

EXPLANATORY STATEMENT

Health Insurance Act 1973

Health Insurance Legislation Amendment (Flood Affected Areas) 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) shall, in specified circumstances and for specified statutory provisions, be treated as if it were specified in this table.

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*.

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 Medicare benefits to assist patients to receive services by telehealth or telephone to protect Australians during the coronavirus (COVID-19) pandemic. These temporary services are listed in the *Health Insurance (Section 3C General Medical Services - COVID-19 Telehealth and Telephone Attendances) Determination 2020* (the Principal Determination).

General practitioners and other medical practitioners working in general practice can only perform these telehealth or telephone services if they have an existing relationship with the patient. An existing relationship is defined as:

- the medical practitioner who performs the service has provided a face-to-face service to the patient in the last 12 months; or
- the medical practitioner who performs the service is located at a medical practice, and the patient has a face-to-face service arranged by that practice in the last 12 months. This can be a service performed by another doctor located at the practice, or a service performed by another health professional located at the practice (such as a practice nurse or Aboriginal and Torres Strait Islander health worker); or
- the medical practitioner who performs the service is a participant in the Approved Medical Deputising Service (AMDS) program, and the AMDS provider that employs the medical practitioner has a formal agreement with a medical practice that has provided at least one face-to-face service to the patient in the last 12 months.

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.

The *Health Insurance Legislation Amendment (Flood Affected Areas) Determination 2021* (the Determination) will amend the Principal Determination to exempt telehealth and telephone services provided to patients who are located within a flood affected local government area (as declared by a State or Territory) from the requirement that the service can only be provided if the medical practitioner has an existing relationship with the patient.

The exemption will minimise unwanted disruption to patients' access to regular and essential health care in flood affected areas and ensure their continued access to telehealth and telephone services, where their usual medical practitioner is unavailable.

The exemption for the existing relationship requirement will only apply for the duration of a disaster declaration in a specific local government area, and will be lifted when the declaration is withdrawn. It is important to note that the MBS COVID-19 telehealth and telephone items are time-limited, and are due to cease on 30 June 2021.

Consultation

The legislative instrument is intended to minimise disruptions to patients' access to essential health care services by expanding access to temporary telehealth and telephone services in flood affected local government areas where patients are prevented from accessing their usual medical practitioner. Considering the nature of the flood emergency, it was not reasonably practicable to undertake consultation with representatives of persons affected by the instrument.

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

Section 1 to 4 of the Determination commence immediately after registration. The amendments in Schedule 1 are taken to have commenced retrospectively on 10 March 2021. This enables patients living in a local government area that has been declared as a disaster area due to flooding by the State or Territory Government, and who do not have an existing relationship with a medical practitioner, to access the temporary COVID-19 telehealth and telephone services for the duration of the disaster declaration.

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 Act. 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 Legislation Amendment (Flood Affected Areas) Determination 2021*

Section 1 – Name

Section 1 provides for the Determination to be referred to as the *Health Insurance Legislation Amendment (Flood Affected Areas) Determination 2021*.

Section 2 – Commencement

Section 2 provides that sections 1 to 4 of the Determination commence immediately after registration on the Federal Register of Legislation. The amendments in Schedule 1 of the Determination are taken to have commenced retrospectively on 10 March 2021.

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 Determination)

Item 1 amends subsection 5(1) of the Principal Determination to insert a definition of a person who is in a flood affected area. A person who is in a flood affected area is a patient who, at the time of accessing the telehealth or telephone service, is located within a State or Territory local government area which is declared as a natural disaster due to flood by a State or Territory Government.

Item 2 repeals and substitutes subsection 8(9) of the Principal Determination to provide that a person who is in a flood affected area is also exempt from the requirement that the telehealth service can only be provided if the medical practitioner has an existing relationship with the patient. The exemption to this requirement will continue to 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.

Statement of Compatibility with Human Rights

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

Health Insurance Legislation Amendment (Flood Affected Areas) 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 Medicare benefits to assist patients to receive services by telehealth or telephone to protect Australians during the coronavirus (COVID-19) pandemic. These temporary services are listed in the *Health Insurance (Section 3C General Medical Services - COVID-19 Telehealth and Telephone Attendances) Determination 2020* (the Principal Determination).

General practitioners and other medical practitioners working in general practice can only perform these telehealth or telephone services if they have an existing relationship with the patient. An existing relationship is defined as:

- the medical practitioner who performs the service has provided a face-to-face service to the patient in the last 12 months; or
- the medical practitioner who performs the service is located at a medical practice, and the patient has a face-to-face service arranged by that practice in the last 12 months. This can be a service performed by another doctor located at the practice, or a service performed by another health professional located at the practice (such as a practice nurse or Aboriginal and Torres Strait Islander health worker); or
- the medical practitioner who performs the service is a participant in the Approved Medical Deputising Service (AMDS) program, and the AMDS provider that employs the medical practitioner has a formal agreement with a medical practice that has provided at least one face-to-face service to the patient in the last 12 months.

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.

The *Health Insurance Legislation Amendment (Flood Affected Areas) Determination 2021* (the Determination) will amend the Principal Determination to exempt telehealth and telephone services provided to patients who are located within a flood affected local government area (as declared by a State or Territory Government) from the requirement that the service can only be provided if the medical practitioner has an existing relationship with the patient.

The exemption will minimise unwanted disruption to patients' access to regular and essential health care in flood affected areas and ensure their continued access to telehealth and telephone services, where their usual medical practitioner is unavailable.

The exemption for the existing relationship requirement will only apply for the duration of a disaster declaration in a specific local government area, and will be lifted when the

declaration is withdrawn. It is important to note that the MBS COVID-19 telehealth and telephone items are time-limited, and are due to cease on 30 June 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 maintains the right to health and the right to social security by ensuring patients who are located within a flood affected local government area will continue to access telehealth and telephone services, where required.

Conclusion

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

Paul McBride
First Assistant Secretary
Medical Benefits Division
Health Resourcing Group
Department of Health