

## **EXPLANATORY STATEMENT**

Issued by the authority of the Minister for Government Services

*Human Services (Medicare) Act 1973*

*Human Services (Medicare) (Medicare Programs) Amendment Specification 2024*

### **Purpose**

The Human Services (Medicare) (Medicare Programs) Amendment Specification 2024 (the Specification) is made for the purposes of paragraph 41G(b) of the *Human Services (Medicare) Act 1973* (the Medicare Act) and amends the *Human Services (Medicare) (Medicare Programs) Specification 2021* (the Principal Specification).

The Specification amends the Principal Specification to include the Assisted Reproductive Technology Storage Funding Program (the Program) as a 'medicare program' for the purposes of paragraph 41G(b) of the Medicare Act.

The Program assists eligible patients who face extra costs for fertility treatment due to cancer or a genetic condition. As costs associated with the ongoing cryostorage of eggs, sperm or embryos (eligible materials) are not currently subsidised through the Medicare Benefits Schedule (MBS), the Program aims to reduce out-of-pocket costs for assisted reproductive technology (ART) cryostorage services for these patients.

Specifying the Program as a 'medicare program' will enable Commonwealth officers to record, communicate and divulge certain information protected by Commonwealth secrecy laws for the purposes of administering the Program.

The Specification also amends the Principal Specification to repeal the Cleft Lip and Cleft Palate Scheme (the Scheme) as a specified 'medicare program' for the purposes of paragraph 41G(b) of the Medicare Act. The Scheme is now fully provided for under the *Health Insurance Act 1973* (Health Insurance Act) and so is included as a 'medicare program' under subparagraph 41G(a)(i) of the Medicare Act. This means it is no longer necessary to include the Scheme under the Principal Specification.

### **Background**

Subsection 130(1) of the Health Insurance Act prohibits a person from making a record of, divulging or communicating information about the affairs of another person obtained in the performance of duties, or exercise of functions or powers, under the Act unless an exception applies. Exceptions to this general prohibition relevantly include where the recording, communication or divulgence is for the purpose of enabling a person to perform functions in relation to a 'medicare program.'

Section 41G of the Medicare Act defines 'medicare programs' as services, benefits, programs or facilities that are provided under certain health-related legislation referred to in paragraph 41G(a) or that are specified in a legislative instrument made by the

Minister under paragraph 41G(b). The power to modify or vary a legislative instrument is also permitted under subsection 33(3) of the *Acts Interpretation Act 1901*.

By defining 'medicare programs' to include programs specified in a legislative instrument, section 41G of the Medicare Act provides a mechanism for updating, from time to time, the list of programs in relation to which information can be recorded, communicated and divulged.

Specification of the Program as a 'medicare program' will enable Services Australia to verify certain patient information against their Medicare record, which is protected information acquired under the Health Insurance Act. This was recommended as part of a Privacy Impact Assessment (PIA) on the Program. A register of Privacy Impact Assessments undertaken or commissioned by Services Australian can be found on the Services Australia website at <https://www.servicesaustralia.gov.au>.

### ***Assisted Reproductive Technology Storage Program***

The Program aims to support patients who face extra costs associated with fertility preservation. The Department of Health and Aged Care (DoHAC) and Services Australia jointly administer this program.

Patients do not need to register with DoHAC or Services Australia. Provided they have a valid Medicare card and satisfy the eligibility requirements, they can participate by opting in with participating clinics. In particular, eligible patients are people (with a valid Medicare card) who need cryostorage for their eligible materials because they:

- (i) have a cancer diagnosis that may impact fertility and/or
- (ii) are at risk of passing on certain genetic diseases and conditions who have undergone MBS-funded pre-implantation genetic testing.

A patient's eligibility will be confirmed using information Services Australia holds that was collected for Medicare purposes. This information is protected by subsection 130(1) of the Health Insurance Act, as it is information with respect to the affairs of another person, which has been acquired by an officer in the performance of duties or in the exercise of powers or functions under the Health Insurance Act.

Services Australia is responsible for administering payments and payment systems, as well as registration of participating clinics. In particular, Services Australia administers payments on behalf of DoHAC as a demand-driven grant. Services Australia makes payments on a reimbursement basis, to all eligible clinics who register for the Program and submit claims for eligible services provided to eligible patients as set out in the Program guidelines. These guidelines can be found on DoHAC's website at <https://www.health.gov.au/resources/publications/art-storage-funding-program-guidelines>.

Specifying the Program as a 'medicare program' is necessary for its administration. The Specification will ensure the requisite data can be shared and accessed by authorised officers in Services Australia and DoHAC to determine eligibility for the

Program, administer the Program, and undertake compliance functions in relation to the Program.

### Information sharing

Participating clinics (such as specialist and fertility clinics) in the Program must, prior to accepting a patient into the Program, obtain the consent of eligible patients to participate in, and have their personal information collected for the purposes of the Program. This consent will include the patient's consent to the collection and use of their personal and sensitive information for the purpose of the Program, and its disclosure to both Services Australia and DoHAC for the purposes of:

- (a) administering the Program and validating claims and facilitating payments
- (b) compliance and assurance purposes
- (c) program evaluation and policy development.

As part of the Program, participating clinics submit claims to Services Australia, including specific information about each cryostorage service for which they are claiming payment. DoHAC do not have direct access to Services Australia's Organisation Register. Services Australia reports to DoHAC when registration has occurred. The claims submitted to Services Australia include the following information:

- patient Medicare card number
- patient individual reference number
- patient first name
- patient date of birth
- eligible material type (i.e. eggs, sperm or embryos)
- storage eligibility reason
- storage start date
- storage end date.

Services Australia uses the above information to inform pre-payment eligibility checks. DoHAC uses the information to perform post-payment compliance activities.

Certain checks are undertaken by Services Australia to ensure Program payments are only made in respect of eligible patients. The following checks undertaken by Services Australia require access to or disclosure of a patient's Medicare information that is protected by subsection 130(1) of the Health Insurance Act:

- Services Australia validates patient information (that is, Medicare Card Number, Individual Reference Number, date of birth) submitted by the participating clinic through the claiming process, against Medicare records.
- Services Australia identify if the patient has a date of death recorded . If the patient has died and the claim is within the grace period parameters detailed in the Program guidelines, the claim is valid and will be paid.

- Where a claim relates to patients who have undergone pre-implantation genetic testing, the first time that service is claimed, Services Australia will check patient MBS item history and identify if one of the relevant pre-implantation genetic testing items has been claimed by the patient within the past 2 years.

If a discrepancy is detected through the above checks, Services Australia communicates the discrepancy to the participating clinic that submitted the claim.

The above information will also need to be accessed and disclosed by Services Australia to DoHAC for the purposes of Program assurance including post-payment compliance activities, statistical and evaluation purposes and to inform policy development.

Specifying the Program as a 'medicare program' will enable officers to record, communicate and divulge information protected by subsection 130(1) of the Health Insurance Act for the purposes of undertaking these eligibility checks and compliance functions to ensure the integrity of the Program.

#### Additional detail about what safeguards apply to protect this information

The *Privacy Act 1988* (the Privacy Act) applies to all 'personal information' collected for the purposes of the Program regardless of whether it is also covered by one or more secrecy provisions.

DoHAC and Services Australia are Commonwealth agencies that must adhere to the Australia Privacy Principles contained in Schedule 1 of the Privacy Act.

Medicare enrolment and claiming information acquired by an officer in the performance of his or her duties, or in the exercise of his or her powers or functions under the Health Insurance Act will remain subject to secrecy provisions to prevent unauthorised handling of that information.

#### ***Cleft Lip and Cleft Palate Scheme***

The *Health Insurance Amendment (Prescribed Dental Patients and Other Measures) Bill 2023* amended the Health Insurance Act by removing the age restrictions in Section 3BA of that Act for eligible persons requiring treatment for cleft and craniofacial conditions. By removing age restrictions, the Scheme is no longer required to be an administered program and is now a normal service under the Medicare Benefits Schedule. For the purposes of section 41G of the Medicare Act, the Scheme is now provided for as a 'medicare program' under subparagraph 41G(a)(i) the *Health Insurance Act 1973*.

#### **Commencement**

The Specification commences the day after registration on the Federal Register of Legislation.

## **Consultation**

The Specification ensures that the recording, communication and divulgence of Medicare information for the purposes of the Program does not contravene subsection 130(1) of the Health Insurance Act. As this Specification is of a mechanical nature, no public consultation on the Specification was considered necessary.

DoHAC and Services Australia were consulted on these amendments to the Principal Specification.

## **Impact Analysis**

The Office of Impact Analysis was consulted and agreed that an Impact Analysis is not required (OIA23-06145).

## **General**

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

Details of this instrument are set out in the **Attachment A**.

The instrument is compatible with the human rights and freedoms recognised or declared under section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A full statement of compatibility is set out in **Attachment B**.

## **ATTACHMENT A**

### ***Human Services (Medicare) (Medicare Programs) Amendment Specification 2024***

#### **Section 1 – Name**

This section provides that the name of this instrument is the *Human Services (Medicare) (Medicare Programs) Amendment Specification 2024* (the Specification).

#### **Section 2 – Commencement**

This section provides that the Specification commences the day after it is registered on the Federal Register of Legislation.

#### **Section 3 – Authority**

This section provides that the legislative authority for making the Specification is paragraph 41G(b) of the *Human Services (Medicare) Act 1973* (the Medicare Act). At the end of section 3, there is a note to alert the reader that the power to amend a legislative instrument can be found in subsection 33(3) of the *Acts Interpretation Act 1901*. This subsection 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.

This gives the Minister power to amend the *Human Services (Medicare) (Medicare Programs) Specification 2021* (Principal Specification) for the purposes of paragraph 41G(b) of the Medicare Act.

#### **Section 4 – Schedules**

This section provides that each instrument that is specified in a Schedule to the Specification is amended or repealed as set out in the applicable items in the Schedule concerned, and that any other item in a Schedule to the Specification has effect according to its items.

### **SCHEDULE 1 – AMENDMENTS**

Schedule 1 amends the Principal Specification.

**Item 1** repeals table item 22 in Schedule 1 of the Principal Specification. Table item 22 is no longer required to be specified as the Cleft Lip and Cleft Palate Scheme is now provided for as a ‘medicare program’ under subparagraph 41G(a)(i) of the Medicare Act.

**Item 2** inserts a new table item 33 at the end of the table in Schedule 1 of the Principal Specification. New table item 33 will specify the 'Assisted Reproductive Technology Storage Funding Program' as a 'medicare program' for the purposes of paragraph 41G(b) of the Medicare Act.

The implications of these amendments are explained in detail in the outline and background sections above.

## ATTACHMENT B

### Statement of Compatibility with Human Rights

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

#### ***Human Services (Medicare) (Medicare Programs) Amendment Specification 2024***

The legislative 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 *Human Services (Medicare) (Medicare Programs) Amendment Specification 2024* (the Specification) amends the *Human Services (Medicare) (Medicare Programs) Specification 2021* (the Principal Specification). The Principal Specification specifies programs that are a 'medicare program' for the purposes of paragraph 41G(b) of the *Human Services (Medicare) Act 1973* (the Medicare Act).

A number of Commonwealth laws allow information that has been obtained in administering one program to be recorded, communicated or divulged for the administration of another program in circumstances where the other program is a 'medicare program.' For example, the *Health Insurance Act 1973* authorise persons to record, divulge and communicate information obtained under those Acts for the purposes of enabling a person to perform functions in relation to 'medicare programs' or other specified Acts. These laws rely on the term 'medicare programs' in section 41G of the Medicare Act to identify those programs for which information may be recorded, divulged and communicated.

Section 41G of the Medicare Act defines 'medicare programs' to be services, benefits, programs or facilities that are provided under certain health-related legislation referred to in paragraph 41G(a) or those that are specified in a legislative instrument made under paragraph 41G(b).

By expanding the term 'medicare program' to include programs specified in a legislative instrument, section 41G of the Medicare Act provides a mechanism to update and add to the range of programs that operate as 'medicare programs' (and in relation to which information can be recorded, divulged and communicated).

The Specification amends the Principal Specification in the following ways:

- it repeals the Cleft Lip and Cleft Palate Scheme (the Scheme) as a specified scheme as it is no longer required to be listed as a 'medicare program' for the purposes of section 41G(b) of the Medicare Act.
- it amends the Principal Specification to include the Assisted Reproductive Technology Storage Funding Program (the Program) as a 'medicare program' for the purposes of section 41G(b) of the Medicare Act.



## Human rights implications

The Specification engages the following human rights:

- the right to health – Article 12(1) of the *International Covenant on Economic Social and Cultural Rights* (ICESCR) and Article 12 of the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW)
- the right to privacy – Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR).

### *Right to health*

Article 12(1) of the ICESCR provides that the States Parties recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

Article 12 of the CEDAW provides that States Parties shall take all appropriate measures to eliminate the discrimination against women in the field of health care to ensure access to health care services, including those related to family planning.

The Specification specifies the Program as a ‘medicare program’ under paragraph 41G(b) of the Medicare Act.

The Program assists eligible patients who face extra costs for fertility treatment due to cancer and/or a genetic condition. As costs associated with the ongoing cryostorage of eggs, sperm or embryos (eligible materials) are not currently subsidised through the Medicare Benefits Schedule, the Program aims to reduce out-of-pocket costs for Assisted Reproductive Technology (ART) cryostorage services for these patients.

The Specification therefore advances the right to health established by Article 12 of the ICESCR and Article 12 of the CEDAW insofar as it does not diminish the accessibility of existing ‘medicare programs’ and also facilitates a program which subsidises fertility treatment costs to patients who face extra costs due to certain health conditions.

The Specification also removes the Scheme as a ‘medicare program’ under paragraph 41G(b) of the Medicare Act. This does not have an impact on the right to health because the Scheme is now fully covered under the *Health Insurance Amendment (prescribed dental patient and other measures) Act 2024* as a ‘medicare program’.

### *Right to Privacy*

Article 17 to the ICCPR provides that no-one shall be subject to arbitrary or unlawful interference with their privacy.

Specifying the Program as a ‘medicare program’ will authorise a person to divulge, communicate and record information obtained under certain Commonwealth laws for the purposes of administering the Program. In practice, the change will primarily

support the use of Medicare-related information held by Services Australia for the Program purposes.

For the purposes of Article 17 of the ICCPR, the collection or use of any personal information would not be unlawful as it would be authorised under legislation.

Further, the collection or use of personal information for this purpose would not constitute an arbitrary interference with the right to privacy as it would be undertaken for legitimate and necessary objectives of administering the Program, including to do so consistently with the Medicare Benefits Schedule and other health programs.

The limitation on the right to privacy is proportionate, as the provision of any personal information about patients would only be undertaken for the purposes of administering the Program. Information would be subject to secrecy provisions to prevent unauthorised disclosures as well as protections under the *Privacy Act 1988*.

### **Conclusion**

The Specification is compatible with human rights because it advances the protection of right to health. To the extent that it limits the right to privacy to that end, those limitations are reasonable, necessary and proportionate.

**The Hon Bill Shorten MP, Minister for Government Services**