

EXPLANATORY STATEMENT

Health Insurance Act 1973

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

The *Health Insurance Act 1973* (the Act) sets out the principles and definitions governing the Medicare Benefits Schedule (MBS). The Act provides for payments by way of medical benefits and for other purposes.

Subsection 133(1) of 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 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*.

For the purposes of paragraph 10(2)(aa) of the Act, section 28 of the *Health Insurance Regulations 2018* (HIR) provides the items that have a benefit equal to 100% of the fee in respect of the service.

Purpose

The purpose of the *Health Insurance Legislation Amendment (2022 Measures No. 2) Regulations 2022* (the Regulations) is to amend the GMST and HIR from 1 August 2022.

The amendments within the Regulations will amend the GMST and the HIR to reflect Government policy by amending a colorectal surgery item to clarify the co-claiming arrangements, increasing the fee for a gynaecological surgery item to correct an error and correcting a typographical error in subsection 28(1) of the HIR. The Regulations will also make a minor amendment to a clause relating to the review of a mental health treatment planning item and resolve an incorporated documents issue as identified by the Senate Standing Committee for the Scrutiny of Delegated Legislation.

Consultation

The Department has consulted with stakeholders regarding the item descriptor for MBS item 32006, including with representatives from the colorectal surgery Implementation Liaison Group, the Colorectal Surgical Society of Australia and New Zealand, the Australian Medical Association, and the private hospital and private health insurance sectors.

Following implementation of MBS Review Taskforce changes to the gynaecology items on 1 March 2022, the sector has identified a small number of instances where items are not operating as intended.

The other amendments in the Regulations are minor and machinery in nature and did not require consultation to be undertaken.

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 August 2022.

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

ATTACHMENT

Details of the Health Insurance Legislation Amendment (2022 Measures No. 2) Regulations 2022

Section 1 – Name

This section provides for the Regulations to be referred to as the *Health Insurance Legislation Amendment (2022 Measures No. 2) Regulations 2022*.

Section 2 – Commencement

This section provides for the Regulations to commence on 1 August 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

Health Insurance (General Medical Services Table) Regulations 2021

Item 1 makes a minor amendment to paragraph 2.20.6(4)(a) to insert telehealth mental health treatment plan items 92112, 92113, 92116 or 92117 after 2700, 2701, 2715 and 2717. This change will allow a face-to-face review to be undertaken even if the patient had their initial treatment plan provided under telehealth items 92112, 92113, 92116 or 92117.

Item 2 makes a minor amendment to Medicare Benefits Schedule (MBS) item 32006, for left hemicolectomy, to clarify that the service should not be performed in conjunction with other colorectal surgery items 32024, 32025, 32026 or 32028.

Items 3 to 7 and 9 amend MBS items 35631, 35632, 35633, 35635, 35637 and 35641 to:

- remove the references to the revised American Fertility Society (rAFS) scale, which is a system that applies to grading endometriosis;
- replace references to different stages of endometriosis with minimal, mild, moderate and severe; and
- remove references to European Society for Hysteroscopy (ESH) classifications, which is a system that classifies intrauterine adhesions.

These changes have been made to address concerns raised by the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee).

On 1 March 2022 changes to numerous gynaecological services were made in the GMST to implement the Government's response to recommendations by the MBS Reviews Taskforce. These changes were announced in the 2021-22 Budget under the *Guaranteeing Medicare – changes to the Medicare Benefits Schedule* measure and implemented by the *Health Insurance Legislation Amendment (2021 Measures No. 4) Regulations 2021*.

The Senate Standing Committee for the Scrutiny of Delegated Legislation raised concerns around the incorporation of documents related to the “rAFS stage IV” in item 35641 and the “ESH” classification grades in items 35633 and 35635. The advice provided to the Committee was that the intent of the terminology was to describe the presence of particular clinical scenarios rather than to incorporate a document, however amendments to the items to remove reference to these classifications would be made to eliminate any doubt about their incorporation. These changes will align with the Committee's guidelines which provide that a document is likely to be incorporated by a legislative instrument where that document is necessary to interpret, apply or otherwise use that instrument.

Amendments to items 35631, 35632 and 35637 are minor amendments that will align with the changes to items 35633, 35635 and 35641.

Item 10 amends the fee for lymph node dissection for staging or restaging of gynaecological malignancy (MBS item 35723). The fee for this item will increase to \$1,466.35. This change aligns the fee for this item with the fee for lymph node dissection, for testicular tumour (MBS item 37607). This will mean patients will receive a higher Medicare rebate for this service from 1 August 2022. This change will align this item with the response to recommendations by the MBS Reviews Taskforce, which were announced in the 2021-22 Budget under the *Guaranteeing Medicare – changes to the Medicare Benefits Schedule* measure.

Items 8 and 11 amend items 35637 and 35754 to better reflect the requirements of the service to be provided. The change to item 35637 will ensure the co-claiming restriction for this service aligns with the MBS Review Taskforce's recommendation. The previous item descriptor for item 35754 did not accurately reflect the complexity of the service and this change will clarify the requirements for a service under item 35754.

Health Insurance Regulations 2018

Item 12 makes a minor amendment to subsection 28(1) by omitting MBS item 93424 from table item 28Z and substituting it with 93423. This change has been made to correct a typographical error.

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) 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 purpose of the *Health Insurance Legislation Amendment (2022 Measures No. 2) Regulations 2022* (the Regulations) is to amend the GMST and HIR from 1 August 2022.

The amendments within the Regulations will amend the GMST and the HIR to reflect Government policy by amending a colorectal surgery item to clarify the co-claiming arrangements, increasing the fee for a gynaecological surgery item to correct an error and correcting a typographical error in subsection 28(1) of the HIR. The Regulations will also make a minor amendment to a clause relating to the review of a mental health treatment planning item and resolve an incorporated documents issue as identified by the Senate Standing Committee for the Scrutiny of Delegated Legislation.

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 access to publicly subsidised medical services are clinically and cost-effective as intended.

Conclusion

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

Mark Butler

Minister for Health and Aged Care