

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Health

Health Insurance Act 1973

Health Insurance (Section 3C General Medical Services – Specialist, Consultant Physician and Consultant Psychiatrist COVID-19 Telehealth Services) Amendment Determination No.2 2020.

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

The Table 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 2019*.

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

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).

As part of the package, the Government announced \$100 million to fund new Medicare services for people in home isolation or quarantine, as a result COVID-19, to receive health consultations remotely.

On 13 March 2020, new temporary Medicare Benefits Schedule (MBS) items were introduced to allow specialists, consultant physicians and consultant psychiatrists to provide services by video conference and phones services to patients who have been diagnosed with the COVID-19 virus, or who are more vulnerable of contracting the COVID-19 virus. The services are also able to be provided by specialists, consultant physicians and consultant psychiatrists who are in isolation for possible COVID-19 infection. These items are prescribed in the *Health Insurance (Section 3C General Medical Services – Specialist, Consultant Physician and Consultant Psychiatry COVID-19 Telehealth Services) Determination 2020* (the Principal Determination).

Immediately following the commencement of the Principal Determination, the Health Insurance *Health Insurance (Section 3C General Medical Services – Specialist, Consultant Physician and Consultant Psychiatrist COVID-19 Telehealth Services) Amendment Determination No.1 2020* was made to expand the types of

services which specialists, consultant physicians and consultant psychiatrists could provide.

The purpose of the *Health Insurance (Section 3C General Medical Services – Specialist, Consultant Physician and Consultant Psychiatry COVID-19 Telehealth Services) Amendment Determination No.2 2020* (the Amendment Determination) is to amend the Principal Determination to modify the descriptors for the consultant psychiatrist telehealth and phone service items (91828 to 91831 and 91838 to 91841) to clarify the timing of the attendance by replacing the words “of more than” with “at least” in subclause (c).

The Amendment Determination will also amend the Principal Determination to add new obstetric antenatal and postnatal services telehealth and phone service items. Eight new items will be listed to allow practitioners rendering these services to undertake these services by telehealth (items 91850, 91851, 91852 and 91853) or by phone (items 91855, 91856, 91857 and 91858) where video conferencing is not available.

The purpose of the Amendment Determination is to ensure patients can receive Medicare benefits whilst in home isolation or quarantine or whilst the health professional is in home isolation or quarantine, as a result of COVID-19 virus. To this effect, the amendments in the Schedule are taken to have commenced immediately after the Principal Determination commenced. This is to ensure that patients will continue to be able to receive Medicare benefits for these services and will not be disadvantaged during in home isolation or quarantine, as a result of COVID-19 virus. Although Schedule 1 applies retrospectively, it is not contrary to section 12 of the *Legislation Act 2003* as it does not disadvantage a person and only imposes applies a liability on the Commonwealth for the retrospective period.

Consultation

On 11 March 2020, the Prime Minister, the Hon. Scott Morrison MP, announced a comprehensive health package to protect all Australians, including vulnerable groups such as the elderly, those with chronic conditions and Indigenous communities, from the coronavirus (COVID-19). Due to the nature of the emergency and the short timeframe in drafting this legislative instrument to implement this phase of the health package, it was not reasonably practicable to undertake consultation with representatives of persons affected by the instrument.

Details of the Determination are set out in the [Attachment](#).

The Determination commences on 13 March 2020.

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

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

ATTACHMENT

Details of the Health Insurance (Section 3C General Medical Services – Specialist, Consultant Physician and Consultant Psychiatry COVID-19 Telehealth Services) Amendment Determination No.2 2020

Section 1 – Name

Section 1 provides for the Determination to be referred to as the *Health Insurance (Section 3C General Medical Services – Specialist, Consultant Physician and Consultant Psychiatry COVID-19 Telehealth Services) Amendment Determination No.2 2020*

Section 2 – Commencement

Section 2 provides that the Determination commences immediately after the commencement of the *Health Insurance (Section 3C General Medical Services – Specialist, Consultant Physician and Consultant Psychiatrist COVID-19) Telehealth Services) Determination 2020*.

Section 3 – Authority

Section 3 provides that the 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 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 Determination has effect according to its terms.

Schedule 1 – Amendments

Health Insurance (Section 3C General Medical Services – Specialist, Consultant Physician and Consultant Psychiatry COVID-19 Telehealth Services) Determination 2020 (Principal Determination)

The purpose of the Amendment Determination is to to modify the descriptors for the consultant psychiatrist telehealth and phone service items (91828 to 91831 and 91838 to 91841) to clarify the timing of the attendance by replacing the words “of more than” with “at least” in subclause (c).

Item 1

Division 1.3 –Services and Fees – Consultant psychiatrist attendances via video conference

Division 1.3 of the Amendment Determination amends the descriptors for item 91828 to include “(c) the attendance was at least 15 minutes, but not more than 30 minutes in duration; and”.

For item 91829 the item descriptor will be amended to include “(c) the attendance was at least 30 minutes, but not more than 45 minutes in duration; and”.

For item 91830 the item descriptor will be amended to include “(c) the attendance was at least 45 minutes, but not more than 75 minutes in duration; and”.

For item 91831 the item descriptor will be amended to include “(c) the attendance was at least 75 minutes in duration; and”.

For the purpose of Division 1.3, a consultant physician has the same meaning as in the Act. The meaning of consultant physician, is a consultant physician in relation to a particular specialty, which means a medical practitioner in relation to whom there is in force a determination under section 3DB or 3E of the Act, that the medical practitioner is recognised as a consultant physician in that specialty.

Item 2

Division 1.6 – Services and fees – consultant psychiatrist attendances via phone services

Division 1.6 of the Amendment Determination amends the descriptors for item 91838 to include “(c) the attendance was at least 15 minutes, but not more than 30 minutes in duration; and”.

For item 91839 the item descriptor will be amended to include “(c) the attendance was at least 30 minutes, but not more than 45 minutes in duration; and”.

For item 91840 the item descriptor will be amended to include “(c) the attendance was at least 45 minutes, but not more than 75 minutes in duration; and”.

For item 91841 the item descriptor will be amended to include “(c) the attendance was at least 75 minutes in duration; and”.

For the purpose of Division 1.6, a consultant physician has the same meaning as in the Act. The meaning of consultant physician, is a consultant physician in relation to a particular specialty, which means a medical practitioner in relation to whom there is in force a determination under section 3DB or 3E of the Act, that the medical practitioner is recognised as a consultant physician in that specialty.

Item 3

Division 1.7 - Services and Fees – Obstetrics obstetric attendances via telehealth services

Division 1.7 of the Amendment Determination lists eight new professional attendance items (91850, 91851, 91852, 91853, 91855, 91856, 91857 and 91858) that provide new obstetric antenatal and postnatal services via video conference and phone to patients who are at risk of COVID-19 virus or by health professionals at risk of COVID-19 virus. The new services must bulk-billed.

For the purpose of Division 1.7, a specialist has the same meaning as in the *Health Insurance Act 1973* (the Act). The meaning of specialist is a specialist, in relation to a particular specialty, which means a medical practitioner in relation to whom there is in force a determination under section 3DB or 3E of the Act, that the medical practitioner is recognised as a specialist in that specialty, or a medical practitioner who is taken to be so recognised under section 3D of the Act.

For the purpose of Division 1.7, a midwife has the same meaning as provided in clause 2.41.2 of the *Health Insurance (General Medical Services Table) Regulations 2019*. A nurse practitioner has the same meaning as in the Act and an Aboriginal and Torres Strait Islander health practitioner has the same meaning as provided in the *Health Insurance (Allied Health Services) Determination 2014*.

Items 91855, 91856, 91857 and 91858 are telephone services and require an audio link only. Subclause 1.7.1(3) requires that the rendering practitioner must not perform a service in subgroup 2 if the practitioner and the patient have the capacity to undertake an attendance by video conference.

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 – Specialist, Consultant Physician and Consultant Psychiatry COVID-19 Telehealth Services) Amendment Determination No.2 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

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).

As part of the package, the Government announced \$100 million to fund new Medicare services for people in home isolation or quarantine, as a result COVID-19, to receive health consultations remotely.

On 13 March 2020, new temporary Medicare Benefits Schedule (MBS) items were introduced to allow specialists, consultant physicians and consultant psychiatrists to provide services by video conference and phones services to patients who have been diagnosed with the COVID-19 virus, or who are more vulnerable of contracting the COVID-19 virus. The services are also able to be provided by specialists, consultant physicians and consultant psychiatrists who are in isolation for possible COVID-19 infection. These items are prescribed in the *Health Insurance (Section 3C General Medical Services – Specialist, Consultant Physician and Consultant Psychiatry COVID-19 Telehealth Services) Determination 2020* (the Principal Determination).

Immediately following the commencement of the Principal Determination, the Health Insurance *Health Insurance (Section 3C General Medical Services – Specialist, Consultant Physician and Consultant Psychiatrist COVID-19 Telehealth Services) Amendment Determination No.1 2020* was made to expand the types of services which specialists, consultant physicians and consultant psychiatrists could provide.

The purpose of the *Health Insurance (Section 3C General Medical Services – Specialist, Consultant Physician and Consultant Psychiatry COVID-19 Telehealth Services) Amendment Determination No.2 2020* (the Amendment Determination) is to amend the Principal Determination to modify the descriptors for the consultant psychiatrist telehealth and phone service items (91828 to 91831 and 91838 to 91841) to clarify the timing of the attendance by replacing the words “of more than” with “at least” in subclause (c).

The Amendment Determination will also amend the Principal Determination to add new obstetric antenatal and postnatal services telehealth and phone service items. Eight new items will be listed to allow practitioners rendering these services to undertake these services by telehealth (items 91850, 91851, 91852 and 91853) or by phone (items 91855, 91856, 91857 and 91858) where video conferencing is not available.

The purpose of the Amendment Determination is to ensure patients can receive Medicare benefits whilst in home isolation or quarantine or whilst the health professional is in home isolation or quarantine, as a result of COVID-19 virus. To this effect, the amendments in the Schedule are taken to have commenced immediately after the Principal Determination commenced. This is to ensure that patients will continue to be able to receive Medicare benefits for these services and will not be disadvantaged during in home isolation or quarantine, as a result of COVID-19 virus. Although Schedule 1 applies retrospectively, it is not contrary to section 12 of the *Legislation Act 2003* as it does not disadvantage a person and only imposes applies a liability on the Commonwealth for the retrospective period.

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 advances the right to health and the right to social security by ensuring people who have been affected by COVID-19 can access publicly subsidised health services without the risk of affecting other people or health professionals.

Conclusion

This instrument is compatible with human rights as it advances the right to health and the right to social security.

Greg Hunt
Minister for Health