

EXPLANATORY STATEMENT

Health Insurance Act 1973

Health Insurance (Section 3C General Medical Services – Telehealth and Telephone Attendances) Amendment (No. 3) Determination 2024

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) shall, in specified circumstances and for specified statutory provisions, be treated as if it were specified in the Table.

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*.

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 (No. 3) Determination 2024* (the Amendment Determination) is to amend the *Health Insurance (Section 3C General Medical Services – Telehealth and Telephone Attendances) Determination 2021* to apply an exemption for phone items 91882, 91883 and 91884 to the general rule that telehealth services are not available to a patient, or in relation to a patient, who is an admitted patient.

Phone items 91882, 91883 and 91884 for psychiatry services provided to a person other than the patient were introduced on 1 March 2024 by the *Health Insurance (Section 3C General Medical Services – Telehealth and Telephone Attendances) Amendment (No. 1) Determination 2024*. It was intended that these items would be available for phone services where the patient is an admitted patient. The Amendment Determination will allow phone services under items 91882, 91883 and 91884 to be provided to a person other than a patient if the patient is an admitted patient in line with the initial policy intention.

The change will align phone attendance items 91882, 91883 and 91884 with the equivalent video attendance items.

Consultation

No consultation was undertaken regarding the change listed in the Amendment Determination as it is machinery in nature and intended to align the legislation with existing policy authority and intention.

Consultation in relation to the 1 March 2024 introduction of phone items 91882, 91883 and 91884 for psychiatry services provided to a person other than a patient,

was undertaken with relevant professional bodies including the Australian Medical Association and the Royal Australian and New Zealand College of Psychiatrists.

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

The Amendment Determination commences the day after the instrument is registered.

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

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 (No. 3) Determination 2024*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 (No. 3) Determination 2024* (the Amendment Determination).

Section 2 – Commencement

Section 2 provides for the Amendment Determination to commence the day after the instrument is registered.

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 (Telehealth Determination)

Item 1 amends subsection 7(1A) of the Telehealth Determination to insert references to three phone attendance items (91882, 91883 and 91884). Subsection 7(1A) lists items that are exempt from the rule specified in subsection 7(1), which provides that an item listed in the Telehealth Determination does not apply to a service if the service is provided to a patient, or in relation to a patient, who is an admitted patient. Accordingly, this change will allow patients admitted to hospital to access services under items 91882, 91883 and 91884 where the other requirements of the service are met. Note, the term “admitted patient” is defined in subsection 5(1) of the Telehealth Determination. Patients will continue to have access to services under items 91882, 91883 and 91884 in out of hospital settings.

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 (No. 3) Determination 2024.

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 (Section 3C General Medical Services – Telehealth and Telephone Attendances) Amendment (No. 3) Determination 2024* (the Amendment Determination) is to amend the *Health Insurance (Section 3C General Medical Services – Telehealth and Telephone Attendances) Determination 2021* to apply an exemption for phone items 91882, 91883 and 91884 to the general rule that telehealth services are not available to a patient, or in relation to a patient, who is an admitted patient.

Phone items 91882, 91883 and 91884 for psychiatry services provided to a person other than the patient were introduced on 1 March 2024 by the *Health Insurance (Section 3C General Medical Services – Telehealth and Telephone Attendances) Amendment (No. 1) Determination 2024*. It was intended that these items would be available for phone services where the patient is an admitted patient. The Amendment Determination will allow phone services under items 91882, 91883 and 91884 to be provided to a person other than a patient if the patient is an admitted patient in line with the initial policy intention.

The change will align phone attendance items 91882, 91883 and 91884 with the equivalent video attendance 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, the right to social security and the right of equality and non-discrimination by ensuring patients have access to MBS phone services in accordance with the policy intention.

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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