

# Medical Indemnity Amendment Regulations 2004 (No. 3) 2004 No. 334

## **EXPLANATORY STATEMENT** **STATUTORY RULES 2004 NO. 334**

Issued by the Authority of the Minister for Health and Ageing

*Medical Indemnity Act 2002*

*Medical Indemnity Amendment Regulations 2004 (No. 3)*

Subsection 79(1) of the *Medical Indemnity Act 2002* (the Act) provides in part that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The Act provides the mechanism through which key aspects of the Australian Government's medical indemnity measures are delivered. Further details are provided in [Attachment A](#).

The purpose of the Regulations is to amend the *Medical Indemnity Regulations 2003* (the Principal Regulations) to:

- refine aspects of the regulations which affect some doctors' eligibility for the run-off cover indemnity scheme;
- allow additional time for doctors' applications for exemption from the United Medical Protection (UMP) support payment to be considered; and
- identify a new class of persons who are liable to pay the UMP support payment and provide a new payment day for that class.

The run-off cover indemnity scheme was established under Part 2, Division 2B of the Act. Under the scheme medical indemnity insurers or medical defence organisations can seek to recover the cost of an eligible run-off claim from the Commonwealth under section 34ZC of the Act. Section 34ZB of the Act sets out the criteria for an eligible run-off claim. This includes identifying the types of persons to whom an eligible claim can apply (subsection 34ZB(2)). Paragraph 34ZB(2)(f) also provides for persons to be included in the class of persons to whom subsection 34ZB(2) applies by way of regulation. The current regulation 12 provides for two additional classes of persons to be eligible in this way:

- doctors providing medical services for free in the course of private practice, who would otherwise meet the requirements of subsection 34ZB(2); and
- certain overseas trained doctors who meet a range of criteria, including no longer being in Australia.

However, in practice, the wording of regulation 12 has:

- resulted in the unintended, potential consequence of allowing doctors who would otherwise had to have been out of private practice for three years before being eligible for the run-off cover indemnity scheme, becoming immediately eligible by virtue of providing medical services for free; and
- has been identified by the medical indemnity industry as being too restrictive in relation to certain overseas trained doctors and the requirement to have left Australia permanently to be

eligible under the run-off cover indemnity scheme. Medical indemnity insurers are concerned that the present wording will mean that these doctors, if they return to Australia for a holiday, or to give evidence in a medical negligence action, or for any other purpose which is not related to the provision of medical services, could compromise their eligibility under the run-off cover scheme

The amendments to regulation 12 allow the Government's policy intentions to be met and ameliorate the unintended consequences by:

- ensuring that doctors do not have accelerated eligibility under the run-off cover indemnity scheme by virtue of providing medical services for free; and
- changing the emphasis in relation to certain overseas trained doctors from having to be out of Australia physically in order to qualify under the run-off cover scheme to the doctor's residency status as one of the determinants for his or her automatic inclusion under the run-off cover indemnity scheme.

Section 51 of the Act sets out who is liable to pay the UMP support payment. The UMP support payment is a tax imposed on participating members of a MDO which is a participating MDO under the IBNR Scheme. The tax is imposed under section 4 of the *Medical Indemnity (UMP Support Payment) Act 2002*. UMP is the only participating MDO in the IBNR Scheme. Those liable to pay the UMP support payment are those persons who were members of UMP on 30 June 2000.

Subsection 52(4) of the Act provides that the regulations may specify that a person is exempt from the UMP support payment in the circumstances specified in the regulations. The Regulations allow certain persons applying for an exemption for the UMP support payment for a contribution year an additional six months from the payment date of a contribution year to supply relevant statements to the Health Insurance Commission. These persons include public sector specialists, salaried medical practitioners and persons indemnified by a Commonwealth, State or Territory agency in relation to all past incidents.

The relevant payment day for the contribution year commencing 1 July 2003 was 1 September 2004. The Health Insurance Commission has received a small but significant number of applications for exemptions which were lodged after the payment day and which may, but for their lateness may otherwise succeed. The Regulations enable these applications to be processed and provide the applicants with the opportunity to be considered for an exemption of what has proved to be a controversial payment for members and former members of UMP.

The Regulations also amend regulation 26 in order to provide a new payment day for the class of members or former members of UMP who were not invoiced by the Health Insurance Commission during May 2004, when most persons liable to pay a UMP support payment were invoiced.

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

Regulations 1, 2 and 3 and Schedule 1 to the Regulations are taken to have commenced on 1 July 2004, which is the date on which the run-off cover indemnity scheme commenced. Schedule 2 to the Regulations are taken to have commenced on 31 August 2004, which ensures that the arrangements commenced prior to 1 September 2004, the payment day for the contribution year starting 1 July 2003. Schedule 3 to the Regulations commences on the date of notification in the *Gazette*. The amendments which have retrospective effect are not contrary to subsection 48(2) of the *Acts Interpretation Act 1901* as the changes are beneficial in nature, and do not affect the rights of any person so as to disadvantage that person. Nor do they impose liabilities on any person in respect of anything done, or omitted to be done, before the date of notification.

The Act does not specify any conditions that need to be met before the power to make the Regulations may be exercised.

## ATTACHMENT A

The original medical indemnity framework was announced on 23 October 2002. This package of measures included the establishment of the Incurred but Not Reported Liabilities (IBNR) Scheme. Under the scheme, the Government reimburses participating medical defence organisations for the cost of certain unfunded IBNR claims for incidents which occurred on or before 30 June 2002. Currently, only United Medical Protection (UMP) is receiving financial assistance under this scheme.

Another key measure of the original package was the IBNR contribution - now called the UMP support payment. The IBNR contribution was to be paid as a tax by members and former members of UMP. The purpose of the tax was to recoup the cost of Commonwealth assistance under the IBNR Scheme over time.

The IBNR contribution was reformulated under the Australian Government's second package of medical indemnity measures. These measures were announced on 17 December 2003 and were based substantially on the recommendations made to the Government by the Medical Indemnity Review Panel. As a result, the IBNR contribution (now UMP support payment) was modified to reduce the amount of moneys recouped from UMP members and former members and limit the number of years for which persons liable to make a payment would have to pay.

As part of the measures announced on 17 December 2003, the Government also announced that it would establish a run-off cover indemnity scheme. The purpose of this scheme was to cover the cost of claims against certain eligible persons (principally those who have retired permanently from private practice). Under the scheme, the Commonwealth will reimburse medical defence organisations (MDOs) and medical indemnity insurers for eligible run-off cover claims and pre-claim costs in respect of eligible persons no longer in private practice. This cover will be at no cost to the eligible persons. The cost of the claims is to be recouped from the insurers through the *Medical Indemnity (Run-off Cover Support Payment) Act 2004*. The provisions which set out the arrangements for the run-off cover indemnity scheme can be found in:

- Part 2, Division 2B of the Act (these provisions include the payment arrangements for the run-off cover indemnity scheme); and
- Part 3, Division 2A of the *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003* (these provisions include the arrangements under which medical indemnity insurers offer indemnity cover to doctors eligible under the run-off cover indemnity scheme).

## **ATTACHMENT B**

### **DETAILS THE *MEDICAL INDEMNITY AMENDMENT REGULATIONS 2004 (No. 3)***

**Regulation 1** provides for the Regulations to be referred to as the *Medical Indemnity Amendment Regulations 2004 (No. 3)*

**Regulation 2** provides for regulations 1, 2 and 3 and Schedule 1 to commence on 1 July 2004 which is the date on which the run-off cover indemnity scheme commenced; Schedule 2 to commence on 31 August 2004, which ensures that the arrangements commenced prior to 1 September 2004, the payment day for the contribution year starting 1 July 2003; and Schedule 3 to commence on the date of notification in the *Gazette*.

**Regulation 3** provides for Schedules 1, 2 and 3 to amend the *Medical Indemnity Regulations 2003* (the Principal Regulations).

#### **Schedule 1 - Amendments taken to have commenced on 1 July 2004**

##### **Item [1]**

This item substitutes a revised expression for the existing subparagraph 12(1)(b)(iii) and insert a new subparagraph 12(1)(b)(iv). These amendments still enable the Government's policy aim to be met but provide criteria which enable better and fairer administration of this policy objective. The purpose of both the original and amending provisions is that claims arising from treatment by certain temporary resident doctors, after they permanently cease private medical practice in Australia and they no longer live in Australia, can to be covered by the run-off cover indemnity scheme.

Following the introduction of the current subparagraph 12(1)(b)(iii) medical indemnity insurers indicated that this formulation could mean that these doctors, if they returned to Australia for a holiday, or to give evidence in a medical negligence action, or for any other purpose which was not related to the provision of medical services, could compromise their eligibility under the run-off cover scheme simply by being physically present in Australia.

In general, if a doctor no longer meets the eligibility criteria under subsection 34ZB(2) of the Act, for example the doctor returns to private practice or stops being on maternity leave, then claims arising from their past practice cannot be considered to be eligible run-off claims which are payable under subsection 34ZC of the Act.

The Regulations amend paragraph 12(1)(b) in a way which achieves the same policy outcome, but without the potentially harsh consequences were the doctor to return physically to Australia. The amendments emphasise the residency status of the doctor as a determinant of eligibility. Implicit in the amendments is the concept that if doctors have the status of a visitor, not a resident, they may not necessarily compromise their access to the run-off cover scheme simply by physically returning to Australia.

Overseas trained doctors wishing to qualify under the run-off cover indemnity scheme would need to meet all the criteria set out in the existing and subparagraphs of paragraph 12(1)(b).

#### **Schedule 2 - Amendments taken to have commenced on 31 August 2004**

##### **Item [1]**

This item amends subregulation 26(1) to include a reference to new subregulation 26(3), which is inserted by item [2] below.

## **Item [2]**

This item inserts a new subregulation 26(3) for a class of persons who have not been invoiced by the Health Insurance Commission (the HIC) for the United Medical Protection (UMP) support payment for the 2003-04 contribution year. This group has a new payment date of 28 February 2005.

This class of persons is not be disadvantaged by the item, as they have effectively the same time in which to pay the UMP support payment as those persons who were invoiced by the HIC by the end of May 2004. They also have the opportunity to apply for a deferral or exemption from the UMP support payment for the 2003-04 contribution year and are not liable for late payment penalties due to a failure to pay the UMP support by the payment day until after 28 February 2005.

The need for this amendment arose due to administrative processes within the HIC for the purposes of quality control identifying individuals who had not been invoiced appropriately.

## **Schedule 3 - Amendments commencing on gazettal**

### **Item [1]**

This item amends paragraph 12(1)(a) to ensure that the Government's intended effect of this regulation is met. The amendment ensures that the doctors affected by regulation 12 remain eligible to provide free medical services, and that the affected doctors' eligibility for the run-off cover indemnity scheme is consistent with the criteria in paragraphs 34ZB(2)(a) to 34ZB(2)(d) of *Medical Indemnity Act 2002* (the Act).

The original wording of paragraph 12(1)(a) unintentionally accelerated the eligibility of some doctors for cover under run-off cover indemnity scheme. Most of the classes of doctor identified in subsection 34ZB(2) of the Act provide for doctors to be automatically eligible under the run-off cover indemnity scheme once they meet the requirements of the particular class. An exception to this pattern is paragraph 34ZB(2)(b). Doctors who seek to qualify for the run-off cover scheme under this paragraph will first have to have stopped working as a doctor in private medical practice for three years.

Under the current expression of regulation 12, this particular group of doctors could qualify for the access under the run-off cover scheme before the three year exclusion period was served by virtue of providing private medical services for free. This is not the Government's intention.

The reason why doctors can continue to be eligible under subsection 34ZB(2) whilst still providing medical services is to reflect current practices in the medical profession. Doctors do retire effectively from the private medical workforce and their gratuitous services are limited to writing referrals to specialists or providing prescriptions. The extent of these types of services is very limited.

### **Item [2]**

Paragraph 20(1)(d) provides that a person is exempt from the UMP support payment for a contribution year if, before the payment day for a contribution year, the person gives the HIC a notice in writing that provides certain information about their employment by a Commonwealth, State or Territory agency. This item amends paragraph 20(1)(d) to clarify that the payment day by which a person must provide the written notice is the payment day which applies for that person.

### **Item [3]**

This item inserts a new subregulation 20(1A). This allows public sector specialists applying for an exemption from the UMP support payment for a contribution year an additional 6 months from the payment date of a contribution year to supply relevant statements to the HIC. In the event that the doctor's application was successful the doctor would be deemed to have satisfied the condition to provide notice before the relevant payment day.

#### **Item [4]**

Paragraph 21(1)(d) provides that a person is exempt from the UMP support payment for a contribution year if, before the payment day for a contribution year, the person gives the HIC a notice in writing that provides certain information about their employment as a salaried medical practitioner. This item amends paragraph 21(1)(d) to clarify that the payment day by which a person must provide the written notice is the payment day which applies for that person.

#### **Item [5]**

This item inserts a new subregulation 21(1A). It allows salaried medical practitioners applying for an exemption from the UMP support payment for a contribution year an additional 6 months from the payment date of a contribution year to supply relevant statements to the HIC . In the event that the doctor's application was successful the doctor would be deemed to have satisfied the condition to provide notice before the relevant payment day.

#### **Items [6] to [10]**

Regulation 22 of the Principal Regulations provides for exemption from the UMP support payment in the 2003-04 contribution year for persons with comprehensive retroactive cover provided by a medical defence organisation (MDO) or insurer. In order to be eligible for an exemption, doctors must, among other things, have provided notice to the HIC before the payment day for the contribution year starting 1 July 2003.

The items amend regulation 22 to enable persons applying for exemption under regulation 22 to apply for a general exemption from the present contribution year onwards. This removes the requirement to have provided notice to the HIC by 1 July 2003, and extends eligibility for the exemption beyond the 2003-04 contribution year.

#### **Item [11]**

This item inserts a new subregulation 22(3A). This item allows persons to whom regulation 22 applies an additional 6 months from the payment date of a contribution year to supply relevant supporting statements to the HIC. In the event that the doctor's application was successful the doctor would be deemed to have satisfied the condition to provide notice before the relevant payment day.

#### **Items [12] and [13]**

Regulation 23 of the Principal Regulations provides for exemption from the UMP support payment in the 2003-04 contribution year for persons indemnified by a Commonwealth, State or Territory agency in relation to all past incidents. In order to be eligible for an exemption, doctors must, among other things, have provided notice to the HIC before the payment day for the contribution year starting 1 July 2003.

The items amend regulation 23 to enable persons applying for exemption under regulation 23 to apply for a general exemption from the present contribution year onwards. This removes the requirement to have provided notice to the HIC by 1 July 2003, and extends eligibility for the exemption beyond the 2003-04 contribution year.

**Item [14]**

This item inserts a new subregulation 23(1A). This item allows persons for whom regulation 23 applies an additional 6 months from the payment date of a contribution year to supply relevant supporting statements to the HIC. In the event that the doctor's application was successful the doctor would be deemed to have satisfied the condition to provide notice before the relevant payment day.

**Item [15]**

This item renumbers existing regulation 24 to become subregulation 24(1), to allow for new subregulation 24(2), which is inserted by item [14] below. It does not alter the substance of the regulation.

**Item [16]**

This item inserts a new subregulation 24(2). This allows persons for whom subregulation 24(1) applies an additional 6 months from the payment date of a contribution year to supply relevant supporting statements to the HIC. In the event that the doctor's application was successful the doctor would be deemed to have satisfied the condition to provide notice before the relevant payment day.