

EXPLANATORY STATEMENT

Health Insurance Act 1973

Health Insurance (Section 3C Cleft Lip and Cleft Palate Services) Amendment Determination 2023

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 2021*.

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

The purpose of the *Health Insurance (Section 3C Cleft Lip and Cleft Palate Services) Amendment Determination 2023* (the Amendment Determination) is to implement Medicare Benefits Schedule (MBS) Review Taskforce (the Taskforce) recommendations related to cleft dental services, by amending the *Health Insurance (Section 3C Cleft Lip and Cleft Palate Services) Determination 2020* (CLCP Determination) to specify eligible cleft and craniofacial conditions and to remove references to ‘prescribed dental patients.’

These changes are administrative in nature, setting out the eligible conditions currently specified in the *Health Insurance (Prescribed Dental Patient) Determination 2015*, a determination under paragraph 3BA(3)(a) of the Act. Section 3BA of the Act is subject to removal by the *Health Insurance Amendment (Prescribed Dental Patients and Other Measures) Bill 2023*, which passed the House of Representatives on 29 March 2023 and the Senate on 10 August 2023. Accordingly, the changes will ensure eligible patients continue to have access to cleft dental services under the MBS.

The Determination also amends the indexation provision at subsection 8(1) to apply an indexation factor of 0.5 per cent to items specified in the CLCP Determination, to ensure consistency with the updated indexation framework announced by Government as part of the 2023-24 Budget.

In December 2020, the Taskforce released the Final Report on the Cleft Dental Services MBS Items and endorsed 29 recommendations to modernise the MBS and ensure items reflect contemporary practice, including the changes under this Amendment Determination. Changes to cleft dental services under the MBS were announced in the

2022-23 Budget under the *Guaranteeing Medicare – Medicare Benefits Schedule New and Amended Listings* measure.

Consultation

The Department of Health and Aged Care approached peak professional bodies with responsibility for cleft dental services to seek their views on potential changes to patient eligibility. The Australian Dental Association, Australian Society of Orthodontists, and Australian and New Zealand Association of Oral & Maxillofacial Surgeons responded in support of the proposed changes.

No consultation was undertaken regarding the indexation changes in the Amendment Determination, as they are intended to align relevant MBS items in the CLCP Determination with the Government’s policy on Medicare indexation, following the announcement in the 2023-24 Budget of revisions to the indexation methodology.

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

The Determination commences on 1 November 2023.

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 (Section 3C Cleft Lip and Cleft Palate Services) Amendment Determination 2023

Section 1 – Name

Section 1 provides for the Determination to be referred to as the *Health Insurance (Section 3C Cleft Lip and Cleft Palate Services) Amendment Determination 2023* (the Amendment Determination).

Section 2 – Commencement

Section 2 provides that the Amendment Determination commences on 1 November 2023.

Section 3 – Authority

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

Schedule 1 – Amendments

Health Insurance (Section 3C Cleft Lip and Cleft Palate Services) Determination 2020 (CLCP Determination)

Item 1 removes references to ‘prescribed dental patients’ at subsection 7(1) and substitutes references to ‘a patient diagnosed with an eligible cleft and craniofacial condition as specified in the table at section 9’. The term ‘prescribed dental patients’ is currently defined by section 3BA of the *Health Insurance Act 1973* (the Act). However, this section of the Act is subject to removal by the *Health Insurance Amendment (Prescribed Dental Patients and Other Measures) Bill 2023*, which passed the House of Representatives on 29 March 2023 and the Senate on 10 August 2023. This change will ensure eligible patients continue to have access to cleft dental services under the Medicare Benefits Schedule.

Item 2 amends subsection 8(1) to apply an indexation factor of 0.5 per cent to items specified in the CLCP Determination.

Item 3 inserts section 9 which specifies eligible cleft and craniofacial conditions. These conditions are currently specified in the *Health Insurance (Prescribed Dental Patient) Determination 2015*, a determination under paragraph 3BA(3)(a) of the Act. This section of the Act is also subject to removal by the *Health Insurance Amendment (Prescribed Dental Patients and Other Measures) Bill 2023*, which was passed in the House of Representatives on 29 March 2023 and the Senate on 10 August 2023.

Statement of Compatibility with Human Rights

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

Health Insurance (Section 3C Cleft Lip and Cleft Palate Services) Amendment Determination 2023

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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These changes are administrative in nature, setting out the eligible conditions currently specified in the *Health Insurance (Prescribed Dental Patient) Determination 2015*, a determination under paragraph 3BA(3)(a) of the Act. Section 3BA of the Act is subject to removal by the *Health Insurance Amendment (Prescribed Dental Patients and Other Measures) Bill 2023*, which passed the House of Representatives on 29 March 2023 and the Senate on 10 August 2023. Accordingly, the changes will ensure eligible patients continue to have access to cleft dental services under the MBS.

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In December 2020, the Taskforce released the Final Report on the Cleft Dental Services MBS Items and endorsed 29 recommendations to modernise the MBS and ensure items reflect contemporary practice, including the changes under this Determination. Changes to cleft dental services under the MBS were announced in the 2022-23 Budget under the *Guaranteeing Medicare – Medicare Benefits Schedule New and Amended Listings* measure.

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 maintains the rights to health and social security and the right of equality and non-discrimination by continuing to support access to Medicare benefits for patients requiring treatment for eligible cleft and craniofacial conditions.

Conclusion

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

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