

EXPLANATORY STATEMENT

Issued by the Minister for Health

Health Insurance Act 1973

Health Insurance (Section 3C General Medical Services – GP and Allied Health COVID-19 Services) Amendment Determination No. 2 2020

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 general medical 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 4(1) of the Act. The most recent version of the regulations is the *Health Insurance (General Medical Services Table) Regulations 2019*.

This instrument relies on subsection 33(3) of the *Acts Interpretation Act 1901* (AIA). Subsection 33(3) of the AIA 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.

On 11 March 2020, the Prime Minister, the Hon. Scott Morrison MP, announced a comprehensive \$2.4 billion health package to protect all Australians, including vulnerable groups such as the elderly, those with chronic conditions and Aboriginal and Torres Strait Islander communities, from the coronavirus (COVID-19).

As part of the package, the Government announced \$100 million to fund new Medicare services for people in home isolation or quarantine, as a result of COVID-19, to receive health consultations remotely.

On 13 March 2020, new consultation services provided by GPs, other doctors in general practice, nurse practitioners and mental health allied health workers were introduced to provide services remotely to patients who have been diagnosed with the COVID-19, or who are vulnerable of contracting COVID-19. The services are also able to be provided by GPs, other doctors in general practice, nurse practitioners and mental health allied health workers who are in isolation for possible COVID-19 infection. These items are prescribed in the *Health Insurance (Section 3C General Medical Services – GP and Allied Health COVID-19 Services) Determination 2020* (the Principal Determination).

Immediately following commencement of the Principal Determination, the *Health Insurance (Section 3C General Medical Services – GP and Allied Health COVID-19 Services) Amendment Determination No.1 2020* (Amendment Determination) was made to expand the types of services which could be provided by phone.

Taken together, the two legislative instruments allow patients at risk of COVID-19 access to the following services:

- Remote equivalent Level B to D consulting room attendance items provided by GPs and other doctors in general practice. These services can be provided by telehealth, or in circumstances when video conferencing is unavailable, by phone.
- Remote equivalent focussed psychological strategies consulting room items provided by GPs and other doctors in general practice with appropriate mental health training. These mental health treatment services can be provided by telehealth, or in circumstances when video conferencing is unavailable, by phone.
- Remote equivalent Better Access consulting room items provided by allied health providers with appropriate mental health training. Eligible providers include clinical psychologists, psychologists, occupational therapists and social workers. These mental health treatment services can be provided by telehealth, or in circumstances when video conferencing is unavailable, by phone.
- Remote equivalent Level B to D consulting room attendance items provided by participating nurse practitioners. These services can be provided by telehealth, or in circumstances when video conferencing is unavailable, by phone.

The new items will be available to patients at risk of COVID-19. A patient will be considered at risk of COVID-19 if they have been diagnosed with the disease (but not hospitalised for treatment) or are in isolation due to risk of COVID-19 infection.

A person considered more susceptible to the COVID-19 virus is also defined as an at risk patient. This includes:

- patients 70 years of age or older;
- patients of Aboriginal or Torres Strait Islander descent who are 50 years of age or older;
- patients who are pregnant;
- patients who care for children under 12 months; and
- a person receiving treatment for chronic health conditions or who is immune comprised.

For the remote equivalent Level B to D attendance, a person considered more susceptible to COVID-19 must have an existing relationship with the doctor (or medical practice who employs the doctor) to be eligible.

Health professionals working in isolation can continue to provide certain health services to their patients during the period of their isolation by telehealth or telephone. This includes GPs, other doctors in general practice, allied health providers and participating nurse practitioners.

All services can only be rendered if the treating health professional chooses to accept the patient's Medicare benefit as full payment for the service (otherwise known as 'bulk-billing'). This will mean there will be no out-of-pocket for patients.

Purpose

The purpose of the *Health Insurance (Section 3C General Medical Services – GP and Allied Health COVID-19 Services) Amendment Determination No. 2 2020* is to amend the Principal Determination to add new remote antenatal and postnatal services provided by participating midwives. Eight new items will be listed to allow participating midwives to render these services by telehealth (91211, 91212, 91214 and 91215) or by phone (91218, 91219, 91221 and 91222) where video conferencing is unavailable.

Consultation

On 11 March 2020, the Prime Minister, the Hon. Scott Morrison MP, announced a comprehensive health package to protect all Australians, including vulnerable groups such as the elderly, those with chronic conditions and Indigenous communities, from COVID-19. Due to the nature of the emergency and the short timeframe in drafting this legislative instrument to implement this phase of the health package, it was not reasonably practicable to undertake consultation with representatives of persons affected by the instrument.

Details of the Determination are set out in the [Attachment](#).

Sections 1 to 4 of the Determination commence immediately after registration. The amendments in the Schedule are taken to have commenced retrospectively from 13 March 2020 to enable patients with COVID-19 to access antenatal and postnatal participating midwife services remotely. Subsection 3C(2) of the Act allows for retrospective commencement as it excludes subsection 12(2) of the *Legislation Act 2003* from applying to determinations made under section 3C(1) of the *Health Insurance Act 1973*. However, the provision is consistent with subsection 12(2) of the *Legislation Act 2003* as it does not disadvantage persons existing entitlements and only imposes retrospective liabilities on the Commonwealth.

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 General Medical Services – GP and Allied Health COVID-19 Services) Amendment Determination No. 2 2020

Section 1 – Name

Section 1 provides for the Determination to be referred to as the *Health Insurance (Section 3C General Medical Services – GP and Allied Health COVID-19 Services) Amendment Determination No. 2 2020*

Section 2 – Commencement

Section 2 provides that the Determination commences immediately after registration. The amendments in the Schedule are taken to have commenced retrospectively from 13 March 2020 to enable patients with COVID-19 to access antenatal and postnatal participating midwife services remotely.

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 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

Schedule 1 will amend the *Health Insurance (Section 3C General Medical Services – GP and Allied Health COVID-19 Services) Determination 2020* to list eight new items to enable patients at risk of COVID-19 to access remote antenatal and postnatal provided by participating midwives.

The new items will also allow participating midwives who are in isolation for possible COVID-19 infection to continue providing services remotely to their patients.

The services must be performed by telehealth unless videoconferencing is unavailable.

The Amending Determination will also make minor editorial changes to some of the existing items in the Principal Determination.

Statement of Compatibility with Human Rights

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

Health Insurance (Section 3C General Medical Services – GP and Allied Health COVID-19 Services) Amendment Determination No. 2 2020

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 General Medical Services – GP and Allied Health COVID-19 Services) Amendment Determination No. 2 2020* is to list new remote antenatal and postnatal services provided by participating midwives for patients at risk of COVID-19. Eight new items will be listed to allow participating midwives to render these services by telehealth (91211, 91212, 91214 and 91215) or by phone (91218, 91219, 91221 and 91222) where video conferencing is unavailable.

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 advances the right to health and the right to social security by ensuring people who have been affected by COVID-19 can access publicly subsidised health services without the risk of affecting other people or health professionals.

Conclusion

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

Greg Hunt
Minister for Health