

EXPLANATORY STATEMENT

Health Insurance Act 1973

Health Insurance (General Medical Services Table) Amendment (Pain Management Services) Regulations 2022

Subsection 133(1) of the *Health Insurance Act 1973* (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 II of the Act provides for the payment of Medicare benefits for professional services rendered to eligible persons. Section 9 of the Act provides that Medicare benefits be calculated by reference to the fees for medical services set out in prescribed tables.

Subsection 4(1) of the Act provides that regulations may prescribe a table of general medical services which sets out items of general medical services, the fees applicable for each item, and rules for interpreting the table. The table made under this subsection is referred to as the general medical services table (GMST). The most recent version of the regulations is the *Health Insurance (General Medical Services Table) Regulations 2021*.

Purpose

The *Health Insurance (General Medical Services Table) Amendment (Pain Management Services) Regulations 2022* (the Regulations) amend six pain management items listed in the GMST to clarify the claiming arrangements for these services. This amendment clarifies the policy position of these items and more accurately reflects recommendations made by the MBS Review Taskforce (the Taskforce) regarding these pain management services.

Pain management items 39110, 39111, 39116, 39117, 39118 and 39119 for percutaneous zygapophyseal joint denervation were announced by Government in the 2021-22 Budget under the *Guaranteeing Medicare — changes to the Medicare Benefits Schedule* measure and implemented through the *Health Insurance Legislation Amendment (2021 Measures No. 4) Regulations 2021* (the 1 March 2022 Regulations).

These items are differentiated by the left and right sides of the body and different spinal regions, as recommended by the Taskforce. Each of the six items was implemented with a restriction of three services in any given 12 month period.

The Department has subsequently received feedback from the Faculty of Pain Medicine within the Australian and New Zealand College of Anaesthetists, pain management specialists and other stakeholders that the frequency claiming restriction introduced in the 1 March 2022 Regulations does not fully align with the intent of the Taskforce's recommendation, and would have the practical effect of preventing some patients from receiving clinically appropriate pain treatment, contrary to current clinical practice.

The Regulations amend the claiming frequency restrictions that currently apply to items 39110, 39111, 39116, 39117, 39118 and 39119 to allow for the claiming of one or more of these items during a single attendance, also known by the clinical community as an ‘episode of care’, where clinically relevant. The new claiming frequency restriction will allow for a maximum of three attendances (or episodes) in a 12 month period.

Consultation

The Pain Management Clinical Committee was established in June 2018 and its report was endorsed by the Taskforce in December 2019. Consultation on implementation of the recommendations occurred through the Pain Management Implementation Liaison Group (ILG) which met in June 2020, as well as further consultation with ILG members and peak bodies in 2021.

Groups consulted as part of the implementation of the changes to the pain management items introduced on 1 March 2022 included the Australian Pain Society, Royal Australasian College of Physicians, Neuro-modulation Society of Australia and New Zealand, Australian Society of Anaesthetists, Australian and New Zealand College of Anaesthetists, Australian Medical Association, Palliative Care Australia, Royal Australian College of General Practitioners, Private Healthcare Australia, Australian Private Hospital Association, and consumer representatives.

Stakeholders, including the Faculty of Pain Medicine within the Australian and New Zealand College of Anaesthetists and members of the ILG, have also been consulted on the current amendment to the six items. This consultation occurred in February and March 2022.

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 11 April 2022 or the day after registration.

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

ATTACHMENT

Details of the *Health Insurance (General Medical Services Table) Amendment (Pain Management Services) Regulations 2022*

Section 1 – Name

This section provides for the Regulations to be referred to as the *Health Insurance (General Medical Services Table) Amendment (Pain Management Services) Regulations 2022*.

Section 2 – Commencement

This section provides for the Regulations to commence the later of 11 April 2022 or the day 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 items [1] to [6] – Schedule 1 (items 39110, 39111, 39116, 39117, 39118 and 39119, column 2)

Amendment items [1] to [6] amend the frequency claiming restriction that currently applies to six pain management items (items 39110, 39111, 39116, 39117, 39118 and 39119). Under this change, any of these items may be claimed one or more times during a single attendance (also known as an “episode of care” in the clinical community), where clinically relevant – to a maximum of three attendances (or episodes) over a 12 month period.

Statement of Compatibility with Human Rights

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

Health Insurance (General Medical Services Table) Amendment (Pain Management Services) 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

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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 by ensuring appropriate access to clinically required services, consistent with the recommendation made by MBS Review Taskforce in its Report on Pain Management Services, 2019.

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