

EXPLANATORY STATEMENT

Health Insurance Act 1973

Health Insurance (Section 3C General Medical Services – Smoking Cessation Services) Determination 2021

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 (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 2021*.

Purpose

On 21 December 2020, the Therapeutic Goods Administration (TGA) announced that from 1 October 2021 e-cigarettes containing nicotine must be supplied with a prescription from a doctor in specific circumstances, subject to State and Territory legislation.

To support the TGA's regulatory changes, in the 2021-22 Budget the Government announced new temporary face-to-face, telehealth and phone items to provide patients with access to nicotine and smoking cessation counselling, and if clinically relevant, prescribe liquid nicotine as part of this cessation plan. The change was announced as part of the *Guaranteeing Medicare – Strengthening Primary Health Care – MBS Telehealth* measure.

The purpose of the *Health Insurance (Section 3C General Medical Services – Smoking Cessation Services) Determination 2021* (the Determination) is to list 18 new temporary items for general practitioner (GP) and other medical practitioner (OMP) services related to nicotine and smoking cessation counselling. These new items include six face-to-face, six telehealth and six phone services. These items are temporary and will cease on 30 June 2022.

Consultation

Consultation was undertaken with peak bodies, including the Royal Australian College of General Practitioners and the Australian Medical Association, regarding the introduction of the new nicotine and smoking cessation items.

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

The Determination commences on 21 July 2021.

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 – Smoking Cessation Services) Determination 2021Section 1 – Name

Section 1 provides for the Determination to be referred to as the *Health Insurance (Section 3C General Medical Services – Smoking Cessation Services) Determination 2021*.

Section 2 – Commencement

Section 2 provides that the Determination commences on 21 July 2021.

Section 3 – Authority

Section 3 provides that the Determination is made under subsection 3C(1) of the *Health Insurance Act 1973*.

Section 4 – Cessation

Section 4 provides that, unless revoked earlier, the Determination will cease on 30 June 2022.

Section 5 – Definitions

Section 5 defines terms used in the Determination.

Section 6 – Treatment of relevant services

Section 6 provides that a clinically relevant service provided in accordance with the Determination shall be treated, for relevant provisions of the *Health Insurance Act 1973* and *National Health Act 1953*, and regulations made under those Acts, as if it were both a professional service and a medical service and as if there were an item specified in the general medical services table for the service.

Section 7 – Application of provisions of the general medical services table

Section 7 specifies provisions of the general medical services table that apply as if the relevant items in the Determination were specified in the relevant provision in the general medical services table.

Subsection 7(1) of the Determination provides that items in the Schedule of the Determination will be treated as if they were specified in clause 1.2.1 of the general medical services table. Clause 1.2.1 provides that an item in Schedule 1 of the general medical services table does not apply to a service provided in contravention of a law of the Commonwealth, a State or Territory.

Subsection 7(2) of the Determination provides that items in the Schedule of the Determination will be treated as if they were specified in subclause 1.2.5(1) of the general medical services table. Clause 1.2.5 provides a list of requirements that a professional service may include.

Subsection 7(3) of the Determination provides that the face-to-face nicotine and smoking cessation items (93680 to 93685) will be treated as if they were specified in subclause 1.2.7(1) of the general medical services table. Clause 1.2.7 details the application and matters included in personal attendance by medical practitioners.

Section 8 – Application of items

Section 8 specifies the application of the items in the Schedule of the Determination.

Subsection 8(1) provides that an item in the Schedule of the Determination does not apply to a service if the patient is an admitted patient, as defined in section 5 of the Determination.

Subsection 8(2) provides that an item in the Schedule of the Determination only applies to a service that is an attendance by a single medical practitioner on a single patient.

Subsection 8(3) provides that for items 93682, 93685, 93692, 93695, 93702 and 93705, ‘eligible area’ has the meaning given by section 4 of the *Health Insurance (Section 3C General Medical Services – Other Medical Practitioner) Determination 2018*. These items, which are prescribed in the Schedule, provide face-to-face, telehealth and phone attendances for services performed by OMPs in regional, rural and remote areas (Modified Monash areas 2 to 7).

Section 9 – Limitation of items

Section 9 specifies a nicotine and smoking cessation service (93680 to 93685) cannot be performed for a patient on the same occasion as:

- another service to which an item in this Determination applies; or
- a service in Part 2 of the general medical services table applies.

Schedule – Relevant services

The Schedule specifies the service and the associated fee for items in Group A45, which provides general practitioner (GP) and other medical practitioner (OMP) services related to nicotine and smoking cessation counselling.

Items in Subgroup 1 of Group A45 provide time-tiered face-to-face GP and OMP services related to nicotine and smoking cessation counselling.

Items in Subgroup 2 of Group A45 provide telehealth GP and OMP services related to nicotine and smoking cessation counselling. The meaning of a ‘telehealth attendance’ is defined in section 5 of the Determination.

Items in Subgroup 3 of Group A45 provide phone GP and OMP services related to nicotine and smoking cessation counselling. The meaning of a ‘phone attendance’ is defined in section 5 of the Determination.

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 – Smoking Cessation Services)
Determination 2021*

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 21 December 2020, the Therapeutic Goods Administration (TGA) announced that from 1 October 2021 e-cigarettes containing nicotine must be supplied with a prescription from a doctor in specific circumstances, subject to State and Territory legislation.

To support the TGA's regulatory changes, in the 2021-22 Budget the Government announced new temporary face-to-face, telehealth and phone items to provide patients with access to nicotine and smoking cessation counselling, and if clinically relevant, prescribe liquid nicotine as part of this cessation plan. The change was announced as part of the *Guaranteeing Medicare – Strengthening Primary Health Care – MBS Telehealth* measure.

The purpose of the *Health Insurance (Section 3C General Medical Services – Smoking Cessation Services) Determination 2021* (the Determination) is to list 18 new temporary items for general practitioner (GP) and other medical practitioner (OMP) services related to nicotine and smoking cessation counselling. These new items include six face-to-face, six telehealth and six phone services. These items are temporary and will cease on 30 June 2022.

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

This instrument advances the rights health and social security and the right of equality and non-discrimination by providing patients greater access to services related to nicotine and smoking cessation counselling.

Conclusion

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

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