

## EXPLANATORY STATEMENT

### *Health Insurance Act 1973*

#### *Health Insurance (Section 3C General Medical – Expansion of GP and Allied Health Mental Health 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. The most recent version of the Table is the *Health Insurance (General Medical Services Table) Regulations (No. 2) 2020*.

#### **Purpose**

On 2 August 2020, the Minister for Health, the Hon Greg Hunt MP, announced the Australian Government will make available additional Medicare Benefits Schedule (MBS) subsidised mental health support services for people subject to further restrictions outlined in public health orders as part of the coronavirus (COVID-19) pandemic. These people will receive temporary access between 7 August 2020 and 31 March 2021 to a further 10 additional Medicare-subsidised psychological therapy sessions.

The *Health Insurance (Section 3C General Medical – Expansion of GP and Allied Health Mental Health Services) Determination 2020* (the Determination) will list 36 new mental health treatment items provided by medical practitioners working in general practice, psychologists, psychiatrists, occupational therapists and social workers from 7 August 2020.

The new items will be available to people who:

- have been referred for mental health treatment services under the ‘Better Access to Psychiatrists, Psychologists and General Practitioners through the Medicare Benefits Schedule’ (otherwise known as the ‘Better Access’ initiative); and
- have accessed the limit of 10 Better Access treatment services within a calendar year; and
- have had the effectiveness of their mental health treatment reviewed following delivery of the initial 10 Better Access treatment services in a calendar year by a medical practitioner working in general practice, a psychiatrist or a paediatrician, and the reviewing medical practitioner considers the treatment has been effective (or treatment has not been effective, but additional treatment may be effective) and it is clinically appropriate for the person to access additional mental health treatment services; and
- meet the conditions of a ‘person with a mental health disorder subject to COVID-19 public health orders’ in the instrument.

People who meet those conditions will be eligible for up to 10 additional mental health treatment services which can be accessed through services in person at consulting rooms until 31 March 2021. Alternatively, they can be accessed via telehealth or phone until 30

September 2020, consistent with Government policy to provide temporary access to remote service options during the COVID-19 pandemic.

**Consultation**

Due to the short timeframe in drafting this legislative instrument to implement the new mental health items, it was not reasonably practicable to undertake consultation with representatives of persons affected by the instrument considering the nature of the emergency. The Government has received stakeholder advice supporting the extension of the Better Access Initiative and this advice was used to inform this measure.

Details of the Determination are set out in the Attachment.

The Determination commences on 7 August 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*

**Details of the Health Insurance (Section 3C General Medical – Expansion of GP and Allied Health Mental Health Services) Determination 2020**

Section 1 – Name

Section 1 provides for the instrument to be referred to as the *Health Insurance (Section 3C General Medical – Expansion of GP and Allied Health Mental Health Services) Determination 2020*.

Section 2 – Commencement

Section 2 provides that the instrument commences on 7 August 2020.

Section 3 – Authority

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

Section 4 – Cessation

Section 4 provides that, unless revoked earlier, Schedule 2 will cease on 30 September 2020 and the instrument will cease on 31 March 2021.

Section 5 – Definitions

Section 5 defines terms used in the instrument.

Section 6 – Treatment of relevant services

Section 6 provides that a clinically relevant service provided in accordance with the Determination shall be treated, for relevant provisions of the *Health Insurance Act 1973* and *National Health Act 1953*, and regulations made under those Acts, as if it were both a professional service and a medical service and as if there were an item specified in the general medical services table for the service.

Section 7 – Application of items in this instrument

Subsection 7(1) applies a general condition of access for the items in this instrument (the ‘better access subsequent treatment services’ as defined in section 5).

Paragraph 7(1)(a) requires a person to have received 10 ‘better access initial treatment services’ as defined in section 5. This includes mental health treatment services under Better Access that are limited to a maximum of 10 services, for any particular patient, in a calendar year. It does not include the eating disorder mental health treatment services available under Medicare.

Paragraph 7(1)(b) requires the person to have been reviewed by a ‘reviewing practitioner’ to determine if continued mental health treatment under Better Access is appropriate. The reviewing practitioner is limited to the same types of doctor who can grant the patient access to the better access

initial treatment services: a medical practitioner in general practice; a psychiatrist; or a paediatrician.

The review must be conducted after the 10<sup>th</sup> Better Access initial treatment services performed in the calendar year. If the reviewing practitioner considers the person is responding to mental health treatment under Better Access (or they may respond to additional mental health treatment), and determines that a higher intensity of treatment would be appropriate for the management of the patient's mental health disorder, they must record their recommendation of access to the temporary additional mental health treatment available under Better Access. The reviewing practitioner must record the recommendation by modifying the patient's plan (the GP mental health treatment plan, shared care plan or psychiatrist assessment and management plan), or where no such plan exists, by creating a separate written record.

Subsection 7(2) applies a general limitation that, for any particular patient, no more than 10 better access subsequent treatment services can be performed.

### Section 8 – Application of items in Group A41

Section 8 applies condition specific to the focussed psychological strategy services performed by general practitioners and other medical practitioners working in general practice (item in Group A41 of this instrument).

Subsection 8(1) requires that a person must have a GP mental health treatment plan or a psychiatrist assessment and management plan to access any of items 93300 to 93311. This is consistent with the arrangements which apply to the initial Better Access general practice focussed psychological strategy treatment consulting room services (items 2721 and 2725 of the general medical services table, and items 283 and 286 of the *Health Insurance (Section 3C General Medical Services – Other Medical Practitioner) Determination 2018*).

Subsection 8(2) requires that the general practitioner or other medical practitioner working in general practice who renders the service must be registered with the Chief Executive Medicare and have appropriate mental health treatment training and skills requirements.

Subsection 8(3) requires that a phone attendance item is not to be performed if the patient prefers an in person service (and it is safe and possible for the service to be performed) or the service can be performed by telehealth.

Subsections 8(4) and (5) require that general practitioners and other medical practitioners working in general practice must only perform a telehealth or phone attendance service where they have an existing relationship with the patient, as defined by the *Health Insurance (Section 3C General Medical Services - COVID-19 Telehealth and Telephone Attendances) Determination 2020*. This requirement does not apply to a person who is under the age of 12 months, a person who is experiencing homelessness, a person who is in a COVID-19 impacted area, or a person who receives the service from a medical practitioner located at an Aboriginal Medical Service or an Aboriginal Community Controlled Health Service. This arrangement is consistent with the arrangements which apply to the initial Better Access general practice focussed psychological strategy treatment services performed by telehealth or phone.

### Section 9 – Effect of election to claim private health insurance for an allied health service

Section 9 limits the allied health services in the instrument (items in Groups M25 and M26) from being claimed if a private health insurance benefit has been claimed for the service.

### Schedules

Schedules 1 and 2 prescribe the temporary better access subsequent treatment services which can be rendered to a 'person with a mental health disorder subject to COVID-19 public health orders', as defined in section 5 of the instrument.

Schedule 1 lists the services which can be performed in person at consulting rooms until 31 March 2021, including:

- Items in subgroup 1 of Group A41 which provide eligible patients access to focussed psychological strategy services by general practitioners;
- Items in subgroup 2 of Group A41 which provide eligible patients access to focussed psychological strategy services by other medical practitioners in general practice;
- Items in Group M25 which provide eligible patients access to psychological therapy health services by other eligible clinical psychologists; and
- Items in Group M26 which provide eligible patients access to focussed psychological strategy services performed by eligible psychologists (subgroups 1 and 2), eligible occupational therapists (subgroup 3) and eligible social workers (subgroup 4).

Schedule 2 lists the services which can be performed by telehealth or phone until 30 September 2020, including:

- Items in subgroup 1 of Group A41 which provide eligible patients access to focussed psychological strategy services by general practitioners;
- Items in subgroup 2 of Group A41 which provide eligible patients access to focussed psychological strategy services by other medical practitioners in general practice;
- Items in Group M25 which provide eligible patients access to psychological therapy health services by other eligible clinical psychologists; and
- Items in Group M26 which provide eligible patients access to focussed psychological strategy services performed by eligible psychologists (subgroups 1 and 2), eligible occupational therapists (subgroup 3) and eligible social workers (subgroup 4).

## 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 – Expansion of GP and Allied Health Mental Health 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

On 2 August 2020, the Minister for Health, the Hon Greg Hunt MP, announced the Australian Government will make available additional Medicare Benefits Schedule (MBS) subsidised mental health support services for people subject to further restrictions outlined in public health orders as part of the coronavirus (COVID-19) pandemic. These people will receive temporary access between 7 August 2020 and 31 March 2021 to a further 10 additional Medicare-subsidised psychological therapy sessions.

The *Health Insurance (Section 3C General Medical – Expansion of GP and Allied Health Mental Health Services) Determination 2020* (the Determination) will list 36 new mental health treatment items provided by medical practitioners working in general practice, psychologists, psychiatrists, occupational therapists and social workers from 7 August 2020.

The new items will be available to people who:

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- have accessed the limit of 10 Better Access treatment services within a calendar year; and
- have had the effectiveness of their mental health treatment reviewed following delivery of the initial 10 Better Access treatment services in a calendar year by a medical practitioner working in general practice, a psychiatrist or a paediatrician, and the reviewing medical practitioner considers the treatment has been effective (or treatment has not been effective, but additional treatment may be effective) and it is clinically appropriate for the person to access additional mental health treatment services; and
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People who meet those conditions will be eligible for up to 10 additional mental health treatment services which can be accessed through services in person at consulting rooms until 31 March 2021. Alternatively, they can be accessed via telehealth or phone until 30 September 2020, consistent with Government policy to provide temporary access to remote service options during the COVID-19 pandemic.

### 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 are affected by further restrictions outlined in public health orders as part of the COVID-19 pandemic can access additional publicly subsidised mental health services on a temporary basis.

#### **Conclusion**

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

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