

EXPLANATORY STATEMENT

Health Insurance Act 1973

Health Insurance (Section 3C General Medical Services – Telehealth and Telephone Attendances) Amendment (COVID-19 Positive Patients Exemption) Determination 2022

Subsection 3C(1) of the *Health Insurance Act 1973* (the Act) provides that the Minister may, by legislative instrument, determine that a health service not specified in an item in the general medical services table (the Table) shall, in specified circumstances and for specified statutory provisions, be treated as if it were specified in the Table.

The Table is set out in the regulations made under subsection 4(1) of the Act. The most recent version of the regulations is the *Health Insurance (General Medical Services Table) Regulations 2021*.

This instrument relies on subsection 33(3) of the *Acts Interpretation Act 1901* (AIA). Subsection 33(3) of the AIA provides that 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

Since 13 March 2020, the Australian Government has been providing temporary access to Medicare benefits for certain medical services to protect Australians during the coronavirus (COVID-19) pandemic. From 1 January 2022, permanent patient access to certain general practitioner, specialist and allied health telehealth and phone services was continued in the *Health Insurance (Section 3C General Medical Services – Telehealth and Telephone Attendances) Determination 2021* (the Principal Determination).

General practitioners (GPs) and other medical practitioners (OMPs) working in general practice can only perform these telehealth or phone services if they have an existing relationship with the patient. An existing relationship is defined as:

- the medical practitioner who performs the service has provided a face-to-face service to the patient in the last 12 months; or
- the medical practitioner who performs the service is located at a medical practice, and the patient has a face-to-face service arranged by that practice in the last 12 months. This can be a service performed by another doctor located at the practice, or a service performed by another health professional located at the practice (such as a practice nurse or Aboriginal and Torres Strait Islander health worker); or
- the medical practitioner who performs the service is a participant in the Approved Medical Deputising Service (AMDS) program, and the AMDS provider that employs the medical practitioner has a formal agreement with a medical practice that has provided at least one face-to-face service to the patient in the last 12 months.

This requirement does not apply to a person who is under the age of 12 months, a person who is experiencing homelessness, a person who is required to quarantine or isolate under a State or Territory Government public health order, or a person who receives the service from a medical practitioner located at an Aboriginal Medical Service or an Aboriginal Community Controlled Health Service or a person who is in a natural disaster affected area.

Some GP telehealth and phone items for specific services or for the management of specific health conditions also do not require an existing clinical relationship, including GP items for urgent after-hours (unsociable hours) services, pregnancy counselling services, blood-borne viruses and sexual or reproductive health consultations, mental health consultations and nicotine cessation services.

On 30 September 2022, National Cabinet met, and the Ministers agreed to end mandatory isolation requirements for COVID-19 positive persons, with each State and Territory jurisdiction to implement changes at a time of their choosing through relevant public health legislation.

The purpose of the *Health Insurance (Section 3C General Medical Services – Telehealth and Telephone Attendances) Amendment (COVID-19 Positive Patients Exemption) Determination 2022* (the Amendment Determination) is to amend the Principal Determination to remove the requirement for patients to have an existing relationship with their medical practitioner to access a general practice telehealth or phone service if the patient has received a positive COVID-19 test result within the last 7 days. A person who has tested positive for COVID-19 is defined as a patient who has received a positive COVID-19 test result, confirmed by either laboratory testing (PCR) or a COVID-19 rapid antigen self-test (RAT) approved for supply in Australia by the Therapeutic Goods Administration.

The Amendment Determination will commence retrospectively on 13 October 2022. The changes in the Amendment Determination do not disadvantage or impose liabilities on the rights of any person, and therefore give effect to the retrospective commencement of these amendments pursuant to subsection 12(2) of the *Legislation Act 2003*.

Consultation

Representations in support of an exemption for COVID -19 positive patients were made by a number of primary care practitioners and peak organisations including the Australian Medical Association and the Royal Australian College of General Practitioners. These changes will ensure patients who test positive for COVID-19 continue to have access to remote general practice services under the MBS, following changes by States and Territories to relevant public health legislation to remove mandatory isolation periods.

Details of the Amendment Determination are set out in the [Attachment](#).

The Amendment Determination commences retrospectively on 13 October 2022.

The Amendment Determination is a legislative instrument for the purposes of the *Legislation Act 2003*.

Authority: Subsection 3C(1) of the

Health Insurance Act 1973

Details of the Health Insurance (Section 3C General Medical Services – Telehealth and Telephone Attendances) Amendment (COVID-19 Positive Patients Exemption) Determination 2022

Section 1 – Name

Section 1 provides for the Amendment Determination to be referred to as the *Health Insurance (Section 3C General Medical Services – Telehealth and Telephone Attendances) Amendment (COVID-19 Positive Patients Exemption) Determination 2022*.

Section 2 – Commencement

Section 2 provides that the Amendment Determination commences on 13 October 2022.

Section 3 – Authority

Section 3 provides that the Amendment Determination is made under subsection 3C(1) of the *Health Insurance Act 1973*.

Section 4 – Schedules

Section 4 provides that each instrument that is specified in a Schedule to this Amendment Determination is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Amendment Determination has effect according to its terms.

Schedule 1 – Amendments

Health Insurance (Section 3C General Medical Services – Telehealth and Telephone Attendances) Determination 2021

Amendment item 1 inserts a definition for ***a person who has tested positive for COVID-19***, defining this term as a patient who has received a positive COVID-19 test result within the last 7 days, confirmed by either a laboratory testing (PCR) or a COVID-19 rapid antigen self-test (RAT) approved for supply in Australia by the Therapeutic Goods Administration. For the purposes of this definition, the last 7 days means 7 or less days from the date the patient received a positive COVID-19 test result.

Amendment item 2 inserts new subparagraph 7(6)(a)(vii) to provide an exemption to the requirement for a patient to have an existing relationship with the medical practitioner providing the service to access general practice telehealth and phone services if the patient has received a positive COVID-19 test result within the last 7 days. The last 7 days means 7 or less days from the date the patient received a positive COVID-19 test result.

Statement of Compatibility with Human Rights

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

Health Insurance (Section 3C General Medical Services – Telehealth and Telephone Attendances) Amendment (COVID-19 Positive Patients Exemption) Determination 2022

This 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 Amendment Determination

Since 13 March 2020, the Australian Government has been providing temporary access to Medicare benefits for certain medical services to protect Australians during the coronavirus (COVID-19) pandemic. From 1 January 2022, permanent patient access to certain general practitioner, specialist and allied health telehealth and phone services was continued in the *Health Insurance (Section 3C General Medical Services – Telehealth and Telephone Attendances) Determination 2021* (the Principal Determination).

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The Amendment Determination will commence retrospectively on 13 October 2022. The changes in the Amendment Determination do not disadvantage or impose liabilities on the rights of any person, and therefore give effect to the retrospective commencement of these amendments pursuant to subsection 12(2) of the *Legislation Act 2003*.

Human rights implications

This instrument engages 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

This instrument maintains the rights to health and social security and the right of equality and non-discrimination by ensuring that patients who receive a positive COVID-19 test result continue to have access to general practice telehealth and phone services even in circumstances where the medical practitioner providing the service does not have an existing relationship with the patient.

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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