

## **EXPLANATORY STATEMENT**

### Select Legislative Instrument No. 79, 2014

#### *Health Insurance Act 1973*

#### *Health Insurance (Diagnostic Imaging Services Table) Amendment (2014 Measures No. 1) 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.

Subsection 4AA(1) of the Act provides that the regulations may prescribe a table of diagnostic imaging services which sets out the items of services, the fees applicable for each item, and rules for interpreting the table. The *Health Insurance (Diagnostic Imaging Services Table) Regulation 2013* (the Principal Regulation) currently prescribes such a table.

The *Health Insurance (Diagnostic Imaging Services Table) Amendment (2014 Measures No.1) Regulation 2014* (the Amendment Regulation) is part of the on-going management of the Diagnostic Imaging Services Table. The Amendment Regulation includes amendments to Schedule 1 to the Principal Regulation to ensure that the diagnostic imaging services funded through the Medicare Benefits Schedule (MBS) are reflective of Government commitments.

The Amendment Regulation merges eight current MBS pelvis ultrasound items into four new MBS items, by removing the gender specific terminology in the item descriptors ('male' or 'female') and replacing it with gender neutral terminology. The change will not change the clinical criteria for claiming pelvis ultrasound items. 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 (that is, woman/man, female/male). This change adheres to the Australian Government Guidelines on the Recognition of Sex and Gender.

Additionally, the Amendment Regulation amends eight ultrasound MBS items (relating to the pelvis, urinary tract, urinary bladder, and abdomen) to reference the four new MBS items and removes the reference to the previous eight pelvis ultrasound MBS items which have been deleted.

Finally, the Amending Regulation includes a provision which includes a regional exemption from the Capital Sensitivity measure for computed tomography ('CT') services that are provided in a remote location. The Principal Regulation provides for reduced Medicare benefits for most diagnostic services performed using aged equipment as an incentive for providers to upgrade equipment in the interests of quality and safety for consumers. This is indicated by the use of the '(K)' and '(NK)' symbols in the MBS item descriptors. MBS items with '(NK)' in the descriptor have a MBS fee which has a value of approximately fifty per cent of the corresponding '(K)' item. Previously, a provider performing a CT service on equipment that was older than 10 years was eligible for the '(K)' item (that is, an item with a higher Medicare rebate) if the service was performed on equipment in a 'remote location'.

Under the *Health Insurance (Diagnostic Imaging Services Table) Regulation 2013*, CT services became subject to the same regional exemption rules as other modalities. It may be the case that some providers who were previously able to access the remote location exemption may no longer be able to access the regional exemption contained in the *Health Insurance (Diagnostic Imaging Services Table) Regulation 2013*. To ensure that providers have time to adapt to the new requirements the Amendment Regulation ensures that previously eligible healthcare providers who are no longer eligible from 1 July 2014 continue to have access to higher Medicare rebates for two years in respect of their older equipment from the date of the Amendment Regulations until 30 June 2016.

#### Consultation

The Department of Health has consulted with the medical profession, including the Australian Medical Association, Royal Australian College of Surgeons, the Royal Australian and New Zealand College of Radiologists and other relevant professional medical groups as well as the Medical Services Advisory Committee.

The National Lesbian, Gay, Bisexual, Transgender and Intersex Health Alliance and the Organisation Intersex International have also been consulted throughout the process to ensure the proposed item descriptors incorporate appropriate language.

All stakeholder groups have expressed their approval for the proposed changes to proceed.

Details of the Amendment Regulation are set out in the Attachment.

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

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

The Amendment Regulation commences on 1 July 2014.

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

**Details of the Health Insurance (Diagnostic Imaging Services Table) Amendment (2014 Measures No.1) Regulation 2014**

**Section 1 – Name of regulation**

This section provides for the regulation to be referred to as the *Health Insurance (Diagnostic Imaging Services Table) Amendment (2014 Measures No.1) Regulation 2014*.

**Section 2 – Commencement**

This section provides for the regulation to commence on 1 July 2014.

**Section 3 – Authority**

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

**Section 4 – Schedule(s)**

This section provides that 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**

**Item [1] – Clause 1.2.1 of Schedule 1**

Item 1 repeals the clause 1.2.1 and replaces it with a new clause 1.2.1 which simplifies the current drafting to avoid repeating the phrase ‘an item that includes the symbol (NK) at the end’ in subclauses 1.2.3(1) to (3) of Schedule 1. Item 1 also deletes the meaning of the definition of (K) and (NK) items from clause 1.2.1. These definitions are relocated in full to the dictionary in Schedule 3 under item 17 below. Item 1 is a drafting change and does not change the current arrangements.

**Item [2] – Subclauses 1.2.3(1) to (3) of Schedule 1**

Item 2 makes consequential amendments to subclauses 1.2.3(1) to (3) to reflect the changes made by item 1.

**Item [3] After paragraph 1.2.3(6)(a) of Schedule 1**

Item 3 introduces an additional regional exemption from capital sensitivity provisions where a relevant proprietor applies for an exemption under subclause 1.2.3(4).

**Item [4] – At the end of clause 1.2.3 of Schedule 1**

Item 4 adds an expiry date of 30 June 2016 to the new regional exemption from capital sensitivity provisions.

**Item [5] – Schedule 1, item 55014 (column headed “Description”, paragraph (f))**

Item 5 removes reference to items “55020, 55038, 55044, 55731 or 55732”, and substitutes the items with items “55038, 55065 or 55067”.

**Item [6] – Schedule 1, item 55017 (column headed “Description”, paragraph (e))**

Item 6 removes reference to items “55020, 55038, 55044, 55731 or 55732”, and substitutes the items with items “55038, 55065 or 55067”.

**Item [7] – Schedule 1, item 55036 (column headed “Description”, paragraph (f))**

Item 7 removes reference to items “55020, 55038, 55044”, “55731 or 55732”, and substitutes these items with items “55038, 55065 or 55067”.

**Item [8] – Schedule 1, item 55038, (column headed “Description”, paragraph (e))**

Item 8 removes reference to items “55020, 55036, 55044, 55731 or 55732”, and substitutes these items with items “55036, 55065 or 55067.”

**Item [9] – Schedule 1, item 55063 (column headed “Description”, paragraph (d))**

Item 9 removes reference to items “55020, 55036, 55038, 55044, 55600, 55601, 55603, 55604, 55731 or 55732”, and substitutes these items with items “55036, 55038, 55065, 55067, 55600, 55601, 55603 or 55604”.

**Item [10] – Schedule 1, item 55064 (column headed “Description”, paragraph (c))**

Item 10 removes reference to items “55022, 55037, 55039, 55045, 55600, 55601, 55603, 55604, 55733 or 55734” and substitute these items with items “55037, 55039, 55068, 55069, 55600, 55601, 55603 or 55604”.

**Item [11] – Schedule 1, after item 55064**

Item 11 introduces four new pelvis ultrasound items that contain gender neutral terminology.

**Item [12] – Schedule 1, item 55084 (column headed “Description”, paragraph (d))**

Item 12 removes reference to items “55020, 55036, 55038, 55044, 55600, 55601, 55603, 55604, 55731 or 55732”, and substitutes these items with items “55036, 55038, 55065, 55067, 55600, 55601, 55603 or 55604”.

**Item [13] – Schedule 1, item 55085 (column headed “Description”, paragraph (c))**

Item 13 removes references to items “55045, 55600, 55601, 55603, 55604, 55733 or 55734”, and substitutes these items with items “55068, 55069, 55600, 55601, 55603 or 55604”.

**Item [14] – Part 3 of Schedule 1 (definition of *Anaes.*)**

Item 14 relocates the definition of *Anaes.* to its appropriate alphabetical position.

**Item [15] Part 3 of Schedule 1 (definitions of *(K)* and *(NK)*)**

Item 15 repeals the definitions of (K) and (NK) items. These definitions would be replaced under item 17.

**Item [16] Part 3 of Schedule 1 (definitions of *(NR)* and *(R)* )**

Item 16 relocates the definitions of (NR) and (R) to their appropriate alphabetical positions.

**Item [17] Part 3 of Schedule 1**

Item 17 inserts full definitions of (K) and (NK) items in Part 3 of Schedule 1.

**Item [18] Amendment of listed provisions – repeals**

Item 18 repeals items 55020, 55022, 55044, 55045, 55731, 55732, 55733, and 55734 which contain unnecessary gender specific language.

## Statement of Compatibility with Human Rights

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

### ***Health Insurance (Diagnostic Imaging Services Table) Amendment (2014 Measures No. 1) 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**

The *Health Insurance (Diagnostic Imaging Services Table) Amendment (2014 Measures No. 1) Regulation 2014* amends the *Health Insurance (Diagnostic Imaging Services Table) Regulation 2013* to ensure diagnostic imaging services funded through the Medicare Benefits Schedule (MBS) continue to reflect government commitments.

In accordance with subsection 4 AA (1) of the *Health Insurance Act 1973* the regulation may prescribe a table of diagnostic imaging services which sets out the items of services, the fees applicable for each item, and rules for interpreting the table. Schedule 1 of the regulation will be amended as follows:

- amendments to eight MBS pelvis ultrasound items, by substituting the gender specific terminology in the item descriptors with gender neutral terminology, where it will not change the clinical or eligibility intent of the item;
- consequential amendments to eight ultrasound items (relating to the pelvis, urinary tract, urinary bladder, and abdomen) to ensure the amended forms of the pelvis ultrasound items are referenced in the items and the redundant items are removed; and
- the listing of a grandfathering provision providing an exemption from capital sensitivity provisions for computed tomography ('CT') services that are provided in a 'remote location'; to accommodate for providers who have been adversely affected by previous amendments to capital sensitivity exemptions in the regulation.

#### **Human rights implications**

The regulations engage Articles 2, 9 and 12 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 reports that the *'highest attainable standard of health'* takes into account the country's available resources. This 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*

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 reports 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 to the regulation advance rights to health and social security primarily by increasing access to publicly subsidised, non-discriminative health services.

- Currently, the eight MBS pelvis ultrasound items refer to a patient's biological sex, for example, *'Pelvis, male, ultrasound scan of'*. As a result, the item can only be claimed by a patient who is recorded as a male on the Department of Human Services 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. Allowing 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) upholds critical components of the right to health - *the right to non-discrimination and equality*.
- Previously, pursuant to clause 2.2.1(1) of Schedule 1 to the *Health Insurance (Diagnostic Imaging Services Table) Regulations 2012*, a CT service performed by a provider on equipment that was older than 10 years, was eligible for the ('K') item (i.e. an item with a higher Medicare rebate) if the service was performed on equipment in a *'remote location'*. To provide consistency for all modalities, CT services became subject to the same rules as other modalities when the *Health Insurance (Diagnostic Imaging Capital Sensitivity) Determination 2011* was revoked and the provisions were included in the *Health Insurance (Diagnostic Imaging Services Table) Regulation 2013*. The grandfathering provision ensures providers who have been adversely affected by the amendments, which removed the 30km remoteness rule for CT services and substituted the RA Geographical Classification Rural and Remoteness criteria, have access to increased Medicare rebates for two years from the date of this regulation. This improves rights to health and social security by ensuring patients still have access to such services until the providers can meet the amended capital sensitivity requirements.

- The consequential amendments to eight ultrasound items (relating to the pelvis, urinary tract, urinary bladder, and abdomen) are purely administrative and do not raise any human rights.

### **Conclusion**

The Legislative Instrument is compatible with human rights because it advances the protection of human rights.

**Peter Dutton**  
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