

EXPLANATORY STATEMENT

Health Insurance Act 1973

Health Insurance Legislation Amendment (Extend Cessation Date of Temporary COVID-19 Items) Determination 2021

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 (GMST) and the pathology services table (PST) shall, in specified circumstances and for specified statutory provisions, be treated as if it were specified in these tables.

The GMST is set out in the regulations made under subsection 4(1) of the Act. The latest version of the GMST is the *Health Insurance (General Medical Services Table) Regulations (No. 2) 2020*.

The PST is set out in the regulations made under subsection 4A of the Act. The latest version of the PST 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

Since 13 March 2020, the Australian Government has been providing temporary access to Medicare benefits for certain medical services to protect Australians during the coronavirus (COVID-19) pandemic.

On 14 March 2021, the Government announced that it will invest more than \$1.1 billion to extend the national health response and suppression strategy to the COVID-19 pandemic. As part of this response, the temporary Medicare telehealth and telephone services will continue until 30 June 2021 and the temporary Medicare pathology testing services for COVID-19 will continue until 31 December 2021.

This extension accords with the advice of the Australian Health Protection Principal Committee (AHPPC) which recommended an extension of the temporary access to Medicare benefits for telehealth and phone consultation items and specific COVID-19 pathology testing items to provide a nationally consistent and coordinated approach to COVID-19 management that ensures containment and suppression with efforts that are rapidly deployable, flexible and scalable.

The *Health Insurance (Section 3C General Medical Services – COVID-19 Telehealth and Telephone Attendances) Determination 2020* (Principal COVID-19 Telehealth and Telephone Determination) lists temporary Medicare Benefits Schedule (MBS) items that are available to general practitioners (GPs), medical practitioners,

specialists, consultant physicians, nurse practitioners, participating midwives, allied health providers and dental practitioners in the practice of oral and maxillofacial surgery. These temporary items can be provided by either telehealth or telephone and are due to cease on 31 March 2021.

The *Health Insurance (Section 3C General Medical – Expansion of GP and Allied Health Mental Health Services) Determination 2020* (Principal Expansion of GP and Allied Health Services Determination) lists mental health treatment items provided by eligible general practitioners, other medical practitioners, clinical psychologists, psychologists, occupational therapists and social workers. This includes the provision of an additional ten mental health treatment services for eligible patients under the *Better Access to Psychiatrists, Psychologists and General Practitioners through the MBS initiative*, which can be accessed via telehealth or telephone, until 31 March 2021. These services are consistent with Government policy to provide temporary access to remote service options during the COVID-19 pandemic.

The *Health Insurance (Section 3C Pathology Services – COVID- 19) Determination 2020* (Principal COVID-19 Pathology Services Determination) lists temporary pathology items for severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) pathology testing. These tests are available for persons who may have contracted COVID-19, and for screening essential workers in the Victorian aged care sector, interstate heavy vehicle drivers and interstate rail crew members. These temporary items are due to cease on 31 March 2021.

The purpose of the *Health Insurance Legislation Amendment (Extend Cessation Date of Temporary COVID-19 Items) Determination 2021* (the Determination) is to extend:

- the temporary COVID-19 telehealth and telephone items in the Principal COVID-19 Telehealth and Telephone Determination from 31 March 2021 until 30 June 2021;
- the temporary telehealth and telephone mental health treatment items in the Principal Expansion of GP and Allied Health Services Determination from 31 March 2021 until 30 June 2021; and
- the temporary COVID-19 pathology testing items in the Principal COVID-19 Pathology Services Determination from 31 March 2021 until 31 December 2021.

Consultation

Consultation was not undertaken on this Determination to extend the temporary COVID-19 telehealth and telephone items and the temporary COVID-19 pathology testing items as there is no change to the arrangements for patients or health professionals, and Medicare will continue to subsidise those services during these times.

As part of its health care package to protect all Australians from COVID-19, the Australian Government is continuing to consult broadly with the medical sector, including to plan permanent post-pandemic telehealth arrangements.

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

The Determination commence immediately after registration.

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 Legislation Amendment (Extend Cessation Date of Temporary COVID-19 Items) Determination 2021

Section 1 – Name

Section 1 provides for the Determination to be referred to as the *Health Insurance Legislation Amendment (Extend Cessation Date of Temporary COVID-19 Items) Determination 2021*.

Section 2 – Commencement

The Determination commence immediately after registration.

Section 3 – Authority

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

Schedule 1 - Amendments

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

Item 1 amends Section 4 of the Principal COVID-19 Telehealth and Telephone Determination to extend the items listed in the principal determination from 31 March 2021 until 30 June 2021. This will extend the availability of temporary telehealth and telephone services which can be provided remotely to support patient access in a safe and timely manner during the COVID-19 pandemic.

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

Item 2 amends paragraph (a) of Section 4 of the Principal Expansion of GP and Allied Health Services Determination to extend items listed in Schedule 2 of the principal determination from 31 March 2021 until 30 June 2021.

Schedule 2 lists telehealth and phone mental health treatment plan preparation and review services as well as psychological therapy and focussed psychological strategy services which can be provided by eligible general practitioners, other medical practitioners, clinical psychologists, psychologists, occupational therapists and social workers.

Health Insurance (Section 3C Pathology Services – COVID-19) Determination 2020 (Principal COVID-19 Pathology Services Determination)

Item 3 amends Section 3 of the Principal COVID-19 Pathology Services Determination to extend the items listed in the principal determination from 31 March 2021 until 31 December 2021. This will extend the availability of the temporary SARS-CoV-2 pathology testing which is available for persons who may have contracted COVID-19 and for screening essential workers in the Victorian aged care sector, interstate heavy vehicle drivers and interstate rail crew members.

Statement of Compatibility with Human Rights

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

Health Insurance Legislation Amendment (Extend Cessation Date of Temporary COVID-19 Items) Determination 2021

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 13 March 2020, the Australian Government has been providing temporary access to Medicare benefits for certain medical services to protect Australians during the coronavirus (COVID-19) pandemic.

On 14 March 2021, the Government announced that it will invest more than \$1.1 billion to extend the national health response and suppression strategy to the COVID-19 pandemic. As part of this response, the temporary Medicare telehealth and telephone services will continue until 30 June 2021 and the temporary Medicare pathology testing services for COVID-19 will continue until 31 December 2021.

This extension accords with the advice of the Australian Health Protection Principal Committee (AHPPC) which recommended an extension of the temporary access to Medicare benefits for telehealth and phone consultation items and specific COVID-19 pathology testing items to provide a nationally consistent and coordinated approach to COVID-19 management that ensures containment and suppression with efforts that are rapidly deployable, flexible and scalable.

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workers in the Victorian aged care sector, interstate heavy vehicle drivers and interstate rail crew members. These temporary items are due to cease on 31 March 2021.

The purpose of the *Health Insurance Legislation Amendment (Extend Cessation Date of Temporary COVID-19 Items) Determination 2021* (the Determination) is to extend:

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- the temporary telehealth and telephone mental health treatment items in the Principal Expansion of GP and Allied Health Services Determination from 31 March 2021 until 30 June 2021; and
- the temporary COVID-19 pathology testing items in the Principal COVID-19 Pathology Services Determination from 31 March 2021 until 31 December 2021.

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 the availability of the temporary telehealth and phone consultation items, including for mental health treatment services, until 30 June 2021. The Government will continue to review the ongoing role of these services to support the pandemic in the short term, and will plan permanent post-pandemic telehealth arrangements with key stakeholders.

This instrument also extends specific COVID-19 pathology testing items until 31 December 2021, to enable quarantine and infection control measures. This extension will support rapid pathology testing, including for essential workers and people who may contracted COVID-19.

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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