

EXPLANATORY STATEMENT

Health Insurance Act 1973

Health Insurance (Section 3C General Medical Services – Telehealth and Telephone Attendances) Amendment (High Risk Groups) 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* (GMST).

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

The purpose of the *Health Insurance (Section 3C General Medical Services – Telehealth and Telephone Attendances) Amendment (High Risk Groups) Determination 2022* (the Amendment Determination) is to amend the *Health Insurance (Section 3C General Medical Services – Telehealth and Telephone Attendances) Determination 2021* (the Principal Determination). This amendment will allow people who are experiencing acute respiratory symptoms and who meet the Pharmaceutical Benefits Schedule (PBS) eligibility criteria for antiviral therapy to receive telehealth or telephone consultations from any available medical practitioner to seek a request to a private pathologist for Polymerase Chain Reaction (PCR) testing. This exemption will apply until 31 March 2023.

Usually, a patient must have an established clinical relationship with the medical practitioner, meaning one face to face service in a 12 month period, before they are eligible to receive telehealth or telephone consultations (known as the usual medical practitioner rule or the UMP rule) if the patient doesn't qualify for an exemption under existing exemption criteria. In a period where there is a higher prevalence of COVID-19, and taking into consideration the holiday period with practices having reduced staff, there is potential for high risk patient groups missing out on accessing the COVID-19 antiviral therapy in a timely manner, if they are unable to confirm their diagnosis through a PCR test.

This exemption will allow patients who meet the high risk patient criteria to receive a telehealth consultation for the purpose of seeking a request for a Medical Benefits Schedule (MBS) PCR test. Where a treating practitioner considers a test for COVID-19 to be necessary for the clinical management of their patient, it should be explicitly stated in the request, including where testing for COVID-19 is requested alongside testing for other respiratory pathogens (e.g. "Respiratory virus PCR including COVID-19").

The Amendment Determination will benefit people who are experiencing acute respiratory symptoms and:

- suspect they have COVID-19 but have not tested positive with a RAT;
- are seeking a PCR test from a private pathologist (due to not being able to access a General Practitioner Respiratory clinic, for example) to confirm diagnosis;
- would be eligible for oral antiviral treatment should they test positive for COVID-19 as they are considered a high risk group; and
- are unable to make a timely appointment with their usual general practitioner.

A person is considered a high risk of severe illness as a result of a COVID-19 infection if they are:

- 70 years of age or older;
- 50 years of age or older with at least two additional risk factors;
- of First Nations descent, who is 30 years of age or older and with at least one additional risk factor; or
- 18 years of age or older and who is moderately to severely immunocompromised.

The Government agreed to these changes 22 December 2022. The Amendment Determination will ensure people who are experiencing acute respiratory symptoms and are at a high risk of developing a severe illness as a result of a COVID-19 infection to access medical services when they need it most.

Examples of Risk Factors and Conditions for UMP Rule Exemption

Risk factors for people over 70, 50 or 30 years of age can include:

- a) living in residential aged care;
- b) living with disability with multiple conditions and/or frailty (but not limited to living in supported accommodation);
- c) neurological conditions like stroke or dementia and demyelinating conditions e.g. multiple sclerosis, Guillain-Barre Syndrome;
- d) chronic respiratory conditions including COPD, moderate or severe asthma;
- e) obesity or diabetes (type I or II requiring medication);
- f) heart failure, coronary artery disease, cardiomyopathies;
- g) kidney failure or cirrhosis; and/or
- h) living remotely with reduced access to higher level healthcare.

Conditions for people 18 years of age or older who are moderately to severely immunocompromised include:

- a) blood cancer or some red blood cell disorders (thalassemia, sickle cell disease);
- b) transplant recipient;
- c) primary or acquired (HIV) immunodeficiency;
- d) chemotherapy or whole-body radiotherapy in the last 3 months;
- e) high dose corticosteroids or pulse corticosteroid therapy in the last 3 months;
- f) immunosuppressive treatments in the last 3 months;
- g) rituximab in the last 12 months;
- h) cerebral palsy or Down Syndrome;
- i) congenital heart disease; and/or
- j) living with disability with multiple conditions and/or frailty.

Consultation

No consultation was undertaken on these changes as they are intended to provide access to high risk patient groups as soon as they begin to experience symptoms of COVID-19. As the changes made in the Amendment Determination address a patient access gap, it was not practicable to conduct a consultation process with all affected stakeholders.

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

The Determination commences on the day after registration.

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

Authority: Subsection 3C(1) of the
Health Insurance Act 1973

ATTACHMENT

Details of the *Health Insurance (Section 3C General Medical Services – Telehealth and Telephone Attendances) Amendment (High Risk Groups) Determination 2022*Section 1 – Name

Section 1 provides for the Determination to be referred to as the *Health Insurance (Section 3C General Medical Services – Telehealth and Telephone Attendances) Amendment (High Risk Groups) Determination 2022*.

Section 2 – Commencement

Section 2 provides that the Determination commences on the day after registration.

Section 3 – Authority

Section 3 provides that the 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 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 Determination has effect according to its terms.

Schedule 1 – Amendments

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

Item [1] amends subsection 5(1) to insert a definition for ‘*person who meets the PBS criteria for COVID-19 antiviral therapy*’. Under this definition, a person who meets the Pharmaceutical Benefits Scheme (PBS) criteria for COVID-19 antiviral therapy means a person who is:

- (a) 70 years of age or older;
- (b) 50 years of age or older with at least two additional risk factors;
- (c) of First Nations descent, who is 30 years of age or older and with at least one additional risk factor; or
- (d) 18 years of age or older and who is moderately to severely immunocompromised.

Item [2] amends subsection 7(6), which provides exemptions to the usual medical practitioner rule set out in subsection 7(5), to insert subparagraph (viii). Under this amendment, the usual medical practitioner rule will not apply to people who meet the PBS criteria for COVID-19 antiviral therapy who are experiencing acute respiratory symptoms. This amendment will ensure that people who are experiencing acute respiratory symptoms and are at a high risk of developing a severe illness arising from a COVID-19 infection can access general practice telehealth and phone services when they need it most.

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 (High Risk Groups) 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 Determination

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- o) kidney failure or cirrhosis; and/or
- p) living remotely with reduced access to higher level healthcare.

Conditions for people 18 years of age or older who are moderately to severely immunocompromised include:

- k) blood cancer or some red blood cell disorders (thalassemia, sickle cell disease);
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- o) high dose corticosteroids or pulse corticosteroid therapy in the last 3 months;
- p) immunosuppressive treatments in the last 3 months;
- q) rituximab in the last 12 months;
- r) cerebral palsy or Down Syndrome;
- s) congenital heart disease; and/or
- t) living with disability with multiple conditions and/or frailty.

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 will reflect contemporary clinical practice to ensure that patients continue to have access to health and social security through relevant subsidised general medical services on the Medicare Benefits Schedule.

Conclusion

This instrument is compatible with human rights as it maintains the right to health and the right to social security.

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