EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Health

*Health Insurance Act 1973*

*Health Insurance Legislation Amendment (2018 Measures No. 1) Instrument 2018*

Section 3C of the *Health Insurance Act 1973* (the Act) provides that the Minister may, by legislative instrument, determine that a health service not specified in an item in the general medical, diagnostic imaging or pathology services table (the Tables) shall, in specified circumstances and for specified statutory provisions, be treated as if it were specified in the Tables. The Tables consist of the following: the Health Insurance (General Medical Services Table) Regulations made under section 4 of the Act: the Health Insurance (Diagnostic Imaging Services Table) Regulations made under section 4AA of the Act; and the Health Insurance (Pathology Services Table) Regulations made under section 4A of the Act.

Section 4BA of the Act provides that the Minister, after consultation with Royal College of Pathologists of Australasia, determine that a particular pathology service, or pathology services included in a class of pathology services, are pathologist-determinable services.

Subsection 33(3) of the *Acts Interpretation Act 1901* provides that where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

**Purpose**

The *Health Insurance Regulations 1975* is repealed on 1 October 2018 and replaced by the *Health Insurance Regulations 2018* (the Principal Regulations). The Health Insurance Regulations have been remade due to the operation of the sunsetting provisions of the *Legislation Act 2003*.

A number of consequential amendments are required to other instruments to reflect changes in the Principal Regulations. These amendments have been made through the *Health Insurance Legislation Amendment (2018 Measures No. 1) Instrument 2018* (the Amending Instrument), and include:

* consequential amendments to reflect the change in the name and the reordering of sections;
* the repeal of terms that are no longer used; and
* the removal of sections which are duplicated in the Principal Regulations.

**Consultation**

No consultation was undertaken on the making of this Amending Instrument as the nature of the changes are merely technical in nature and are consequential to the changes made by the Principal Regulations.

Details of the Amending Instrument are set out in the Attachment.

The Amending Instrument commences immediately after the commencement of the *Health Insurance Regulations 2018*.

The Amending Instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.

ATTACHMENT

Details of the *Health Insurance Legislation Amendment (2018 Measures No. 1) Instrument 2018*

Section 1 – Name

# Section 1 provides for the Amending Instrument to be referred to as the *Health Insurance Legislation Amendment (2018 Measures No. 1) Instrument 2018*.

Section 2 – Commencement

Section 2 provides that the Amending Instrument commences immediately after the commencement of the *Health Insurance Regulations 2018*.

Section 3 – Authority

Section 3 provides that the Amending Instrument is made under sections 3C and 4BA of the *Health Insurance Act 1973* (the Act).

Section 4 – Schedules

Section 4 provides that that each instrument that is specified in a Schedule to this Amending 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 to Instruments made under section 3C of the *Health Insurance Act 1973*

*Health Insurance (Allied Health Services) Determination 2014*

Item 1 - Subsection 4(1) (definition of *allied health service*)

Item 1 repeals the current definition of the term “allied health service” and substitutes it with a definition that refers to the updated section of the *Health Insurance Regulations 2018* (the Principal Regulations).

Subsection 3C(1) of the Act enables the Minister to make a written determination in respect of a health service, or a health service in a specified class of health services, for the purposes of payment of Medicare benefits. Subsection 3C(8) specifies the types of health services that may be subject to a determination under subsection 3C(1). Paragraph 3C(8)(a) specifies medical, surgical, obstetric, dental or optometrical treatment. Paragraph 3C(8)(b) of the Act enables other types of health services to be prescribed by regulations.

Section 12 of the Principal Regulations prescribes classes of health services in paragraphs (a) to (s). This enables Medicare benefits to be payable for these prescribed allied health services, including psychology, physiotherapy and podiatry services.

This item makes a minor editorial amendment by repealing and substituting the meaning of *allied health service* in the *Health Insurance (Allied Health Services) Determination 2014* to reflect the change in the name of the Principal Regulations and the reordering of sections made though the Principal Regulations.

***Health Insurance (Midwife and Nurse Practitioner) Determination 2015***

**Item 2 - Subsection 4(1)**

Item 2 repeals the current subsection 4(1) and substitutes it with an amended subsection 4(1).

Section 5 of the Principal Regulations specifies the kinds of collaborative arrangements between participating midwives and medical practitioners, the kinds of medical practitioners for the purpose of collaborative arrangements, and the requirements collaborative arrangements must comply with.

This item makes a minor editorial amendment by repealing and substituting the meaning of *collaborative arrangement*, for a participating midwife in the *Health Insurance (Midwife and Nurse Practitioner) Determination 2015*  to reflect the change in the name of the Principal Regulations and the reordering of sections made though the Principal Regulations.

**Item 3 - Subsection 10(2)**

Item 3 repeals the current subsection 10(2) and substitutes it with an amended subsection 10(2).

Section 7 of the Principal Regulations specifies the kinds of collaborative arrangements between participating nurses and medical practitioners, the kinds of medical practitioners for the purpose of collaborative arrangements, and the requirements collaborative arrangements must comply with.

This item makes a minor editorial amendment by repealing and substituting the meaning of *collaborative arrangement*, for a participating nurse practitioner in the *Health Insurance (Midwife and Nurse Practitioner) Determination 2015* to reflect the change in the name and the reordering of sections made though the Principal Regulations.

**Item 4 - Schedule 1 (item 82100, column 2, paragraph (f))**

Section 6 of the Principal Regulations specifies the record keeping requirements for an eligible midwife who is providing midwifery services in accordance with a collaborative arrangement in paragraph 5(2)(d).

This item makes a minor editorial amendment in the *Health Insurance (Midwife and Nurse Practitioner) Determination 2015* by omitting and substituting the section and regulation name referred to in paragraph (f). This is to reflect the change in the name of the Principal Regulations and the reordering of sections made though the Principal Regulations.

***Health Insurance (Diabetes Testing in Aboriginal and Torres Strait Islander Primary Health Care Sites) Determination 2015***

**Item 5 – Paragraph 6(a)**

Item 5 repeals paragraph 6(a) and substitutes it with an amended paragraph.

This item makes a minor editorial amendment to the Diabetes Testing in Aboriginal and Torres Strait Islander Primary Health Care Sites determination, by repealing and substituting paragraph (a) of section 6. This change is to reflect the change in name of the Principal Regulations.

This item also amends the reference to the *National Health Regulations* to include a reference to the most recent version.

Schedule 2 - Amendments to Instrument made under section 4BA of the *Health Insurance Act 1973*

***Health Insurance (Pathologist-determinable Services) Determination 2015***

**Item 6 - Subsection 4(1) (definition of *Regulations*)**

This item makes a minor amendment to the *Health Insurance (Pathologist-determinable Services) Determination 2015* by repealing the meaning of *Regulations*. This term does not need to be defined as it is not used in this determination.

**Statement of Compatibility with Human Rights**

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

***Health Insurance Legislation Amendment (2018 Measures No. 1) Instrument 2018***

This Amending 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 Amending Instrument**

The *Health Insurance Regulations 1975* is repealed on 1 October 2018 and replaced by the *Health Insurance Regulations 2018* (the Principal Regulations). The Health Insurance Regulations have been remade due to the sunsetting provisions of the *Legislation Act 2003*.

A number of consequential amendments are required to other instruments to reflect changes in the Principal Regulations. These amendments have been made through the *Health Insurance Legislation Amendment (2018 Measures No. 1) Instrument 2018* (the Amending Instrument), and include:

* consequential amendments to reflect the change in the name and the reordering of sections;
* the repeal of terms that are no longer used; and
* the removal of sections which are duplicated in the Principal Regulations.

**Human rights implications**

The Amending Instrument engages Articles 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

This Amending Instrument does not directly engage human rights as it only implements minor technical amendments as a consequence of the remaking of the Principal Regulations. However the Principal Instruments that are being amended by the Amending Instrument will maintain rights to health and social security by ensuring access to publicly subsidised health services which are clinically effective, safe and cost-effective.

**Conclusion**

This Amending Instrument does not directly engage human rights.

**Michael Ryan**

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