

EXPLANATORY STATEMENT

Health Insurance Act 1973

Health Insurance (Section 3C General Medical Services – COVID-19 Telehealth and Telephone Attendances) Amendment (In-Hospital Telehealth and Phone Services) 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 2021*.

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. The *Health Insurance (Section 3C General Medical Services – COVID-19 Telehealth and Telephone Attendances) Determination 2020* (the Principal Determination) lists temporary Medicare Benefits Schedule (MBS) items that are available to general practitioners, 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 telehealth and phone items are available for services provided out-of-hospital and are due to cease on 31 December 2021.

The purpose of the *Health Insurance (Section 3C General Medical Services – COVID-19 Telehealth and Telephone Attendances) Amendment (In-Hospital Telehealth and Phone Services) Determination 2021* (the Amendment Determination) is to list 40 new temporary items in the Principal Determination for specialist telehealth and phone services performed by the admitting medical practitioner or admitting dental practitioner for private patients admitted to hospital. The new items include services provided by specialists, consultant physicians, consultant psychiatrists, public health physicians, medical practitioners in the practice of anaesthesia and dental practitioners in the practice of oral and maxillofacial surgery.

These new items are only available if the specialist medical practitioner or dental practitioner performing the service is located in an area determined by the Commonwealth Chief Medical Officer to be a COVID-19 hotspot; is in COVID-19 isolation because of a State or Territory public health order; or is in COVID-19 quarantine because of a State or

Territory public health order. The specialist medical practitioner or dental practitioner who performs the service must also have been responsible for the patient's treatment at the time the patient was admitted to hospital. A patient can only have one admitting medical practitioner or admitting dental practitioner at the time they are admitted to hospital.

The expansion of specialist telehealth and phone services will ensure continuity of care for private in-hospital patients and is necessary to keep both health care practitioners and patients safe during the evolving COVID-19 pandemic.

The services covered by the 40 new telehealth and phone items will not be considered hospital treatment for the purposes of the *Private Health Insurance Act 2007* by rules made under that Act. This means that the items will have a Medicare benefit of 85% of the schedule fee and will not attract a private health insurance benefit. These changes, along with other temporary COVID-19 MBS telehealth items, will remain in place until 31 December 2021, with ongoing arrangements to be considered as part of broader Government consideration of MBS telehealth arrangements.

Consultation

Following feedback from the Royal Australian and New Zealand College of Psychiatrists (RANZCP) and the Australian Private Hospital Association (APHA), the items introduced in the Amendment Determination are intended to allow the specialist medical practitioner or dental practitioner responsible for the patient's treatment at the time the patient is admitted to hospital to perform in-hospital services remotely where it is clinically relevant to the patient to do so and the specialist medical practitioner or dental practitioner is affected by COVID-19 restrictions.

Considering the nature of the instrument and due to the short timeframe in drafting the Amendment Determination, it was not reasonably practicable to undertake broader consultation on it.

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

The Amendment Determination commences on 15 September 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 – COVID-19 Telehealth and Telephone Attendances) Amendment (In-Hospital Telehealth and Phone Services) Determination 2021

Section 1 – Name

Section 1 provides for the Determination to be referred to as the *Health Insurance (Section 3C General Medical Services – COVID-19 Telehealth and Telephone Attendances) Amendment (In Hospital Telehealth and Phone Services) Determination 2021*.

Section 2 – Commencement

Section 2 provides that the Amendment Determination commences 15 September 2021.

Section 3 – Authority

Section 3 provides that the Amendment 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

Schedule 1 makes amendments to the *Health Insurance (Section 3C General Medical Services – COVID-19 Telehealth and Telephone Attendances) Determination 2020* (Principal Determination).

Item 1 – Subsection 5(1)

Item 1 inserts definitions for *admitting dental practitioner* and *admitting medical practitioner*. Subsection 5(1) provides that *admitting medical practitioner* means the medical practitioner responsible for the patient's treatment at the time the patient is admitted to hospital and *admitting dental practitioner* means the dental practitioner responsible for the patient's treatment at the time the patient is admitted to hospital.

Item 2 – After subsection 8(1)

Item 2 inserts subsection 8(1A) into the Principal Determination, which provides that subsection 8(1) does not apply to items in Schedule 5 of the Principal Determination. Subsection 8(1) provides the general rule that an item in the Principal Determination does not apply to a service if the patient is an admitted patient. Schedule 5 will be added to the Principal Determination by **Item 3**.

Item 3 – After Schedule 4

Item 3 inserts Schedule 5 in the Principal Determination, listing 40 new temporary items for specialist telehealth and phone services provided to private patients who are being treated in a

public or private hospital, including 36 new specialist, consultant physician and consultant psychiatrist items that will be treated as if they are included in Group A40 of the general medical services table (the Table) and four new items for dental practitioners in the practice of oral and maxillofacial surgery that will be treated as if they are included in Group O1 of the Table.

The *Private Health Insurance (Health Insurance Business) Rules 2018* will be amended to specify that the treatments covered by the 40 new items are not hospital treatment for the purposes of the *Private Health Insurance Act 2007*. As services that attract medicare benefit, the services will also not be general treatment.

As services that are not hospital treatment or hospital substitute treatment, the medicare benefit for these items will be paid at 85% of the schedule fee.

Division 5.1 of Schedule 5 sets out the new specialist, consultant physician and psychiatrist items. Clauses 5.1.1 and 5.1.2 provide the requirements for accessing these new items.

Clause 5.1.1 provides that an item in Division 5.1 only applies to a service if:

- the patient who receives the service is admitted to hospital;
- the medical practitioner who performs the service is located in an area determined by the Commonwealth Chief Medical Officer to be a COVID-19 hotspot or is in COVID-19 isolation or COVID-19 quarantine because of a State or Territory public health order; and
- the medical practitioner was responsible for the patient's treatment at the time the patient was admitted to hospital.

Clause 5.1.1 also provides that clause 1.2.2 of the Table is to have effect as if the 36 items in Division 5.1 are specified in that clause. Clause 1.2.2 of the Table provides restrictions on attendances by specialists and consultant physicians without referrals.

Clause 5.1.2 provides that clause 2.13.1 of the Table applies to the new public health physician telehealth and phone items (92517 to 92520 and 92525 to 92528). Clause 2.13.1 of the Table provides the requirements for attendances by public health physicians.

Division 5.2 of Schedule 5 sets out the new COVID-19 in-hospital dental practitioner telehealth and phone items. These items all relate to oral and maxillofacial surgery.

Clause 5.2.1 provides the requirements for access to these services for dental practitioners in the practice of oral and maxillofacial surgery, which mirror the requirements for the specialist, consultant physician and consultant psychiatrist telehealth and phone items in clause 5.1.1 above.

Clause 5.2.1 also provides that the new items in Division 5.2 only apply to a service provided in the course of dental practice by a dental practitioner approved by the Minister before 1 November 2004 for the definition of 'professional service' in subsection 3(1) of the *Health Insurance Act 1973*. This mirrors the requirement for existing oral and maxillofacial items in the Table.

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 – COVID-19 Telehealth and Telephone Attendances) Amendment (In-Hospital Telehealth and Phone Services) 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. The *Health Insurance (Section 3C General Medical Services – COVID-19 Telehealth and Telephone Attendances) Determination 2020* (the Principal Determination) lists temporary Medicare Benefits Schedule (MBS) items that are available to general practitioners, 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 telehealth and phone items are available for services provided out-of-hospital and are due to cease on 31 December 2021.

The purpose of the *Health Insurance (Section 3C General Medical Services – COVID-19 Telehealth and Telephone Attendances) Amendment (In-Hospital Telehealth and Phone Services) Determination 2021* (the Amendment Determination) is to list 40 new temporary items in the Principal Determination for specialist telehealth and phone services performed by the admitting medical practitioner or admitting dental practitioner for private patients admitted to hospital. The new items include services provided by specialists, consultant physicians, consultant psychiatrists, public health physicians, medical practitioners in the practice of anaesthesia and dental practitioners in the practice of oral and maxillofacial surgery.

These new items are only available if the specialist medical practitioner or dental practitioner performing the service is located in an area determined by the Commonwealth Chief Medical Officer to be a COVID-19 hotspot; is in COVID-19 isolation because of a State or Territory public health order; or is in COVID-19 quarantine because of a State or Territory public health order. The specialist medical practitioner or dental practitioner who performs the service must also have been responsible for the patient's treatment at the time the patient was admitted to hospital. A patient can only have one admitting medical practitioner or admitting dental practitioner at the time they are admitted to hospital.

The expansion of specialist telehealth and phone services will ensure continuity of care for private in-hospital patients and is necessary to keep both health care practitioners and patients safe during the evolving COVID-19 pandemic.

The services covered by the 40 new telehealth and phone items will not be considered hospital treatment for the purposes of the *Private Health Insurance Act 2007* by rules made under that Act. This means that the items will have a medicare benefit of 85% of the schedule fee and will not attract a private health insurance benefit. These changes, along with other temporary COVID-19 MBS

telehealth items, will remain in place until 31 December 2021, with ongoing arrangements to be considered as part of broader Government consideration of MBS telehealth arrangements.

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 rights to health and social security by providing access to in-hospital specialist telehealth and phone consultation services for patients where their admitting medical practitioner or oral and maxillofacial surgeon is impacted by COVID-19 restrictions. The new items will ensure continuity of care for private in-hospital patients and help keep both health care practitioners and patients safe during the evolving COVID-19 pandemic.

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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