

## EXPLANATORY STATEMENT

### *Health Insurance Act 1973*

#### *Health Insurance Legislation Amendment (Section 3C General Medical Services – Usual Medical Practitioner Exemption) 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 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 (No. 2) 2020*.

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**

Since 13 March 2020, the Australian Government has been providing temporary access to Medicare benefits for certain medical services to protect Australians during the coronavirus (COVID-19) pandemic. These temporary services are listed in the *Health Insurance (Section 3C General Medical Services - COVID-19 Telehealth and Telephone Attendances) Determination 2020* (the Principal COVID-19 Determination).

General practitioners (GPs) and other medical practitioners (OMPs) working in general practice can only perform these telehealth or phone services if they have an existing relationship with the patient. An existing relationship is defined as:

- the medical practitioner who performs the service has provided a face-to-face service to the patient in the last 12 months; or
- the medical practitioner who performs the service is located at a medical practice, and the patient has a face-to-face service arranged by that practice in the last 12 months. This can be a service performed by another doctor located at the practice, or a service performed by another health professional located at the practice (such as a practice nurse or Aboriginal and Torres Strait Islander health worker); or
- the medical practitioner who performs the service is a participant in the Approved Medical Deputising Service (AMDS) program, and the AMDS provider that employs the medical practitioner has a formal agreement with a medical practice that has provided at least one face-to-face service to the patient in the last 12 months.

This requirement does not apply to a person who is under the age of 12 months, a person who is experiencing homelessness, a person who is in an area declared a COVID-19 hotspot by the Commonwealth Chief Medical Officer, a person who is required to quarantine or isolate under a State or Territory Government public health

order, or a person who receives the service from a medical practitioner located at an Aboriginal Medical Service or an Aboriginal Community Controlled Health Service.

The *Health Insurance Legislation Amendment (Section 3C General Medical Services – Usual Medical Practitioner Exemption) Determination 2021* (the Amendment Determination) amends the Principal COVID-19 Determination to remove the requirement for patients to have an existing relationship with their medical practitioner to access a general practice telehealth or phone item related to mental health support services, including services provided under the *Better Access to Psychiatrists, Psychologists and General Practitioners through the MBS initiative* (also known as Better Access) and eating disorder services. The Amendment Determination also removes this requirement for Better Access telehealth and phone services provided under the *Health Insurance (Section 3C General Medical – Expansion of GP and Allied Health Mental Health Services) Determination 2020*.

### **Consultation**

In the 2021-22 Budget under the *Guaranteeing Medicare – Strengthening Primary Health Care – MBS Telehealth* measure, the Government announced changes to temporary telehealth and phone services, including removing the requirement for a patient to have an existing relationship with the medical practitioner to access GP Better Access and mental health treatment items.

It was not reasonably practicable to undertake consultation with all representatives of persons affected by the instrument considering the nature of the COVID-19 emergency and given the removal of the existing relationship requirement increases access to mental health treatment services.

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*

***Details of the Health Insurance Legislation Amendment (Section 3C General Medical Services – Usual Medical Practitioner Exemption) Determination 2021***

Section 1 – Name

Section 1 provides for the Determination to be referred to as the *Health Insurance Legislation Amendment (Section 3C General Medical Services – Usual Medical Practitioner Exemption) Determination 2021*.

Section 2 – Commencement

Section 2 provides that the Determination commences 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 – 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 - COVID-19 Telehealth and Telephone Attendances) Determination 2020* (Principal COVID-19 Determination)

**Item 1** amends subsection 8(10) of the Principal COVID-19 Determination to include the items listed in subgroups 3, 10, 19, 20, 21, 25, 26, 27 and 28 of Group A40 in the exemption to subsection 8(8), which requires an existing relationship with the medical practitioner for patients to access general practice (GP) telehealth and phone services. The items listed in these subgroups are GP and other medical practitioner (OMP) telehealth and phone attendances related to mental health support services.

*Health Insurance (Section 3C General Medical – Expansion of GP and Allied Health Mental Health Services) Determination 2020* (Principal GP and Allied Health Mental Health Services Determination)

**Item 2** repeals the definition of *patient's usual medical practitioner* from section 5(1) of the Principal GP and Allied Health Mental Health Services Determination.

**Item 3** repeals subsections 8(4) and (5) from the Principal GP and Allied Health Mental Health Services Determination to remove the requirement of an existing relationship with the medical practitioner for patients to access the listed telehealth and phone services. The listed items are mental health support services provided under the *Better Access to Psychiatrists, Psychologists and General Practitioners through the MBS initiative*.

## Statement of Compatibility with Human Rights

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

*Health Insurance Legislation Amendment (Section 3C General Medical Services – Usual Medical Practitioner Exemption) 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

Since 13 March 2020, the Australian Government has been providing temporary access to Medicare benefits for certain medical services to protect Australians during the coronavirus (COVID-19) pandemic. These temporary services are listed in the *Health Insurance (Section 3C General Medical Services - COVID-19 Telehealth and Telephone Attendances) Determination 2020* (the Principal COVID-19 Determination).

General practitioners (GPs) and other medical practitioners (OMPs) working in general practice can only perform these telehealth or phone services if they have an existing relationship with the patient. An existing relationship is defined as:

- the medical practitioner who performs the service has provided a face-to-face service to the patient in the last 12 months; or
- the medical practitioner who performs the service is located at a medical practice, and the patient has a face-to-face service arranged by that practice in the last 12 months. This can be a service performed by another doctor located at the practice, or a service performed by another health professional located at the practice (such as a practice nurse or Aboriginal and Torres Strait Islander health worker); or
- the medical practitioner who performs the service is a participant in the Approved Medical Deputising Service (AMDS) program, and the AMDS provider that employs the medical practitioner has a formal agreement with a medical practice that has provided at least one face-to-face service to the patient in the last 12 months.

This requirement does not apply to a person who is under the age of 12 months, a person who is experiencing homelessness, a person who is in an area declared a COVID-19 hotspot by the Commonwealth Chief Medical Officer, a person who is required to quarantine or isolate under a State or Territory Government public health order, or a person who receives the service from a medical practitioner located at an Aboriginal Medical Service or an Aboriginal Community Controlled Health Service.

The *Health Insurance Legislation Amendment (Section 3C General Medical Services – Usual Medical Practitioner Exemption) Determination 2021* (the Amendment Determination) amends the Principal COVID-19 Determination to remove the requirement for patients to have an existing relationship with their medical practitioner to access a general practice telehealth or phone item related to mental health support services, including services provided under the *Better Access to Psychiatrists, Psychologists and General Practitioners through the MBS initiative* (also known as Better Access) and eating disorder services. The Amendment Determination also removes this requirement for Better Access telehealth and phone services provided under the *Health Insurance (Section 3C General Medical – Expansion of GP and Allied Health Mental Health Services) Determination 2020*.

## **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 right to health, the right to social security and the right of equality and non-discrimination by providing patients with greater access to remote service options for mental health support services.

## **Conclusion**

This instrument is compatible with human rights as it advances the right to health, the right to social security and the right of equality and non-discrimination.

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