

EXPLANATORY STATEMENT

Health Insurance Act 1973

Health Insurance (Section 3C Pathology Services – COVID-19) Amendment (No. 4) 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 pathology 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 4A(1) of the Act. The most recent version of the regulations is the *Health Insurance (Pathology Services Table) Regulations 2020*.

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

On 25 July 2020, the Minister for Health, the Hon Greg Hunt MP, and the Minister for Aged Care and Senior Australians, Senator the Hon Richard Colbeck, announced the Australian Government would establish a Victorian Aged Care Response Centre to coordinate and expand resources to tackle the challenge of coronavirus (COVID-19) in aged care.

The purpose of the *Health Insurance (Section 3C Pathology Services – COVID-19) Amendment (No. 4) Determination 2020* (Amending Determination) is to introduce a new item for SARS-COV-2 testing of aged care workers in Victoria. This will assist providers of aged care services to manage their workforce appropriately to prevent the spread of COVID-19 in residential aged care facilities. The MBS item will facilitate regular screening of asymptomatic aged care and residential care employees that care or otherwise provide services for the elderly in Victoria. People who are employed, hired, retained, contracted or otherwise work with the elderly in Victoria will be able to go to a private sector collection centre for repeat COVID-19 tests as required without a request from a medical practitioner. Samples may also be collected under Government direction if required and the samples provided to private pathology providers in Victoria for collection.

The Amending Determination will amend the *Health Insurance (Section 3C Pathology Services – COVID-19) Determination 2020* (the Principal Determination) to list a new rapid COVID-19 screening test for aged care workers (item 69501) performed by the private pathology sector. The test will be available to workers who provide aged care services in residential aged care facilities, home care, or in the community.

A patient episode initiation (PEI) rebate or bulk billing incentive (BBI) will not be applicable with the MBS item 69501 test. However, an increased MBS fee has been

applied for new MBS item 69501 so that it is equivalent to the total MBS rebate paid for MBS item 69480 when claimed with the relevant PEI and BBI for a private sector collection centre sample. A PEI and BBI has not been applied to MBS item 69501 as the Government may be required to assist with collecting samples in particular cases, which would not attract a PEI or BBI.

Performance of item 69501 is conditional on the results of the test being provided to the aged care worker and the Victorian public health unit within 24 hours of delivery of the pathology specimen to an accredited pathology laboratory.

The service must be bulk-billed at no cost to the aged care worker, and it cannot be performed with another pathology item in the Principal Determination or in the pathology services table.

This service does not replace the existing SARS-COV-2 items in the Principal Determination for testing patients who may have contracted COVID-19. For these patients, the following items should be claimed:

- item 69479 where the service is performed for private patients in public pathology laboratories; or
- item 69480 where the service is performed by the private pathology sector.

Consultation

On 25 July 2020, the Minister for Health and the Minister for Aged Care and Senior Australians announced measures to support the Victorian Government to manage the outbreaks of COVID-19 in residential aged care facilities.

Due to the short timeframe in drafting this legislative instrument to implement screening of asymptomatic aged care workers, it was not reasonably practicable to undertake consultation with representatives of persons affected by the instrument considering the nature of the emergency.

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

The Amending Determination commences immediately after registration of the instrument.

The Amending 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 Pathology Services – COVID-19) Amendment (No. 4) Determination 2020

Section 1 – Name

Section 1 provides for the instrument to be referred to as the *Health Insurance (Section 3C Pathology Services – COVID-19) Amendment (No. 4) Determination 2020*.

Section 2 – Commencement

Section 2 provides that the instrument commences immediately after registration.

Section 3 – Authority

Section 3 provides that the instrument 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 Amending 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 Amending Determination has effect according to its terms.

Schedule 1 – Amendments

Subsection 3C(3) of the Act provides that a determination made under subsection 3C(1) may make provision for and in relation to the specification of a matter or thing by applying, adopting or incorporating, with or without modification, the provisions of this Act or the regulations as in force at a particular time or as in force from time to time.

Subsection 5(2) of the Principal Determination states that, unless the contrary intention appears, a reference in the Principal Determination to a provision of the Act or the *National Health Act 1953* or regulations made under the Act or under the *National Health Act 1953* as applied, adopted or incorporated in relation to specifying a matter is a reference to those provisions as in force from time to time and any other reference to provisions of an Act or regulations is a reference to those provisions as in force from time to time.

Item 3 of the Amending Determination repeals and substitutes section 6 (the heading is retained) of the Principal Determination to specify what provisions apply in relation to health services in the instrument. Item 3 will:

- Insert subsection 6(1) which states that items 69476, 69477, 69479 or 69480 of the Principal Determination are treated, for the relevant provisions, as if each service were a professional service and a pathology service. Effectively this applies the arrangements that apply to most MBS-funded pathology services.
- Insert subsection 6(2) which states that item 69501 is treated, for the relevant provisions, as if it were a pathology service other than provisions which relate to pathology requests.

- Insert subsection 6(3) which set out the specific provisions which relate to the excluded pathology request provisions in section 16A of the Act, for the purpose of item 69501.

The excluded provisions set out, inter alia, the circumstances in which Medicare benefits will be payable in respect of pathology services and detail the requirements for pathology services which must be rendered pursuant to a request. It is necessary to exclude these provisions from applying in respect of the relevant services to enable item 69501 to be instigated by the action of the aged care workers (providing a specimen), rather than a request from a treating practitioner, to facilitate health screening of the aged care workforce. It remains a requirement that the test is performed by or on behalf of an approved pathology practitioner, in an accredited pathology laboratory, which is owned by an approved pathology authority.

Item 4 of the Amending Determination inserts new item 69501. The item will be available to a person who provides aged care services in Victoria. This includes a person who works for an ‘approved provider’ in the *Aged Care Act 1997* (an aged care provider receiving Commonwealth subsidies) or a person who provides an ‘aged care service’ in Victoria (a person who undertakes residential care, home care, or other aged care in the community). Also see item 1 of this instrument.

The test must be:

- bulk-billed by the approved pathology practitioner who performs the test; and
- performed by the private pathology sector; and
- the results of the tests must be provided to the person being tested and to the appropriate Victorian health authority in accordance with Victorian legislation and regulations , within 24 hours of delivery of the pathology specimen to the accredited pathology laboratory where the service is rendered.

Statement of Compatibility with Human Rights

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

Health Insurance (Section 3C Pathology Services – COVID-19) Amendment (No. 4) 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

On 25 July 2020, the Minister for Health, the Hon Greg Hunt MP, and the Minister for Aged Care and Senior Australians, Senator the Hon Richard Colbeck, announced the Australian Government would establish a Victorian Aged Care Response Centre to co-ordinate and expand resources to tackle the challenge of coronavirus (COVID-19) in aged care.

The purpose of the *Health Insurance (Section 3C Pathology Services – COVID-19) Amendment (No. 4) Determination 2020* is to introduce a new item for SARS-COV-2 testing of aged care workers in Victoria. This will assist providers of aged care services to prevent the spread of COVID-19 in residential aged care facilities and enable the rapid screening of asymptomatic aged care employees. This will help protect Australian residents receiving some form of aged care support, who are at greater risk of serious illness from COVID-19.

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 aged care workers in Victoria can be screened for COVID-19. This will assist providers of aged care services to prevent the spread of COVID-19 in residential aged care facilities and enable the rapid screening of asymptomatic aged care employees.

Conclusion

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

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