

## EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Health and Aged Care

*Health Insurance Act 1973*

*Health Insurance (Professional Services Review - Allied Health, Primary Health Care and Others) Determination 2023*

### **Authority**

Paragraph 81(1A)(a) of the *Health Insurance Act 1973* (Act) provides that the Minister may determine by legislative instrument that a health professional of a particular kind, who provides a health service within the meaning of subsection 3C(8) of the Act, is a practitioner for the purposes of Part VAA of the Act.

Paragraph 81(1A)(b) of the Act provides that the Minister may determine by legislative instrument that a vocation engaged in by a health professional of a kind determined under subsection 81(1A) is a profession under Part VAA of the Act.

Subsection 33(3) of the *Acts Interpretation Act 1901* 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 Professional Services Review (PSR) Scheme is established under Part VAA of the Act. Section 79A of the Act states:

*The object of this Part is to protect the integrity of the Commonwealth medicare benefits, dental benefits and pharmaceutical benefits programs and, in doing so:*

- (a) protect patients and the community in general from the risks associated with inappropriate practice; and*
- (b) protect the Commonwealth from having to meet the cost of services provided as a result of inappropriate practice.*

The purpose of the *Health Insurance (Professional Services Review - Allied Health, Primary Health Care and Others) Determination 2023* (Determination) is to list those health professionals who are practitioners and those vocations that are professions for the purposes of Part VAA of the Act. This enables the listed health professionals and their vocations to be reviewed under the PSR Scheme.

The Determination repeals and remakes the *Health Insurance (Professional Services Review - Allied Health and Others) Determination 2012* (previous Determination). The previous Determination was due to sunset on 1 April 2023.

The Determination has been updated to include definitions of the listed health professionals. This is by reference to registration under the Health Practitioner Regulation National Law (the National Law), as in force in each state and territory, for relevant health professionals, and for others, by reference to professional qualifications, similar to eligibility requirements for billing Medicare under the *Health Insurance (Allied Health Services) Determination 2014*. As assessment of

inappropriate practice is based on whether a practitioner's conduct would be unacceptable to the general body of the members of their profession, incorporating the definitions of relevant health professionals should clarify the scope of a PSR review and the group of persons that would constitute the profession.

The title of the Determination has been updated to include 'Primary Health Care' to more accurately reflect the range of health professionals listed. The Determination also makes minor amendments to the list of practitioners (Schedule 1) and professions (Schedule 2). This includes amending the spelling of 'dietitians' and amending 'Aboriginal and Torres Strait Islander health *services*' to 'Aboriginal and Torres Strait Islander health *practice*' for consistency with the National Law. The list of practitioners and professions is otherwise identical to the previous Determination. This will ensure that the PSR Scheme continues to apply to all health professionals who provide Medicare services.

### **Consultation**

The Department of Health and Aged Care consulted with key peak bodies, including the Australian Medical Association, and colleges and professional organisations representing the affected health professional groups. Stakeholders did not raise any objections to the making of this instrument. In addition, feedback from these peak bodies was taken into consideration when drafting the definitions of the listed health professionals.

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

The Determination commences on 1 April 2023.

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

Authority: Subsection 81(1A) of the  
*Health Insurance Act 1973*

***Details of the Health Insurance (Professional Services Review - Allied Health, Primary Health Care and Others) Determination 2023***

Section 1 – Name

Section 1 provides that this instrument is the *Health Insurance (Professional Services Review - Allied Health, Primary Health Care and Others) Determination 2023*.

Section 2 – Commencement

Section 2 provides that this instrument commences on 1 April 2023.

Section 3 – Authority

Section 3 provides this instrument is made under subsection 81(1A) of the *Health Insurance Act 1973*.

Section 4 – Repeal

Section 4 provides that the *Health Insurance (Professional Services Review – Allied Health and Others) Determination 2012* is repealed.

Section 5 – Interpretation

Section 5 defines the terms used in this instrument.

Section 6 – Practitioners

Section 6 provides that, for the purposes of paragraph 81(1A)(a) of the Act, a health professional listed in Schedule 1 is a practitioner.

Section 7 – Professions

Section 7 provides that, for the purposes of paragraph 81(1A)(b) of the Act, a vocation listed in Schedule 2 is a profession.

Section 8 – Savings provisions

Section 8 provides that the *Health Insurance (Professional Services Review - Allied Health and Others) Determination 2012* continues to apply to a practitioner in relation to a request made under subsection 86(1) of the Act prior to 1 April 2023, despite its repeal.

Schedule 1 – Health professionals determined to be practitioners

Schedule 1 provides a list of health professionals who are practitioners for the purposes of Part VAA of the Act.

Schedule 2 – Vocations determined to be professions

Schedule 2 provides a list of vocations that are professions for the purposes of Part VAA of the Act.

## 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 - Allied Health, Primary Health Care and Others) 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 Legislative Instrument**

The *Health Insurance (Professional Services Review - Allied Health, Primary Health Care and Others) Determination 2023* (Determination) provides a list of health professionals who are practitioners and vocations that are professions for the purposes of Part VAA of the *Health Insurance Act 1973* (the Act). This enables the listed health professionals and their vocations to be reviewed under the Professional Services Review (PSR) Scheme.

#### **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 redirect 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.

### *Analysis*

The object of the PSR Scheme, outlined in section 79A of the Act, is to protect patients and the community in general from the risks associated with inappropriate practice and to protect the Commonwealth from having to meet the cost of services provided as a result of this inappropriate practice. The PSR Agency investigates the provision of services by a practitioner to determine whether the practitioner has engaged in inappropriate practice in providing Medicare services or in prescribing under the Pharmaceutical Benefits Scheme (PBS).

As the primary mechanism for monitoring the clinical relevance of professional services provided under the Medicare program, the PSR Agency performs a public health role when undertaking reviews of practitioners. If a practitioner is found to have engaged in inappropriate practice in their provision of health services, this may lead to sanctions for the practitioner, including repayment of Medicare benefits or disqualification from Medicare. If a case arises involving a significant threat to the life or health of any other person, these concerns must also be referred to an appropriate regulatory body. This process may lead to the identification of conduct that may not otherwise be brought to the attention of the appropriate regulatory body.

The PSR Scheme supports the right to health and social security by sanctioning practitioners for providing services that are not clinically necessary (that is, services that would be unacceptable to the general body of practitioners in the relevant profession) and by ensuring that the Commonwealth's limited resources are directed to the most effective health services.

The provisions in this instrument are aimed at ensuring that any health professional who can provide Medicare services can be reviewed under the PSR Scheme. By extending Part VAA of the Act to all health professionals providing Medicare services or prescribing under the PBS, this Determination ensures the public can attain the highest standard of physical and mental health services.

### **Conclusion**

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

**The Hon Mark Butler MP  
Minister for Health and Aged Care**