

EXPLANATORY STATEMENT

Health Insurance Act 1973

Health Insurance (Section 3C Midwife and Nurse Practitioner Services) Determination 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.

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.

Purpose

The purpose of the *Health Insurance (Section 3C Midwife and Nurse Practitioner) Determination 2020* (the Determination) is to repeal and remake the *Health Insurance (Midwife and Nurse Practitioner) Determination 2015* (the previous Determination) and prescribe a new table of midwife and nurse practitioner services from 1 July 2020. This will ensure that Medicare benefits continue to be payable for midwife and nurse practitioner services performed by those practitioners.

This Determination will also apply indexation for midwife and nurse practitioner services by replacing the fees in the previous Determination with fees indexed by 1.5%. This reflects the Government's policy regarding Medicare indexation and means that patients will receive a higher Medicare benefit for these services from 1 July 2020.

Consultation

In the 2017-18 Budget, the Government announced the re-commencement of indexation of Medicare benefits under the *Guaranteeing Medicare - Medicare Benefits Schedule - indexation* measure. This instrument will continue the Government's policy regarding indexation by indexing the schedule fees for these services.

No consultation was undertaken on this instrument as it continues the business-as-usual implementation of the Government's policy on Medicare indexation, which is expected by stakeholders to be applied on 1 July of each year. The complete list of all indexed fees is available in the Medicare Benefits Schedule xml data file which is available for anyone to download on MBS Online (www.mbsonline.gov.au).

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

The Determination commences on 1 July 2020.

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

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

ATTACHMENT

Details of the *Health Insurance (Section 3C Midwife and Nurse Practitioner Services) Determination 2020*

Part 1 - Preliminary

Section 1 – Name

Section 1 provides for the Determination to be referred to as the *Health Insurance (Section 3C Midwife and Nurse Practitioner Services) Determination 2020*.

Section 2 – Commencement

Section 2 provides that the Determination commences on 1 July 2020.

Section 3 – Authority

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

Section 4 – Revocation

Section 4 revokes the previous determination the *Health Insurance (Midwife and Nurse Practitioner) Determination 2015*.

Section 5 - Definitions

Section 5 adopts definitions and provisions from the *Health Insurance Act 1973* the *National Health Act 1953* and regulations made under those Acts.

Section 6 - Additional definitions for telehealth items

Section 6 defines “care recipient”, “telehealth eligible area”, “participating in a video consultation” and “residential care service” for the purposes of descriptors in items in Part 2 of Schedule 1 or Part 3 of Schedule 2.

Part 2 Midwifery services

Section 7 - Interpretation

Section 7 defines collaborative arrangement for a midwife, what work is included in a “delivery” and circumstances for a midwife to be a member of a practice.

Section 8 – Treatment of midwifery services

Section 8 provides, in accordance with section 3C(1), that a midwifery service under the determination is a professional and medical service for the general medical services table and as if the fee were in the table.

Section 9 – Collaborative arrangements

Section 9 requires fees may only be charged for midwifery services when in a collaborative arrangement with an obstetric medical practitioner as set out in section 5 of the *Health Insurance Regulations 2018*.

Section 10 – General Requirements

Subsection 10(1) provides that the midwifery items only apply where:

- the service is personally performed by the participating midwife. Accordingly, these services cannot be performed by another practitioner on a midwife's behalf; and
- the service is provided to a single patient at the one time. Attending multiple patients on the one occasion, such as group attendances, would not apply; and
- the participating midwife is not an employee of a public hospital, or is an employee of a public hospital but provides services other than in his or her capacity as a public hospital employee.

Subsection 10(2) provides that subsection 10(1) applies whether or not another person provides essential assistance to the participating midwife in providing the service.

Subsection 10(3) requires that for a midwifery item to apply, the patient must be in attendance when the service is provided.

Subsections 10(4) and 10(5) provide clarification of the content of the requirement for 'professional attendance' in items 82100 – 82115 and items 82130 – 82140. Professional attendance includes the provision of services such as advising on the patient's condition, making clinical notes about the services provided to the patient and formulating a plan for the patient's treatment. However, it does not include supplying a vaccine in connection with the service unless the cost of the vaccine has been subsidised by the Commonwealth or the State.

Section 11 - Other requirement for telehealth and midwifery services

Subsection 11(1) provides that a telehealth midwifery item only applies to a service where no other telehealth support service described in subsection 11(2) is provided to the patient on the same occasion.

Subsection 11(2) specifies the items to which the subsection applies, being the other midwife and nurse practitioner telehealth items in the Determination, and those items for telehealth support services which are specified in the general medical services table.

Subsection 11(3) provides that certain items do not apply if the practitioner travels to a place to satisfy the requirement in sub-subparagraph (c)(i)(B) of those items.

Section 12 - Labour and delivery

Subsection 12(1) requires that for confinement items 82120 and 82125 to apply, the service must be provided during a period of exclusive care of a patient in labour by the participating midwife. This means that the participating midwife attends the patient for the duration of the service to the exclusion of all other patients. The midwife could not be managing more than one patient on the one occasion and sharing his or her time between them.

Subsection 12(2) provides that where a patient's care is referred to an obstetrician or medical practitioner by a participating midwife prior to the commencement of labour, with that medical practitioner or obstetrician managing the patient's labour and delivery, the midwife is precluded from also providing care during the confinement under items 82120 and 82125.

Subsection 12(3) recognises that there will be circumstances where the participating midwife is unable to undertake the patient's delivery under item 82120, either because the woman's labour exceeds twelve hours and care is transferred to a second midwife, or where there is a clinical need to escalate care to a medical practitioner or where there are exceptional circumstances. This subsection enables the payment of Medicare benefits in these circumstances. Medicare benefits are not payable under item 82120 where a participating midwife routinely provides care during labour for patients that a medical practitioner intends to deliver.

Subsection 12(4) recognises that there will be circumstances where a participating midwife to whom a patient has been transferred is unable to undertake the patient's delivery under item 82125, either because:

- the woman's labour exceeds twenty four hours (being twelve hours under the care of the first midwife from whom the patient has been transferred and twelve hours under the care of the midwife to whom the patient was transferred) and care is transferred to another midwife; or
- there is a clinical need to escalate care to a medical practitioner.

This subsection enables the payment of Medicare benefits in these circumstances. Medicare benefits are not payable under item 82125 where a participating midwife routinely provides care during labour for patients that a medical practitioner intends to deliver.

Part 3 Nurse practitioner services

Section 13 Treatment of nurse practitioner services – general

Paragraph 13(a) provides that, subject to section 14, nurse practitioner services provided in accordance with the Determination are to be treated, for the purposes of section 3C of the Act, as if they were both a professional service and a medical service for the purposes of the provisions of the Act, the *National Health Act 1953* and regulations made under each Act which provide for medical services or professional services.

Paragraph 13(b) provides that, subject to section 14, these services are to be treated as if there were an item in the GMST that related to the relevant service and specified a fee for that service, being the respective fee specified in Parts 1 and 2 of Schedule 2 of the Determination in relation to the service.

Section 14 - Treatment of nurse practitioner services - pathology

Paragraph 14(a) provides that nurse practitioner services specified in Part 1 of Schedule 2 to the Determination (i.e. nurse practitioner pathology services) are to be treated as if they were both a professional service and a medical service for the purposes of the provisions of the Act, the *National Health Act 1953* and regulations made under each Act which provide for medical services or professional services.

Paragraph 14(b) provides that these services are to be treated as if there were an item in the PST that related to the relevant service and specified a fee for that service, being the fee specified in Part 1 of Schedule 2 in relation to the service.

Section 15 – Collaborative arrangements and scope of practice

Subsection 15(1) provides that a nurse practitioner item only applies where the service is provided in accordance with collaborative arrangements in place for the patient and within the scope of practice of the participating nurse practitioner.

Subsection 15(2) provides that a collaborative arrangement, in respect of a patient of a participating nurse practitioner, is an arrangement mentioned in regulation 7 of the *Health Insurance Regulations 2018*.

Section 16 – General requirements

Subsection 16(1) provides that the nurse practitioner items, other than nurse practitioner pathology items, only apply where:

- the service is personally performed by the participating nurse practitioner. Accordingly, these services cannot be performed by another practitioner on a nurse practitioner's behalf; and
- the services is provided to a single patient at the one time. Attending multiple patients on the one occasion, such as group attendances, would not apply; and
- the participating nurse practitioner is not an employee of a public hospital, or is an employee of a public hospital but provides services other than in his or her capacity as a public hospital employee.

Subsection 16(2) provides that subsection 16(1) applies whether or not another person provides essential assistance to the participating nurse practitioner in providing the service.

Subsection 16(3) requires that for a nurse practitioner item other than a nurse practitioner pathology item applies, the patient must be in attendance when the service is provided.

Subsections 16(4) and 16(5) provide clarification of the content of the requirement for 'professional attendance' in the nurse practitioner items which are set out in Part 2 of Schedule 2 of the Determination. The content of professional attendance for nurse practitioners is the same as that for participating midwives.

Section 17 – Requirements for pathology items

Subsection 17 provides that the nurse practitioner pathology items only apply if the participating nurse practitioner who renders the service is not an employee of a public hospital, or is an employee of a public hospital but provides services other than in his or her capacity as a public hospital employee.

Section 18 – Other requirements for telehealth nurse practitioner services

Subsection 18(1) provides that the telehealth nurse practitioner items only apply to a service provided no other telehealth support service described in subsection 18(2) is provided to the patient on the same occasion. This avoids duplication of telehealth services.

Subsection 18(2) specifies the items to which may not be duplicated on the same occasion, being the other midwife and nurse practitioner telehealth items in the Determination, and those items for telehealth support services which are specified in the general medical services table.

Subsection 18(3) provides that items do not apply if the practitioner travels to a place to satisfy the requirement in sub-subparagraph (c)(i)(B) of the item.

Schedule 1 – Midwifery services and fees

Part 1 Midwifery services and fees

Part 1 of Schedule 1 of the Determination sets out the relevant general midwifery services, assigns applicable item numbers, item descriptors and fees for those services. These 9 items in Group M13 Subgroup 1 enable the payment of Medicare benefits to patients of participating midwives for antenatal, birthing and postnatal care.

Part 2 Telehealth midwifery services and fees

Part 2 of Schedule 1 of the Determination sets out the relevant telehealth midwifery services, assigns applicable item numbers, item descriptors and fees for the services. These 3 items in group M13 Subgroup 2, enable the payment of Medicare benefits to patients of participating midwives for telehealth support services.

Schedule 2 Nurse Practitioner services and fees

Part 1 Nurse practitioner pathology services and fees

Part 1 of Schedule 2 of the Determination sets out the relevant nurse practitioner pathology services, assigns applicable item numbers, item descriptors and fees for the service. These 10 items in Group P9 - simple basic pathology tests, have not been subject to indexation as pathology service items have not been indexed and are subject to separate review.

Part 2 Nurse practitioner services and fees

Part 2 of Schedule 2 of the Determination sets out the general nurse practitioner services, assigns applicable item numbers, and item descriptors and fees for the services. These 4 items are placed in Group M14 subgroup 1.

Part 3 Telehealth nurse practitioner services and fees

Part 3 of Schedule 2 of the Determination sets out the relevant telehealth nurse practitioner services, assigns applicable item numbers, item descriptors and fees for the services. These 6 items enable the payment of Medicare benefits to patients of participating nurse practitioners for telehealth support services in Group M14 subgroup 2.

Statement of Compatibility with Human Rights

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

Health Insurance (Section 3C Midwife and Nurse Practitioner Services) Determination 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 Midwife and Nurse Practitioner) Determination 2020* (the Determination) is to repeal and remake the *Health Insurance (Midwife and Nurse Practitioner) Determination 2015* (the previous Determination) and prescribe a new table of midwife and nurse practitioner services from 1 July 2020. This will ensure that Medicare benefits continue to be payable for midwife and nurse practitioner services performed by those practitioners.

This Determination will also apply indexation for midwife and nurse practitioner services by replacing the fees in the previous Determination with fees indexed by 1.5%. This reflects the Government's policy regarding Medicare indexation and means that patients will receive a higher Medicare benefit for these services from 1 July 2020.

Human rights implications

This instrument may engage 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 furthers the right to health and the right to social security because it will increase the Medicare benefit for patients accessing the prescribed health services. This will assist patients to continue accessing clinically relevant health services, consistent with the rights to health and social security.

Conclusion

This instrument is compatible with human rights.

Paul McBride
First Assistant Secretary
Medical Benefits Division
Health Financing Group
Department of Health