

EXPLANATORY STATEMENT

Select Legislative Instrument 2013 No. 143

Health Insurance Act 1973

Health Insurance (General Medical Services Table) Amendment (Bariatric and Other Measures) Regulation 2013

Subsection 133(1) of the *Health Insurance Act 1973* (the Act) provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Part II of the Act provides for the payment of Medicare benefits for professional services rendered to eligible persons. Section 9 of the Act provides that Medicare benefits shall be calculated by reference to the fees for medical services set out in the general medical, pathology and diagnostic imaging tables.

Subsection 4(1) of the Act provides that the regulations may prescribe a table of medical services (other than diagnostic imaging services and pathology services) which sets out items of medical services, the fees applicable for each item, and rules for interpreting the table. The *Health Insurance (General Medical Services Table) Regulation 2012* (the Principal Regulation) currently prescribes such a table.

The regulation amends the Principal Regulation to ensure that the medical services funded through the Medicare Benefits Schedule (MBS) continue to be up-to-date and representative of best medical practice.

Schedule 1 to the regulation includes a number of minor changes to implement Government policies in relation to Medicare.

Amendments to 15 MBS items are to substitute gender specific words for gender neutral terminology where this will not change the clinical or eligibility intent of the item. These amendments are being made in order to comply with the *Australian Government Guidelines on the Recognition of Gender* which were developed in 2012 by the Attorney-General's Department. Currently, where an item refers to a patient's biological sex – such as an item for a 'cervical smear from a woman' – the item can only be claimed by a patient who is recorded as a female on the DHS database. This may disadvantage patients who do not identify with their biological sex or who identify with a gender other than that which they were assigned at birth. The changes allow for the items to be provided to all patients who have the anatomical characteristics but who do not identify with the gender specific language (woman/man, female/male).

The regulation also includes amendments to improve and better define the target groups appropriate for different bariatric procedures for the treatment of obesity as a result of advice from the Medical Services Advisory Committee (the MSAC). The MSAC provides advice to the Minister for Health and Ageing on evidence relating to the safety, effectiveness and cost-effectiveness of new medical technologies and procedures. This advice informs Government

decisions about new, and in some cases existing, medical procedures. The advice has resulted in the introduction of eight new MBS items (31569 to 31590). These new items provide Medicare rebates for the following surgical interventions for the treatment of obesity: adjustable gastric banding; sleeve gastrectomy; gastroplasty; Roux-en-Y gastric bypass; and biliopancreatic diversion with or without duodenal switch. The advice has also resulted in an amendment to four existing bariatric surgery items (20791, 30515, 30518 and 30601) and the subsequent deletion of five bariatric surgery items (14215, 30511, 30512, 30514 and 31441).

Details of the regulation are set out in the Attachment.

The Act specifies no conditions which need to be met before the power to make the regulation may be exercised.

The regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The regulation commences on 1 July 2013.

Consultation

Consultation for the amendments to remove gender specific language from the MBS occurred with the Organisation Intersex International, the National LGBTI Health Alliance, the Australian Medical Association and the Royal Australian College of Surgeons.

Consultation regarding the changes to the bariatric surgery items occurred with the Obesity Surgery Society of Australia and New Zealand.

Authority: Subsection 133(1) of the
Health Insurance Act 1973

ATTACHMENT**Details of the *Health Insurance (General Medical Services Table) Amendment (Bariatric and Other Measures) Regulation 2013*****Section 1 – Name of regulation**

This section provides for the regulation to be referred to as the *Health Insurance (General Medical Services Table) Amendment (Bariatric and Other Measures) Regulation 2013*.

Section 2 – Commencement

This section provides for the regulation to commence on 1 July 2013.

Section 3 – Authority

This regulation is made under the *Health Insurance Act 1973*.

Section 4 – Schedule(s)

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 – Amendments**Items [1], [3], [4], [6], [7] - [9], [11] and [12] – Amendments to bariatric surgery items**

These items make a number of changes to the MBS for procedures related to bariatric surgery. These changes are part of an initiative to improve and better define the target groups appropriate for different bariatric surgery procedures. These changes include the introduction of eight new items, an amendment to four existing items and the deletion of five items. These changes are a result of advice provided by the Medical Services Advisory Committee.

Items [2], [5], [10] and [13] – Amendments to gender specific language in MBS items

These items allow for the substitution of gender specific words for gender neutral terminology which are a result of a gender review undertaken by the Department of Health and Ageing. The review was conducted in response to the *Australian Government's Draft Guidelines on the Recognition of Gender*, which were developed in 2012 by the Attorney-General's Department. The overarching intent of these guidelines is to ensure that no individual is denied access to appropriate medical treatment based on their sex or gender.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Health Insurance (General Medical Services Table) Amendment (Bariatric and Other Measures) Regulation 2013

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The instrument amends the *Health Insurance (General Medical Services Table) Regulation 2012* (the Principal Regulation) to ensure that the medical services funded through the Medicare Benefits Schedule continue to be up-to-date and representative of best medical practice.

In accordance with s 4 of the *Health Insurance Act 1973*, the Principal Regulation prescribes a table of medical services containing: items of medical services; the amount of fees applicable for each item; and rules for the interpretation of the table.

The *Health Insurance (General Medical Services Table) Amendment (Bariatric and other measures) Regulation 2013* (the regulation) includes a number of minor changes to implement Government policies in relation to Medicare. The primary changes included in the Amendment Regulation are as follows:

- amendments to 15 MBS items to substitute gender specific words for gender neutral terminology will be made where this would not change the clinical or eligibility intent of the item. These amendments are being made in order to comply with the *Australian Government Guidelines on the Recognition of Gender* which were developed in 2012 by the Attorney-General's Department. Currently, where an item refers to a patient's biological sex – such as an item for a 'cervical smear from a woman' – the item can only be claimed by a patient who is recorded as a female on the DHS database. This may disadvantage patients who do not identify with their biological sex or who identify with a gender other than that which they were assigned at birth. The changes will remove the legislative restriction and allow for the items to be provided to all patients who have the anatomical characteristics but who do not identify with the gender specific language (woman/man, female/male).
- the introduction of 8 new MBS items (32222 to 32229), the amendment of 4 existing bariatric surgery items (20791, 30515, 30518 and 30601) and the subsequent deletion of 5 bariatric surgery items (14215, 30511, 30512, 30514 and 31441) will also be made, to improve and better define the target groups appropriate for different bariatric procedures for the surgical treatment of obesity which is the result of advice from the Medical Services Advisory Committee (MSAC). The MSAC provides advice to the Minister for Health and Ageing on evidence relating to the safety, effectiveness and cost-effectiveness of new medical technologies and procedures. This advice informs Government decisions about new, and in some cases existing, medical procedures. The changes also allow for the re-numbering of subgroups and the substitution of headings within Group T8 to accommodate the new bariatric items.

Human Rights Implications

The regulation engages Articles 2, 9 and 12 and of the International Covenant on Economic, Social and Cultural Rights (ICESCR), specifically the rights to health and social security.

The right to health – the right to the enjoyment of the highest attainable standard of physical and mental health – is contained in article 12(1) of the ICESCR. The UN Committee on Economic Social and Cultural Rights (the Committee) has stated that the right to health is not a right for each individual to be healthy, but is a right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.

The Committee has also stated that the ‘highest attainable standard of health’ takes into account the country’s available resources. The right may be understood as a right of access to a variety of public health and health care facilities, goods, services, programs and conditions necessary for the realisation of the highest attainable standard of health.

The right to social security is contained in article 9 of the ICESCR. It requires that a country must, within its maximum available resources, ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care. Countries are obliged to demonstrate that every effort has been made to use all resources that are at their disposal in an effort to satisfy, as a matter of priority, this minimum obligation.

The Committee has stated that there is a strong presumption that retrogressive measures taken in relation to the right to social security are prohibited under ICESCR. In this context, a retrogressive measure would be one taken without adequate justification that had the effect of reducing existing levels of social security benefits, or of denying benefits to persons or groups previously entitled to them.

However, it is legitimate for a Government to re-direct its limited resources in ways that it considers to be more effective at meeting the general health needs of all society, particularly the needs of the more disadvantaged members of society.

Analysis

The amendments made by items 1, 3, 4, 6 to 9 and 11 to 16 will implement a number of changes to the MBS for procedures related to bariatric surgery. These changes are part of an initiative to improve and better define the target groups appropriate for different bariatric surgery procedures. These changes include the introduction of 8 new items, an amendment to 4 existing items and the deletion of 5 items. These changes are a result of advice provided by the MSAC. The MSAC found that the clinical outcomes from bariatric surgery are better and more cost effective than non-surgical interventions. The amendments will improve access to surgical procedures for the treatment of obesity and therefore increase patient rights to health and social security.

The amendments made by items 2, 5, 10 and 17 allow for the substitution of gender specific words for gender neutral terminology which are a result of a gender review undertaken by the Department. The review was conducted in response to the *Australian Government’s Draft Guidelines on the Recognition of Gender*, which were developed in 2012 by the Attorney-General’s Department. The overarching intent of these guidelines is to ensure that no individual is denied access to appropriate medical treatment based on their sex or gender and therefore the amendments will increase patient rights to health and social security.

The amendments made by items 18 to 26 to the regulation do not engage any of the relevant rights. They are technical amendments that do not alter current arrangements for the payment of Medicare benefits. The changes allow for the re-numbering of subgroups and the substitution of headings within Group T8 to accommodate the new bariatric items.

The Hon Tanya Plibersek MP
Minister for Health