

EXPLANATORY STATEMENT

Health Insurance Act 1973

Health Insurance Legislation Amendment (Section 3C General Medical Services – Eating Disorder and HCH Consequential Changes) 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 (the GMST) shall, in specified circumstances and for specified statutory provisions, be treated as if it were specified in the GMST.

The GMST 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.

Section 12(2) of the *Legislation Act 2003* prohibits the Commonwealth from commencing instruments prior to registration if retrospective commencement would disadvantage a person (other than the Commonwealth) or impose a liability on a person (other than the Commonwealth).

Section 3C(2) of the *Health Insurance Act 1973* excludes section 12(2) of the *Legislation Act 2003* from applying to determinations made under section 3C(1) of the *Health Insurance Act 1973*. This allows the Commonwealth to make retrospective 3C determinations.

Purpose

The purpose of the *Health Insurance Legislation Amendment (Section 3C General Medical Services – Eating Disorder and HCH Consequential Changes) Determination 2021* (the Amendment Determination) is to make consequential changes to:

- the *Health Insurance (Allied Health Services) Determination 2014* (the Principal Allied Health Determination);
- the *Health Insurance (Section 3C General Medical Services - COVID-19 Telehealth and Telephone Attendances) Determination 2020* (the Principal COVID-19 Telehealth and Telephone Determination); and
- the *Health Insurance (Section 3C General Medical – Expansion of GP and Allied Health Mental Health Services) Determination 2020* (the Principal GP and Allied Health Mental Health Services).

On 1 March 2021, the eating disorder services provided under the *Health Insurance (Section 3C General Medical Services – Eating Disorders Treatment Plan and Psychological Treatment Services) Determination 2019* (the Principal Eating Disorders Services Determination) were repealed and incorporated into the GMST. The Amendment Determination replaces all references to the Principal Eating Disorders Services Determination in the Principal Allied Health Determination and the Principal COVID-19 Telehealth and Telephone Determination with the relevant references to the GMST. These changes will come into effect retrospectively from 1 March 2021.

On 30 June 2021, the *Health Insurance (Health Care Homes) Determination 2017* (the HCH Determination) will cease. The Amendment Determination introduces Section 13 in the Principal Allied Health Determination and Section 8 in the Principal COVID-19 Telehealth and Telephone Determination to allow patients to continue using referrals provided under, or as part of, a shared care plan where the shared care plan was prepared by a medical practitioner on or before 30 June 2021 and the referral is still valid. The Amendment Determination will remove all references to services provided under the HCH Determination in these two determinations as well as the Principal GP and Allied Health Mental Health Services Determination from 30 June 2022.

Consultation

No consultation was undertaken on the consequential changes, as they are consequential in nature.

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

Sections 1 to 4 of the Amendment Determination commence immediately after registration of the instrument, Schedule 1 commences on 1 March 2021, Schedule 2 commences on 30 June 2021 and Schedule 3 commences on 30 June 2022.

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 (Section 3C General Medical Services – Eating Disorder and HCH Consequential Changes) Determination 2021

Section 1 – Name

Section 1 provides for the Determination to be referred to as the *Health Insurance Legislation Amendment (Section 3C General Medical Services – Eating Disorder and HCH Consequential Changes) Determination 2021*.

Section 2 – Commencement

Sections 1 to 4 of the Amendment Determination commence immediately after registration of the instrument, Schedule 1 commences on 1 March 2021, Schedule 2 commences on 30 June 2021 and Schedule 3 commences on 30 June 2022.

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 – Eating disorder consequential amendments

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

Item 1 repeals the definition of *eating disorder psychological treatment service*, which referred to the repealed Principal Eating Disorders Services Determination.

Item 2 amends the definition of *eating disorder treatment and management plan* to replace the reference to the Principal Eating Disorders Services Determination with a reference to the GMST.

Item 3 repeals the definition of *eligible patient*, which referred to the repealed Principal Eating Disorders Services Determination.

Item 4 amends subsection 6AA(1) to replace the phrase “an *eating disorder psychological treatment service*”, which is no longer defined under the Principal Allied Health Determination, with “the service”.

Item 5 repeals and replaces subsection 6AA(2) to remove references to the Principal Eating Disorders Services Determination and reflect the language used in the GMST for limitations to patient access to eating disorder services.

Item 6 repeals and replaces subsection 6AA(3) and inserts subsection 6AA(3C) to remove references to the Principal Eating Disorders Services Determination and reflect the language used in the GMST for limitations to patient access to eating disorder services.

Item 7 repeals and replaces subsection 6AA(5) to remove references to the Principal Eating Disorders Services Determination and define eligible patient for the purposes of eating disorder items in Subgroup 2 of Part 8 of Schedule 2.

Item 8 repeals subsection 6AA(6), which referred to the repealed Principal Eating Disorders Services Determination.

Item 9 amends paragraphs (a) to (c) of subsection 8B(2) to replace references to the Principal Eating Disorders Services Determination with references to Group A36 of the GMST.

Item 10 amends the service description for items 82352 to 82381 in Part 8 of Schedule 2 to remove bold text from “Eating disorder psychological treatment service”, which is no longer defined under the Principal Allied Health Determination.

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

Item 11 repeals the definition of *eating disorder examination questionnaire*, which referred to the repealed Principal Eating Disorders Services Determination.

Item 12 repeals the definition of *eating disorder psychological treatment service*, which referred to the repealed Principal Eating Disorders Services Determination.

Item 13 repeals the definition of *Eating Disorders Services Determination*, which referred to the repealed Principal Eating Disorders Services Determination.

Item 14 amends the definition of *eating disorder treatment and management plan* to replace the reference to the Principal Eating Disorders with a reference to the GMST.

Item 15 repeals the definition of *eligibility criteria*, which referred to the repealed Principal Eating Disorders Services Determination.

Item 16 repeals the definition of *eligible patient*, which referred to the repealed Principal Eating Disorders Services Determination.

Item 17 repeals the definition of *patient review*, which referred to the repealed Principal Eating Disorders Services Determination.

Item 18 inserts clause 1.1.16A, which defines eligible patient for the purposes of eating disorder items in Subgroup 27 or 28 of Group A40.

Item 19 amends subclause 1.1.17(1) to replace the phrase “an *eating disorder psychological treatment service*”, which is no longer defined under the Principal COVID-19 Telehealth and Telephone Determination, with “the service”.

Item 20 repeals and replaces subclause 1.1.17(3) to remove references to the Principal Eating Disorders Services Determination and reflect the language used in the GMST for limitations to patient access to eating disorder services.

Item 21 repeals and replaces subclause 1.1.17(4) to remove references to the Principal Eating Disorders Services Determination and reflect the language used in the GMST for limitations to patient access to eating disorder services.

Item 22 repeals and replaces subclause 1.1.17(5) to remove references to the Principal Eating Disorders Services Determination and reflect the language used in the GMST for limitations to patient access to eating disorder services.

Item 23 inserts clause 3.1.5A which defines eligible patient for the purposes of eating disorder items in Subgroup 20 or 22 of Group M18.

Item 24 amends subclause 3.1.6(1) to replace the phrase “an *eating disorder psychological treatment service*”, which is no longer defined under the Principal COVID-19 Telehealth and Telephone Determination, with “the service”.

Item 25 repeals and replaces subclause 3.1.6(2) to remove references to the Principal Eating Disorders Services Determination and reflect the language used in the GMST for limitations to patient access to eating disorder services.

Item 26 repeals and replaces subclause 3.1.6(3) to remove references to the Principal Eating Disorders Services Determination and reflect the language used in the GMST for limitations to patient access to eating disorder services.

Item 27 repeals and replaces subclause 3.1.6(5) to remove references to the Principal Eating Disorders Services Determination and reflect the language used in the GMST for limitations to patient access to eating disorder services.

Item 28 amends paragraphs (a) to (c) of subclause 3.1.6(6) to replace references to the Principal Eating Disorders Services Determination with references to Group A36 of the GMST.

Schedule 2 – Health Care Homes transitional provisions

Health Insurance (Allied Health Services) Determination 2014

Item 1 introduces Section 13, which allows relevant services to continue to be provided under a shared care plan prepared by a medical practitioner on or before 30 June 2021, the cessation date for the HCH Determination.

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

Item 2 introduces Section 8, which allows relevant services to continue to be provided under a shared care plan prepared by a medical practitioner on or before 30 June 2021, the cessation date for the HCH Determination.

Schedule 3 – Health Care Homes consequential amendments

Health Insurance (Allied Health Services) Determination 2014

Item 1 repeals the definition of *shared care plan*, which referred to a service under the HCH Determination.

Item 2 repeals subsection 7(5), which related to shared care plans.

Item 3 repeals subsection 9B, which related to shared care plans.

Item 4 amends subparagraph (a)(ii) of the service descriptions for items 10950 to 10970 in Part 1 of Schedule 2 to remove references to shared care plans.

Item 5 amends paragraph (b) of the service descriptions for items 10950 to 10970 in Part 1 of Schedule 2 to remove references to shared care plans.

Item 6 amends subparagraph (a)(ii) of the service descriptions for certain items in Part 2 of Schedule 2 to remove references to shared care plans. The amended items include 80000, 80001, 80010, 80011, 80020, 80021, 80100, 80101, 80110, 80111, 80120, 80121, 80125, 80126, 80135, 80136, 80145, 80146, 80150, 80151, 80160, 80161, 80170 and 80171.

Item 7 amends paragraph (b) of the service descriptions for items 81100, 81110 and 81120 in Part 4 of Schedule 2 to remove references to shared care plans.

Item 8 amends subparagraph (a)(ii) of the service descriptions for items 81300 to 81360 in Part 6 of Schedule 2 to remove references to shared care plans.

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

Item 9 repeals the definition of *shared care plan*.

Item 10 repeals paragraph (d) of clause 3.1.5, which referred to shared care plans, and consequentially amends paragraph (c).

Item 11 amends subparagraph (a)(ii) of the service descriptions for items 91166 to 91188 in Schedule 3 to remove references to shared care plans.

Item 12 repeals and replaces paragraphs (a) and (b) of the service descriptions for items 93000 and 93013 in Schedule 3 to remove references to shared care plans.

Item 13 amends paragraph (a) of the service descriptions for items 93048 to 93061 in Schedule 3 to remove references to shared care plans.

Item 14 amends paragraph (b) of the service descriptions for two items in Schedule 3 (93284 and 93286) to remove references to shared care plans.

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

Item 15 repeals the definition of *shared care plan*.

Statement of Compatibility with Human Rights

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

Health Insurance Legislation Amendment (Section 3C General Medical Services – Eating Disorder and HCH Consequential Changes) 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

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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.

The Right of Equality and Non-Discrimination

The rights of equality and non-discrimination are contained in articles 2, 16 and 26 of the International Covenant on Civil and Political Rights (ICCPR). Article 26 of the ICCPR requires that all persons are equal before the law, are entitled without any discrimination to the equal protection of the law and in this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Analysis

The consequential changes maintain the right to health, the right to social security and the right of equality and non-discrimination by giving effect to other amendments to the general medical services table and other legislative instruments made under subsection 3C(1) of the Act.

Conclusion

This instrument is compatible with human rights as it maintains the right to health, the right to social security and the right of equality and non-discrimination.

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