

EXPLANATORY STATEMENT

Health Insurance Act 1973

Health Legislation Amendment (Administration) Regulations 2020

Subsection 133(1) of the *Health Insurance Act 1973* (the Health Insurance Act) provides that the Governor-General may make regulations, not inconsistent with that Act, prescribing all matters required or permitted by that Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to that Act.

Part II of the Health Insurance Act provides for the payment of Medicare benefits for professional services rendered to eligible persons. Section 9 of the Health Insurance Act provides that Medicare benefits be calculated by reference to the fees for medical services set out in prescribed tables.

Subsections 4AA(1) and 4A(1) of the Health Insurance Act provides that regulations may prescribe a table of diagnostic imaging and pathology services which sets out items of diagnostic imaging and pathology services, the fees applicable for each item, and rules for interpreting the table. The tables made under these subsections are referred to as the diagnostic imaging services table and the pathology services table. The most recent version of these regulations are the *Health Insurance (Diagnostic Imaging Services Table) Regulations (No. 2) 2020* (DIST) and the *Health Insurance (Pathology Services Table) Regulations 2020* (PST).

The *Human Services (Medicare) Act 1973* (the Human Services Medicare Act) sets out the functions and powers of the Chief Executive Medicare, as well as a number of other miscellaneous provisions, relating to the administration of Medicare. Section 44 of the Human Services Medicare Act provides that the Governor-General may make regulations, not inconsistent with that Act, prescribing all matters required or permitted by that Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to that Act. The *Human Services (Medicare) Regulations 2017* are made under the Human Services Medicare Act.

This instrument relies on subsection 33(3) of the *Acts Interpretation Act 1901* (the 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 3 September 2020, the Health Insurance Amendment (Administration) Bill 2020 (the bill) was introduced to the House of Representatives. The bill will make minor administrative changes to improve the operation of the Health Insurance Act commencing the day after Royal Assent.

The purpose of the *Health Legislation Amendment (Administration) Regulations 2020* (the Regulations) is to make consequential changes to three legislative instruments which reference provisions or terms in the Health Insurance Act which will become

redundant upon commencement of the *Health Insurance Amendment (Administration) Act 2020* (Administration Act).

Consultation

Consultation was not undertaken on the Regulations as the amendments are editorial only and do not alter existing arrangements.

Details of the Regulations are set out in the Attachment.

The Regulations begin upon the commencement of the Administration Act. If the Administration Act has commenced, the Regulations commence the day after the instrument is registered.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

Authority: Subsection 133(1) of the *Health Insurance Act 1973* and section 44 of the *Human Services (Medicare) Act 1973*

Details of the *Health Legislation Amendment (Administration) Regulations 2020*

Section 1 – Name

This section provides the name of the Regulations is the *Health Legislation Amendment (Administration) Regulations 2020*.

Section 2 – Commencement

This section provides the Regulations will have effect upon commencement of the *Health Insurance Amendment (Administration) Act 2020* (Administration Act). If the Administration Act has commenced, the Regulations commence the day after the instrument is registered. The Regulations do not commence at all if the Administration Act does not commence.

Section 3 – Authority

This section provides the Regulations are made under the *Health Insurance Act 1973* and under the *Human Services (Medicare) Act 1973*.

Section 4 – Schedules

This section provides that each instrument that is specified in a Schedule to this instrument is amended as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 – Amendments

Item 1 amends the *Health Insurance (Diagnostic Imaging Services Table) Regulations (No. 2) 2020* to replace “subsection 4AA(1)” with “section 4AA”. The Administration Act will omit the (1) from subsection 4AA (so it becomes the text under section 4AA) as a consequential change from the removal of subsection 4AA(2). The Amendment Act removes the annual sunset period for the diagnostic imaging services table to reduce unnecessary administrative work and mitigate the risk that an error during the remake process could affect patient entitlements to benefits under Medicare.

Item 2 amends the *Health Insurance (Pathology Services Table) Regulations 2020* to replace “subsection 4A(1)” with “section 4A”. The Administration Act will omit the (1) from subsection 4A (so it becomes the text under section 4A) as a consequential change from the removal of subsection 4A(2). The Amendment Act removes the annual sunset period for the pathology services table to reduce unnecessary administrative work and mitigate the risk that an error during the remake process could affect patient entitlements to benefits under Medicare.

Item 3 amends paragraph 35(e) of the *Human Services (Medicare) Regulations 2017* to replace “participating optometrist” with “optometrist”. The Administration Act will remove the requirement for optometrists, or employers of optometrists, to enter into an undertaking with the Minister of Health (to become a ‘participating optometrist’) as a condition of rendering an optometry service under Medicare.

Statement of Compatibility with Human Rights

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

Health Legislation Amendment (Administration) Regulations 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 Disallowable Legislative Instrument

On 3 September 2020, the Health Insurance Amendment (Administration) Bill 2020 (the bill) was introduced to the House of Representatives. The bill will make minor administrative changes to improve the operation of the *Health Insurance Act 1973* commencing the day after Royal Assent.

The purpose of the *Health Legislation Amendment (Administration) Regulations 2020* (the Regulations) is to make consequential changes to three legislative instruments which reference provisions or terms in the *Health Insurance Act 1973* which will become redundant upon commencement of the *Health Insurance Amendment (Administration) Act 2020* (Administration Act).

Human rights implications

The Regulations engage Articles 9 and 12 of the International Covenant on Economic Social and Cultural Rights (ICESCR), specifically the rights to social security and health.

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

The Regulations makes consequential changes to three legislative instruments to update redundant provisions or terms in the *Health Insurance Act 1973*. There is no change to persons' rights or entitlements to health or social security.

Conclusion

The Regulations are compatible with human rights as it promotes the protection of the human rights contained in Articles 9 and 12 of the ICESCR.

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