EXPLANATORY STATEMENT

Health Insurance Act 1973
Health Insurance (Section 19AB Exemptions Guidelines) Determination 2019

Authority

Subsections 19AB(1) and 19AB(2) of the *Health Insurance Act 1973* (the HIA) provides that Medicare benefits are not payable for services provided by, or on behalf of, an overseas trained doctor (OTD) or foreign graduate of an accredited medical school (FGAMS), except where:

- the person was first recognised as a medical practitioner in Australia before 1997;
- the person was an OTD prior to 1 January 1997, and before that date had applied to undertake examinations to become a medical practitioner; or
- the relevant medical service is provided more than 10 years after the person first became a medical practitioner, and the person either first became a medical practitioner before 18 October 2001, was a permanent Australian at the time of becoming a medical practitioner, or became a permanent Australian after first becoming a medical practitioner.

Subsection 19AB(7) of the Act provides that for the purpose of subsections 19AB(1) and 19AB(2):

- an OTD is a person whose primary medical qualification was not obtained from an accredited medical school, being a medical school accredited by the Australian Medical Council and located in Australia or New Zealand; and
- a FGAMS is a person whose primary medical qualification was obtained from an accredited medical school and who was not a permanent Australian, or a New Zealand citizen or permanent resident, when he or she first enrolled at an accredited medical school.

Under subsection 19AB(3) of the HIA, the Minister for Health has the power to grant an exemption from the restrictions in subsections 19AB(1) and 19AB(2) of the HIA (an exemption). An exemption may be granted in respect of one person or a class of persons. The Minister also has the power under subsection 19AB(4) of the HIA to make exemptions subject to such conditions as the Minister considers fit.

Subsection 19AB(4B) of the HIA provides that the Minister must, by legislative instrument, determine guidelines that apply to the granting of exemptions and the imposition of conditions on such exemptions. Subsection 19AB(4A) provides that the Minister must comply with such guidelines in exercising the power to grant an exemption under subsection 19AB(3) and the power to make an exemption subject to conditions under subsection 19AB(4).

Purpose

The *Health Insurance (Section 19AB Exemptions Guidelines) Determination 2019* (the Guidelines) repeals and replaces the *Health Insurance (Section 19AB Exemptions) Guidelines 2017* (the Previous Guidelines) made for the purposes of subsection 19AB(4B) of the HIA.

The Guidelines have been updated to include a definition of Distribution Priority Area to apply to general practitioners and other medical practitioners who are not specialists. The Distribution Priority Area is now to be used in relation to general practitioners or other medical practitioners who are not specialists instead of the District of Workforce Shortage system.

Areas of shortage for medical practitioners who identify as specialists (excluding general practice) will continue to be identified using the existing District of Workforce Shortage methodology.

Background

Distribution Priority Area (DPA)/District of Workforce Shortage (DWS)

The Guidelines provide a framework for considering applications for exemptions under subsection 19AB(3) of the HIA and imposing conditions on these exemptions. An exemption enables a doctor who is an OTD or FGAMS and who would otherwise be prevented from providing Medicare-eligible services by the operation of subsections 19AB(1) and 19AB(2) to provide such services and Medicare benefits are payable in respect of those services, subject to meeting specified requirements.

The Guidelines provide that the key consideration when assessing most exemption applications is whether the location to which the application relates is in a DPA or DWS for the applicant's field of medical practice. For example, where the applicant is a specialist cardiologist, the primary consideration for granting an exemption will generally be whether the service location to which the application relates and at which the applicant is seeking to practise privately falls within a DWS for the specialty of cardiology. Where the applicant is a general practitioner (GP) or other non-specialist for Medicare purposes, the primary consideration will generally be whether the applicant is seeking to practise in a DPA for general practice.

The requirement that DPA or DWS status should serve as the primary consideration for most exemption decisions is intended to effect a more equitable distribution of the private medical workforce across Australia. This requirement aims to alleviate medical workforce shortages in recognised DPA or DWS areas, particularly in regional and remote communities that experience difficulties in accessing medical services due to their distance from the capital cities.

DPA

DPA are identified for non-specialist medical practitioners by comparing the services provided in a GP catchment area with the services needed, known as the benchmark.

A DPA for non-specialists also includes any area located in Modified Monash Model (MMM) areas 5, 6 or 7. The MMM remoteness area classification system categorises metropolitan, regional, rural and remote areas according to both geographical remoteness and population size. The system was developed to recognise the challenges in attracting health workers to smaller regional communities.

The MMM overlays the Australian Statistical Geography Standard Remoteness Area (ASGS-RA) classification system, created by the Australian Bureau of Statistics (ABS) on the basis of the latest residential population data.

The MMM establishes 7 remoteness categories that are based on remoteness area classifications adapted from the ABS's ASGS-RA classifications as specified in the Australian Statistical Geography Standard (July 2011 edition), and better differentiates inner and outer regional areas based on the size of their residential populations. The MMM categories can be summarised as follows:

MMM category	Description
1	Areas categorised RA 1 (Major Cities)
2	Areas categorised RA 2 (Inner Regional Australia) as determined by Health using ABS ASGS-RA classifications and RA 3 (Outer Regional Australia) as determined by Health using ABS ASGS-RA classifications that are in, or within 20km road distance, of a town with population >50,000.
3	Areas categorised RA 2 and RA 3 that are not in MM 2 and are in, or within 15km road distance, of a town with population between 15,001 and 50,000.
4	Areas categorised RA 2 and RA 3 that are not in MM 2 or MM 3, and are in, or within 10km road distance, of a town with population between 5,000 and 15,000.
5	All other areas in RA 2 and 3.
6	All areas categorised RA 4 (Remote Australia) as determined by Health using ABS ASGS-RA classifications that are not on a populated island that is separated from the mainland in the ABS geography and is more than 5km offshore.
7	All other areas – that being RA 5 (Very Remote Australia) as determined by Health using ABS ASGS-RA classifications and areas on a populated island that is separated from the mainland in the ABS geography and is more than 5km offshore.

A map showing the MMM status of every Australian street address is provided on the DoctorConnect website: www.doctorconnect.gov.au/

DWS

DWS areas are identified for specialist medical practitioners (excluding general practitioners) by using the latest Medicare fee billing statistics and Australian Bureau of Statistics (ABS) estimated residential population data to determine the level of Medicare-subsidised medical service provision for each medical specialty in each geographical area of Australia.

FSE is an estimated measure of the workload performed by medical practitioners based on Medicare billing data. The FSE methodology models total hours worked for each practitioner based on the number of days worked, volume of services and Medicare Schedule fees.

A medical practitioner's FSE is calculated using the following formula:

$$\frac{\text{total days worked x average working hours per day}}{\text{full-time benchmark}}$$

The definition also provides a benchmark - one FSE is the statistical equivalent of a workload of 7.5 hours per day, five days per week, 48 weeks per year.

A map showing the DPA or DWS status of every Australian street address for GPs and other non-specialists, specialists and consultant physicians is provided on the DoctorConnect website: www.doctorconnect.gov.au/

The Guidelines also provide for circumstances where DPA or DWS status will not be the primary consideration; for example, where the applicant will be providing short term locum services or providing services at an Aboriginal and Torres Strait Islander specific primary health care service in respect of which a direction under subsection 19(2) of the HIA is in force.

Commencement

The Guidelines commence on 1 July 2019.

Documents Incorporated by Reference

The following documents are incorporated within the Guidelines by reference:

- *Acts Interpretation Act 1901*;
- *Australian Statistical Geography Standard, July 2011 edition,* published by the Australian Bureau of Statistics and is available on their website; https://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/1270.0.55.005July%202011;
- *Health Insurance Regulations 2018*; and
- *Migration Regulations 1994*.

Consultation

Health has not formally consulted external stakeholders during the process of revising the Guidelines, however these amendments are as a result of work undertaken by the Department of Health's Distribution Working Group.

The new DPA methodology uses GP catchment areas to measure whether a catchment area is receiving adequate GP services. GP catchment areas provide an improvement over the District of Workforce Shortage assessment areas by describing a more comprehensive picture of doctor-patient location relationships, as they reflect where people live and where they access health services.

The Guidelines are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. Details of this instrument are set out in Attachment A.

ATTACHMENT A

Health Insurance (Section 19AB Exemptions Guidelines) Determination 2019

Part 1 Preliminary

Section 1 Name

Section 1 provides that the name of the instrument is the *Health Insurance (Section 19AB Exemptions Guidelines) Determination 2019* (the Guidelines).

Section 2 Commencement

Section 2 provides that the Guidelines commence on 1 July 2019.

Section 3 Authority

Section 3 provides that the Guidelines are made under subsection 19AB(4B) of the *Health Insurance Act 1973*.

Section 4 Definitions and interpretation

Subsection 4(1) defines terms used in the Guidelines.

There are separate methods for determining a DPA in respect of general practitioners (GPs) and other non-specialists for Medicare purposes (non-specialists) and for determining a DWS for specialists (which is taken to include consultant physicians and exclude general practitioners) in a particular specialty.

Distribution Priority Area

For general practitioners and other medical practitioners who are not specialists, DPAs are identified by comparing the services provided in a GP catchment area with the services needed, known as the benchmark.

A DPA for non-specialists also includes the Northern Territory and any area located in MMM areas 5, 6 or 7.

A GP catchment area will not be considered a DPA for general practitioners if it is classified as an inner metropolitan area by the Department.

Districts of Workforce Shortage for specialists

For medical practitioners who are specialists in a particular specialty (excluding general practice), DWS areas are identified by using the latest Medicare fee billing statistics and Australian Bureau of Statistics (ABS) estimated residential population data to determine the level of Medicare-subsidised medical service provision for each medical specialty in each geographical area of Australia.

A DWS for specialists also includes the Northern Territory and any area located in Remoteness Areas 3, 4 or 5 as determined by the Department using ASGS data.

Subsection 4(2) clarifies that a service location is in a DPA or DWS for a particular type of practitioner if:

- for a GP or other non-specialist, the location is in a DPA for GPs and other non-specialists; and
- for a specialist in a particular specialty (excluding general practice), the location is in a DWS for specialists in that specialty.

Subsection 4(3) provides that a reference throughout the Guidelines to a specialist includes a reference to a consultant physician. This is to increase readability of the Guidelines.

Subsection 4(4) provides that references throughout the Guidelines to 'the type of medical practitioner to which an application relates' means a reference to either specialists in a particular specialty, or to GPs and other non-specialists.

Subsection 4(5) provides that references to provisions in the *Migration Regulations 1994* are to the provisions in force and applied to the person at the time the person migrated to Australia.

Section 5 Schedules

Section 5 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.

Part 2 Exemptions

Section 6 Considerations for exemptions – general

Section 6 sets out the matters the Minister for Health is to take into consideration when deciding on most applications for exemption.

Subsection 6(1) provides that the section is subject to sections 7 – 10 of the Guidelines. Those sections set out considerations that are to apply in particular circumstances, for example where the applicant will be providing short-term locum services or will be providing services at an Aboriginal and Torres Strait Islander specific primary health care service.

Subsection 6(2) provides that the primary consideration for making decisions on applications for exemptions is whether the location for which the exemption is sought is in a DPA or DWS for the type of medical practitioner applying for the exemption (namely a specialist in a particular specialty, or a GP or other non-specialist).

Subsection 6(3) provides that the following may also be taken into account when assessing an application for an exemption under this section:

- whether the applicant's registration or licence as a medical practitioner is subject to any conditions (paragraph 6(3)(a));
- whether the applicant's visa, if they hold one, allows them to practise medicine or undertake clinical training in medicine (paragraph 6(3)(b));

- whether the applicant has entered into, or commenced negotiations to enter into, an agreement to provide professional services at the relevant service location (paragraph 6(3)(c));
- whether the applicant is seeking to replace another OTD or FGAMS who practised privately at the location and held an exemption for the location, and whose Medicare provider number for the location has been cancelled. The other OTD or FGAMS must have provided services at the location within the last 12 months (paragraph 6(3)(d));
- whether the applicant is seeking to provide private medical services at the specified location during the after-hours period (paragraph 6(3)(e));
- if the location to which the application relates is not in a DPA or DWS in respect of the type of practitioner applying for an exemption, whether the applicant commenced negotiations to provide services at the practice location while the location was considered to be a DPA or DWS (paragraph 6(3)(f); and
- any other matters the Minister considers relevant (paragraph 6(3)(g)).

Subsection 6(4) provides that in subsection 3(d) a reference to a person who was subject to an exemption for the location includes a reference to a person to whom a class exemption applied. This is included for the avoidance of doubt.

Section 7 – Considerations for exemption – provision of services at Commonwealth funded Aboriginal and Torres Strait Islander primary health care service

Section 7 of the Guidelines aims to increase the number of medical practitioners providing private services to Aboriginal and Torres Strait Islander populations, even where those populations are located in major cities or are not otherwise located in areas of medical workforce shortage.

Subsection 7(1) provides that this section applies where the applicant for an exemption will be providing, or has commenced negotiations to provide, services at an Aboriginal and Torres Strait Islander specific primary health care service. These are primary health care organisations that predominantly service Aboriginal and Torres Strait Islander clients. A direction under subsection 19(2) of the HIA must be in force in respect of the organisation (see subsection 4(1) of the Guidelines).

Where section 7 applies, subsection 7(2) provides that decisions about whether to grant an exemption must not take into account whether service location is in a DPA or DWS for the type of medical practitioner seeking the exemption. Subsection 7(2) also provides that the Minister may take into account those matters set out in paragraphs 6(3)(a)-(e) of the Guidelines and any other matters he or she considers relevant.

Section 8 – Considerations for exemption – spouses

Subsection 8(1) provides that this section applies where the applicant is the spouse of:
- a medical practitioner who is not prevented by section 19AB of the HIA from providing, or having rendered on their behalf, Medicare-eligible services – in other words a medical practitioner who is not an OTD or FGAMS, or who is an OTD or FGAMS who has a current section 19AB exemption or who falls into one of the classes to which the prohibition on payment of benefit for services provided by OTDs and FGAMS does not apply, for example OTDs or FGAMS who first became medical practitioners before 1 January 1997; or

- a person who:
  - holds a General Skilled Migration visa following assessment by a relevant assessing authority as having a skilled occupation or a migration occupation in demand (at the relevant time);
  - migrated to Australia within the last 10 years with the intention of working in that occupation; and
  - is currently employed in, volunteers in or is undertaking a training placement in that occupation.

In all cases the spouse of the applicant must ordinarily reside in Australia.

Where these provisions apply, subsection 8(2) provides that when deciding whether to grant an exemption, whether the location to which the application relates is in a DPA or DWS for the relevant type of medical practitioner is not to be taken into account. The Minister may take into account the distance between the primary place of work of the spouse of the applicant and the service location, the matters set out in paragraphs 6(3)(a) - (e) of the Guidelines and any other matters he or she considers relevant.

Section 9 – Considerations for exemption – provision of locum services

Subsection 9(1) provides that the section applies where the applicant for an exemption has entered into, or has started negotiations to enter into, an agreement to provide locum services at a particular location for a maximum period of six months and the applicant has not previously provided locum services at the same practice under a subsection 19AB(3) exemption related to the provision of locum services.

Paragraph 9(1)(c) clarifies that a doctor may not have multiple locum placements at any one practice.

Where section 9 applies, subsection 9(2) provides that, in deciding whether to grant an exemption, the Minister must not take into account whether the location is in a DPA or DWS for the relevant type of medical practitioner.

Subsection 9(2) also provides that the Minister may take into account the matters set out in paragraphs 6(3)(a) – (e) of the Guidelines and any other matters the Minister considers relevant.

Where a locum arrangement or proposed locum arrangement would be for more than six months and section 9 does not apply, the general considerations at section 6 of the Guidelines apply unless one of the other ‘exceptions’ to section 6 applies, for example that the application is to provide services at an Aboriginal and Torres Strait Islander specific primary health care service.

Section 10 – Considerations for class exemptions

Subsection 19AB(3) of the HIA provides that an exemption may be granted in respect of a class of persons.

Subsection 10(1) of the Guidelines provides that the section applies to decisions in respect of exemptions for a class of persons. Where section 10 applies, subsection 10(2) provides that

the Minister is not required to consider whether members of the class will be providing services within a DPA or DWS, and can take into account any matters he or she considers relevant.

Section 11 – Conditions

Subsection 19AB(4) of the HIA provides that the Minister may make exemptions subject to any conditions he or she thinks fit.

Subsection 11(1) provides that except in special circumstances, all exemptions must be subject to the condition that the exemption will only be applicable to a particular service location, for example a particular medical practice, health centre or hospital. However, subsection 10(2) provides that this does not apply to exemptions made in respect of a class of practitioners.

Subsection 11(3) provides that an exemption may be made subject to the condition that the exemption only applies to professional services rendered after hours. 'After hours' is defined in subsection 4(1) of the Guidelines as all day Saturday, Sunday or public holidays and before 8:00 a.m. and after 6:00 p.m. on any other day.

Subsections 11(4) and 11(5) provide that the Minister is not limited in the conditions that he or she may place on an exemption by subsections 11(1) and 11(3), and that in making decisions about imposing conditions on an exemption the Minister may take into account any matters he or she considers relevant.

Section 12 – Period of Exemption

Subsection 12(1) provides that an exemption cannot be backdated and may be time limited to cease on a date specified in the exemption instrument.

Subsection 12(2) provides that where an exemption is granted to a person to provide locum services, the exemption must be specified to cease on a day no later than six months from the date of commencement of the exemption.

Schedule 1 – Repeals

Schedule 1 provides that the *Health Insurance (Section 19AB Exemptions) Guidelines 2017* are repealed.

Statement of Compatibility with Human Rights

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

Health Insurance (Section 19AB Exemptions Guidelines) Determination 2019

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 *Health Insurance (Section 19AB Exemptions Guidelines) Determination 2019*

The *Health Insurance Act 1973* (the HIA) provides the conditions for medical practitioners to provide medical services that are subsidised by Medicare rebates. Subsections 19AB(1) and 19AB(2) of the HIA prevent two cohorts of medical practitioners who were registered in Australia after 1 January 1997 from providing, or having provided on their behalf, services for which Medicare rebates may be paid. These cohorts are:

- overseas trained doctors (OTDs) – medical practitioners who did not obtain their primary medical degree (Bachelor of Surgery/Bachelor of Medicine or equivalent) at an Australian Medical Council (AMC) accredited medical school located in Australia or New Zealand; and
- foreign graduates of an accredited medical school (FGAMS) – medical practitioners who obtained their primary medical degree at an AMC accredited medical school in Australia or New Zealand but who were not permanent residents or citizens of either country on the day they enrolled in their degree.

The restrictions that apply under subsections 19AB(1) and 19AB(2) remain in effect for a minimum period of ten years commencing on the date the OTD or FGAMS is first registered as a medical practitioner in Australia. These restrictions are referred to as the 'ten year moratorium requirement'.

Subsection 19AB(3) of the HIA provides that the Minister for Health may grant an exemption from the operation of subsections 19AB(1) and 19AB(2). Where an exemption is granted, the OTD or FGAMS may provide services that attract Medicare rebates before their ten year moratorium has expired. These exemptions are referred to as section 19AB(3) exemptions and, once granted, allow the Department of Human Services to issue a Medicare provider number to an OTD or FGAMS and pay Medicare rebates for the services they provide.

Subsection 19AB(4B) provides that the Minister for Health must, by legislative instrument, determine guidelines that apply to granting exemptions under section 19AB(3) and to the imposing of conditions on exemptions.

The *Health Insurance* (*Section 19AB Exemptions Guidelines) Determination 2019* (the Guidelines) repeals and replaces the *Health Insurance* (*Section 19AB Exemptions) Guidelines 2017* (the Previous Guidelines).

Like the Previous Guidelines, the Guidelines provide that the primary consideration for the Minister for Health when assessing most applications for a subsection 19AB(3) exemption is whether the applicant medical practitioner is seeking to practise in a Distribution Priority Area (DPA) or District of Workforce Shortage (DWS) for their medical specialty (see subsection 6(2) of the Guidelines).

A DPA is a GP catchment area, where the services supplied to the population are less then the amount of services needed within the catchment area (the benchmark).

A DWS is geographical area that has less access to Medicare-subsidised medical services than the national average with reference to the latest Medicare fee billing statistics. A lack of access to Medicare eligible services is indicative of unmet local needs for medical services.

These Guidelines continue to function as an important mechanism for the Australian Government to achieve a targeted increase in the availability of Government subsidised medical services in geographic areas that experience the greatest need. By providing a mechanism for encouraging doctors to practise in DPA or DWS areas, the Guidelines are of particular benefit to Australians who reside in regional and remote areas and who face difficulties with accessing appropriate medical services because of their distance from the capital cities.

Although the DPA or DWS status of the location to which the application relates is required by the Guidelines to be the primary consideration in deciding most applications for an exemption, subsection 6(3) of the Guidelines continues to specify a range of other matters the Minister may consider. These remain unchanged from the Previous Guidelines and include:

- whether any restrictions have been imposed on the applicant's medical registration and whether the applicant's visa allows them to practice medicine or undertake clinical training in medicine;
- whether the applicant has entered into or commenced negotiations to enter into an agreement to provide medical services at the location to which the application relates and, if the location is not a DPA or DWS at the time the application is decided, whether the location was in a DPA or DWS at the time the applicant commenced negotiations to provide services at the location while it was in a DPA or DWS; and
- whether the applicant is intending to provide private medical services in the after-hours period.

The Guidelines also set out a number of categories of application for an exemption for which the Minister is not to consider the DPA or DWS status of the location in making his or her decision whether to grant a subsection 19AB(3) exemption, specifically:

- where the applicant will be providing services at an Aboriginal and Torres Strait Islander specific primary health care service that is subject to a direction made under subsection 19(2) of the HIA (section 7);
- where the applicant is a spouse (including de facto partner) of:
  - a medical practitioner who is not prevented from providing Medicare-eligible services, or having them providing on their behalf, by subsections 19AB(1) and (2) of the HIA; or

- a person who holds a general skilled migration visa and has been assessed as having a skilled occupation or migration occupation in demand, who migrated to Australia in the last 10 years to work in that occupation and who is currently employed in, volunteers in or is training in that occupation (section 8); or

- where the applicant will be providing locum services at a location for a maximum of 6 months and has not previously provided locum services at the same location (section 9).

These categories, and the matters that may be taken into account in considering applications in these categories, remain unchanged from the Previous Guidelines.

Subsection 19AB(3) of the HIA provides that exemptions may be made in relation to classes of persons. The Guidelines make no change to the considerations that may be taken into account where the Minister is considering making an exemption in relation to a class of persons, and specifically provide that the Minister need not consider whether members of the class will be providing services in a DPA or DWS (section 10).

The requirement that an exemption for an individual must, except in special circumstances, be subject to a condition that the exemption applies only to a particular service location has been retained (subsections 11(1) and 11(2) of the Guidelines). The Guidelines also continue to provide that, without limiting the conditions that may be applied, an exemption may be made subject to the condition that the exemption only applies to professional services rendered after-hours (subsections 11(3) and (4)).

Finally, the Guidelines continue to prevent the backdating of exemptions and to limit the time that an exemption granted to an applicant seeking to provide locum services may remain valid (section 12).

Human rights implications

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 International Covenant on Economic Social and Cultural Rights (ICESCR). Whilst the UN Committee on Economic Social and Cultural Rights (the Committee) has stated that the right to health is not to be understood as a right to be healthy, it does entail a right to a system of health protection that provides equality of opportunity for people to enjoy the highest attainable level of health.

The right to social security is contained in Article 9 of the ICESCR. The right 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 HIA underpins the Medicare system, which was implemented by the Australian Government to subsidise the cost of medical services for Australian citizens and permanent residents. Under this system, Medicare rebates function as a payment to patients so that they may meet the costs of medical services. The ten year moratorium requirement under section 19AB functions as a control that enables the Australian Government to:

- identify medical services that will be subsidised by a Medicare rebate; and
- influence the distribution of the private medical workforce with a view to ensuring Medicare-subsidised medical services are accessible to all Australian citizens and permanent residents.

The Guidelines are instrumental in defining the workforce distribution intent of section 19AB because they define a DPA or DWS and identify this as the key consideration for the Australian Government when assessing the majority of applications for an exemption under subsection 19AB(3). In this way, the Guidelines promote the right to health for all Australians by including a number of provisions that have a direct effect on medical workforce distribution, specifically the private medical workforce.

The Guidelines also recognise that Aboriginal and Torres Strait Islander persons may be marginalised in terms of their ability to access appropriate medical services for a number of reasons, even where they do not reside in a DPA or DWS. The Guidelines retain special provisions that enable OTDs and FGAMS to obtain a subsection 19AB(3) exemption to provide affordable medical care through Aboriginal and Torres Strait Islander specific primary health care services across Australia without the DPA or DWS status of the location of the service being a consideration. The Guidelines also recognise the place of locum doctors in ensuring the availability of private medical services in all locations in Australia, and applications from OTDs and FGAMS intending to work in short term locum positions are not assessed based on the DPA or DWS status of the practice location.

The Guidelines do not prevent Australians residing in an area that is not considered to be a DPA or DWS from accessing medical services, including services that are subsidised through the Medicare system. All Australians continue to have the right to choose their doctor and to receive a Medicare rebate for any service provide by a Medicare eligible doctor.

The Guidelines only apply to particular cohorts of medical practitioners, i.e. only OTDs and FGAMS, as subsections 19AB(1) and (2) only apply to OTDs and FGAMS.

The Guidelines improve the ability of all Australians to maximise their enjoyment of their rights to health and social security. There is no incompatibility with the right engaged because the Guidelines serve a legitimate objective that is reasonable, necessary and proportionate in the circumstances.

Right to Freedom of Movement

The right to freedom of movement is contained in articles 12 and 13 of the International Covenant on Civil and Political Rights. The right to freedom of movement includes the right to move freely within a country for persons who are lawfully within a country. The right to freedom of movement also includes a right to enter a country for persons who are citizens of that country and the right to leave any country.

The Australian Government is not directly responsible for determining where any doctor (Australian or overseas trained) may practise medicine. Eligibility to practise medicine in Australia is determined through the medical registration process. A doctor may only practise medicine once they are registered with the Medical Board of Australia (MBA). The MBA imposes conditions or restrictions on the practice of some doctors, which in some cases will restrict them to working in particular practices.

Subsections 19AB(1) and (2) of the HIA prevent certain OTDs and FGAMS from providing services for which Medicare rebates will be payable, or from having Medicare-eligible services provided on their behalf, unless an exemption granted under subsection 19AB(3) of the HIA applies to the OTD or FGAMS.

However, it should also be noted that OTDs and FGAMS are free to provide professional medical services that are not subsidised by the Medicare scheme, meaning that section 19AB of the HIA is not relevant and a subsection 19AB(3) exemption is not required by the practitioner.

Where an OTD or FGAMS chooses to provide private medical services and seeks a subsection 19AB(3) exemption, the Guidelines establish that the primary consideration for the Minister will usually be whether the applicant is seeking to practise privately in a DPA or DWS area for their specialty. However, the Guidelines set out a range of other matters that may be taken into account, including whether:

- the applicant is proposing to provide after hours services and the location to which the application relates;
- services were provided at the location within the last 12 months by another person covered by a subsection 19AB(3) exemption whose Medicare provider number has since been cancelled; or
- the applicant has entered into or commenced negotiations to enter into an agreement to provide services at the location to which the application relates.

Additionally, as mentioned above the Guidelines also specify situations in which the DPA or DWS status of the applicant's proposed practice location is not to be taken into consideration.

Nothing in the Guidelines forces OTDs and FGAMS to provide medical services in a DPA or DWS or any particular area in Australia, or requires OTD or FGAMS to service a particular group of patients or to provide a particular set of medical services within their medical specialty.

The Guidelines also do not place any restriction on the ability of OTDs or FGAMS to either enter or leave Australia. The Guidelines are not incompatible with the right to freedom of movement.

Rights of Equality and Non-Discrimination

The rights of equality and non-discrimination are contained in articles 2, 16 and 26 of the International Covenant on Civil and Political Rights. The rights of equality and non-discrimination provide that laws, policies and programs should not be discriminatory and also that public authorities should not apply or enforce laws, policies or programs in a discriminatory or arbitrary manner.

The provisions of the Guidelines are intended to serve an important medical workforce distribution function. The Guidelines and the related section 19AB restrictions limit the capacity of OTDs and FGAMS to provide services for which Medicare rebates are payable. However, OTDs and FGAMS are not identified on the basis of their race, their descent, or their national or ethnic origin.

These doctors are identified according to:

- the institution from which the doctor obtained their primary medical degree (OTDs); and
- the institution from which the doctor obtained their primary medical degree and whether the doctor was a citizen or permanent resident of Australia or New Zealand at the time of enrolling at the institution (FGAMS).

The ten year moratorium requirement is applied uniformly to all medical practitioners who belong to the OTDs and FGAMS cohorts. Australian citizens, permanent residents and temporary residents who fall into these cohorts are all subject to the same restrictions under the ten year moratorium requirement and receive the same treatment by each of the provisions of the Guidelines.

The Guidelines do not provide for any decisions about the granting of subsection 19AB(3) exemptions to be based on the race, national origin, age, gender or religion of the applicant. The Australian Government does not consider or record the race, decent, place of birth or ethnicity of any doctor when considering their application for a subsection 19AB(3) exemption.

The Guidelines do provide that an application from a practitioner in particular spousal relationship (including a de facto relationship) should not be assessed according to the DPA or DWS status of the location at which the applicant wishes to provide services. These are where the applicant is the spouse of:

- another medical practitioner who is not subject to the 10 year moratorium requirement, or who hold a subsection 19AB(3) exemption; or
- a person on a general skilled migration visa with a skilled occupation in demand, who migrated to Australia to work in that occupation and who is currently employed in, volunteers in or is training in that occupation.

The ‘spousal exemption’ ensures that the 10 year moratorium requirement:

- does not adversely impact the Australian Government’s efforts to attract and retain skilled migrants into the non-medical practitioner occupations that are listed on the Skilled Occupation List or former Migration Occupation in Demand List; and
- increases the likelihood that an OTD or FGAMS who already holds a subsection 19AB(3) exemption to provide Medicare-subsidised services and who is in a spousal relationship with another OTD or FGAMS applying for an exemption will continue to work in that DPA or DWS;

The spousal categories achieve these reasonable objectives by allowing an OTD or FGAMS to apply for a Medicare provider number for a practice location that is near to their spouse’s place of employment, on the condition that their spouse’s current employment and migration status satisfy section 8 of the Guidelines.

The Guidelines are not incompatible with the rights of equity and non-discrimination.

Conclusion

The *Health Insurance (Section 19AB Exemptions Guidelines) Determination 2019* are compatible with human rights because the provisions contained within the Guidelines advance the protection of human rights by enabling limited resources (Medicare benefits) to be spent more effectively and for the benefit of all Australians. To the extent that the *Health Insurance (Section 19AB Exemptions Guidelines) Determination 2019* may limit human rights, those limitations are reasonable, necessary and proportionate.

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