

EXPLANATORY STATEMENT

National Health Act 1953

National Health (Collaborative Arrangements for Nurse Practitioners) Instrument 2022

Authority

The *National Health (Collaborative Arrangements for Nurse Practitioners) Instrument 2022* (the Principal Instrument) is an instrument made under subsection 84(1) of the *National Health Act 1953* (the Act) for the purposes of the definition of ‘authorised nurse practitioner’ (which deals with eligible nurse practitioners providing nurse practitioner treatment in collaborative arrangements with medical practitioners).

Under subsection 33(3) of the *Acts Interpretation Act 1901*, 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 and operation

The purpose of the Principal Instrument is to repeal and remake the *National Health (Collaborative arrangements for nurse practitioners) Determination 2010* (the Former Instrument). The Former Instrument is required to be remade on or before 1 October 2022, being the date on which the Former Instrument is due to sunset under section 50 of the *Legislation Act 2003*. The practical effect of remaking the Former Instrument is to continue, without any change, the existing collaborative arrangements under which a nurse practitioner may prescribe certain medicines under the Pharmaceutical Benefits Scheme (PBS).

Since 1 November 2010, a nurse practitioner who is approved under subsection 84AAJ(2) of the Act as an ‘authorised nurse practitioner’ is permitted to prescribe certain medicines under the PBS. Subsection 84(1) of the Act defines ‘authorised nurse practitioner’ as an ‘eligible nurse practitioner’ in relation to whom an approval is in force under subsection 84AAJ(2) of the Act, so far as the eligible nurse practitioner provides nurse practitioner treatment in a collaborative arrangement of a kind or kinds specified in a legislative instrument made by the Minister for the purposes of the definition, with one or more medical practitioners of a kind or kinds specified in the legislative instrument.

The Principal Instrument specifies the kinds of medical practitioners and collaborative arrangements for the purposes of the definition of ‘authorised nurse practitioner’ in subsection 84(1) of the Act. Section 6 provides that all medical practitioners are specified for the purposes of the definition of ‘authorised nurse practitioner’ in subsection 84(1) of the Act.

The kinds of collaborative arrangements specified in subsection 7(1) of the Principal Instrument are the following collaborative arrangements, provided those arrangements comply with the requirements in subsection 7(2):

- (a) a collaborative arrangement in which the eligible nurse practitioner is employed or engaged by one or more medical practitioners or an entity that employs or engages one or more medical practitioners;

- (b) a collaborative arrangement in which a medical practitioner refers a patient to the eligible nurse practitioner in writing;
- (c) a collaborative arrangement in which the eligible nurse practitioner and one or more medical practitioners make an agreement in writing, signed by each party;
- (d) a collaborative arrangement in which the eligible nurse practitioner has acknowledgement from one or more medical practitioners that the practitioner will be collaborating with the eligible nurse practitioner to provide care to one or more patients within the arrangement, and the nurse practitioner makes records required by section 8 of the Principal Instrument in relation to each patient to whom the collaborative arrangement applies.

Subsection 7(2) of the Principal Instrument provides that each collaborative arrangement must make provision for consultation between the eligible nurse practitioner and a medical practitioner; referral of the patient by the nurse practitioner to a medical practitioner; and transfer of a patient's care by the nurse practitioner to a medical practitioner.

Consultation

The Principal Instrument makes no substantive changes to the kinds of medical practitioners and collaborative arrangements determined under the Former Instrument. However, some stylistic and legal technical changes have been made to the Principal Instrument in accordance with the Office of Parliamentary Counsel's Drafting Directions to improve the drafting standard and otherwise to enhance the construction of the Principal Instrument under the enabling provision of the Act.

These stylistic and legal technical changes are consistent with the complementary provisions for 'participating nurse practitioners' in sections 7 and 8 of the *Health Insurance Regulations 2018*. The substantive elements of the Former Instrument have not changed. The Principal Instrument maintains the original policy intent to mirror the complementary provisions in the *Health Insurance Regulations 2018* and thereby promotes consistent application and administration under the legislation.

On this basis, the Principal Instrument is considered minor and machinery in nature and no formal consultation was undertaken by the Department.

Commencement

The Principal Instrument is a disallowable legislative instrument for the purposes of the *Legislation Act 2003* and commences on the day after the instrument is registered on the Federal Register of Legislation.

Details of the Principal Instrument are set out in **Attachment A**. The Principal Instrument is compatible with the rights and freedoms recognised or declared under section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A statement of compatibility with human rights is set out in **Attachment B**.

ATTACHMENT A

Details of the *National Health (Collaborative Arrangements for Nurse Practitioners) Instrument 2022*

Part 1 – Preliminary

Section 1 - Name

Section 1 provides that the name of the instrument is the *National Health (Collaborative Arrangements for Nurse Practitioners) Instrument 2022* (the Principal Instrument).

Section 2 - Commencement

Section 2 provides that the Principal Instrument commences on the day after it is registered on the Federal Register of Legislation.

Section 3 - Authority

Section 3 provides that the legislative authority for making the Principal Instrument is subsection 84(1) of the *National Health Act 1953* (the Act).

Section 4 - Definitions

Section 4 defines terms used in the Principal Instrument, including some terms from the *Health Insurance Regulations 2018* to promote consistent use of expression.

Section 5 – Schedules

Section 5 provides that each instrument in a Schedule is to be amended or repealed in accordance with the applicable items in that Schedule.

Part 2—Specified medical practitioners and collaborative arrangements

Section 6 - Authorised nurse practitioners—specified medical practitioners

Section 6 provides that all medical practitioners are specified for the purposes of the definition of ‘authorised nurse practitioner’ in subsection 84(1) of the Act. The term ‘medical practitioner’ is defined in the *Health Insurance Act 1973*. Under subsection 4(1A) of the Act, a word or phrase defined for the purposes of the *Health Insurance Act 1973* has the meaning that it would have if used in that Act (and any instrument made thereunder).

Section 7 - Authorised nurse practitioners—specified collaborative arrangements

Subsection 7(1) specifies the kinds of collaborative arrangements for the purposes of the definition of ‘authorised nurse practitioner’ in subsection 84(1) of the Act provided those arrangements comply with subsection 7(2). The arrangements are summarised below.

Arrangement where nurse practitioner is employed or engaged by medical practice

Paragraph 7(1)(a) specifies a kind of collaborative arrangement in which the eligible nurse practitioner is employed or engaged by one or more medical practitioners or by an entity that employs or engages one or more medical practitioners. The reference to ‘employs or engages’ covers both employees and contractors. This arrangement will cover an eligible nurse practitioner who is employed or engaged by a medical practice so long as the medical practice employs or engages one or more medical practitioners.

Arrangement where nurse practitioner is referred patients from a medical practitioner

Paragraph 7(1)(b) specifies a kind of collaborative arrangement in which a medical practitioner refers a patient in writing to the nurse practitioner for treatment.

Arrangement where there is an agreement between eligible nurse practitioner and one or more medical practitioners

Paragraph 7(1)(c) specifies a collaborative agreement in which there is a written agreement between the eligible nurse practitioner and one or more medical practitioners and the agreement is signed by each party.

Arrangement where eligible nurse practitioner has acknowledgement from one or more medical practitioners, and keeps written records regarding patients

Paragraph 7(1)(d) specifies a collaborative arrangement in which the eligible nurse practitioner has acknowledgement from one or more medical practitioners that the practitioner will be collaborating with the eligible nurse practitioner to provide care to one or more patients within the arrangement; the eligible nurse practitioner tells the relevant patient or patients that they will be providing care in an arrangement that complies with subsection 7(2); and the eligible nurse practitioner makes records required by section 8 of the Principal Instrument in relation to each patient to whom the collaborative arrangement applies.

Irrespective of the kind of collaborative arrangement, subsection 7(2) provides that a collaborative arrangement must provide for:

- (a) consultation between the nurse practitioner and a medical practitioner;
- (b) referral of a patient by the nurse practitioner to a medical practitioner; and
- (c) transfer of a patient’s care by the nurse practitioner to a medical practitioner.

This ensures that that all kinds of collaborative arrangement must deal expressly with how the collaboration is to occur regarding consultation, referral and transfer.

Subsection 7(3) provides that a collaborative arrangement may apply to more than one patient.

Section 8 - Nurse practitioner record-keeping requirements for certain collaborative arrangements

Subsection 8(1) provides the general record-keeping requirements for the purposes of subparagraph 7(1)(d)(iii) of the Principal Instrument. The eligible nurse practitioner must

record the following in their written records in relation to each patient to whom the collaborative arrangement in paragraph 7(1)(d) applies:

- (a) the name of at least one medical practitioner who has given the nurse practitioner an acknowledgement mentioned in paragraph 7(1)(d)(i) (the ‘*named medical practitioner*’);
- (b) the nurse practitioner has informed the patient the nurse practitioner will be providing services to the patient in a collaborative arrangement with one or more medical practitioners;
- (c) the circumstances in which the nurse practitioner will consult with a medical practitioner about the patient’s care, refer the patient to a medical practitioner, and transfer the patient’s care to a medical practitioner.

Subsection 8(2) provides the record-keeping requirements for the purposes of subparagraph 7(1)(d)(iii) of the Principal Instrument in relation to particular events. The following matters in paragraphs 8(2)(a) to (d) must be recorded by the nurse practitioner in their written records as soon as practicable after the event occurs in relation to each patient to whom a collaborative arrangement in paragraph 7(1)(d) applies:

- (a) any consultation or other communication between the nurse practitioner and a medical practitioner about the patient’s care;
- (b) any referral of the patient by the nurse practitioner to a medical practitioner;
- (c) any transfer of the patient’s care by the nurse practitioner to a medical practitioner;
- (d) if the nurse practitioner gives a copy of a document mentioned in subsection 8(4) to a named practitioner (as defined above) or the patient’s usual general practitioner—when the copy was given.

Subsection 8(3) specifies the circumstances in which the eligible nurse practitioner must provide a copy of a document mentioned in subsection 8(4) of the Principal Instrument to a named medical practitioner or the patient’s usual general practitioner. Paragraph 8(3)(a) outlines the circumstance relating to a named medical practitioner; being, the circumstance in which the eligible nurse practitioner consults the named medical practitioner, refers the patient to the named medical practitioner, or transfers the patient’s care to the named medical practitioner; and the named medical practitioner requests a copy of the document.

Paragraph 8(3)(b) outlines the circumstance relating to the patient’s usual general practitioner; being, the circumstance in which the patient’s general practitioner is not a named medical practitioner for the patient and the patient consents.

Subsection 8(4) specifies the documents that must be provided in the circumstances outlined in subsection 8(3). Those are a referral of the patient by the nurse practitioner to a specialist or consultant physician, the results of diagnostic imaging or pathology services requested by the nurse practitioner in relation to the patient, and a record of services provided by the nurse practitioner to the patient.

Subsection 8(5) defines the term ‘usual general practitioner’ for the purposes of section 8 of the Principal Instrument to include a medical practitioner nominated by the patient.

Schedule 1—Repeals

Schedule 1 repeals the *National Health (Collaborative arrangements for nurse practitioners) Determination 2010*.

ATTACHMENT B

Statement of Compatibility with Human Rights

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

National Health (Collaborative Arrangements for Nurse Practitioners) Instrument 2022

This legislative 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 legislative instrument

The purpose of the *National Health (Collaborative Arrangements for Nurse Practitioners) Instrument 2022* (the instrument) is to repeal and remake the *National Health (Collaborative arrangements for nurse practitioners) Determination 2010* (the former instrument). The former instrument is required to be remade on or before 1 October 2022, being the date on which the former instrument will sunset under section 50 of the *Legislation Act 2003*. The practical effect of remaking the former instrument is to continue, without any change, the existing collaborative arrangements under which a nurse practitioner may prescribe certain medicines under the Pharmaceutical Benefits Scheme (PBS).

Since 1 November 2010, a nurse practitioner who is approved under subsection 84AAJ(2) of the Act as an ‘authorised nurse practitioner’ is permitted to prescribe certain medicines under the PBS. Subsection 84(1) of the Act defines ‘authorised nurse practitioner’ as an ‘eligible nurse practitioner’ in relation to whom an approval is in force under subsection 84AAJ(2) of the Act, so far as the eligible nurse practitioner provides nurse practitioner treatment in a collaborative arrangement of a kind or kinds specified in a legislative instrument made by the Minister for the purposes of the definition, with one or more medical practitioners of a kind or kinds specified in the legislative instrument.

The instrument specifies the kinds of medical practitioners and collaborative arrangements for the purposes of the definition of ‘authorised nurse practitioner’ in subsection 84(1) of the Act. Section 6 of the instrument provides that all medical practitioners are specified for the purposes of the definition of ‘authorised nurse practitioner’ in subsection 84(1) of the Act.

The kinds of collaborative arrangements specified in subsection 7(1) of the instrument are the following collaborative arrangements, provided those arrangements comply with the requirements in subsection 7(2):

- (a) a collaborative arrangement in which the eligible nurse practitioner is employed or engaged by one or more medical practitioners or an entity that employs or engages one or more medical practitioners;
- (b) a collaborative arrangement in which a medical practitioner refers a patient in writing to the eligible nurse practitioner;
- (c) a collaborative arrangement in which the eligible nurse practitioner and one or more medical practitioners make an agreement in writing, signed by each party;
- (d) a collaborative arrangement in which the eligible nurse practitioner has acknowledgement from one or more medical practitioners that the practitioner will be

collaborating with the eligible nurse practitioner to provide care to one or more patients within the arrangement, and the nurse practitioner makes records required by section 8 of the instrument in relation to each patient to whom the collaborative arrangement applies.

Subsection 7(2) of the instrument provides that each collaborative arrangement must make provision for consultation between the eligible nurse practitioner and a medical practitioner; referral of the patient by the nurse practitioner to a medical practitioner; and transfer of a patient's care to a medical practitioner.

Human rights implications

This instrument engages Articles 9 and 12 of the International Covenant on Economic Social and Cultural Rights (the 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 instead 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 would be legitimate for a Government to re-direct its limited resources in ways that it considered 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 (the 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 instrument specifies the kinds of medical practitioners and collaborative arrangements for the purposes of the definition of ‘authorised nurse practitioner’ in subsection 84(1) of the Act. It supports the approval of eligible nurse practitioners under subsection 84AAJ(2) of the Act as ‘authorised nurse practitioners’ to prescribe certain medicines under the PBS. This instrument will maintain rights to health and social security by ensuring that authorised nurse practitioners can continue to prescribe certain medicine under the PBS beyond 1 October 2022, which is when the 2010 Determination will sunset under the *Legislation Act 2003*.

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.

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