

EXPLANATORY STATEMENT

Health Insurance Act 1973

Health Insurance (Section 3C General Medical – Expansion of GP and Allied Health Mental Health Services and Chronic Disease Management) Amendment 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 included 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* (GMST).

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 eligible people to receive additional mental health support services under the Medicare Benefits Schedule (MBS). Eligible people can currently access up to 20 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*’ initiative).

On 30 November 2020, the Australian Government announced a further \$132.2 million in its response to the Royal Commission into Aged Care Quality and Safety’s recommendations on COVID-19.

As part of this commitment, the Government announced it would provide temporary, additional support through the Better Access initiative to aged care residents whose mental health and wellbeing has been affected by the COVID-19 pandemic, or the measures taken to contain its spread. This addresses recommendation three of the Royal Commission, and extends on the Government’s earlier commitment of \$12.4 million to support the mental health and wellbeing of aged care recipients and their families through the Grief and Trauma Response Package.

The Government’s response also included \$12.1 million for additional individual allied health sessions under the Medicare chronic disease management plans and \$15.7 million for allied health group services for care recipients of a residential aged care facility which has been affected by the COVID-19 pandemic or the measures taken to contain its spread.

To support these measures, from 10 December 2020 until 30 June 2022, the *Health Insurance (Section 3C General Medical – Expansion of GP and Allied Health Mental Health Services) Amendment (Care Recipient in a Residential Aged Care Facility) Determination 2020* and the *Health Insurance (Section 3C General Medical – Expansion of GP and Allied Health Chronic Disease Management Services for Care Recipients of a Residential Aged Care Facility) Determination 2020* created new temporary items to enable people who are a care recipient in a residential aged care facility to access:

- mental health treatment services under the Better Access initiative; and
- additional individual and group allied health services for those who have a chronic disease management plan or have had a health assessment.

The purpose of the *Health Insurance (Section 3C General Medical – Expansion of GP and Allied Health Mental Health Services and Chronic Disease Management) Amendment Determination 2020* (Amendment Determination) is to list four new temporary items (941, 942, 2733 and 2735) for care recipients in a residential aged care facility to enable general practitioners and medical practitioners working in general practice to provide initial focussed psychological strategy treatment services for assessed mental health disorders. These new items mirror the existing treatment items 283, 286, 2721 and 2725 but will allow for a flag fall amount plus the standard attendance amount to be claimed for the first patient attended during each in-person attendance at a residential aged care facility. This amount is intended to reflect the costs practitioners incur when providing professional services in residential aged care facilities, and aligns with the provision of other mental health services for these patients.

The Amendment Determination also makes minor administrative changes to reflect the policy intent of the mental health treatment and additional chronic disease management services.

Consultation

The Royal Commission into Aged Care Quality and Safety recommended the urgent creation of items under the MBS to increase the provision of allied health services, including mental health services, to people in aged care facilities during the pandemic. Consultation was undertaken with relevant stakeholders to inform implementation considerations for the Better Access expansion to aged care residents.

Consultation on the drafting of this instrument was not undertaken as the changes are administrative in nature to reflect the policy intent of the measure.

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

Sections 1 to 4 of the Amendment Determination commence immediately after registration. The amendments in Schedule 1 are taken to have commenced retrospectively from 10 December 2020 after the commencement of the *Health Insurance (Section 3C General Medical – Expansion of GP and Allied Health Mental Health Services) Amendment (Care Recipient in a Residential Aged Care Facility) Determination 2020*. This enables a flag fall to be claimed in instances where a medical practitioner has attended a residential aged care facility and provided care recipients of the facility initial focussed psychological strategy treatment services for their assessed mental health disorders.

Subsection 3C(2) of the Act allows for retrospective commencement as it excludes

subsection 12(2) of the *Legislation Act 2003* from applying to determinations made under section 3C(1) of the *Health Insurance Act 1973*. However, the provision does not fall within the circumstances specified in subsection 12(2) of the *Legislation Act 2003* as it does not disadvantage persons existing entitlements and only imposes retrospective liabilities on the Commonwealth.

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 and Chronic Disease Management) Amendment Determination 2020

Section 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 and Chronic Disease Management) Amendment Determination 2020*.

Section 2 – Commencement

Section 2 provides that the Amendment Determination commences immediately after registration on the Federal Register of Legislation. The amendments in Schedule 1 are taken to have commenced retrospectively on 10 December 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 – Schedule

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

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

Amendment 1 makes an editorial amendment by repealing the definition of ***better access initial treatment service*** in the Principal Determination. This definition is no longer required as there are no longer any references to this term in the Principal Determination.

Amendment 2 repeals and substitutes the definition of ***better access subsequent treatment service*** to clarify that this applies to a service that is provided under an item in Schedule 1 or 2 of the Principal Instrument, except for an item in Group A42. This change excludes mental health planning items for care recipients of a residential aged care facility from the count of 10 services.

Amendment 2 also inserts the definition of ***course of treatment***. This incorporates the amended definition in the *Health Insurance (Allied Health Services) Determination 2014* to make it a requirement of the psychological therapy (93375 and 93376) and focussed psychological strategies (93381, 93382, 93383, 93384 and 93385) items that a maximum of six prescribed services can be rendered under a referral for each patient (see **amendment 7**).

Amendment 3 repeals and substitutes subsection 7(2) of the Principal Determination to remove mental health planning items from the requirement that a person is only allowed 10 better access subsequent treatment services for that calendar year. This restriction applies for items listed in Group A41 (additional focussed psychological strategies), M25 (additional psychological therapy services) and M26 (additional focussed psychological strategies for allied mental health).

Amendments 4 and 5 repeal and substitute the application of a flag fall amount for the initial treatment service provided by general practitioners and medical practitioners at a residential aged care facility to include the new initial treatment items. Providers will receive a flag fall amount plus the standard attendance structure for each patient attendance, if the provider attends to the patient at the residential aged care facility. This amount is intended to reflect the costs doctors incur when providing professional services in residential aged care facilities.

Subsection 11(1) of the Principal Determination is replaced to apply that for the first patient attended by a general practitioner at one residential aged care facility, the fee for the service under item 2733, 2735, 93400, 93401, 93402, 93403, 93421, 93287 and 93288 applies plus \$66.75.

Subsection 11(2) of the Principal Determination is replaced to apply that for the first patient attended by a medical practitioner at one residential aged care facility, the fee for the service under item 941, 942, 93431, 93432, 93433, 93434, 93451, 93291 and 93292 applies plus \$48.55.

Amendment 6 inserts Schedule 4 which outlines the services and fees for the new initial focussed psychological strategy services for medical practitioners working in general practice.

Section 1 of Schedule 4 provides the application of the new initial focussed psychological strategy items. Subsection 1(1) provides 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 1(2) limits how many focussed psychological strategies services can be rendered per patient. Paragraph 1(2)(a) requires that a service to which item 941, 942, 2733 or 2735 applies will not be eligible for a benefit if a patient has had 6 prescribed focussed psychological strategies services in a calendar year without a review by the medical practitioner managing the patient's GP mental health treatment plan or psychiatrist assessment and management plan. Paragraph 1(2)(b) requires that a service to which item 941, 942, 2733 or 2735 applies will not be eligible for a benefit if a patient has had 10 prescribed focussed psychological strategies in a calendar year.

Schedule 4 lists two new items (2733 and 2735) for the provision of an initial focussed psychological strategy service by a general practitioner, and two new items (941 and 942) for the provision of an initial focussed psychological strategy service by a medical practitioner (not including a general practitioner, specialist or a consultant physician). These new items are for people who are care recipients in a residential aged care facility.

Health Insurance (Allied Health Services) Determination 2014 (Principal Allied Health Determination)

Amendment 7 repeals and substitutes the definition of *course of treatment* which is applicable to psychological therapy and focussed psychological strategies items in the Principal Allied Health Determination. The amendment prescribes the services which count towards the six service rule under a referral, including:

- (a) the face-to-face individual psychological therapy (M6) and focussed psychological strategies (M6) to be performed in various locations in the Principal Allied Health Determination; and
- (b) the face-to-face individual psychological therapy (93375 and 93376) and focussed psychological strategies (93381, 93382, 93383, 93384 and 93385) to be performed at residential aged care facilities for care recipients in residential care; and
- (c) the remote individual psychological therapy and focussed psychological strategies in the *Health Insurance (Section 3C General Medical Services - COVID-19 Telehealth and Telephone Attendances) Determination*

Amendment 8 amends the definition of *relevant service* in subsection 6(4) of the Principal Allied Health Determination to include the new initial treatment items 941, 942, 2733, 2735, 93375, 93376, 93381 to 93386 in the definition. For any particular patient, an item listed in this definition in Principal Allied Health Determination applies in a calendar year only if the service described in the item is one of the first 10 relevant services (which now includes items 93375, 93376, 93381 to 93386) provided to the patient in the calendar year.

Amendment 9 amends items 10950, 10951, 10952, 10953, 10954, 10956, 10958, 10960, 10962, 10964, 10966, 10968 and 10970 of the Principal Allied Health Determination to provide that the maximum amount of services under these items include services provided under items 93501 to 93513 or 93524 to 93538.

Amendment 10 amends items 81300, 81305, 81310, 81315, 81320, 81325, 81330, 81335, 81340, 81345, 81350, 81355, 81360 of the Principal Allied Health Determination to provide that the maximum amount of services under these items include services provided under items 93546 to 93558 or 93579 to 93593.

Amendments 11 to 22 amend items 81100, 81105, 81110, 81115, 81120 and 81125 to include new assessment items 93606, 93607 and 93608 and group attendance items 93613, 93614 and 93615 for the purpose of provisions relating to eligibility (an assessment item must be rendered before a group attendance is performed) and limitations on the maximum number of services (for example, a patient may have no more than 8 standard group services in a calendar year).

Health Insurance (Section 3C General Medical Services - COVID-19 Telehealth and Telephone Attendances) Determination 2020 (Principal COVID-19 Determination)

Amendment 23 repeals and substitutes subsection 8(3) of the Principal COVID-19 Determination to include new items 941, 942, 2733, 2735, 93375, 93376, 93381, 93382, 93383, 93374, 93385 and 93386 in the tally of 10 services.

Amendments 24 and 25 amend the tables at 1.1.6 and 1.1.9 of the Principal COVID-19 Determination to limit new items 93469 or 93475 to the list of services that cannot be performed within a 3 month period.

Amendment 26 amends items 92004, 92011, 92016 and 92023 of the Principal COVID-19 Determination to include that new items 93470 and 93479 cannot be performed with these items within a 9 month period.

***Health Insurance (Section 3C General Medical Services – Other Medical Practitioner)
Determination 2018 (Principal OMP Determination)***

Amendment 27 amends item 228 of the Principal OMP Determination to include that new items 93470 and 93479 cannot be performed with this item within a 9 month period.

Amendment 28 amends the table at 1.6.3 of the Principal OPM Determination to limit new items 93469 or 93475 to the list of services that cannot be performed within a 3 month period

Amendment 29 amends items 235, 236, 237, 238, 239 and 240 of the Principal OMP Determination to restrict new items 93469 or 93475 from being performed with these items.

Amendment 30 amends subdivision 1.9.4(2) of the Principal OMP Determination to include new items 941, 942, 2733 and 2735 in the limitations that apply to items 283, 285, 286, 287, 371 and 372.

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 and Chronic Disease Management) Amendment 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 eligible people to receive additional mental health support services under the Medicare Benefits Schedule (MBS). Eligible people can currently access up to 20 mental health treatment services under the ‘Better Access’ initiative (also known as ‘Better Access to Psychiatrists, Psychologists and General Practitioners through the Medicare Benefits Schedule’).

On 30 November 2020, the Australian Government announced a further \$132.2 million in its response to the Royal Commission into Aged Care Quality and Safety’s recommendations on COVID-19.

As part of this commitment, the Government announced it would provide temporary, additional support through the Better Access initiative to aged care residents whose mental health and wellbeing has been affected by the COVID-19 pandemic, or the measures taken to contain its spread. This addresses recommendation three of the Royal Commission, and extends on the Government’s earlier commitment of \$12.4 million to support the mental health and wellbeing of aged care recipients and their families through the Grief and Trauma Response Package.

The Government’s response also included \$12.1 million for additional individual allied health sessions under the Medicare chronic disease management plans and \$15.7 million for allied health group services for care recipients of a residential aged care facility which has been affected by the COVID-19 pandemic or the measures taken to contain its spread.

To support these measures, from 10 December 2020 until 30 June 2022, the *Health Insurance (Section 3C General Medical – Expansion of GP and Allied Health Mental Health Services) Amendment (Care Recipient in a Residential Aged Care Facility) Determination 2020* and the *Health Insurance (Section 3C General Medical – Expansion of GP and Allied Health Chronic Disease Management Services for Care Recipients of a Residential Aged Care Facility) Determination 2020* created 120 new temporary items to enable people who are a care recipient in a residential aged care facility to access:

- mental health treatment services under the Better Access initiative; and
- additional individual and group allied health services for those who have a chronic disease management plan or have had a health assessment.

The purpose of the *Health Insurance (Section 3C General Medical – Expansion of GP and Allied Health Mental Health Services and Chronic Disease Management) Amendment Determination 2020* (Amendment Determination) is to list four new temporary items (941, 942, 2733 and 2735) for care recipients in a residential aged care facility to enable a general practitioner and a medical practitioner working in general practice to provide initial focussed psychological strategy treatment services for

assessed mental health disorders from 10 December 2020. These new items mirror the existing treatment items 283, 286, 2721 and 2725 but will allow for a flag fall amount plus the standard attendance amount to be claimed for the first patient attended during each in-person attendance at a residential aged care facility. This amount is intended to reflect the costs practitioners incur when providing professional services in residential aged care facilities, and aligns with the provision of other mental health services for these patients. The Amendment Determination also makes minor administrative changes to reflect the policy intent of the mental health treatment and additional chronic disease management services.

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 providing initial focussed psychological strategy services for assessed mental health disorders for patients who are a care recipient in a residential aged care facility. This will ensure care recipients of a residential aged care facility receive access to mental health support under Medicare in the same way as older Australians residing in the community in recognition of the impacts of the COVID-19 pandemic.

Conclusion

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

Liz Dowd
Acting First Assistant Secretary
Medical Benefits Division
Health Resourcing Group
Department of Health