

EXPLANATORY STATEMENT

Health Insurance Act 1973

Health Insurance (Section 3C General Medical Services – General Practice Attendance for Assessing Patient Suitability for a COVID-19 Vaccine) Amendment (No. 3) 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 Table) shall, in specified circumstances and for specified statutory provisions, be treated as if it were specified 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 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 Australian Government is committed to offering every person in Australia access to safe and effective COVID-19 vaccines at no cost.

On 25 February 2021, the *Health Insurance (Section 3C General Medical Services – General Practice Attendance for Assessing Patient Suitability for a COVID-19 Vaccine) Determination 2021* (the Principal Determination) listed 16 new Medicare Benefits Schedule (MBS) items to support general practices to administer the COVID-19 vaccine.

General practices supplied with the COVID-19 vaccine are able to provide a service to assess if a person is suitable to receive the COVID-19 vaccine. The 16 MBS patient suitability assessment services, can be rendered to a person who is at least 18 years of age by general practitioners (GPs) and other medical practitioners (OMPs), or by a person on behalf of the medical practitioner (such as a registered nurse or other health professional registered under the Health Practitioner Regulation National Law) if it is provided in

accordance with acceptable clinical practice and under supervision of the medical practitioner.

On 18 June 2021, two new MBS items (items 10660 and 10661) were introduced for GPs or OMPs to personally attend to the patient for more than 10 minutes, to provide in-depth clinical advice on the individual risks and benefits associated with receiving a dose of the COVID-19 vaccine to patients who are at least 50 years of age. These items were introduced through the *Health Insurance (Section 3C General Medical Services – General Practice Attendance for Assessing Patient Suitability for a COVID-19 Vaccine) Amendment (No. 2) Determination 2021*.

The purpose of the *Health Insurance (Section 3C General Medical Services – General Practice Attendance for Assessing Patient Suitability for a COVID-19 Vaccine) Amendment (No. 3) Determination 2021* (the Amendment Determination) is to remove the age requirements for patients to access the suitability assessment items including the two in-depth assessment items, to apply indexation to the two in-depth assessment items and to make administrative changes to the two in-depth assessment items to align with the original policy intent.

Schedule 1 of the Amendment Determination retrospectively provides that a service under the two in-depth assessment items 10660 or 10661 can only be claimed once per patient during their lifetime. This change will retrospectively commence on 18 June 2021 and is administrative in nature as it reflects the original policy intent of the in-depth assessment services.

Schedule 2 of the Amendment Determination removes the requirement for a patient to be at least 50 years of age in order to access the two in-depth assessment items. The removal of this age restriction for these services will ensure that all Australians are able to access the in-depth assessment items, where it is clinically relevant. This change will retrospectively commence on 29 June 2021.

Schedule 3 of the Amendment Determination retrospectively removes the requirement for the patient to be at least 18 years of age in order to access the 16 suitability assessment items. The age restriction will be retrospectively removed from 31 May 2021, and this change will allow all Australians to access the assessment services for the COVID-19 vaccine.

Schedule 4 of the Amendment Determination will increase the fees for items 10660 and 10661 by 0.9 per cent from 1 July 2021. This reflects the Government's policy regarding Medicare indexation and means that patients will receive an increased Medicare benefit for these services.

Although Schedules 1, 2 and 3 apply retrospectively, they are not contrary to section 12 of the *Legislation Act 2003* as they do not disadvantage a person and only apply a liability on the Commonwealth for the retrospective period.

Consultation

As part of its health care package to protect all Australians from COVID-19, the Australian Government is consulting broadly with the medical sector.

This legislative instrument is intended to minimise disruptions to patients' access to essential health care services by supporting general practices to provide assessments for patient suitability to receive the COVID-19 vaccine and in-depth patient assessments for patients who have concerns with receiving a dose of the COVID-19 vaccine.

Considering the nature of the instrument and due to the short timeframe in drafting this legislative instrument, it was not reasonably practicable to undertake consultation with representatives of persons affected by the instrument.

Details of the Amendment Determination are set out in the Attachment.

Sections 1 to 4 of the Amendment Determination commence immediately after registration of the instrument, Schedule 1 retrospectively commences on 18 June 2021, Schedule 2 retrospectively commences on 29 June 2021, Schedule 3 retrospectively commences on 31 May 2021 and Schedule 4 commences on 1 July 2021.

The Amendment 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 Services – General Practice Attendance for Assessing Patient Suitability for a COVID-19 Vaccine) Amendment (No. 3) Determination 2021

Section 1 – Name

Section 1 provides for the Amendment Determination to be referred to as the *Health Insurance (Section 3C General Medical Services – General Practice Attendance for Assessing Patient Suitability for a COVID-19 Vaccine) Amendment (No. 3) Determination 2021*.

Section 2 – Commencement

Sections 1 to 4 of the Amendment Determination commence immediately after registration of the instrument, Schedule 1 retrospectively commences on 18 June 2021, Schedule 2 retrospectively commences on 29 June 2021, Schedule 3 retrospectively commences on 31 May 2021 and Schedule 4 commences on 1 July 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 – Once during patient's lifetime clause

Health Insurance (Section 3C General Medical Services – General Practice Attendance for Assessing Patient Suitability for a COVID-19 Vaccine) Determination 2021 (the Principal Determination)

Item 1 inserts a new subsection 4 under section 8 of the Principal Determination, which is titled *Items 10660 and 10661 – claiming frequency*, to clarify that a service provided under items 10660 and 10661 cannot be claimed more than once during a patient's lifetime. This change is administrative in nature and reflects the original policy intent of the services.

Schedule 2 – Amendments to remove age restriction

Health Insurance (Section 3C General Medical Services – General Practice Attendance for Assessing Patient Suitability for a COVID-19 Vaccine) Determination 2021 (the Principal Determination)

Item 1 amends the item descriptors of the in-depth assessment items 10660 or 10661 to remove the requirement for the patient to be at least 50 years of age to access these services. These items provide services for in-depth clinical advice on the individual risks and benefits associated with receiving a dose of the COVID-19 vaccine to patients.

Schedule 3 – Amendments to remove definition of eligible for a COVID-19 vaccine

Health Insurance (Section 3C General Medical Services – General Practice Attendance for Assessing Patient Suitability for a COVID-19 Vaccine) Determination 2021 (the Principal Determination)

Item 1 repeals the definition of *eligible for a COVID-19 vaccine* as the definition provides that a patient that is eligible to for a COVID-19 vaccine is at least 18 years of age. This definition is no longer required, as the age restriction for these services will be remove.

Item 2 amends the item descriptors of the suitability assessment items in the Subgroups 1 to 4 of Group A44 to remove the requirement that the patient must be eligible for a COVID-19 vaccine. This change removes the requirement that the patient must be at least 18 years of age in order to access the suitability assessment items.

Schedule 4 – Indexation

Health Insurance (Section 3C General Medical Services – General Practice Attendance for Assessing Patient Suitability for a COVID-19 Vaccine) Determination 2021 (the Principal Determination)

Item 1 indexes the schedule fee for item 10660 by 0.9 per cent from 1 July 2021.

Item 2 indexes the schedule fee for item 10661 by 0.9 per cent from 1 July 2021.

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 Services – General Practice Attendance for Assessing Patient Suitability for a COVID-19 Vaccine) Amendment (No. 3) 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

The Australian Government is committed to offering every person in Australia access to safe and effective COVID-19 vaccines at no cost.

On 25 February 2021, the *Health Insurance (Section 3C General Medical Services – General Practice Attendance for Assessing Patient Suitability for a COVID-19 Vaccine) Determination 2021* (the Principal Determination) listed 16 new Medicare Benefits Schedule (MBS) items to support general practices to administer the COVID-19 vaccine.

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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

This instrument advances the right to health, the right to social security and the right of equality and non-discrimination by removing the age restriction for the suitability assessment items and the age restriction in the in-depth assessment items, which will enable all Australians to access these services. This change will support patient access and general practices in administering the COVID-19 vaccine. This instrument also furthers the right to health, the right to social security and the right of equality and non-discrimination by increasing the Medicare benefit patients will receive when accessing the in-depth assessment items. This will assist patients to continue accessing clinically relevant health services, consistent with the rights to health and social security.

Conclusion

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

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