

## EXPLANATORY STATEMENT

### *Health Insurance Act 1973*

#### *Health Insurance Amendment (Better Access Services for Family and Carer Participation) Determination 2023*

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**

The purpose of the *Health Insurance Amendment (Better Access Services for Family and Carer Participation) Determination 2023* (the Amendment Determination) is to amend the *Health Insurance (Allied Health Services) Determination 2014* (the AHS Determination); the *Health Insurance (Section 3C General Medical Services – Telehealth and Telephone Attendances) Determination 2021* (the Telehealth Determination); and the *Health Insurance (Section 3C General Medical Services – Other Medical Practitioner) Determination 2018* (the OMP Determination) to introduce 44 new items to facilitate family and carer participation in treatment under the *Better Access to Psychiatrists, Psychologists and General Practitioners through the MBS* initiative (Better Access) as part of a suite of legislative amendments that will introduce 48 items for this purpose. These changes were announced in the 2021-22 Budget under the *Mental Health* measure.

Services provided to a person other than the patient under any of the 48 new items to facilitate family and carer participation in treatment under Better Access will also count towards a patient's limit of 10 individual services per calendar year for Better Access service items.

#### **Consultation**

The changes in the Amendment Determination were informed by recommendations of the Productivity Commission in its Inquiry into Mental Health, the MBS Review Taskforce, and the National Children's Mental Health and Wellbeing Strategy. These processes involved extensive stakeholder consultation, research and expert analysis. The Medical Services Advisory Committee (MSAC) Executive considered the proposed MBS changes to facilitate family and carer participation in treatment under

Better Access on 19 August 2022. MSAC Executive noted the supporting evidence and endorsed the changes.

Representatives of the Royal Australian College of General Practitioners (RACGP), Australian Medical Association (AMA), Australian College of Rural and Remote Medicine (ACRRM), Royal Australian and New Zealand College of Psychiatrists (RANZCP), Australian Psychological Society (APS), Australian Clinical Psychology Association (ACPA), Australian Association of Psychologists Inc (AAPi), Australian Association of Social Workers (AASW) and Occupational Therapy Australia (OTA), headspace National, Orygen, Emerging Minds, Gidget Foundation Australia, as well as consumer and carer representatives, were given the opportunity to comment on the MBS changes in the Amendment Determination.

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

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

The Amendment Determination commences immediately after the commencement of the *Health Insurance Legislation Amendment (2023 Measures No. 1) Determination 2022*.

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

## ***Details of the Health Insurance Amendment (Better Access Services for Family and Carer Participation) Determination 2023***

### Section 1 – Name

Section 1 provides for the Amendment Determination to be referred to as the *Health Insurance Amendment (Better Access Services for Family and Carer Participation) Determination 2023*.

### Section 2 – Commencement

Section 2 provides that the Amendment Determination commences immediately after the commencement of the *Health Insurance Legislation Amendment (2023 Measures No. 1) Determination 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 – Better Access services

#### ***Health Insurance (Allied Health Services) Determination 2014 (AHS Determination)***

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

#### ***Health Insurance (Section 3C General Medical Services – Other Medical Practitioner) Determination 2018 (OMP Determination)***

Items 1 to 20 of Schedule 1 of the Amendment Determination amend the AHS Determination. Items 21 to 41 of Schedule 1 of the Amendment Determination amend the Telehealth Determination. Items 42 to 46 of Schedule 1 of the Amendment Determination amend the OMP Determination.

**Item 1** amends subsection 4(1) of the AHS Determination to include the 16 new items for allied health services to facilitate family and carer participation in treatment under the *Better Access to Psychiatrists, Psychologists and General Practitioners through the MBS initiative (Better Access)* in the definition of *course of treatment*.

**Item 2** amends section 6 of the AHS Determination to include the 48 new items for services to facilitate family and carer participation in treatment under Better Access in the limitation

providing a total of 10 services per calendar year for Better Access service items and insert references to “a person other than the patient” where relevant. Amended section 6 also includes new subclause (5), which provides additional requirements for the 16 new items for allied health services to facilitate family and carer participation in treatment under Better Access (refer to **items 5 to 20** of Schedule 1), including:

- the referring practitioner or the allied health practitioner providing the service must determine it clinically appropriate to provide the service to a person other than a patient and make a written record of this determination;
- the practitioner providing the service must explain the service to the patient, obtain the patient’s consent for the service and make a written record of the consent;
- the service must be provided as part of the patient’s treatment; and
- in relation to a particular patient, no more than two services to which any of the 48 new Better Access items apply may be provided in a calendar year.

For items 2739, 2741, 2743 and 2745, refer to the *Health Insurance Legislation Amendment (2022 Measures No. 4) Regulations 2022*.

**Item 3** amends subsection 6AA(3C) of the AHS Determination to include the 48 new items for services to facilitate family and carer participation in treatment under Better Access in the list of items that are counted as services providing treatment under an eating disorder treatment and management plan and remove references to repealed mental health video conference items (refer to the *Health Insurance Legislation Amendment (2022 Measures No. 4) Regulations 2022* and the *Health Insurance Legislation Amendment (2023 Measures No. 1) Determination 2022*).

For items 2739, 2741, 2743 and 2745, refer to the *Health Insurance Legislation Amendment (2022 Measures No. 4) Regulations 2022*.

**Item 4** amends the AHS Determination to insert new section 6E, which provides the referral requirements for the 16 new items for allied health services to facilitate family and carer participation in treatment under Better Access (refer to **items 5 to 20**).

**Items 5 to 20** amends the AHS Determination to insert 16 new allied health items for psychological therapy and focussed psychological strategies services provided to a person other than the patient.

**Items 21 and 22** amend subsection 7(2) of the Telehealth Determination to include the 48 new items for services to facilitate family and carer participation in treatment under Better Access in the limitation providing a total of 10 services per calendar year for Better Access service items and insert references to “a person other than the patient” where relevant.

**Item 23** amends paragraph 1.1.02(1)(b) of the Telehealth Determination to include a reference to the new other medical practitioner items to facilitate family and carer participation in treatment under Better Access (for items 309, 311, 313 and 315, refer to **item 46**). Clause 1.1.02 provides the application requirements for items in Subgroups 3 and 10 of Group A40.

**Item 24** amends subclause 1.1.02(2) of the Telehealth Determination to insert references to the new general practitioner items for telehealth and phone services to facilitate family and carer participation in treatment under Better Access (for items 91859, 91861, 91864 and 91865, refer to **items 28 and 29**). Clause 1.1.02 provides the application requirements for items in Subgroups 3 and 10 of Group A40.

**Item 25** amends paragraphs 1.1.12(3)(a) to (d) of the Telehealth Determination to include the 48 new items to facilitate family and carer participation in treatment under Better Access in the list of referral and treatment options as well as telehealth and phone services introduced in response to the COVID-19 pandemic, which have now been continued on an ongoing basis, and Better Access group therapy services introduced on 1 November 2022.

**Item 26** amends paragraphs 1.1.17(5)(a) to (e) of the Telehealth Determination to include the 48 new items for services to facilitate family and carer participation in treatment under Better Access in the list of items that are counted as services providing treatment under an eating disorder treatment and management plan and remove references to repealed mental health video conference items (refer to the *Health Insurance Legislation Amendment (2022 Measures No. 4) Regulations 2022* and the *Health Insurance Legislation Amendment (2023 Measures No. 1) Determination 2022*).

**Item 27** amends the Telehealth Determination to insert new clause 1.1.19, which provides additional requirements for the eight new items for general practitioner and other medical practitioner services to facilitate family and carer participation in treatment under Better Access (for items 91859 to 91867, refer to **items 28 and 29**), including:

- the medical practitioner must determine it clinically appropriate to provide the service to a person other than a patient and make a written record of this determination;
- the medical practitioner must explain the service to the patient, obtain the patient's consent for the service and make a written record of the consent;
- the service must be provided as part of the patient's treatment; and
- in relation to a particular patient, no more than two services to which any of the 48 new Better Access items apply may be provided in a calendar year.

**Items 28 and 29** amend the Telehealth Determination to insert eight new general practitioner and other medical practitioner items for focussed psychological strategies telehealth and phone services provided to a person other than the patient (91859 to 91867).

**Item 30** amends subclause 3.1.5(1) of the Telehealth Determinations to extend the ranges of items to include the 16 new allied health items for telehealth and phone services to facilitate family and carer participation in treatment under Better Access (refer to **items 34 to 41**). Clause 3.1.5 provides the requirements for referrals by specialists, consultant physicians and general practitioners for psychological therapy and focussed psychological strategies therapy health services.

**Item 31** amends clause 3.1.7 of the Telehealth Determination to insert subclause (2A), which provides that a reference in subclause (2) to a service providing a treatment to a patient includes the 48 new items for services to facilitate family and carer participation in treatment under Better Access. Clause 3.1.7 provides restrictions for allied health eating disorder items, including limitations on the number of services providing treatments under an eating disorder treatment and management plan.

**Item 32** amends paragraphs 3.1.7(5)(a) to (e) of the Telehealth Determination to include the 48 new items for services to facilitate family and carer participation in treatment under Better Access in the list of items that are counted as services providing treatment under an eating disorder treatment and management plan and remove references to repealed mental health video conference items (refer to the *Health Insurance Legislation Amendment (2022 Measures No. 4)*

*Regulations 2022 and the Health Insurance Legislation Amendment (2023 Measures No. 1) Determination 2022).*

For items 2739, 2741, 2743 and 2745, refer to the *Health Insurance Legislation Amendment (2022 Measures No. 4) Regulations 2022*.

**Item 33** amends the Telehealth Determination to insert new clause 3.1.9, which provides requirements for the 16 new allied health items for telehealth and phone services to facilitate family and carer participation in treatment under Better Access (refer to **items 34 to 41**), including the definition of *referring practitioner* for the purpose of these items. The requirements also include that:

- the referring practitioner or the allied health practitioner providing the service must determine it clinically appropriate to provide the service to a person other than a patient and make a written record of this determination;
- the practitioner providing the service must explain the service to the patient, obtain the patient's consent for the service and make a written record of the consent;
- the service must be provided as part of the patient's treatment; and
- in relation to a particular patient, no more than two services to which any of the 48 new Better Access items apply may be provided in a calendar year.

**Items 34 to 41** amend the Telehealth Determination to insert 16 new allied health items for psychological therapy and focussed psychological strategies telehealth and phone services provided to a person other than the patient.

**Item 42** amends clause 1.9.2 of the OMP Determination to provide the fees for new items 311 and 315 (refer to **item 46**).

**Item 43** amends subclause 1.9.4(1) of the OMP Determination to insert references where required to the new other medical practitioner items for services to facilitate family and carer participation in treatment under Better Access (for items 309, 311, 313 and 315, refer to **item 46**). Subclause 1.9.4(1) provides the requirements for other medical practitioner focussed psychological strategies service items.

**Item 44** amends subclause 1.9.4(2) of the OMP Determination to insert references to the new general practitioner and other medical practitioner items for services to facilitate family and carer participation in treatment under Better Access in subparagraph (2)(a)(i) and insert references to the new 48 items for services to facilitate family and carer participation in treatment under Better Access in paragraph (b). Subclause 1.9.4(2) provides the limitations on the number of Better Access service items provided to, or in relation to, a patient in a calendar year.

**Item 45** amends the OMP Determination to insert new clause 1.9.5, which provides additional requirements for the four new items for other medical practitioner services to facilitate family and carer participation in treatment under Better Access (for items 309, 311, 313 and 315 refer to **item 46**), including:

- the medical practitioner must determine it clinically appropriate to provide the service to a person other than a patient and make a written record of this determination;
- the medical practitioner must explain the service to the patient, obtain the patient's consent for the service and make a written record of the consent;
- the service must be provided as part of the patient's treatment; and

- in relation to a particular patient, no more than two services to which any of the 48 new Better Access items apply may be provided in a calendar year.

**Item 46** amends the OMP Determination to insert four new other medical practitioner items for focussed psychological strategies services provided to a person other than the patient (309, 311, 313 and 315).

## Statement of Compatibility with Human Rights

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

*Health Insurance Amendment (Better Access Services for Family and Carer Participation)  
Determination 2023*

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

The purpose of the *Health Insurance Amendment (Better Access Services for Family and Carer Participation) Determination 2023* (the Amendment Determination) is to amend the *Health Insurance (Allied Health Services) Determination 2014* (the AHS Determination); the *Health Insurance (Section 3C General Medical Services – Telehealth and Telephone Attendances) Determination 2021* (the Telehealth Determination); and the *Health Insurance (Section 3C General Medical Services – Other Medical Practitioner) Determination 2018* (the OMP Determination) to introduce 44 new items to facilitate family and carer participation in treatment under the *Better Access to Psychiatrists, Psychologists and General Practitioners through the MBS* initiative (Better Access) as part of a suite of legislative amendments that will introduce 48 items for this purpose. These changes were announced in the 2021-22 Budget under the *Mental Health* measure.

Services provided to a person other than the patient under any of the 48 new items to facilitate family and carer participation in treatment under Better Access will also count towards a patient's limit of 10 individual services per calendar year for Better Access service items.

### 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 advances the right to health and social security and the right of equality and non-discrimination by introducing 44 new items for the facilitation of family and carer participation in treatment under Better Access.

**Conclusion**

This instrument is compatible with human rights as it advances the right to health, the right to social security and the right of equality and non-discrimination.

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