

## EXPLANATORY STATEMENT

### *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Act 2010*

### *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Amendment (Claims Against Employed Midwives) Rules 2021*

#### **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**

The *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Amendment (Claims Against Employed Midwives) Rules 2021* (the Amendment Rules) amend the *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Rules 2020* (the Principal Rules). These are consequential amendments required following changes to the medical and midwife indemnity legislation (through the *Medical and Midwife Indemnity Legislation Amendment Act 2021* (the Amendment Act)).

The Amendment Rules repeal section 8 of the Principal Rules to remove redundant provisions and to enable claims made against all privately practising midwives endorsed by the Nursing and Midwifery Board of Australia (eligible midwives) to prescribe scheduled medicines to be covered under the Midwife Professional Indemnity Scheme, irrespective of how they are covered under an insurance contract.

#### *Background*

The Midwife Professional Indemnity Scheme previously:

- Excluded claims made against eligible midwives who engaged in practice of a kind for which midwives are ordinarily, or could reasonably be expected to be, indemnified under an employer's insurance arrangements, from the Level 1 and Level 2 Commonwealth contribution schemes.
- Excluded eligible midwives who had permanently or temporarily retired from private practice of such a kind from accessing the Run-off Cover Scheme.

Section 8 of the Principal Rules, made for paragraphs 11(3)(g) and 31(5)(c), set out exceptions to both exclusions for eligible midwives who were effectively self-employed but operated their practice through a corporation, all shareholders and directors of which were practising midwives.

Amendments made by the Amendment Act repeal paragraphs 11(3)(g) of the Act, and 31(5)(c) in its current form, with the result that section 8 of the Rules is redundant and has been repealed.

## Consultation

The Department of Health (Health) did not undertake any consultation for the development of the Amendment Instrument given it is a consequential amendment to repeal delegated legislation made redundant by changes to enabling legislation. However, the Department did undertake consultation as part of developing the Amendment Act including to expand the eligibility criteria to cover privately practising midwives as referred above.

The Aboriginal Community Controlled Health Services (ACCHS) requested Government support for access to an insurance product for their employed midwives. This cohort of midwives are unable to obtain indemnity insurance to extend their services to intrapartum care (excluding homebirths) under an indemnity insurer. The Department has worked closely with a number of the ACCHSs and the provider currently administering the Midwife Schemes, Medical Insurance Group Australia Pty Ltd, to support the development of an appropriate insurance product to cover these health services and their midwifery services. A measure to open-up the Midwife Professional Indemnity Scheme to all endorsed midwives irrespective of their employment status was progressed through the Amendment Act.

The Department also provided advice to key stakeholders to outline the changes to be made in the Amendment Act and invited these stakeholders to provide written feedback. The stakeholders contacted during this process included the Australian College of Midwives and medical indemnity insurers including, Avant, Berkshire Hathaway, Guild Insurance, Medical Indemnity Protection Society, MDA National and Medical Insurance Group Australia Pty Ltd.

This instrument commences at the same time as Schedule 2 of the Amendment Act which is 1 July 2021. However, the Amendment Rules do not commence at all if that Schedule does not commence.

This instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.

Details of this instrument are set out in the Attachment.

**Details of the *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Amendment (Claims Against Employed Midwives) Rules 2021***

**Section 1 Name**

This section provides that the name of the instrument is the *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Amendment (Claims Against Employed Midwives) Rules 2021*.

**Section 2 Commencement**

This section provides that the instrument commences at the same time as Schedule 2 of the *Medical and Midwife Indemnity Legislation Amendment Act 2021* (the Amendment Act) which is 1 July 2021. However, the instrument does not commence at all if that Schedule does not commence.

**Section 3 Authority**

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

**Section 4 Schedules**

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

**Schedule 1 – Amendments**

Item 1 of Schedule 1 repeals section 8 of the *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Rules 2020* (the Principal Rules). Section 8 was made for paragraphs 11(3)(g) and 31(5)(c) of the Act.

Paragraph 11(3)(g) of the Act generally excluded from the Level 1 and Level 2 Commonwealth contribution schemes, claims against eligible midwives that related to incidents occurring in the course of practice of a kind for which eligible midwives are ordinarily, or could reasonably be expected to be, indemnified under an employer's insurance arrangements.

Section 31 of the Act dealt with the Run-off Cover Scheme for eligible midwives. One of the categories of midwife who can access the Scheme is eligible midwives who have retired permanently from private practice, or who have not practised privately for more than 3 years. Paragraph 31(5)(c) of the Act generally excluded practice of a kind for which eligible midwives are ordinarily, or could reasonably be expected to be, indemnified under an employer's insurance arrangements, from being considered to be private practice.

However, section 8 of the Principal Rules created an exception to these general rules for eligible midwives who were effectively self-employed but operated their practice through a corporation, all shareholders and directors of which were practising midwives.

In order to remove all employment barriers preventing certain eligible midwives from accessing the Midwife Professional Indemnity Scheme, paragraph 11(3)(g) of the Act, and paragraph 31(5)(c) in its current form are being repealed from the *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Act 2010* and section 8 of the instrument is therefore redundant.

## 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 (Claims Against Employed Midwives) Rules 2021**

This Disallowable 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 Disallowable Legislative Instrument**

The *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Amendment (Claims Against Employed Midwives) Rules 2021* (the Amendment Rules) amend the *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Rules 2020* (the Principal Rules). The purpose of the Amendment Rules is to implement consequential amendments following changes to medical and midwife indemnity legislation (through the *Medical and Midwife Indemnity Legislation Amendment Act 2021* (the Amendment Act)).

The Midwife Professional Indemnity Scheme previously:

- Excluded claims made against eligible midwives who engaged in practice of a kind for which midwives are ordinarily, or could reasonably be expected to be, indemnified under an employer's insurance arrangements, from the Level 1 and Level 2 Commonwealth contribution schemes.
- Excluded eligible midwives who had permanently or temporarily retired from private practice of such a kind from accessing the Run-off Cover Scheme for eligible midwives.

Section 8 of the Principal Rules, made for paragraphs 11(3)(g) and 31(5)(c) of the *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Act 2010*, set out exceptions to both exclusions for eligible midwives who were effectively self-employed but operated their practice through a corporation, all shareholders and directors of which were practising midwives.

The Amendment Rules repeal section 8 of the Principal Rules, which are redundant following changes made by the Amendment Act to enable all claims made against privately practising midwives endorsed by the Nursing and Midwifery Board of Australia (NMBA) to prescribe scheduled medicines to be covered, irrespective of how they are covered under an insurance contract.

#### **Human rights implications**

This Disallowable Legislative Instrument does not engage any human rights recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. It repeals sections of the Principal Rules that are redundant following the repeal of their enabling provisions.

#### **Conclusion**

The Disallowable Legislative Instrument does not engage any human rights.

**The Hon Greg Hunt MP, Minister for Health and Aged Care**