

## EXPLANATORY STATEMENT

### *Health Insurance Act 1973*

#### *Health Insurance Legislation Amendment (2023 Measures No. 4) 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 GMST) or the pathology services table (the PST) shall, in specified circumstances and for specified statutory provisions, be treated as if it were specified in the GMST or in the PST.

The GMST 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*.

The PST is set out in the regulations made under section 4A of the Act. The most recent version of the regulations is the *Health Insurance (Pathology Services Table) Regulations 2020*.

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 Legislation Amendment (2023 Measures No. 4) Determination 2023* (the Amendment Determination) is to:

- amend the *Health Insurance (Section 3C General Medical Services – Telehealth and Telephone Attendances) Determination 2021* (the Telehealth and Telephone Determination) to provide an additional exemption to the usual medical practitioner rule in relation to certain telehealth services provided under the Commonwealth Urgent Care Clinic Program to allow patients to access flexible arrangements for general practitioner attendances at specified locations;
- extend the cessation dates for the *Health Insurance (General Practice COVID-19 Treatment) Determination 2022* (the COVID-19 Treatment Determination), the *Health Insurance (Section 3C Pathology Services – COVID-19) Determination 2020* (the Pathology COVID-19 Determination) and Schedule 5 of the Telehealth and Telephone Determination from 31 December 2023 to 30 June 2024;
- amend five items and delete five items in the Pathology COVID-19 Determination to implement fee parity for publicly and privately provided COVID-19 pathology services;
- amend the definition of **admitted patient** and insert a new definition for **outpatient hospital service** to allow patients to receive relevant telehealth and phone services in outpatient hospital settings;
- insert a provision into the Telehealth and Telephone Determination to ensure the requirements for nurse practitioner telehealth and phone items reflect the requirements for equivalent face-to-face services; and

- make administrative amendments to five phone attendance items in the Telehealth and Telephone Determination to align the item descriptors with the equivalent video items.

#### Usual medical practitioner amendments

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 general practice telehealth or phone consultations (known as the usual medical practitioner rule or the UMP rule), however, there are exemptions to this rule. Schedule 1 of the Amendment Determination will introduce an exemption to the usual medical practitioner rule in certain circumstances for specified telehealth services provided at an eligible urgent care clinic under the Commonwealth Urgent Care Clinic Program.

Following this change, services provided to a patient under telehealth item 91790, 91800, 91801, 91802, 91920, 92115 or 91853 at the Kimberly Medical Group located in Broome Western Australia or My Clinic Plus located in Devonport Tasmania will not be required to be provided by a patient's usual medical practitioner, if:

- the service is provided under the Commonwealth Urgent Care Clinic Program by a general practitioner engaged to provide services at an eligible urgent care clinic; and
- the service is provided during the hours of operation of the eligible urgent care clinic under the Commonwealth Urgent Care Clinic Program; and
- at the time the service is provided, a general practitioner or participating nurse practitioner is not in attendance at the eligible urgent care clinic to provide the service in person.

These amendments also insert definitions for the terms ***Commonwealth Urgent Care Clinic Program*** and ***eligible urgent care clinic*** into the Telehealth and Telephone Determination. These changes will be supported by directions made under subsection 19(2) of the Act.

#### Extension of COVID-19 services

Schedule 2 of the Amendment Determination will extend the cessation date for the COVID-19 Treatment Determination, the Pathology COVID-19 Determination and Schedule 5 of the Telehealth and Telephone Determination from 31 December 2023 to 30 June 2024. The extension of the items included in these determinations will provide patients with continued access to temporary COVID-19 support services.

#### 1 January 2024 amendments

Schedule 3 of the Amendment Determination relates to amendments which will commence on 1 January 2024. These amendments include changes to the Pathology COVID-19 Determination to cease five publicly provided COVID-19 testing service items (69506, 69507, 69508, 69509 and 69510) and amend five privately provided COVID-19 testing service items (69511, 69512, 69513, 69514 and 69515). This amendment provides patients with access to publicly and privately provided COVID-19 testing services under the same MBS item. The intention of this change is to ensure Medicare-eligible patients at risk of severe illness – including older Australians, patients with pre-existing conditions and residents of aged care facilities – can access MBS funded COVID-19 pathology laboratory testing. The amendment will also implement fee parity between public and private providers.

Schedule 3 of the Amendment Determination also includes changes to the Telehealth and Telephone Determination, including an amendment to the definition of *admitted patient* and insertion of a new definition for *outpatient hospital service*. These amendments will allow patients to access relevant telehealth services provided at an outpatient hospital setting from 85 per cent of the schedule fee.

Administrative amendments to the Telehealth and Telephone Determination will also be made. This includes inserting a provision in section 7 that ensures the requirements for nurse practitioner telehealth and phone items reflect the requirements for equivalent face-to-face services and administrative changes to five phone items to ensure item descriptors appropriately reflect the equivalent telehealth items.

### **Consultation**

Consultation was undertaken for amendments made in relation to the Commonwealth Urgent Care Clinics Program with the Tasmanian Government, the Tasmanian Primary Health Network, the Western Australian Government and the Western Australian Primary Health Alliance.

Consultation with peak bodies was not undertaken for the temporary extension of items in the COVID-19 Treatment Determination, the Pathology COVID-19 Determination and Schedule 5 of the Telehealth and Telephone Determination. However, the extension of these instruments is intended to support the Government's commitment to ensuring patients continue to have access to COVID-19 support services.

No consultation was undertaken for amendments to definitions included in the Telehealth and Telephone Determination relating to admitted patients and outpatient hospital services. The matter of whether telehealth and telephone services can be provided in hospital settings was primarily raised by State and Territory Governments seeking clarity on the interaction between MBS services and the National Health Reform Agreement. Practitioners and State and Territory health bodies will be notified of regulatory changes.

No consultation was undertaken for the amendments to the Pathology COVID-19 Determination, as these changes are intended to establish fee parity for COVID-19 pathology services provided publicly and privately. The cessation of five public provided pathology services will not impact claiming of these services, as the five equivalent private provider items will be amended to allow claiming by all providers.

No consultation was undertaken for other the administrative amendments to the Telehealth and Telephone Determination, as the changes are machinery in nature. The amendments ensure that the requirements for nurse practitioner telehealth and telephone items reflect the requirements for equivalent face-to-face services, and that the item descriptors of five phone attendance items align with the item descriptors of the equivalent telehealth items.

Sections 1 to 4 of the Amendment Determination commence the day after the instrument is registered. Schedule 1 of the Amendment Determination commences on 28 December 2023, Schedule 2 of the Amendment Determination commences on 31 December 2023 and Schedule 3 of the Amendment Determination commences on 1 January 2024.

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

Details of the Amendment Determination are set out in the Attachment.

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

**Details of the *Health Insurance Legislation Amendment (2023 Measures No. 4) Determination 2023***

Section 1 – Name

Section 1 provides for the Amendment Determination to be referred to as the *Health Insurance Legislation Amendment (2023 Measures No. 4) Determination 2023* (the Amendment Determination).

Section 2 – Commencement

Section 2 provides that Sections 1 to 4 of the Amendment Determination commence the day after the instrument is registered. Section 2 also provides that Schedule 1 of the Amendment Determination commences 28 December 2023, that Schedule 2 of the Amendment Determination commences on 31 December, and that Schedule 3 of the Amendment Determination commences on 1 January 2024.

Section 3 – Authority

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

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 – Usual medical practitioner amendments

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

**Item 1** inserts definitions of ***Commonwealth Urgent Care Clinic Program*** and ***eligible urgent care clinic*** into subsection 5(1) of the Telehealth and Telephone Determination. The latter provides that an eligible care clinic is defined as either the trustee for Kimberlee Medical Unit Trust trading as the Kimberly Medical Group located in Broome Western Australia, or, the My Clinic Plus Pty Ltd as Trustee for My Clinic Plus Trust trading as My Clinic Plus located in Devonport Tasmania. This change will be supported by the relevant urgent care clinics made under subsection 19(2) of the Act.

**Item 2** amends section 7 to insert a new subsection to provide that telehealth items 91790, 91800, 91808, 91802, 91920, 92115 or 91853 provided at the Kimberly Medical Group located in Broome Western Australia or My Clinic Plus located in Devonport Tasmania will not be required to be provided by a patient’s usual medical practitioner if:

- the service is provided under the Commonwealth Urgent Care Clinic Program by a general practitioner engaged to provide services at an eligible urgent care clinic; and
- the service is provided during the hours of operation of the eligible urgent care clinic under the Commonwealth Urgent Care Clinic Program; and
- at the time the service is provided, a general practitioner or participating nurse practitioner is not in attendance at the eligible urgent care clinic to provide the service in person.

#### Schedule 2 – Extension of COVID-19 services

*Health Insurance (General Practice COVID- 19 Treatment) Determination 2022 (the COVID-19 Treatment Determination)*

**Item 1** amends section 4 of the COVID-19 Treatment Determination to extend the cessation date from 31 December 2023 to 30 June 2024.

*Health Insurance (Section 3C Pathology Services – COVID- 19) Determination 2020 (the Pathology COVID-19 Determination)*

**Item 2** amends section 3 of the Pathology COVID-19 Determination to extend the cessation date from 31 December 2023 to 30 June 2024.

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

**Item 3** amends section 4 of the Telehealth and Telephone Determination to remove paragraph (a), which relates to ceased items, and extend the cessation date of Schedule 5 from 31 December 2023 to 30 June 2024.

#### Schedule 3 – 1 January 2024 amendments

*Health Insurance (Section 3C Pathology Services – COVID- 19) Determination 2020 (the Pathology COVID-19 Determination)*

**Item 1** repeals and replaces the table at Schedule 1 of the Pathology COVID-19 Determination. This amendment repeals items 69506, 69507, 69508, 69509 and 69510, and amends the item descriptors of items 69511, 69512, 69513, 69514 and 69515 to provide access to the same item for public and private providers providing COVID-19 testing services. The fees for the five ceasing COVID-19 testing service items (69506, 69507, 69508, 69509 and 69510) for public providers were lower than those for private providers. The amendment implements fee parity between public and private providers.

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

**Item 2** amends subsection 5(1) to amend the definition of **admitted patient** to provide that a patient is not an admitted patient for the purposes of subsection 7(1) of the Telehealth and Telephone Determination if they receive an outpatient hospital service to which an item in Schedule 1, 2, 4 or 5 or item 11342 or 11345 of the Schedule 4A applies. This change will allow for appropriate claiming of Medicare benefits in outpatient hospital settings at 85 per cent of the

schedule fee in line with government policy. Refer to **item 3** for the definition of *outpatient hospital service*.

**Item 3** amends subsection 5(1) to insert a new definition for *outpatient hospital service*, which means a service provided, or arranged, with the direct involvement of a hospital where the service is provided by a practitioner is located at the hospital, the patient is not located at the hospital and has previously been an admitted patient of the hospital, and the service is not covered by private health insurance.

**Item 4** amends section 7 to insert new subsection 7(10) that provides that items in Subgroup 5 or Subgroup 10 of Group M18 only apply where the nurse practitioner is not employed by the proprietor of a hospital that is not a private hospital, or, is employed by the proprietor of a hospital that is not a private hospital and provides the service other than in the course of employment by that proprietor.

This is an administrative change to ensure the requirements for nurse practitioner telehealth and phone items align with the requirements for equivalent face-to-face services.

**Items 5 to 10** amend the item descriptors of five phone items (91900, 91903, 91906, 91913 and 91916) in the Telehealth and Telephone Determination to align them with their equivalent telehealth items.

## Statement of Compatibility with Human Rights

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

*Health Insurance Legislation Amendment (2023 Measures No. 4) 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 Legislation Amendment (2023 Measures No. 4) Determination 2023* (the Amendment Determination) is to:

- amend the *Health Insurance (Section 3C General Medical Services – Telehealth and Telephone Attendances) Determination 2021* (the Telehealth and Telephone Determination) to provide an additional exemption to the usual medical practitioner rule in relation to certain telehealth services provided under the Commonwealth Urgent Care Clinic Program to allow patients to access flexible arrangements for general practitioner attendances at specified locations;
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- the service is provided during the hours of operation of the eligible urgent care clinic under the Commonwealth Urgent Care Clinic Program; and
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These amendments also insert definitions for the terms ***Commonwealth Urgent Care Clinic Program*** and ***eligible urgent care clinic*** into the Telehealth and Telephone Determination. These changes will be supported by directions made under subsection 19(2) of the Act.

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Administrative amendments to the Telehealth and Telephone Determination will also be made. This includes inserting a provision in section 7 that ensures the requirements for nurse practitioner telehealth and phone items reflect the requirements for equivalent face-to-face services and administrative changes to five phone items to ensure item descriptors appropriately reflect the equivalent telehealth 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

The Amendment Determination maintains the right to health and social security and the rights of equality and non-discrimination by providing access to flexible telehealth and telephone general practitioner attendances, extending access to temporary COVID-19 health services and ensuring consistent arrangements for equivalent services. The Amendment Determination also extends these rights by creating fee parity between public and private pathology service providers for COVID-19 pathology testing services, ensuring at-risk cohorts can receive COVID-19 services as soon as possible.

#### **Conclusion**

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

**Louise Riley**  
**Assistant Secretary**  
**MBS Policy and Reviews Branch**  
**Medicare Benefits and Digital Health Division**  
**Health Resourcing Group**  
**Department of Health and Aged Care**