateness of one subsection of the Private Health Facilities Act. While this has been useful, the Ministry considers that there is a need for a greater review of the entire Act. A broader review of the entire Private Health Facilities Act will be able to consider whether the objectives of the entire Act are appropriate and what, if any, amendments are required to appropriately regulate the private health sector.

7. Conclusion and Recommendations

Private health facilities perform an important role in NSW by bringing health services to their community. The Act regulates private health facilities so as to ensure facilities meet appropriate standards and that there is a comprehensive, balanced and coordinated health service, both public and private throughout NSW.

If an application for a private health facility licence is made, s7(4)(c)(i) of the Act allows the Director-General, after considering any guidelines published in the Gazette, to refuse the application if the application will result in a lack of viable, comprehensive or coordinated health system in a clinical or geographical area.

The object of s7(4)(c)(i) is to ensure that the Director-General has an appropriate oversight of the entire health system so as to ensure health services are viable, comprehensive and coordinated. While this objective is a valid objective, s7(4)(c)(i) has the potential to be anti-competitive which may stifle new private health service initiatives and reduce innovation and efficiency in the health system. As such, the provision should not remain in the Act unless there are no other ways to ensure an appropriate oversight of the health system.

However, general market principles and other provisions of the Private Health Facilities Act can help ensure the Director-General has appropriate oversight of the entire health system. As such, and noting that s7(4)(c)(i) has never been relied upon, s7(4)(c)(i) should be removed from the Act. To that end, the following recommendations are made:

1. As the terms of s7(4)(c)(i) are not appropriate to secure the objectives of the section, s7(4)(c)(i) should be removed from the Private Health Facilities Act; and
2. The Ministry conduct a full review of the entire Private Health Facilities Act.