

EXPLANATORY STATEMENT

Health Insurance Act 1973

Health Insurance (Section 3C Midwife and Nurse Practitioner Services) Amendment (No. 2) 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 (Section 3C Midwife and Nurse Practitioner Services) Amendment (No. 2) Determination 2021* (the Amendment Determination) is to implement the Government's response to the Participating Midwives Reference Group (PMRG) recommendations 4, 5 and 7 of the MBS Review Taskforce's Report on Primary Care, amending three items and inserting four new items for participating midwife attendances.

Recommendation 4 proposes restricting claiming of maternity care plans to prevent low-value care. The Amendment Determination implements the Government's response to this recommendation, restricting claiming of maternity care plan item 82115 to instances where the patient has had at least two antenatal attendances with the claiming participating midwife in the preceding six months. This amendment also prevents the claiming of this item if items 16590 or 16591 have been claimed for the same pregnancy, except in exceptional circumstances. Items 16590 and 16591 are the corresponding medical practitioner services for the planning and management of a pregnancy. These changes will ensure that the MBS provides high-quality maternity care to patients, based on a midwifery continuity of care model.

Recommendation 5 proposes amending the time tiering of intrapartum items to promote safe clinical practice. As part of the Government's response to this recommendation, existing intrapartum items 82120 and 82125 will be amended to create a time-tier of between 6 and 12 hours and allow for birth where performed, and new intrapartum items 82123 and 82127 will be listed to create a time-tier of up to six hours. These changes reflect the model of care that participating midwives operate within and allow participating midwives to hand over care earlier during the intrapartum period if they are fatigued.

Recommendation 7 proposes enabling items to be claimed from the time the participating midwife attends the patient for labour care. The Amendment Determination implements the Government's response to this recommendation, listing new intrapartum item 82116 which provides for an attendance by a participating midwife for up to six hours at a place other than a hospital. This new item will allow the duration of care to account for the labour support provided by the participating midwife before the patient is admitted to hospital. This item will not apply if the birth is performed during the attendance.

Consultation

The MBS Review was conducted by expert committees and working groups focusing on specific areas of the MBS. The clinical committee reports were released for public consultation to inform the final Taskforce reports and recommendations to Government.

The Taskforce released the draft Participating Midwives Reference Group report for consultation between 5 February and 7 June 2019 and considered over 385 submissions as part of this public consultation process.

Targeted consultation was undertaken with the Participating Midwife Implementation Liaison Group (PMILG), who were supportive of these changes. The PMILG has representatives from the following stakeholder groups and peak bodies:

- Australian College of Midwives
- Australian Nursing and Midwifery Federation
- Australian Private Hospitals Association
- Congress of Aboriginal & Torres Strait Islander Nurses & Midwives
- Independent Midwifery Specialists
- Maternity Consumer Network
- My Midwives
- National Association of Specialist Obstetricians and Gynaecologists
- Private Healthcare Australia
- Royal Australian and New Zealand College of Obstetricians and Gynaecologists
- Royal Australian College of General Practitioners

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

The Amendment Determination commences on 1 March 2022.

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 Midwife and Nurse Practitioner Services) Amendment (No. 2) Determination 2021*

Section 1 – Name

Section 1 provides for the Amendment Determination to be referred to as the *Health Insurance (Section 3C Midwife and Nurse Practitioner Services) Amendment (No. 2) Determination 2021*.

Section 2 – Commencement

Section 2 provides that the Amendment Determination commences on 1 March 2022.

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 Amendment 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 Amendment Determination has effect according to its terms.

Schedule 1 – Amendments

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

Amendment item 1 amends the definition of “*delivery*” to instead define “*birth*”. This change is administrative in nature and removes outdated terminology.

Amendment item 2 amends section 12 to allow participating midwives to claim specified intrapartum items where the patient’s care has been transferred to another midwife before the birth for the purpose of managing fatigue, rather than only where labour has exceeded 24 hours, to promote safe clinical practice. This change also inserts subsection (5) to allow the third participating midwife attending the patient for management of labour to make a claim under item 82127 (for item 82127 see **amendment item 5**) where the patient’s care is transferred to another midwife before the birth. This change also removes outdated terminology, replacing references to “*delivery*” with “*birth*” and references to “*confinement*” with “*labour*”.

Amendment item 3 amends maternity care plan item 82115 and inserts items 82116 and 82118 for the management of labour and birth (where performed in hospital).

Item 82115 will be amended to restrict claiming if items 16590 or 16591 have been claimed during the same pregnancy, except in exceptional circumstances, and to require that:

- the patient’s pregnancy has progressed beyond 28 weeks; and
- the participating midwife has provided at least two antenatal attendances to the patient in the preceding six months.

Item 82116 provides an attendance for the management of labour up to six hours, not including birth, at a place other than a hospital. This item allows a participating midwife to provide labour support and care to the patient at home or in some other setting outside of a hospital. To make a claim under this item, the participating midwife must also have provided the patient's antenatal care or be a member of a practice that provided the patient's antenatal care and must document the total attendance time in the patient notes. This item will not apply if the birth is performed during the attendance and is only claimable once per pregnancy.

Item 82118 provides an attendance for the management of labour up to six hours, including birth where performed or attendance and immediate post-birth care at an elective caesarean section if the patient is an admitted patient of a hospital. To make a claim under this item, the participating midwife must have assisted or provided the patient's antenatal care or be a member of a practice that provided the patient's antenatal care and must document the total attendance time in the patient notes. This item must be provided by the first participating midwife to attend the patient for management of labour and includes all hospital attendances related to the labour by the first participating midwife. This item cannot be co-claimed with item 82120.

Amendment item 4 amends item 82120 and inserts item 82123, which provide in-hospital participating midwife attendances for the management of labour. The amendments to item 82120 promote safe clinical practice and will:

- allow for attendances between 6 and 12 hours;
- require the first participating midwife to attend the patient for management of labour to provide the service;
- increase the schedule fee to \$1,567.70;
- require a service under this item to include all hospital attendances related to the labour by the first participating midwife;
- require the total attendance be documented in the patient notes;
- provide that this item cannot be co-claimed with item 82118; and
- remove outdated terminology.

New item 82123 will allow for attendances up to 6 hours, including birth where performed, by the second participating midwife to attend the patient for management of labour. A service under this item includes all hospital attendances related to the labour by the second participating midwife and cannot be co-claimed with item 82125.

To make a claim under either of these items, the participating midwife must have assisted or provided the patient's antenatal care or be a member of a practice that provided the patient's antenatal care and must document the total attendance time in the patient notes. Items 82120 and 82123 can each only be claimed once per pregnancy.

Amendment item 5 amends item 82125 and lists item 82127, which provide in-hospital participating midwife attendances for the management of labour. The amendments to item 82125 promote safe clinical practice and will:

- allow for attendances between 6 and 12 hours;
- require the second participating midwife to attend the patient for management of labour to provide the service;
- increase the schedule fee to \$1,567.70;

- require a service under this item to include all hospital attendances related to the labour by the second participating midwife;
- require the total attendance be documented in the patient notes;
- provide that this item cannot be co-claimed with items 82123 and 82127; and
- remove outdated terminology.

New item 82127 will allow for attendances up to 6 hours, including birth where performed, by the third participating midwife to attend the patient for management of labour. A service under this item includes all hospital attendances related to the labour by the third participating midwife and cannot be co-claimed with item 82125. To make a claim under this item, a second participating midwife must already have provided the patient with a service to which item 82123 applies, and the third participating midwife must have assisted or provided the patient's antenatal care or be a member of a practice that provided the patient's antenatal care and must document the total attendance time in the patient notes. Item 82127 is only claimable once per pregnancy.

Amendment item 6 amends items 82130, 82135 and 82140 to remove outdated terminology, replacing "delivery" with "birth". This change will ensure consistency with new and amended intrapartum and maternity care plan items and is administrative in nature.

Statement of Compatibility with Human Rights

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

Details of the *Health Insurance (Section 3C Midwife and Nurse Practitioner Services) Amendment (No. 2) 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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Recommendation 4 proposes restricting claiming of maternity care plans to prevent low-value care. The Amendment Determination implements the Government's response to this recommendation, restricting claiming of maternity care plan item 82115 to instances where the patient has had at least two antenatal attendances with the claiming participating midwife in the preceding six months. This amendment also prevents the claiming of this item if items 16590 or 16591 have been claimed for the same pregnancy, except in exceptional circumstances. Items 16590 and 16591 are the corresponding medical practitioner services for the planning and management of a pregnancy. These changes will ensure that the MBS provides high-quality maternity care to patients, based on a midwifery continuity of care model.

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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

Through the amendment of existing intrapartum items and introduction of new intrapartum items, this instrument allows for better management of fatigue by participating midwives, promoting safe clinical practices. The introduction of a new item for attendances by a participating midwife for the management of labour outside of hospital will also allow claiming for the labour support provided before the patient is admitted to hospital. The changes to maternity care plan services will also ensure patients continue to receive high-quality maternity care.

Conclusion

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

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