

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Health

Midwife Professional Indemnity (Commonwealth Contribution) Scheme Act 2010

*Midwife Professional Indemnity (Commonwealth Contribution) Scheme Amendment
(Eligible Midwives) Rules 2019*

Authority

Section 90 of the *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Act 2010* (the Act) provides that the Minister may, by legislative instrument, make rules providing for matters required or permitted by the Act to be provided for in the Rules; or necessary or convenient to be provided for in order to carry out or give effect to the Act.

Under subsection 33(3) of the *Acts Interpretation Act 1901*, 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 and Operation

The Act gives effect to the Government's professional indemnity scheme for eligible midwives and provides Commonwealth support for professional indemnity insurance for certain midwives, improving access to maternity services. The Act is currently supported by the *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Rules 2010* (the Principal Rules).

The purpose of the *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Amendment (Eligible Midwives) Rules 2019* (the Amendment Rule) is to close an inconsistent gap in the medical and midwife indemnity insurance support schemes, which exclude certain privately employed midwives. The current arrangements are limiting the ability for a small number of privately employed midwives to obtain Professional Indemnity Insurance (PII) and hence restricting their ability to practice.

The Amendment Rule will ensure claims against privately employed midwives are covered under the High Cost Claims Scheme (HCCS) and Exceptional Claims Scheme (ECS) established under the *Medical Indemnity Act 2002* (MI Act) on the same basis as other employed medical practitioners and allied health professionals.

Prior to 1 July 2010, when the Principle Rules commenced, privately employed midwives were covered under the HCCS and ECS. After the Principal Rules commenced, private sector midwives operating independently (such as self-employed midwives) were covered under the Principal Rules, while intentionally excluded from coverage under the HCCS and ECS to avoid 'double dipping'. However, privately

employed midwives, who have never been covered under the Principal Rules, were also excluded from the HCCS and ECS.

This means that PII claims made against employee medical practitioners and allied health providers (such as dentists, physiotherapists, podiatrists, pharmacists, optometrists and nurses) are eligible under the HCCS and ECS if the claim is made against the practitioner and the practitioner is covered under their employer's PII. However, privately employed midwives are excluded from the HCCS and ECS. The purpose of these amendments is to bring employee midwives within the scope of the HCCS and ECS, so that they are treated the same as other privately employed medical practitioners and allied health professionals.

The Amendment Rule would modify the meaning of the term 'eligible midwife' so that the relevant class of private sector employee midwives are excluded from the definition of 'eligible midwife' in the Act. The MI Act uses the Act's definition of 'eligible midwife' and excludes incidents occurring in the course of practice as an eligible midwife from both the HCCS and the ECS. As such, excluding the relevant class of privately employed midwives from the definition of 'eligible midwife' will have the effect that those midwives will no longer be excluded from the HCCS and the ECS.

The Amendment Rule would take effect from the commencement of Schedule 2 of the *Health Legislation Amendment (Midwives and Nurse Practitioners) Act 2010* (HLAMNP Act), that is, 1 July 2010. Schedule 2 of the HLAMNP Act amended the MI Act to exclude eligible midwife from subsection 28(1), and paragraphs 30(1)(b), 34A(1)(a) and 34E(1)(b) of the MI Act.

The retrospective effect of the amendment is not contrary to subsection 12(2) of the *Legislative Instruments Act 2003* as the change is beneficial in nature, and does not affect the rights of any person so as to disadvantage that person. Nor does the amendment impose liabilities on any person (other than the Commonwealth) in respect of anything done, or omitted to be done, before the date of notification. The Amendment Rule operates to the benefit of privately employed midwives, their employers, and their employers' insurers, because it makes available the HCCS and the ECS.

Following the cessation of the Amendment Rule change, and the commencement of the Medical and Midwife Indemnity Legislation Amendment Bill 2019 (the Bill) on 1 July 2020, the intent is that those same type of employee midwives covered under their employer's medical indemnity insurance policy will transition into the allied health high cost claims scheme and allied health exceptional claims scheme.

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

Details of the Amendment Rule are set out in [Attachment A](#).

A Statement of Compatibility with Human Rights is set out in [Attachment B](#).

Consultation

Consultation was undertaken with Medical Insurance Group Australia and My Midwives Pty Ltd as this amendment only affects 23 midwives employed by My Midwives Pty Ltd, a private midwifery practice and Medical Insurance Group Australia, the only insurer the Commonwealth has a contract with to provide subsidised professional indemnity insurance to midwives.

Attachment A

Details of the *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Amendment (Eligible Midwives) Rules 2019***Section 1 – Name**

This section provides that the title of the instrument is the *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Amendment (Eligible Midwives) Rules 2019*.

Section 2 – Commencement

This section provides that the instrument is taken to have commenced on 1 July 2010.

Section 3 – Authority

This section provides that the instrument is made under section 90 of the *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Act 2010* (the Act).

Section 4 – Schedules

This section provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 – Amendments***Midwife Professional Indemnity (Commonwealth Contribution) Scheme Rules 2010*****Item 1 – After rule 4**

Item 1 inserts new rule 5AA in the *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Rules 2010*, which sets out an exclusion from the term eligible midwife.

New subrule 5AA(1) provides that this rule takes effect on 1 July 2010 and ceases to have effect on 1 July 2020.

New subrule 5AA(2) provides that for paragraph (c) of the definition of ***eligible midwife*** in subsection 5(1) of the Act, the class of persons described in subrule (3) is specified.

New subrule 5AA(3) provides that the class of persons is those persons who meet the following criteria:

- the person is engaged as an employee to practise as a midwife;
- the person's practice is not in a class of practice specified pursuant to subsection 11(3A) of the Act;

- the person's employer is a party to a contract of insurance, with an eligible insurer, that indemnifies the employer in relation to claims that may be made against the employer in relation to incidents that occur or occurred in the course of, or in connection with, the practice by employees of the employer, including the person, of the profession of midwifery.

Statement of Compatibility with Human Rights

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

Midwife Professional Indemnity (Commonwealth Contribution) Scheme Amendment (Eligible Midwives) Rules 2019

This Legislative 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 Legislative Instrument

The *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Act 2010* (the Act) gives effect to the Government's professional indemnity scheme for eligible midwives and provides Commonwealth support for professional indemnity insurance for certain midwives, improving access to maternity services.

The purpose of the *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Amendment (Eligible Midwives) Rules 2019* (Legislative Instrument) is to close an inconsistent gap in the medical indemnity insurance support schemes, which exclude private sector employee midwives. The current arrangements are limiting the ability of a small number of employed private sector midwives to obtain Professional Indemnity Insurance (PII) and hence restricting their ability to practice.

The Legislative Instrument will ensure claims against the specified class of employed privately practicing midwives are covered under the High Cost Claims Scheme (HCCS) and Exceptional Claims Scheme (ECS) established by the *Medical Indemnity Act 2002* on the same basis as other employed medical and allied health practitioners.

Prior to 1 July 2010, when the Midwife Professional Indemnity Scheme (MPIS) commenced, private sector employee midwives were covered under the HCCS and ECS. After the MPIS commenced, privately practicing midwives operating independently (such as sole traders) were covered under the MPIS, while intentionally excluded from coverage under the HCCS and ECS to avoid 'double dipping'. However, private sector employee midwives, who have never been covered under the MPIS, were also excluded from the HCCS and ECS.

This means that PII claims made against employee medical practitioners and allied health providers (such as dentists, physiotherapists, podiatrists, pharmacists, optometrists and nurses) are eligible under the HCCS and ECS if the claim is made against the practitioner and the practitioner is covered under their employer's PII. However, employed midwives are excluded from the HCCS and ECS. The purpose of these amendments is to bring employee midwives within the scope of the HCC and ECS, so that they are treated the same as other employee practitioners and allied health providers.

This will be achieved in the Amendment Rule by amending the meaning of the term ‘eligible midwife’ in the Principal Rules so that the relevant class of private sector employee midwives are excluded from the definition of ‘eligible midwife’ in the Act. The Medical Indemnity Act uses the Act’s definition of ‘eligible midwife’ and excludes incidents occurring in the course of practice as an eligible midwife from both the HCCS and the ECS. As such, excluding the relevant class of privately employed midwives from the definition of ‘eligible midwife’ will have the effect that those midwives will no longer be excluded from the HCCS and the ECS.

Human rights implications

This Legislative Instrument engages the following human rights:

Right to Health

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 International Covenant on Economic Social and Cultural Rights. Whilst the UN Committee on Economic Social and Cultural Rights (the Committee) has stated that the right to health is not to be understood as a right to be healthy, it does entail a right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.

The amendments to the *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Rules 2010* will impact positively on the right to health by ensuring patient access to private sector midwifery services and that employed privately practicing midwives are treated equally compared to other medical and allied health practitioners. This will ensure continued access to and quality of pre-natal and post-natal health care.

Conclusion

This Legislative Instrument is compatible with human rights.