

EXPLANATORY STATEMENT

Health Insurance Act 1973

Health Insurance (Section 3C General Medical – Expansion of GP and Allied Health Mental Health Services) Amendment (Expand Eligible Patients) 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 regulations is the *Health Insurance (General Medical Services Table) Regulations (No. 2) 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

Since 7 August 2020, the Australian Government has been providing Medicare benefits to assist certain people to receive additional mental health support services under the Medicare Benefits Schedule (MBS).

The *Health Insurance (Section 3C General Medical – Expansion of GP and Allied Health Mental Health Services) Determination 2020* (the Principal Determination) prescribes 36 temporary items to allow certain patients to access up to an additional 10 mental health treatment services under the ‘Better Access’ initiative (also known as the ‘Better Access to Psychiatrists, Psychologists and General Practitioners through the Medicare Benefits Schedule’). These items are available to people subject to certain restrictions outlined in public health orders as part of the response to the coronavirus (COVID-19) pandemic.

The purpose of the *Health Insurance (Section 3C General Medical – Expansion of GP and Allied Health Mental Health Services) Amendment (Expand Eligible Patients) Determination 2020* (the Amendment Determination) is to allow any Medicare-eligible person to access up to 10 additional treatment services in a calendar year for treatment of a mental health disorder (**additional Better Access treatment services**). These services are in addition to the existing 10 mental health treatment services which are available to people with a mental health disorder each calendar year under Better Access (**initial Better Access treatment services**).

The Amendment Determination will remove the requirement for a person to have a formal review as a condition of accessing the **additional Better Access treatment services**. This will allow a person to carry over the balance of their **additional Better Access treatment services** to a subsequent calendar year if they have not used their

full allocation of services within a calendar year. It remains a requirement that a person can have no more than 10 **additional Better Access treatment services** in a calendar year.

It also remains a requirement that a person accessing **additional Better Access treatment services** from an allied health professional must have been referred by a medical practitioner in general practice, a psychiatrist or a paediatrician. A person accessing **additional Better Access treatment services** from a GP does not need a referral but requires the need for the services to be indicated in their GP mental health treatment plan or psychiatrist assessment and management plan.

The Amendment Determination will also extend the availability of the temporary **additional Better Access treatment services** which are performed in person (Schedule 1 of the Principal Determination) from 31 March 2021 to 30 June 2022. The **additional Better Access treatment services** performed by telehealth and phone (Schedule 2 of the Principal Determination) will remain available until 31 March 2021, consistent with the advice of the Australian Health Protection Principal Committee to support quarantine and infection control measures.

Consultation

The Government has received stakeholder advice supporting the extension of the Better Access initiative and this advice was used to inform development of this legislative instrument. It was not reasonably practicable to undertake consultation with all representatives of persons affected by the instrument considering the nature of the emergency.

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

The Amendment Determination commences on 9 October 2020.

The Amendment 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 General Medical – Expansion of GP and Allied Health Mental Health Services) Amendment (Expand Eligible Patients) Determination 2020Section 1 – Name

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

Section 2 – Commencement

Section 2 provides that the Amendment Determination commences on 9 October 2020.

Section 3 – Authority

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

Schedule 1 – Amendments

Item 1 of the Amendment Determination changes the cessation date of the Principal Determination from 31 March 2021 to 30 June 2022. This will extend the availability of the **additional Better Access treatment services** which are performed in person.

Items 2, 4 and 6 of the Amendment Determination remove the requirement for eligible persons to be subject to certain restrictions outlined in public health orders as part of the response to COVID-19. Any Medicare-eligible person will now have access to the **additional Better Access treatment services**, provided the service is rendered in accordance with the item descriptor and the application provisions in the Principal Determination.

Item 3 of the Amendment Determination repeals subsection 7(1). Section 7 of the Principal Determination formerly required a person to meet the following conditions to access the **additional Better Access treatment services**:

- a person must have received 10 **initial Better Access treatment services** in a calendar year; and
- following the 10th **initial Better Access treatment service** performed in the year, the person was required to be reviewed by a medical practitioner in general practice, a psychiatrist or a paediatrician to determine if continued mental health treatment under Better Access was appropriate. If the reviewing practitioner considered the person was responding to mental health treatment under Better Access (or they may respond to

additional treatment), the practitioner was required to record their recommendation of access to the **additional Better Access treatment services**.

The Amendment Determination will remove the requirement for a person to have a formal review as a condition of accessing the **additional Better Access treatment services**. This will allow a person to carry over the balance of their **additional Better Access treatment services** to a subsequent calendar year if they have not used their full allocation of services within a calendar year. Subsection 7(2) of the Principal Determination retains the requirement that a person can have no more than 10 **additional Better Access treatment services** in a calendar year.

Items 5 and 7 of the Amendment Determination amend paragraph (b) of the **additional Better Access treatment services** performed by allied health professionals to clarify the minimum administrative conditions on referring practitioners. A referring practitioner must make a written record of the need for **additional Better Access treatment services**. A referring practitioner can satisfy this requirement 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.

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) Amendment (Expand Eligible Patients) 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

Since 7 August 2020, the Australian Government has been providing Medicare benefits to assist certain people to receive additional mental health support services under the Medicare Benefits Schedule (MBS).

The *Health Insurance (Section 3C General Medical – Expansion of GP and Allied Health Mental Health Services) Determination 2020* (the Principal Determination) prescribes 36 temporary items to allow certain patients to access up to an additional 10 mental health treatment services under the ‘Better Access’ initiative (also known as the ‘Better Access to Psychiatrists, Psychologists and General Practitioners through the Medicare Benefits Schedule’). The items are available to people subject to certain restrictions outlined in public health orders as part of the response to the coronavirus (COVID-19) pandemic.

The purpose of the *Health Insurance (Section 3C General Medical – Expansion of GP and Allied Health Mental Health Services) Amendment (Expand Eligible Patients) Determination 2020* (the Amendment Determination) is to allow any Medicare-eligible person to access up to 10 additional treatment services in a calendar year for treatment of a mental health disorder (**additional Better Access treatment services**). These services are in addition to the existing 10 mental health treatment services which are available to people with a mental health disorder each calendar year under Better Access (**initial Better Access treatment services**).

The Amendment Determination will remove the requirement for a person to have a formal review as a condition of accessing the **additional Better Access treatment services**. This will allow a person to carry over the balance of their **additional Better Access treatment services** to a subsequent calendar year if they have not used their full allocation of services within a calendar year. It remains a requirement that a person can have no more than 10 **additional Better Access treatment services** in a calendar year.

The Amendment Determination will also extend the availability of the temporary **additional Better Access treatment services** which are performed in person (Schedule 1 of the Principal Determination) from 31 March 2021 to 30 June 2022. The **additional Better Access treatment services** performed by telehealth and phone (Schedule 2 of the Principal Determination) will remain available until 31 March 2021, consistent with the advice of the Australian Health Protection Principal Committee to support quarantine and infection control measures.

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 extending eligibility to the temporary additional mental health treatment services available under Better Access to any Medicare-eligible person with a mental health disorder.

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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