

EXPLANATORY STATEMENT

Health Insurance Act 1973

Health Insurance (Professional Services Review Scheme) Amendment (2022 Measures No. 3) 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).

Purpose

On 1 July 2022, the *Health Insurance (Professional Services Review Scheme) Amendment (2022 Measures No. 2) Regulations 2022* (PSR Amendment Regulations) amended the Principal Regulations to introduce a new 30/20. Under the 30/20 rule, a medical practitioner is taken to have engaged in inappropriate practice if they have rendered or initiated 30 or more 'relevant phone services' on each of 20 or more days in a 12 month period. Relevant phone service is defined in section 5 of the Principal Regulations and includes phone services performed by GPs, other medical practitioners in general practice, and consultant physicians.

The *Health Insurance (Professional Services Review Scheme) Amendment (2022 Measures No. 3) Regulations 2022* (the Regulations) amends the Principal Regulations to temporarily remove the 30/20 rule from the prescribed pattern of services rules. This recognises that practitioners may be required to temporarily render more 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 Government's intention is that this rule will recommence on 1 October 2022.

The Regulations will retrospectively commence immediately after the commencement of the PSR Amendment Regulations on 1 July 2022 to temporarily cease the introduction of the 30/20 rule. The amendments to the prescribed patterns of service rules in the Regulations will not negatively disadvantage practitioners as these changes allow practitioners to continue providing phone services without being taken to have engaged in inappropriate practice from 1 July 2022.

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 regarding the changes made to the Principal Regulations on 1 July 2022.

It was not reasonably practicable to undertake consultation with all representatives of persons affected by the proposed Regulations considering the nature of the COVID-19 emergency and given that the deferment of the 30/20 rule will allow practitioners to temporarily provide more phone services to help support the community during the current increase in COVID-19 infections across Australia.

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 immediately after the commencement of the *Health Insurance (Professional Services Review Scheme) Amendment (2022 Measures No. 2) Regulations 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. 3) 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. 3) Regulations 2022*.

Section 2 – Commencement

This section provides for the Regulations to commence immediately after the commencement of the *Health Insurance (Professional Services Review Scheme) Amendment (2022 Measures No. 2) Regulations 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 (Professional Services Review Scheme) Regulations 2019 (Principal Regulations)

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 phone services performed by GPs, other medical practitioners in general practice, and consultant physicians. This item removes the definition to reflect the policy to temporarily remove phone items from this particular prescribed pattern of services rule.

Amendment item [2] – 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 from 1 July 2022

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. 3) 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

On 1 July 2022, the *Health Insurance (Professional Services Review Scheme) Amendment (2022 Measures No. 2) Regulations 2022* (PSR Amendment Regulations) amended the Principal Regulations to introduce a new 30/20. Under the 30/20 rule, a medical practitioner is taken to have engaged in inappropriate practice if they have rendered or initiated 30 or more ‘relevant phone services’ on each of 20 or more days in a 12 month period. Relevant phone service is defined in section 5 of the Principal Regulations and includes phone services performed by GPs, other medical practitioners in general practice, and consultant physicians.

The *Health Insurance (Professional Services Review Scheme) Amendment (2022 Measures No. 3) Regulations 2022* (the Regulations) amends the Principal Regulations to temporarily remove the 30/20 rule from the prescribed pattern of services rules. This recognises that practitioners may be required to temporarily render more 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 Government’s intention is that this rule will recommence on 1 October 2022.

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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 and the right of equality and non-discrimination as it does not change any entitlements to Medicare benefits for clinically relevant services available under the Medicare Benefits Schedule.

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