

EXPLANATORY STATEMENT

Select Legislative Instrument No. 28, 2014

Health Insurance Act 1973

Health Insurance Amendment (Specialist Trainee Program) Regulation 2014

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.

The Act enables the payment of a Medicare benefit for a ‘professional service’. A professional service is relevantly defined in section 3(1) of the Act as a medical service provided ‘by or on behalf of’ a medical practitioner. Where a service is provided on behalf of a practitioner, the practitioner claims a Medicare benefit in his or her own name (where the service is bulk-billed).

Subsection 3(17) of the Act relevantly provides that a service is only taken to have been provided ‘on behalf of’ a medical practitioner if the service is provided on behalf of the practitioner by someone who is not themselves a medical practitioner. Accordingly, there are limitations on a medical practitioner directly claiming benefits for a service provided by another medical practitioner.

After consultation with professional medical colleges, regulations were made to allow trainee medical specialists to provide a service under the direct supervision of a supervising medical practitioner, with the supervising practitioner deemed to perform the service and claiming any Medicare benefit for the service in his or her own right. This is currently done through Division 2.36 of the *Health Insurance (General Medical Services Table) Regulations 2013* (the GMST). This has created additional specialist training capacity in private settings, because specialists are not financially disadvantaged by permitting a trainee to perform the procedure.

The *Health and Other Legislation Amendment Act 2013* added new sections which will essentially have the same effect as Division 2.36, but will do so at the level of the Act.

With this trainee specialist concession now recognised at the level of the Act, regulations should now be made in the *Health Insurance Regulations 1975* which prescribe:

- the definition of ‘specialist trainee’;
- the professional services for which a service provided by a specialist trainee may be taken to have been provided by the supervising practitioner; and
- any provisions of the Act or regulations under which the supervising specialist should not be deemed to have performed the procedure.

The regulation:

- repeals the GMST Division 2.36;
- provides a new definition of ‘specialist trainee’ for the purposes of section 3(20) of the Act, that is, a medical practitioner who is enrolled in and undertaking a training

program with a medical college (a ‘medical college’ has the same meaning as in section 3GC of the Act, which outlines the functions of the Medical Training Review Panel); and

- prescribe professional services for the purposes of section 3(18)(a) of the Act; the prescribed services should be those currently prescribed in clause 2.36.2(1) of the GMST, that is, some obstetric services, regional or field nerve blocks, some surgical operations, assistance at operations and anaesthesia performed in connection with certain services.

No exclusions to the operation of the deeming provision are to be prescribed for section 3(19) at this time.

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 the day after it is registered.

Consultation

Consultation took place with the College of Intensive Care Medicine of Australia and New Zealand, the Australian and New Zealand College of Anaesthetists, the Australian and New Zealand College of Obstetricians and Gynaecologists and the Australian Medical Association.

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

Details of the Health Insurance Amendment (Specialist Trainee Program) Regulation 2014

Section 1 – Name of regulation

This section provides for the regulation to be referred to as the *Health Insurance Amendment (Specialist Trainee Program) Regulation 2014*.

Section 2 – Commencement

This section provides for the regulation to commence on the day after it is registered.

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

Health Insurance (General Medical Services Table) Regulation 2013

Item [1] – Division 2.36 of Part 2

This item allows for the repeal of the existing Division 2.36 of Part 2 of the *Health Insurance (General Medical Services Table) Regulation 2013* (GMST).

Item [2] – Dictionary (definition of a *specialist trainee under the supervision of a medical practitioner*)

This item allows for the repeal of the current definition from the GMST.

Health Insurance Regulations 1975

Item [3] – Regulation 2

This item inserts a paragraph number (1) so that the definition listed at item 4 (below) can be inserted as new paragraph (2) at the end of regulation 2.

Item [4] – At the end of regulation 2

This item adds the definition of a *specialist trainee* for the purposes of new subsection 3(20) of the Act.

Item [5] – Regulation 3

This item serves to add to regulation 3, the specified professional services for which new subsection 3(18) of the Act can apply.

Statement of Compatibility with Human Rights

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

Health Insurance Amendment (Specialist Trainee Program) Regulation 2014

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

Under the *Health and Other Legislation Amendment Act 2013*, sections 3(18-20) were added to the *Health Insurance Act 1973* (HIA), received the Royal Assent on 29 June 2013 and came into force on 29 December 2013. These sections allow for a specialist trainee to perform a medical service under the direct supervision of a specialist who is present at all times during the service, and for that service then to be deemed to have been performed by the specialist, for Medicare purposes.

The amendment was made to increase training opportunities for trainee specialists in private settings. Previously, this facility had only been available for fellows of the Royal Australian College of Surgeons and their trainees. As a result of the HIA amendment, it will apply to any trainee of a specialist medical college, working under the direct supervision of a qualified specialist, although only for a defined range of Medicare items in the General Medical Services Table.

New regulation needed to be drafted in relation to the new legislation, in regard to:

- the definition of 'specialist trainee'; and
 - the particular professional services to which the legislation should apply.
- (Regulations already exist in Division 2:36 of the *Health Insurance (General Medical Services Table) Regulation 2013* which specify these services, but these regulations need to be amended in light of the new HIA sections 3(18-20).)

Human Rights Implications

The regulation relates to Articles 6, 7 and 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), specifically the rights around employment.

Articles 6 and 8 refer to the right to technical guidance and training in employment and the right to form or join a trade union respectively. The regulation breaches no element of these articles.

Article 7 refers to, inter alia, the "*right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:*

- (a) *Remuneration which provides all workers, as a minimum, with:*
- (i) *Fair wages and equal remuneration for work of equal value without distinction of any kind...."*

Trainee specialists performing a procedure under the direct supervision may perform part, or all, of a procedure under the direct supervision of a specialist. Therefore, with the procedure

being deemed as provided by the supervising medical practitioner, the trainee specialist may be performing a procedure without receiving Medicare entitlements for performing the procedure.

Since trainee specialists in this situation:

- a) have accepted that theirs is a training role and that the supervising practitioner will be deemed as having performed the procedure; and
- b) will be employed by a hospital as a doctor and will be receiving a wage for undergoing the training;

the human rights of the trainee specialists are not affected.

The Regulation also relates to Article 12 of the ICESCR, specifically the "*right of everyone to the enjoyment of the highest attainable standard of physical and mental health*". A patient undergoing a procedure by a trainee specialist will have given consent for the trainee specialist to perform the procedure. Also, the supervising specialist, who would otherwise be performing the procedure, will be physically present at the procedure and able to perform the procedure to the extent required if necessary. Therefore it is considered that the patient's human rights will not be breached by being attended to by a trainee specialist under supervision.

The trainee specialist is also likely to be an advanced trainee in the final years of specialty training and will have been working as a doctor for several years.

Analysis

The amendments made by 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 Hon. Peter Dutton MP
Minister for Health