

EXPLANATORY STATEMENT

Health Insurance Act 1973

Health Insurance (Professional Services Review Scheme) Amendment (2022 Measures No. 2) 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* (PSR Regulations).

Subsection 86(1A) of the Act requires that the Chief Executive Medicare must refer a person to the Director of the PSR if they are aware of a prescribed pattern of services.

Purpose

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.

Section 8 of the PSR Regulations prescribes the circumstances for a prescribed pattern of services. A medical practitioner is taken to have engaged in inappropriate practice if they have rendered or initiated 80 or more 'relevant service' on each of 20 or more days in a 12 month period, commonly known as the 80/20 rule. Relevant service is defined in section 5 of the PSR Regulations and includes most general practice attendance services performed in person.

From 1 January 2022, the *Health Insurance (Professional Services Review Scheme) Amendment (Prescribed Pattern of Services) Regulations 2021* amended the PSR

Regulations to add GP telehealth and phone items to the 80/20 rule. These items were originally created in response to COVID-19 but are continuing on an ongoing basis. The *Health Insurance (Professional Services Review Scheme) Amendment (Prescribed Pattern of Services) Regulations 2021* also introduced a new 30/20 rule, applying to phone services performed by GPs, other medical practitioners in general practice, and consultant physicians. This would align the arrangements for telehealth and phone services with the arrangements for GP face-to-face services, and protect the integrity of Commonwealth Medicare benefits from consistently high volumes of telehealth and phone services rendered by medical practitioners, without a reasonable justification for rendering those services.

From 20 January 2022, the *Health Insurance (Professional Services Review Scheme) Amendment (2022 Measures No. 1) Regulations 2022* temporarily removed telehealth and phone items from the prescribed pattern of services rules and repealed the 30/20 rule. The temporary arrangements recognised that practitioners may be required to temporarily render more telehealth and phone services as COVID-19 infections were observed to increase early in 2022.

The purpose of the *Health Insurance (Professional Services Review Scheme) Amendment (2022 Measures No. 2) Regulations 2022* (the Regulations) is to amend the PSR Regulations to reapply the 80/20 rule to GP telehealth and phone items from 1 July 2022.

The Regulations also reintroduce the 30/20 rule, which applies to phone services performed by GPs, other medical practitioners in general practice, and consultant physicians. This means a practitioner will be considered to have practiced inappropriately if they render more than 30 phone services on a day more than 20 times in a 12 month period.

Consultation

Consultation was undertaken with the Australian Medical Association, Royal Australian College of Physicians, Cardiac Society of Australia and New Zealand, Royal Australian College of Surgeons and the Royal Australian and New Zealand College of Psychiatrists.

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 on 1 July 2022.

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

ATTACHMENT

Details of the *Health Insurance (Professional Services Review Scheme) Amendment (2022 Measures No. 2) 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. 2) Regulations 2022*.

Section 2 – Commencement

This section provides for the Regulations to commence on 1 July 2022.

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

Schedule 1 makes changes to the *Health Insurance (Professional Services Review Scheme) Regulations 2019*. The changes will apply to services rendered after the commencement of the Regulations. That is, claims for services that will be added to the prescribed pattern of service rule from 1 July 2022 will not be relevant if the practitioner rendered the service prior to 1 July 2022.

Amendment item 1 inserts a definition for a ‘relevant phone service’, which is used to prescribe the services that have application to the 30/20 rule. The 30/20 rule is made under paragraph 8(b) of the Regulations, per **amendment item 3**. The prescribed services include all phone service attendances performed by GPs or other medical practitioners in general practice. It also includes consultant physician items in Subgroup 8 of Group A40.

Amendment item 2 repeals and replaces the definition of a ‘relevant service’ which is used to prescribe the services that have application to the 80/20 rule. The 80/20 rule is made under paragraph 8(a) of the Regulations, per **amendment item 3**. The prescribed services include all face-to-face, telehealth and phone service attendances performed by GPs or other medical practitioners in general practice.

Paragraph (a) of the definition prescribes the face-to-face services which were formerly in the PSR Regulations and adds the following Groups of items to the 80/20 rule:

- Group A41 for additional focussed psychological strategies. These services can be performed by telehealth, phone or in person.
- Group A42 for mental health planning services for persons in residential aged care facilities. These services can be performed by telehealth, phone or in person.
- Group A45 for nicotine and smoking cessation counselling services. These services can be performed by telehealth, phone or in person.

Paragraph (b) has not changed in substance from the paragraph in the PSR Regulations. It continues to prescribe Subgroups 1 and 4 of Subgroup A36 which relate to services for the treatment and management of eating disorders. These services can be performed by telehealth or in person.

Paragraph (c) prescribes the telehealth and phone services in Subgroups of Group A40. Paragraph (d) prescribes the specific in person, telehealth and phone items that are to apply to the 80/20 rule. Paragraph (c) will also continue to prescribe items 139, 90264 and 90265 which were formerly in the PSR Regulations.

Amendment item 3 repeals and replaces section 8 to introduce a new rule which prescribes that medical practitioners who render or initiate 30 or more relevant phone services on each of 20 or more days in a 12 month period has met the circumstances of a prescribed pattern of services. Like the 80/20 rule, practitioners will have 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.

The substituted section will also retain the existing 80/20 rule in paragraph (a).

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. 2) 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

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.

Section 8 of the PSR Regulations prescribes the circumstances for a prescribed pattern of services. A medical practitioner is taken to have engaged in inappropriate practice if they have rendered or initiated 80 or more ‘relevant service’ on each of 20 or more days in a 12 month period, commonly known as the 80/20 rule. Relevant service is defined in section 5 of the PSR Regulations and includes most general practice attendance services performed in person.

From 1 January 2022, the *Health Insurance (Professional Services Review Scheme) Amendment (Prescribed Pattern of Services) Regulations 2021* amended the PSR Regulations to add GP telehealth and phone items to the 80/20 rule. These items were originally created in response to COVID-19 but are continuing on an ongoing basis. The *Health Insurance (Professional Services Review Scheme) Amendment (Prescribed Pattern of Services) Regulations 2021* also introduced a new 30/20 rule, applying to phone services performed by GPs, other medical practitioners in general practice, and consultant physicians.

From 20 January 2022, the *Health Insurance (Professional Services Review Scheme) Amendment (2022 Measures No. 1) Regulations 2022* temporarily removed telehealth and phone items from the prescribed pattern of services rules and repealed the 30/20 rule.

The purpose of the *Health Insurance (Professional Services Review Scheme) Amendment (2022 Measures No. 2) Regulations 2022* (the Regulations) is to amend the PSR Regulations to reapply the 80/20 rule to GP telehealth and phone items from 1 July 2022.

The Regulations also reintroduce the 30/20 rule, which applies to phone services performed by GPs, other medical practitioners in general practice, and consultant physicians. This means a practitioner will be considered to have practiced inappropriately if they render more than 30 phone services on a day more than 20 times in a 12 month period.

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 assist with the progressive realisation by all appropriate means of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health by protecting the integrity of Commonwealth Medicare benefits from consistently high volumes of rendered services by medical practitioners, without a reasonable justification for rendering those services. This will mean that the

sustainability of the Medicare program is protected. There is change to the right to social security and this Regulation does not retrogressively affect the entitlement of patients to Medicare benefits for clinically relevant services.

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