

EXPLANATORY STATEMENT

Health Insurance Act 1973

Health Insurance (Section 3C General Medical Services – Telehealth and Telephone Attendances) Amendment (No. 2) 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 – Telehealth and Telephone Attendances) Amendment (No. 2) Determination 2024* (the Amendment Determination) is to amend the *Health Insurance (Section 3C General Medical Services – Telehealth and Telephone Attendances) Determination 2021* (the Telehealth Determination) from

1 July 2024. The Amendment Determination will:

- provide patients with ongoing access to video and phone attendances relating to blood borne viruses, sexual or reproductive health (BBVSRH);
- update the list of exemptions to the established clinical relationship criteria for general practice video and phone services; and
- make minor amendments to the definition of *eligible urgent care clinic* to address minor typographical errors.

Schedule 1 of the Amendment Determination will remove the cessation provision at section 4 of the Telehealth Determination, which provides that Schedule 5 of the instrument ceases as if revoked on 30 June 2024 at 11:59pm. This change will provide patients with ongoing access to video and phone general practice attendance items relating to BBVSRH services.

Schedule 2 of the Amendment Determination will amend the list of exemptions to the general rule that a patient must have an established clinical relationship with the medical practitioner, meaning one face to face service in a 12-month period, before they are eligible to receive a video or phone consultation (known as the usual medical practitioner rule or the UMP rule). From 1 July 2024, the temporary exemptions at subparagraphs 7(6)(a)(vii) and 7(6)(a)(viii) of the Telehealth Determination, which

were introduced in response to COVID-19 to support timely access to oral antiviral medication, will be removed.

Schedule 2 of the Amendment Determination also removes the temporary exemption to the established clinical relationship criteria for video and phone attendances relating to non-directive pregnancy counselling (NDPC). This change will mean that patients must have an established clinical relationship with the medical practitioner to receive NDPC video and phone services from 1 July 2024.

Consultation

The changes to Schedule 1 and 5 of the Telehealth Determination, excluding the removal of the temporary provisions at subparagraphs 7(6)(a)(vii) and 7(6)(a)(viii), were informed by the findings and recommendations of the MBS Review Advisory Committee (MRAC). The MRAC conducted significant public consultation as part of the Post Implementation Review of Telehealth. Over 450 submissions were received from health experts, health organisations, relevant peak bodies, patients and providers. In relation to the proposed changes to BBVSRH and NDPC items, consultation feedback was largely supportive with positive feedback received from the Australian Medical Association, Australian College of Nurse Practitioners, MSI Australia and Family Planning Australia.

No consultation was undertaken regarding the removal of the COVID-19 measures from the exemptions to the established clinical relationship criteria, however, these exemptions were introduced temporarily with an announced end date, and peak bodies are aware that they are due to cease.

No consultation was undertaken regarding the amendments to address minor typographical errors as these changes are machinery in nature.

Details of the Amendment Determination are set out in the Attachment.

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

Sections 1 to 4 of the Amendment Determination will commence the day after registration of this instrument, Schedule 1 of the Amendment Determination will commence on 30 June 2024, and Schedule 2 of the Amendment Determination will commence on 1 July 2024.

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

ATTACHMENT

Details of the *Health Insurance (Section 3C General Medical Services – Telehealth and Telephone Attendances) Amendment (No. 2) Determination 2024*Section 1 – Name

Section 1 provides for the Amendment Determination to be referred to as the *Health Insurance (Section 3C General Medical Services – Telehealth and Telephone Attendances) Amendment (No. 2) Determination 2024* (Amendment Determination).

Section 2 – Commencement

Section 2 provides for sections 1 to 4 of the Amendment Determination to commence the day after registration of this instrument, Schedule 1 of the Amendment Determination to commence on 30 June 2024 and Schedule 2 of the Amendment Determination to commence on 1 July 2024.

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 – Cessation provision amendments

Health Insurance (Section 3C General Medical Services – Telehealth and Telephone Attendances) Determination 2021 (Telehealth Determination)

Item 1 repeals section 4 of the Telehealth Determination, which currently provides that Schedule 5 will cease on 30 June 2024. This change will provide patients with ongoing access to video and phone general practice attendances relating to blood borne viruses, sexual or reproductive health services.

Item 2 omits the word “Temporary” from the heading of Schedule 5, updating the heading to “GP and medical practitioner telehealth and phone services”. This amendment reflects the changes made in **item 1** of Schedule 1.

Schedule 2 – Telehealth amendments

Health Insurance (Section 3C General Medical Services – Telehealth and Telephone Attendances) Determination 2021 (Telehealth Determination)

Items 1 and 2 make minor amendments to the definition of *eligible urgent care clinic* at subsection 5(1) to address minor typographical errors.

Item 3 repeals the definition of *person who meets the PBS criteria for COVID-19 antiviral therapy* at subsection 5(1). This definition is no longer necessary following the changes made to paragraph 7(6)(a) in **item 5** of Schedule 2.

Items 4 and 5 repeal subparagraphs (vii) and (viii) of paragraph 7(6)(a), which provides a list of exemptions to the general rule that a patient must have an established clinical relationship with the medical practitioner, meaning one face to face service in a 12-month period, before they are eligible to receive a video or phone consultation (known as the usual medical practitioner rule or the UMP rule). The exemptions to the established clinical relationship criteria at subparagraphs 7(6)(a)(vii) and (viii) relate to a person who has tested positive for COVID-19 and a person who meets the PBS criteria for COVID-19 antiviral therapy who is experiencing acute respiratory symptoms respectively. As COVID-19 isolation requirements have lifted, the public health necessity of temporary COVID-19 telehealth measures has diminished. From 1 July 2024, general practice video and phone services provided to patients in these cohorts must be provided by the patient's usual medical practitioner unless other exemptions to the established clinical relationship criteria apply.

Item 6 amends paragraph 7(6)(b) to remove subgroups 15 and 16 of Group A40 from the list of items with exemptions to the established clinical relationship criteria. This change will mean that non-directive pregnancy counselling (NDPC) services must be delivered by the patient's usual medical practitioner.

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 – Telehealth and Telephone Attendances) Amendment (No. 2) 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

The purpose of the *Health Insurance (Section 3C General Medical Services – Telehealth and Telephone Attendances) Amendment (No. 2) Determination 2024* (the Amendment Determination) is to amend the *Health Insurance (Section 3C General Medical Services – Telehealth and Telephone Attendances) Determination 2021* (the Telehealth Determination) from 1 July 2024. The Amendment Determination will:

- provide patients with ongoing access to video and phone attendances relating to blood borne viruses, sexual or reproductive health (BBVSRH);
- update the list of exemptions to the established clinical relationship criteria for general practice video and phone services; and
- make minor amendments to the definition of ***eligible urgent care clinic*** to address minor typographical errors.

Schedule 1 of the Amendment Determination will remove the cessation provision at section 4 of the Telehealth Determination, which provides that Schedule 5 of the instrument ceases as if revoked on 30 June 2024 at 11:59pm. This change will provide patients with ongoing access to video and phone general practice attendance items relating to BBVSRH services.

Schedule 2 of the Amendment Determination will amend the list of exemptions to the general rule that a patient must have an established clinical relationship with the medical practitioner, meaning one face to face service in a 12-month period, before they are eligible to receive a video or phone consultation (known as the usual medical practitioner rule or the UMP rule). From 1 July 2024, the temporary exemptions at subparagraphs 7(6)(a)(vii) and 7(6)(a)(viii) of the Telehealth Determination, which were introduced in response to COVID-19 to support timely access to oral antiviral medication, will be removed.

Schedule 2 of the Amendment Determination also removes the temporary exemption to the established clinical relationship criteria for video and phone attendances relating to non-directive pregnancy counselling (NDPC). This change will mean that patients must have an established clinical relationship with the medical practitioner to received NDPC video and phone services from 1 July 2024.

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 right to health, the right to social security and the right of equality and non-discrimination by continuing to provide access to telehealth and phone general practice attendances for BBVSRH services.

Despite removing specific exemptions to the established clinical relationship criteria, this instrument still maintains the right to health, the right to social security and the right of equality and non-discrimination as patients will continue to have access to relevant MBS video and phone services if they have an established clinical relationship with the medical practitioner providing the service or if they meet one of the other exemptions to this rule.

Conclusion

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

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