

EXPLANATORY STATEMENT

Health Insurance Act 1973

Health Insurance (Professional Services Review Scheme) Amendment (2022 Measures No.1) Regulations 2022

Subsection 133(1) of the *Health Insurance Act 1973* (the Act) provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Part VAA of the Act provides for the Professional Services Review (PSR) Scheme which can review and investigate the provision of services by a person to determine whether the person has engaged in inappropriate practice.

Section 82 of the Act provides definitions of inappropriate practice by practitioners. Subsection 82(1A) provides that a practitioner engages in inappropriate practice in rendering or initiating services during a particular period (the relevant period) if the circumstances in which some or all of the services were rendered or initiated constitute a prescribed pattern of services.

Subsection 82(1B) of the Act provides practitioners a defence that certain prescribed pattern of services do not constitute inappropriate practice if a PSR Committee could reasonably conclude exceptional circumstances existed that affected the rendering or initiating of the services.

Section 82A of the Act provides that regulations may prescribe circumstances in which services rendered or initiated by a medical practitioner constitute a prescribed pattern of services. These circumstances are prescribed in the *Health Insurance (Professional Services Review Scheme) Regulations 2019* (Principal Regulations) and currently includes telehealth services which are in excess of the 80/20 (80 services on each of 20 or more days) and phone services which are in excess of the 30/20 rule (30 services on each of 20 or more days).

Purpose

The *Health Insurance (Professional Services Review Scheme) Amendment (2022 Measures No.1) Regulations 2022* (the Regulations) amends the Principal Regulations to temporarily remove telehealth and phone services from the prescribed pattern of services rules. This recognises that practitioners will be likely to temporarily render more telehealth and phone services as COVID-19 infections increase across the community, as they will be treating more positive COVID-19 patients while also managing the risk of transmission.

The PSR Scheme protects patients and the community by reviewing and examining possible instances of inappropriate practice by practitioners when they provide Medicare services. Addressing inappropriate practice, which is linked to lower quality health care and unnecessary servicing, leads to improved patient care.

Consultation

Consultation was undertaken with the Royal Australia College of General Practitioners and the Australian Medical Association on the intention to temporarily remove telehealth and phone services from the prescribed pattern of services rules during the current increase in COVID-19 infections across Australia. They have indicated support for the temporary removal of the telehealth and phone services from the prescribed pattern of services rules, whilst the profession plays a key role in the pandemic by managing positive COVID-19 patients via telehealth which is helping to reduce the burden on the hospital system.

Details of the Regulations are set out in the Attachment.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations will commence the later of 20 January 2022 or immediately after registration.

Authority: Subsection 133(1) of the
Health Insurance Act 1973

ATTACHMENT

Details of the *Health Insurance (Professional Services Review Scheme) Amendment (2022 Measures No.1) Regulations 2022*

Section 1 – Name

This section provides for the Regulations to be referred to as the *Health Insurance (Professional Services Review Scheme) Amendment (2022 Measures No.1) Regulations 2022*.

Section 2 – Commencement

This section provides for the Regulations to commence the later of 20 January 2022 or immediately after registration.

Section 3 – Authority

This section provides that the Regulations are made under the *Health Insurance Act 1973*.

Section 4 – Schedules

This section provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 – Amendments

Amendment item [1] – section 5 (definition of *relevant phone service*)

Section 5 of the Principal Regulations defined a ‘relevant phone service’ which was used to prescribe circumstances constituting prescribed pattern of services, per the rule in section 8. This particular prescribed pattern of services was known as the 30/20 rule and included all phone services performed by GPs or other medical practitioners in general practice. This item deletes the definition to reflect the policy to temporarily remove phone items from the prescribed pattern of services rules.

Amendment item [2] – section 5 (definition of *relevant service*)

Section 5 of the Principal Regulations defines a ‘relevant service’ which was used to prescribe circumstances constituting prescribed pattern of services, per the rule in section 8. This particular prescribed pattern of services is known as the 80/20 rule and included all face-to-face (except the COVID-19 vaccine assessment items in Group A44), telehealth and phone services attendances performed by GPs or other medical practitioners in general practice. This item repeals and substitutes the definition to remove telehealth services. Face-to-face services performed by GPs or other medical practitioners in general practice will continue to be prescribed for the purpose of the 80/20 rule.

Amendment item [3] – section 8

Section 8 of the PSR Regulations provides the circumstances constituting prescribed pattern of services. This item repeals and replaces section 8 to remove the 30/20 rule from circumstances constituting prescribed pattern of services. A medical practitioner will continue to be taken to have engaged in inappropriate practice if they have rendered or initiated 80 or more ‘relevant services’ on each of 20 or more days in a 12 month period (the 80/20 rule).

Statement of Compatibility with Human Rights

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

Health Insurance (Professional Services Review Scheme) Amendment (2022 Measures No.1) Regulations 2022

This Regulation 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 Disallowable Legislative Instrument

Section 82A of the Act provides that regulations may prescribe circumstances in which services rendered or initiated by a medical practitioner constitute a prescribed pattern of services. These circumstances are prescribed in the *Health Insurance (Professional Services Review Scheme) Regulations 2019* (Principal Regulations) and currently includes telehealth services which are in excess of the 80/20 (80 services on each of 20 or more days) and phone services which are in excess of the 30/20 rule (30 services on each of 20 or more days).

The *Health Insurance (Professional Services Review Scheme) Amendment (2022 Measures No.1) Regulations 2022* (the Regulations) amends the Principal Regulations to temporarily remove telehealth and phone services from the prescribed pattern of services rules. This recognises that practitioners will be likely to temporarily render more telehealth and phone services as COVID-19 infections increase across the community, as they will be treating more positive COVID-19 patients while also managing the risk of transmission.

The PSR Scheme protects patients and the community by reviewing and examining possible instances of inappropriate practice by practitioners when they provide Medicare services. Addressing inappropriate practice, which is linked to lower quality health care and unnecessary servicing, leads to improved patient care.

Human rights implications

The Regulations engage 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 Regulations maintain rights to health and social security as it does not change the entitlement to Medicare benefits for clinically relevant services available under Medicare.

Conclusion

This instrument is compatible with human rights because it maintains existing arrangements and the protection of human rights.

Greg Hunt

Minister for Health and Aged Care