

EXPLANATORY STATEMENT

Health Insurance Act 1973

Health Insurance Legislation Amendment (2022 Measures No. 2) Determination 2022

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 Legislation Amendment (2022 Measures No. 2) Determination 2022* (Amendment Determination) is to:

- make administrative amendments to the *Health Insurance (Section 3C General Medical Services – Telehealth and Telephone Attendances) Determination 2021* (Telehealth Determination);
- extend the cessation date of the *Health Insurance (Section 3C General Medical Services – Smoking Cessation Services) Determination 2021* (Smoking Cessation Determination); and
- amend the schedule fees for two items in the Telehealth Determination and one item in the *Health Insurance (Section 3C General Medical – Expansion of GP and Allied Health Mental Health Services) Determination 2020* (Expansion of Mental Health Services Determination).

Telehealth Amendments

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. Schedule 1 of the Amendment Determination amends the Telehealth Determination to ensure treatment pathways and restrictions are maintained for temporary telehealth and phone services reintroduced in response to the recent surge in Omicron COVID-19 cases.

Extension of Smoking Cessation Services

On 21 July 2021, the Smoking Cessation Determination introduced 18 new temporary items general practitioner (GP) and other medical practitioner (OMP) services related to nicotine and smoking cessation counselling, which were due to cease on 30 June 2022.

Schedule 2 of the Amendment Determination extends the cessation date for these temporary services from 30 June 2022 to 31 December 2023 at 11.59pm.

Fee Amendments

On 1 March 2022, the *Health Insurance Legislation Amendment (2021 Measures No. 4) Regulations 2021* will amend the *Health Insurance Regulations 2018* (HIR) to include a number of general practice remote service items that were originally created in response to the COVID-19 pandemic but have been continued following the realisation of the need for these services in these forms. Prescribing these items in the HIR will change the benefit calculation from 85% to 100% of the fee.

On 1 March, the schedule fees for most of the general practice remote service items being newly prescribed in the HIR will be reduced by the *Health Insurance Legislation Amendment (Section 3C General Medical Services – Telehealth and Phone GP Fee Alignment) Determination 2021* (Fee Alignment Determination). However, the Fee Alignment Determination reduces the fee for item 93423 in the Expansion of Mental Health Services Determination, which is not being prescribed in the HIR on 1 March 2022, and does not reduce the fees for items 92746 and 92747 in the Telehealth Determination, which are being prescribed.

Schedule 3 of the Amendment Determination increases the schedule fee for item 93423 and reduces the schedule fees for items 92746 and 92747 so the benefits paid for the services remain unchanged. These changes are administrative and commence immediately after the commencement of Schedule 1 of the Fee Amendment Determination.

Consultation

No consultation was undertaken for the changes in the Amendment Determination as they are administrative in nature.

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, Schedules 1 to 2 commence the day after registration of the instrument and Schedule 3 commences immediately after the commencement of Schedule 1 of the *Health Insurance Legislation Amendment (Section 3C General Medical Services – Telehealth and Phone GP Fee Alignment) Determination 2021*.

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 (2022 Measures No. 2) Determination 2022*

Section 1 – Name

Section 1 provides for the Amendment Determination to be referred to as the *Health Insurance Legislation Amendment (2022 Measures No. 2) Determination 2022*.

Section 2 – Commencement

Section 2 provides that the sections 1 to 4 of the Amendment Determination commence immediately after registration of the instrument, Schedules 1 to 2 commence the day after registration of the instrument and Schedule 3 commences immediately after the commencement of Schedule 1 of the *Health Insurance Legislation Amendment (Section 3C General Medical Services – Telehealth and Phone GP Fee Alignment) Determination 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 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 – Telehealth amendments

Schedule 1 amends the *Health Insurance (Section 3C General Medical Services – Telehealth and Telephone Attendances) Determination 2021* (Telehealth Determination).

Amendment item 1 amends subsection 5(1) to repeal the definition of ***COVID-19 Commonwealth declared hotspot***.

Amendment item 2 amends subsection 7(5) to provide that a service provided an item in Schedule 8, as well as Schedule 1, must be performed by the patient’s usual medical practitioner. According to this requirement, GPs and other medical practitioners working in general practice can only perform the telehealth or phone services in the Schedules specified if they have an existing relationship with the patient.

A patient’s usual medical practitioner is defined in subsection (8) as:

- the medical practitioner who performs the service has provided a face-to-face service to the patient in the last 12 months; or
- the medical practitioner who performs the service is located at a medical practice, and the patient has a face-to-face service arranged by that practice in the last 12 months. This can be a service performed by another doctor located at the practice, or a service performed

by another health professional located at the practice (such as a practice nurse or Aboriginal and Torres Strait Islander health worker).

Amendment item 3 amends paragraph 7(6)(a) to remove “a service provided to a person in a COVID-19 Commonwealth declared hotspot” as an exemption to the requirement that GPs and other medical practitioners working in general practice can only perform the telehealth or phone services in the Schedules specified if they have an existing relationship with the patient.

Amendment items 4 and 5 amend clause 3.1.2 to maintain the treatment pathways and restrictions for temporary telehealth and phone services reintroduced in response to the recent surge in Omicron COVID-19 cases. Clause 3.1.2 relates to referrals by psychiatrists and paediatricians for pervasive developmental disorder services.

Amendment item 6 amends subclause 3.1.3(6) to maintain the treatment pathways and restrictions for temporary telehealth and phone services reintroduced in response to the recent surge in Omicron COVID-19 cases. Clause 3.1.3 relates to referrals by specialists, consultant physicians and general practitioners for disability services.

Amendment item 7 amends subclause 7.1.1(3) to apply clause 2.1.4 of the Telehealth Determination to items 92523 and 92524. Clause 2.1.4 applies clause 2.13.1 of the general medical services table to the items specified. Clause 2.13.1 of the general medical services table provides requirements for attendances by public health physicians.

Amendment item 8 amends the item descriptor for item 92432 to remove a typographical error.

Schedule 2 – Extension of Smoking Cessation Services

Schedule 2 amends the *Health Insurance (Section 3C General Medical Services – Smoking Cessation Services) Determination 2021*.

Amendment item 9 amends section 4 to extend the cessation date for the temporary smoking cessation services from 30 June 2022 to 31 December 2023 at 11.59pm.

Schedule 3 – Fee amendments

Amendment item 10 of Schedule 3 amends the *Health Insurance (Section 3C General Medical – Expansion of GP and Allied Health Mental Health Services) Determination 2020*.

Amendment items 11 and 12 of Schedule 3 amend the Telehealth Determination.

Amendment item 10 amends item 93423 to increase the schedule fee from \$74.60 to \$87.75. The benefit for this item will remain unchanged.

Amendment item 11 amends item 92746 to reduce the schedule fee from \$89.10 to \$75.75. The benefit for this item will remain unchanged.

Amendment item 12 amends item 92747 to reduce the schedule fee from \$44.70 to \$38.00. The benefit for this item will remain unchanged.

Statement of Compatibility with Human Rights

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

Health Insurance Legislation Amendment (2022 Measures No. 2) Determination 2022

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 Legislation Amendment (2022 Measures No. 2) Determination 2022* (Amendment Determination) is to:

- make administrative amendments to the *Health Insurance (Section 3C General Medical Services – Telehealth and Telephone Attendances) Determination 2021* (Telehealth Determination);
- extend the cessation date of the *Health Insurance (Section 3C General Medical Services – Smoking Cessation Services) Determination 2021* (Smoking Cessation Determination); and
- amend the schedule fees for two items in the Telehealth Determination and one item in the *Health Insurance (Section 3C General Medical – Expansion of GP and Allied Health Mental Health Services) Determination 2020* (Expansion of Mental Health Services Determination).

Telehealth Amendments

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. Schedule 1 of the Amendment Determination amends the Telehealth Determination to ensure treatment pathways and restrictions are maintained for temporary telehealth and phone services reintroduced in response to the recent surge in Omicron COVID-19 cases.

Extension of Smoking Cessation Services

On 21 July 2021, the Smoking Cessation Determination introduced 18 new temporary items general practitioner (GP) and other medical practitioner (OMP) services related to nicotine and smoking cessation counselling, which were due to cease on 30 June 2022. Schedule 2 of the Amendment Determination extends the cessation date for these temporary services from 30 June 2022 to 31 December 2023 at 11.59pm.

Fee Amendments

On 1 March 2022, the *Health Insurance Legislation Amendment (2021 Measures No. 4) Regulations 2021* will amend the *Health Insurance Regulations 2018* (HIR) to include a number of general practice remote service items that were originally created in response to the COVID-19 pandemic but have been continued following the realisation of the need for these services in these forms. Prescribing these items in the HIR will change the benefit calculation from 85% to 100% of the fee.

On 1 March, the schedule fees for most of the general practice remote service items being newly prescribed in the HIR will be reduced by the *Health Insurance Legislation Amendment (Section 3C General Medical Services – Telehealth and Phone GP Fee Alignment) Determination 2021* (Fee Alignment Determination). However, the Fee Alignment Determination reduces the fee for item 93423 in the Expansion of Mental Health Services Determination, which is not being

prescribed in the HIR on 1 March 2022, and does not reduce the fees for items 92746 and 92747 in the Telehealth Determination, which are being prescribed.

Schedule 3 of the Amendment Determination increases the schedule fee for item 93423 and reduces the schedule fees for items 92746 and 92747 so the benefits paid for the services remain unchanged. These changes are administrative and commence immediately after the commencement of Schedule 1 of the Fee Amendment Determination.

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 rights to health and social security and the right of equality and non-discrimination, providing administrative changes to the Telehealth Determination and Expansion of Mental Health Services Determination and continuing to provide patients with access to smoking cessation services. These changes are administrative in nature.

Conclusion

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

Nigel Murray
Assistant Secretary
MBS Policy and Specialist Services Branch
Medical Benefits Division
Health Resourcing Group
Department of Health