

EXPLANATORY STATEMENT

Health Insurance Act 1973

Health Insurance (Section 3C General Medical Services – Cleft and Craniofacial Services) Determination 2024

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 General Medical Services – Cleft and Craniofacial Services) Determination 2024* (the Determination) is to repeal and remake the *Health Insurance (Section 3C Cleft Lip and Cleft Palate Services) Determination 2020* (the Former Determination). This remake will implement Medicare Benefits Schedule (MBS) Review Taskforce (the Taskforce) recommendations related to cleft dental services and modernise the clinical practice for treating patients with cleft and craniofacial conditions.

These changes include:

- Updates to the table of MBS items at Schedule 1 to introduce nine new items, amend 36 existing items, and delete 26 items;
- The expansion of practitioner access to include eligible paediatric dentists and eligible prosthodontists;
- The removal of sub-categories listed under Category 7; and
- Updates to referral pathways for treating dental specialists, where required.

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.

Consultation

The Department of Health and Aged Care engaged with peak professional bodies with responsibility for cleft dental services via the Implementation Liaison Group. Peak bodies included the Australasian Academy of Paediatric Dentistry, Australian Dental Association, Australian Society of Orthodontists, Australasian Cleft Lip & Cleft Palate Association, Australian and New Zealand Association of Oral and Maxillofacial Surgeons, Academy of Australian and New Zealand Prosthodontists, and Australian Private Hospitals Association.

Details of the Determination are set out in the Attachment.

The Determination commences on 1 March 2024.

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 General Medical Services – Cleft and Craniofacial Services) Determination 2024*

Section 1 – Name

Section 1 provides for the Determination to be referred to as Health Insurance (Section 3C General Medical Services – Cleft and Craniofacial Services) Determination 2024 (the Determination).

Section 2 – Commencement

Section 2 provides that the Determination commences on 1 March 2024.

Section 3 – Authority

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

Section 4 – Definitions

Section 4 defines terms used in the Determination.

Section 5 – Schedules

Section 5 of the Determination 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.

Section 6 – Relevant services

Section 6 of the Determination provides that for subsection 3C(1) of the *Health Insurance Act 1973*, a relevant service provided in accordance with this Determination is to be treated, for the relevant provisions, as if it were both a professional service and a medical service; and there were an item in the general medical services table that is related to the service and specified for the service a fee in relation to each State, being the fee specified in Schedule 1 in relation to the service.

Section 7 – Limitation on services

Subsection 7(1) of the Determination provides that an item specified in Schedule 1 to the Determination only applies to a service provided to a patient with an eligible cleft or craniofacial condition. Refer to Schedule 2 for the table of eligible conditions.

Subsection 7(2) of the Determination specifies that items 75009, 75023, 75200, 75203, 75206, 75400, 75402, 75800, 75802, 75815, 75818, 75820, 75833, 75836, 75842, 75845, 75848, 75851 and 75854 apply to a service provided by a dental practitioner.

Subsection 7(3) of the Determination specifies that items 75002, 75005, 75007, 75012, 75015, 75024, 75027, 75030, 75032, 75034, 75039, 75042, 75045, 75048, 75049, 75050, 75051, 75618 and 75621 apply to a service provided by an eligible orthodontist.

Subsection 7(4) of the Determination specifies that items 75002, 75005, 75007, 75618 and 75621 apply to a service provided by an eligible prosthodontist.

Subsection 7(5) of the Determination specifies that items 75002, 75005, 75007, 75024, 75027, 75600 and 75603 apply to a service provided by an eligible paediatric dentist.

Subsection 7(6) of the Determination specifies that items 75002, 75005, 75007, 75012, 75015, 75405, 75600, 75603, 75606, 75609, 75610, 75618 and 75621 apply to a service provided by an eligible oral and maxillofacial surgeon, or a dental practitioner who, immediately prior to 1 November 2012, held an approval granted by the Minister for the purposes of the definition of *professional service* in subsection 3(1) of the *Health Insurance Act 1973*.

Section 8 – Requirement for referral by a referring dentist or medical practitioner

Section 8 of the Determination specifies where items 75002, 75005, 75200, 75203, 75206, 75400, 75402, 75600, 75603, 75618 and 75621 apply only to a service provided by an eligible oral and maxillofacial surgeon if the patient has been referred by a referring dentist or medical practitioner. Note, the terms **referring dentist** and **medical practitioner** are defined by subsection 4(1).

Schedule 1 – Specified health services

Schedule 1 of the Determination provides the table of items in Group C1 for cleft and craniofacial services, removing sub-categories under Category 7 used in the Former Determination. This Schedule introduces nine new items, amends 36 existing items, and deletes 26 items. These changes are intended to ensure cleft dental items align with contemporary clinical practice. Note, the terms **eligible orthodontist**, **eligible prosthodontist**, **eligible paediatric dentist**, **eligible oral and maxillofacial surgeon**, **dental practitioner**, **referring dentist** and **medical practitioner**, which are referred to below, are defined by subsection 4(1).

New item 75002 provides services for an initial attendance by an eligible orthodontist, eligible prosthodontist, eligible paediatric dentist or eligible oral and maxillofacial surgeon. This item will replace services currently provided under items 75001 and 75150, which will be deleted. This item also expands the service to include services provided by an eligible paediatric dentist or eligible prosthodontist.

New item 75005 provides services for a subsequent attendance by an eligible orthodontist, eligible prosthodontist, eligible paediatric dentist or eligible oral and maxillofacial surgeon. This item will replace services currently provided under items 75004 and 75153, which will be deleted. This item also expands the service to include services provided by an eligible paediatric dentist or eligible prosthodontist.

New item 75007 provides services for the production of dental study models by an eligible orthodontist, eligible prosthodontist, eligible paediatric dentist or eligible oral and maxillofacial surgeon. This item will replace services currently provided under items 75006 and 75156, which

will be deleted. This item also expands the service to include services provided by an eligible paediatric dentist or eligible prosthodontist.

New item 75032 provides services for mixed dentition treatment by an eligible orthodontist, combining the services currently provided under items 75033, 75036 and 75037, which will be deleted.

New item 75402 provides services for the surgical removal of one tooth, or tooth fragment, requiring incision of the soft tissue only by a dental practitioner if the patient is referred by a medical practitioner or referring dentist. This item combines the services currently provided under 75403 and 75412, which will be deleted. This item also expands the service to include services provided by a dental practitioner and expands the referral pathways for the service to include referrals from medical practitioners and referring dental practitioners.

New item 75405 provides services for the surgical removal of one tooth, or tooth fragment, by an eligible oral and maxillofacial surgeon if the patient is referred by a medical practitioner or referring dentist. This item combines the services currently provided under 75406, 75409 and 75415, which will be deleted. This item also expands the referral pathways for the service to include referrals from medical practitioners and referring dental practitioners.

New item 75610 provides surgical procedures for intraoral implantation of an osseointegrated fixture. This item combines the services currently provided under items 75612 and 75615. This item also expands the referral pathways for the service to include referrals from medical practitioners and referring dental practitioners.

New item 75802 provides services for the fabrication and fitting of an acrylic base partial denture of 1 to 4 teeth by a dental practitioner. This item combines the services currently provided under item 75803, 75806, 75809 and 75812, which will be deleted.

New item 75820 provides services for the fabrication and fitting of a metal framework partial denture of 1 to 4 teeth by a dental practitioner. This item combines the services currently provided under items 75821, 75824, 75827 and 75830, which will be deleted.

Items 75018, 75021 and 75839 will be deleted. Item 75018 is considered obsolete as it is a combination of items 75015 and 75009. Item 75021 is considered obsolete and unnecessary in contemporary clinical practice. Item 75839 is considered redundant as it is for the provision and fitting of retainers, which is an integral component of a denture framework, and therefore a separate item is considered unnecessary.

Existing items will be amended to:

- allow for the provision of relevant services by additional dental practitioners;
- expand referral pathways for relevant services; and/or
- clarify and update terminology in item descriptors to align with best clinical practice.

Schedule 2 – Eligible cleft or craniofacial conditions

Item 1 of Schedule 2 of the Determination specifies eligible cleft and/or craniofacial conditions.

Schedule 3 – Repeals

Item 1 of Schedule 3 of the Determination repeals the whole of the *Health Insurance (Section 3C Cleft Lip and Cleft Palate Services) Determination 2020*.

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 – Cleft and Craniofacial Services) Determination 2024

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.

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. This instrument also maintains these rights by ensuring that current cleft and craniofacial MBS items align with contemporary clinical practice. While 26 items are repealed by this instrument, this change is consistent with these rights as the services will continue to be available under other new or amended items, or the services are obsolete and do not align with contemporary clinical practice.

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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