

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Health

Health Insurance Act 1973

Health Insurance (Section 3C Diagnostic Imaging – Nuclear Medicine Services) Amendment (No. 2) Determination 2019

Subsection 3C(1) 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 diagnostic imaging services table (the Table) shall, in specified circumstances and for specified statutory provisions, be treated as if it were specified in the Table.

The Table is set out in the regulations made under subsection 4AA(1) of the Act, which ceases to be in force after 12 months and must be re-made each year. The most recent version of the regulations is the *Health Insurance (Diagnostic Imaging Services Table) Regulations 2019*.

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 purpose of the *Health Insurance (Section 3C Diagnostic Imaging – Nuclear Medicine Services) Amendment (No. 2) Determination 2019* (the Determination) is to amend the *Health Insurance (Section 3C Diagnostic Imaging – Nuclear Medicine Services) Determination 2019* (the principal determination) which was made to provide substitute items, due to a shortage of nuclear medicine isotopes following a manufacturing breakdown. As the supply of nuclear medicine isotopes has stabilised, the substitute items are no longer required. It is preferable to keep these substituted items suspended rather than removed. This will allow these substituted items to be quickly reinstated by a further amendment to the principal determination in the event of another shortage of nuclear medicine isotopes.

Consultation

The Australasian Association of Nuclear Medicine Specialists (AANMS), the Royal Australian and New Zealand College of Radiologists (RANZCR) and the Australian Diagnostic Imaging Association (ADIA) were consulted in the development of the temporary items. At the time the temporary items came into effect, stakeholders were informed that the purpose of the temporary items was to allow patients to have continued access to common nuclear medicine imaging services during the shortage in supply of Technetium-99m and that the items would be available for an initial period of three months commencing from 14 September 2019.

Following advice from the Department of Industry, Innovation and Science on 10 December 2019, the Department of Health advised AANMS, RANZCR and ADIA that full production of technetium at the Australian Nuclear Science and Technology Organisation (ANSTO) had resumed and stabilised, and that the temporary items would be withdrawn because they were no longer required. With supplies of technetium back to usual levels, requestors and providers were

also advised to revert to using the technetium based nuclear medicine imaging services on which the temporary items are based.

Details of the Determination are set out in the Attachment.

The Determination commences on the day after it is registered.

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

Authority: Subsection 3C(1) of the
Health Insurance Act 1973

Details of the *Health Insurance (Section 3C Diagnostic Imaging – Nuclear Medicine Services) Amendment (No. 2) Determination 2019*

Section 1 – Name

Section 1 provides for the Determination to be referred to as the *Health Insurance (Section 3C Diagnostic Imaging – Nuclear Medicine Services) Amendment (No. 2) Determination 2019* (the Determination).

Section 2 – Commencement

Section 2 provides that the Determination commences on the day after it is registered on the Federal Register of Legislation.

Section 3 – Authority

Section 3 provides that the Determination is made under subsection 3C(1) of the *Health Insurance Act 1973*.

Section 4 – Schedules

Section 4 provides that that each instrument that is specified in a Schedule to this Determination is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Determination has effect according to its terms.

Schedule 1 – Amendments

Health Insurance (Section 3C Diagnostic Imaging – Nuclear Medicine Services) Determination 2019.

Item 1 – Provides for a new Schedule 2 to the principal determination to apply dates for the application of the items under that determination.

Item 2 – Inserts a new Schedule 2 to the principal determination a table for dates between which the substituted items in Schedule 1 of the principal determination will apply. This amendment closes the recent period during which the substituted items can be used on 20 December 2019. A note indicates a further period may be inserted, by further amendment of the principal determination, to reopen the availability of these items.

Statement of Compatibility with Human Rights

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

Health Insurance (Section 3C Diagnostic Imaging – Nuclear Medicine Services) Amendment (No. 2) Determination 2019

This 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 Determination

The purpose of the *Health Insurance (Section 3C Diagnostic Imaging – Nuclear Medicine Services) Amendment (No. 2) Determination 2019* (the Determination) is to suspend the application of substituted diagnostic imaging nuclear medicine items following the restoration of availability of the usual table items. The new Schedule 2 will, however, permit a further period to be determined should another shortage of essential resources occur such that the usual nuclear medicine diagnostic imaging items become unavailable again.

Human rights implications

This 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 Instrument maintains the right to health and the right to social security. The Instrument provides an ongoing mechanism for providing and funding appropriate substitute services and benefits for all patients in the event of a national shortage in the supply of the essential resources for undertaking the usual nuclear medicine diagnostic imaging services.

Conclusion

This Instrument is compatible with human rights as it maintains the right to health and the right to social security.

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