

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Health

Health Insurance Act 1973

Health Insurance (Pathologist-determinable Services) Amendment Determination 2020

Section 16A of the *Health Insurance Act 1973* (the Act) specifies that certain requirements have to be met for the payment of Medicare benefits in relation to pathology services, including the requirement for a pathology service to be requested (subsection 16A(3)). Pathologist-determinable services allow Medicare benefits to be paid for pathology services which are requested and performed by an approved pathology practitioner for their own patients, or for certain tests which are not requested, but are performed on the basis of information learned from an originally requested service.

Section 4BA of the Act provides that the Minister for Health may determine by legislative instrument, that a particular pathology service, or pathology services included in a class of pathology services, are pathologist-determinable services after consultation with Royal College of Pathologists of Australasia.

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

On 11 March 2020, the Prime Minister, the Hon. Scott Morrison MP, announced a comprehensive \$2.4 billion health package to protect all Australians, including vulnerable groups such as the elderly, those with chronic conditions and Aboriginal and Torres Strait Islander communities, from the coronavirus (COVID-19).

The purpose of the *Health Insurance (Pathologist-determinable Services) Amendment Determination 2020* (Amendment Determination) is to amend the *Health Insurance (Pathologist-determinable Services) Determination 2015* (Principal Determination) to enable items 69494, 69495 or 69496 to be made pathologist determinable if 69485 has been requested, and items 69494, 69495 or 69496 were not requested as part of the same single patient episode.

Item 69485 will be introduced by the *Health Insurance (Section 3C Pathology Services – COVID-19) Determination 2020* to provide a pathology service to test for severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), which is the virus that causes the disease known commonly as COVID-19. Item 69485 will be provided in conjunction with other separate viral respiratory tests (provided under items 69494, 69495 or 69496) to determine if the patient has COVID-19 or another respiratory virus such as influenza.

The Amendment Determination will provide that a pathologist will be able to test for other respiratory viruses, if the treating practitioner did not request a service under items 69494, 69495 or 69496. This will ensure that pathologists can test all relevant viruses, as necessary.

Consultation

Section 4BA of the Act requires that the Royal College of Pathologists of Australasia (RCPA) is consulted on pathology services being made pathologist-determinable services. RCPA was consulted on the enabling 69494, 69495 or 69496 to be pathologist determinable if item 69485 was requested, and items 69494, 69495 or 69496 were not requested as part of the same single patient episode.

Details of the Determination are set out in the Attachment.

The Determination commences immediately after the *Health Insurance (Section 3C Pathology Services – COVID-19) Determination 2020* is registered.

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

ATTACHMENT**Details of the *Health Insurance (Pathologist-determinable Services) Amendment Determination 2020*****Section 1 – Name**

Section 1 provides for the instrument to be referred to as the *Health Insurance (Pathologist-determinable Services) Amendment Determination 2020*.

Section 2 – Commencement

Section 2 provides that the instrument commences immediately after the *Health Insurance (Section 3C Pathology Services – COVID-19) Determination 2020* is registered.

Section 3 – Authority

Section 3 provides that the instrument is made under section 4BA of the *Health Insurance Act 1973*.

Section 4 – Schedules

Section 4 provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 – Amendment***Health Insurance (Pathologist-determinable Services) Determination 2015*****Item 1 – Paragraph 5(c)**

Item 1 repeals and replaces paragraph 5(c) to insert new subparagraph (D) to provide that items 69494, 69495 or 69496 are pathologist determinable if a request has been made under item 69485, but the treating practitioner did not request a service under item 69494, 69495 or 69496 as part of the same single patient episode.

Statement of Compatibility with Human Rights

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

Health Insurance (Pathologist-determinable Services) Amendment Determination 2020

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

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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.

Analysis

This instrument maintains the right to health and the right to social security by ensuring access to publicly subsidised health services which are clinically effective, safe and cost-effective.

Conclusion

This instrument is compatible with human rights as it has a positive effect on the right to health and the right to social security.

David Weiss
First Assistant Secretary
Medical Benefits Division
Health Financing Group
Department of Health