

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Health

Health Insurance Act 1973

Health Insurance (Allied Health Services) Determination 2014

Subsection 3C(1) of the *Health Insurance Act 1973* (the Act) provides that the Minister may determine in writing that a health service not specified in an item in the General Medical Services Table (the Table) shall, in specified circumstances and for the purpose of specified statutory provisions, be treated as if it were specified in the Table. This Table is set out in the *Health Insurance (General Medical Services Table) Regulation*, which is re-made each year.

The *Health Insurance (Allied Health Services) Determination 2011* (the Previous Determination) creates Medicare items that may be provided as Medicare-eligible services by appropriately qualified allied health professionals, including but not limited to psychologists, osteopaths, chiropractors, physiotherapists and audiologists.

The *Health Insurance (Allied Health Services) Determination 2014* (the Determination) revokes and remakes the Previous Determination.

The purpose of the Determination is to remove the gender specific language from the allied health services that are described in the items of the Previous Determination, without altering the clinical or eligibility intent of the items, to ensure that people who identify as transgender and intersex will not be disadvantaged.

These changes are being made as a result of recent amendments to the *Sex Discrimination Act 1984* directed at protecting against discrimination on the grounds of sexual orientation, gender identity and intersex status. Currently where an item refers to a patient's biological sex, such as an item for a 'non-directive pregnancy support counselling health service provided to a woman', the item can only be claimed by a patient who is recorded as a female on the database maintained by the Department of Human Services. This may disadvantage patients who do not identify with their biological sex or who identify with a gender other than that which they were assigned at birth. The changes would allow for the items to be provided to all patients who have the relevant anatomical characteristics but who do not identify with the gender specific language (woman/man, female/male).

Part 3 of Schedule 2 to the Previous Determination lists three items that describe non-directive pregnancy support counselling services (items 81000, 81005 and 81010). These items have been identified as having gender specific language in that they include the term 'woman'. The Determination revises these items to refer to a 'person'.

The Determination also makes a related change to subsection 4(2) of the Previous Determination, which explains what is meant by the phrase 'non-directive pregnancy support counselling'.

The Act specifies no conditions which need to be met before the power to make the Determination may be exercised.

This Determination is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

This Determination commences on 1 January 2014.

Consultation

Consultation for the amendments to remove gender specific language from the Medicare Benefits Schedule occurred with the following organisations:

National Lesbian, Gay, Bisexual, Transgender and Intersex Health Alliance
Organisation Intersex International
Royal Australian College of General Practitioners
Australian Medical Association
The Australian College of Mental Health Nurses
Australian Association of Social Workers
Australian Psychological Society
Australian Society of Anaesthetists
National Health and Medical Research Council

Statement of Compatibility with Human Rights

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

Health Insurance (Allied Health Services) Determination 2014

This 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 *Health Insurance (Allied Health Services) Determination 2014* (the Determination) revokes and remakes the *Health Insurance (Allied Health Services) Determination 2011* (the Previous Determination). The purpose of the Determination is to remove the gender specific language from the allied health services that are described in items of the Previous Determination, without altering the clinical or eligibility intent of the items, to ensure that people who identify as transgender and intersex will not be disadvantaged. These changes are being made as a result of recent changes to the *Sex Discrimination Act 1984* that are directed at protecting against discrimination on the grounds of sexual orientation, gender identity and intersex status.

Human rights implications

The Determination engages Articles 2, 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 has also stated that the ‘highest attainable standard of health’ takes into account the country’s available resources. The 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 realization of the highest attainable standard of health.

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 Determination will advance the human rights to health and social security by ensuring that no individual is denied access to appropriate medical treatment based on their sex or gender.

Conclusion

This Legislative Instrument is compatible with human rights.

Richard Bartlett
First Assistant Secretary
Medical Benefits Division
Department of Health