

EXPLANATORY STATEMENT

Health Insurance Act 1973

Health Insurance Legislation Amendment (Telehealth Clinical Support 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

The purpose of the *Health Insurance Amendment (Telehealth Clinical Support Services) Determination 2021* (the Determination) is to implement changes which will remove and consolidate telehealth items listed across three Principal Determinations. The Principal Determinations which will be amended are the:

- *Health Insurance (Section 3C Midwife and Nurse Practitioner Services) Determination 2020*;
- *Health Insurance (Section 3C General Medical Services – Other Medical Practitioner) Determination 2018*; and
- *Health Insurance (Section 3C General Medical Services - Optometric Services) Determination 2020*.

This Determination will reflect changes made by the *Health Insurance Legislation Amendment (2021 Measures No. 3) Regulations 2021* (the Regulations) which removes and consolidates specialist telehealth items and select general practitioner and medical practitioner telehealth items in the GMST. This includes the removal of the more limited specialist items introduced in 2011 which provide a 50% fee loading for video attendances provided to patients in certain geographical areas and specific settings. These telehealth items will be replaced by continuing telehealth items provided under the *Health Insurance (Section 3C General Medical Services – Telehealth and Telephone Attendances) Determination 2021*, which commences on 1 January 2022.

The patient-end support items associated with the 2011 telehealth program will continue to be available where support is provided by an Aboriginal Health Worker, practice nurse or optometrist, but not by a GP, medical specialist, other medical practitioner, midwife or nurse practitioner.

Consultation

The Department has undertaken consultation with key stakeholders on the MBS telehealth changes, including the Australian Medical Association.

Details of the Determination are set out in the Attachment.

The Determination commences on 1 January 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 (Telehealth Clinical Support Services) Determination 2021

Section 1 – Name

Section 1 provides for the Determination to be referred to as the *Health Insurance Legislation Amendment (Telehealth Clinical Support Services) Determination 2021*.

Section 2 – Commencement

Section 2 provides that the Determination commences on 1 January 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 – Amendments

Health Insurance (Section 3C Midwife and Nurse Practitioner Services) Determination 2020

Amendment items 1 to 4 make consequential amendments to remove reference to items which are repealed under **amendment items 6 and 8**.

Amendment items 5 and 6 repeal three midwife telehealth items (items 82150, 82151 and 82152) and the heading of the Part.

Amendment items 7 and 8 repeal six nurse practitioner telehealth items (items 82220, 82221, 82222, 82223, 82224 and 82225) and the heading of the Part.

Health Insurance (Section 3C General Medical Services – Other Medical Practitioner) Determination 2018

Amendment items 9 to 12 make consequential amendments to remove references to items 371 and 372, which are repealed under **amendment item 14**.

Amendment item 13 repeals clause 1.9.5, which prescribes the limitation of items 371 and 372, as this clause is obsolete.

Amendment item 14 repeals two medical practitioner telehealth items (items 371 and 372).

Amendment item 15 repeals and replaces Division 1.12, which lists the services and fees for Non-Specialist Practitioner video conferencing consultation services on the MBS, to repeal twelve telehealth items (items 812, 827, 829, 867, 868, 869, 873, 876, 881, 885, 891 and 892) as they are obsolete with the introduction of the ongoing telehealth items. Under this change items 894, 896 and 898 will be retained.

Amendment item 16 repeals Division 1.13, which lists the services and fees for Non-Specialist Practitioner video conferencing consultations for patients in rural and remote areas, to repeal four medical practitioner telehealth items (items 2480, 2481, 2482 and 2483).

Health Insurance (Section 3C General Medical Services - Optometric Services) Determination 2020

Amendment item 17 repeals section 13, which prescribes for the application of items 10945 and 10946, as these items will be amended to remove the geographic restrictions which apply to the service under **amendment item 20**. Section 13 specifies that items 10945 and 10946 do not apply to a service if the patient or specialist travels to a place in order for the patient to satisfy the requirement in subparagraph (c)(i) of the item that, at the time of the attendance, the patient is at least 15 kilometres by road from the specialist.

Amendment items 18 and 19 make consequential amendments to remove reference to items 10947 and 10948, which will be repealed under **amendment item 21**.

Amendment item 20 amends items 10945 and 10946, which are for telehealth attendances by an optometrist, to remove the geographic restrictions which apply to the services. These changes will enable more patients across Australia to access ophthalmology services remotely where clinically appropriate.

Amendment item 21 repeals two ophthalmology telehealth items (items 10947 and 10948) and consolidates these services into items 10945 and 10946.

Statement of Compatibility with Human Rights

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

Health Insurance Legislation Amendment (Telehealth Clinical Support 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

The purpose of the *Health Insurance Amendment (Telehealth Clinical Support Services) Determination 2021* (the Determination) is to implement changes which will remove and consolidate telehealth items listed across three Principal Determinations. The Principal Determinations which will be amended are the:

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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 maintains the right to health and the right to social security by ensuring access to publicly subsidised general medical services are clinically and cost-effective. The removal of telehealth items does not retrogressively affect patient access to telehealth services as these will be performed under the services listed in Group A40 of the MBS.

Conclusion

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

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