

## EXPLANATORY STATEMENT

### *National Health Act 1953*

### *National Health (Eligible Midwives) Determination 2022*

#### **Authority**

The *National Health (Eligible Midwives) Determination 2022* (the Principal Determination) is a legislative instrument made under subsection 84AAE(3) of the *National Health Act 1953* (the Act). Subsection 84AAE(3) of the Act provides that the Minister may, by legislative instrument, determine one or more requirements that a person must meet in order to be an ‘eligible midwife’ for the purposes of Part VII of the Act. If there is no determination in force under subsection 84AAE(3) of the Act, a person cannot be an ‘eligible midwife’ for the purposes of the Act (subsection 84AAE(2) refers).

Section 84AAF of the Act provides that an eligible midwife may apply to the Secretary to be an ‘authorised midwife’ for the purposes of Part VII of the Act. The Secretary may approve the application if the Secretary is satisfied that the eligible midwife meets the criteria set out in the Act and the legislative instrument made under subsection 84AAF(3) (if any).

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 purpose of the Principal Determination is to repeal and remake the *National Health (Eligible midwives) Determination 2010* (the Former Determination). The Former Determination is required to be remade on or before 1 October 2022, being the date on which the Former Determination is due to sunset under section 50 of the *Legislation Act 2003*. The practical effect of remaking the Former Determination is to continue, without any change, the existing arrangements for determining who is an ‘eligible midwife’ who is able to prescribe certain medicines under the Pharmaceutical Benefits Scheme (PBS).

Since 1 November 2010, a midwife who is approved under section 84AAF of the Act as an ‘authorised midwife’ is permitted to prescribe certain medicines under the PBS. Subsection 84(1) of the Act defines ‘authorised midwife’ as an ‘eligible midwife’ in relation to whom an approval is in force under subsection 84AAF(2) of the Act, so far as the eligible midwife provides midwifery treatment in a collaborative arrangement of a kind or kinds specified in a legislative instrument made by the Minister for the purpose of the definition of ‘authorised midwife’, with one or more medical practitioners of a kind or kinds specified in the legislative instrument.

Subsection 84AAE(1) of the Act provides that ‘eligible midwife’ means a person who is a ‘midwife’ and who meets the requirements specified in a determination made for the purpose of subsection 84AAE(3) of the Act. If there is no determination in force under subsection 84AAE(3), a person cannot be an ‘eligible midwife’ for the purposes of the Act (subsection 84AAE(2) refers).

A ‘midwife’ is a person who is registered as a midwife or authorised (however described) to practise midwifery, by or under a State or internal Territory law (subsection 4(1) of the Act refers).

Section 6 of the Principal Determination determines a single requirement for the purposes of subsection 84AAE(3) of the Act; being that the registration of the person in the health profession of midwifery is endorsed by the National Board under section 94 of the Health Practitioner Regulation National Law to administer, obtain, possess, prescribe, sell, supply or use a scheduled medicine or class of scheduled medicines.

The Health Practitioner Regulation National Law has the same meaning as in the *National Health Regulation 2016*. That law is principally set out in the Schedule to the *Health Practitioner Regulation National Law Act 2009* (Qld) and applied by each State or internal Territory (with or without modifications) to implement the National Registration and Accreditation Scheme for health professionals.

The registration of a person in the health profession of midwifery may only be endorsed by the National Board under section 94 of the Health Practitioner Regulation National Law if the person:

- (a) holds either of the following qualifications relevant to the endorsement—
  - (i) an approved qualification;
  - (ii) another qualification that, in the National Board’s opinion, is substantially equivalent to, or based on similar competencies to, an approved qualification;and
- (b) complies with any approved registration standard relevant to the endorsement.

To satisfy the requirement in section 6 of the Principal Determination, a person registered in the health profession of midwifery must be endorsed under section 94 of the Health Practitioner Regulation National Law. A midwife may only be endorsed by the National Board if the midwife has provided satisfactory evidence to the National Board that the midwife has the relevant qualifications and complies with all approved registration standards relevant to the endorsement (section 99 of the Health Practitioner Regulation National Law refers). The National Board may subsequently provide notice to the midwife, and notate the Register of Midwives, if satisfied that the criteria for endorsement have been met.

The current registration standards for eligible midwives are made under section 38 of the Health Practitioner Regulation National Law and contain requirements relating to a midwife's qualifications and experience. These standards are approved by the Australian Health Workforce Ministerial Council and publicly available on the website of the Nursing and Midwifery Board of Australia.

Specifically, the ‘Registration standard: Endorsement for scheduled medicines for midwives’ sets out the requirements for endorsement to prescribe schedule 2, 3, 4 and 8 medicines and provide associated services for midwifery practice. The standard is published at the following address: <https://www.nursingmidwiferyboard.gov.au/Registration-Standards/Endorsement-for-scheduled-medicines-for-midwives.aspx>.

**Consultation**

The Principal Determination makes no substantive changes to the requirements determined under the Former Determination. Some stylistic and legal technical changes have been made to the Principal Determination in accordance with the Office of Parliamentary Counsel's Drafting Directions to improve the drafting standard and to enhance readability and navigation. However, as the substantive requirements have not changed for eligible midwives, the Principal Determination is considered minor and machinery in nature and no formal consultation was undertaken.

**Commencement**

The Principal Determination is a disallowable legislative instrument for the purposes of the *Legislation Act 2003* and commences on the day after the instrument is registered on the Federal Register of Legislation.

Details of the Principal Determination are set out in **Attachment A**. The Principal Determination is compatible with the rights and freedoms recognised or declared under section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A statement of compatibility with human rights is set out in **Attachment B**.

## **Details of the *National Health (Eligible Midwives) Determination 2022***

### **Part 1 – Preliminary**

#### Section 1 - Name

Section 1 provides that the name of the instrument is the *National Health (Eligible Midwives) Determination 2022* (the Principal Determination).

#### Section 2 - Commencement

Section 2 provides that the Principal Determination commences on the day after it is registered on the Federal Register of Legislation.

#### Section 3 - Authority

Section 3 provides that the legislative authority for making the Principal Determination is subsection 84AAE(3) of the *National Health Act 1953* (the Act).

#### Section 4 - Definitions

Section 4 defines relevant terms used in the Principal Determination.

#### Section 5 - Schedules

Section 5 provides that each instrument in a Schedule is to be amended or repealed in accordance with the applicable items in that Schedule.

### **Part 2 – Requirements**

#### Section 6 - Eligibility requirements

Section 6 provides, for subsection 84AAE(3) of the Act, the requirement determined for a person to be an ‘eligible midwife’ for the purposes of Part VII of the Act; being that the registration of the person in the health profession of midwifery is endorsed by the National Board under section 94 of the Health Practitioner Regulation National Law to administer, obtain, possess, prescribe, sell, supply or use a scheduled medicine or class of scheduled medicines.

### **Schedule 1 – Repeals**

Schedule 1 repeals the *National Health (Eligible midwives) Determination 2010*.

**ATTACHMENT B****Statement of Compatibility with Human Rights**

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

*National Health (Eligible midwives) Determination 2022*

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 legislative instrument**

The purpose of the *National Health (Eligible Midwives) Determination 2022* (the instrument) is to repeal and remake the *National Health (Eligible midwives) Determination 2010* (the former instrument). The instrument is made under subsection 84AAE(3) of the *National Health Act 1953* (the Act) to determine requirements that must be met by persons in order to be ‘eligible midwives’ for the purpose of Part VII of the Act. The former instrument is required to be remade on or before 1 October 2022, being the date on which the former instrument is due to sunset under section 50 of the *Legislation Act 2003*. The practical effect of remaking the former instrument is to continue, without any change, the existing arrangements for determining who is an ‘eligible midwife’ who is able to prescribe certain medicines under the Pharmaceutical Benefits Scheme (PBS).

Since 1 November 2010, a midwife who is approved under section 84AAF of the Act as an ‘authorised midwife’ is permitted to prescribe certain medicines under the PBS. Subsection 84(1) of the Act defines ‘authorised midwife’ as an ‘eligible midwife’ in relation to whom an approval is in force under subsection 84AAF(2) of the Act, so far as the eligible midwife provides midwifery treatment in a collaborative arrangement of a kind or kinds specified in a legislative instrument made by the Minister for the purpose of the definition of ‘authorised midwife’, with one or more medical practitioners of a kind or kinds specified in the legislative instrument.

Subsection 84AAE(1) of the Act provides that ‘eligible midwife’ means a person who is a ‘midwife’ and who meets the requirements specified in a determination made for the purpose of subsection 84AAE(3) of the Act. If there is no determination in force under subsection 84AAE(3), a person cannot be an ‘eligible midwife’ for the purposes of the Act (subsection 84AAE(2) refers).

A ‘midwife’ is a person who is registered as a midwife or authorised (however described) to practise midwifery, by or under a State or internal Territory law (subsection 4(1) of the Act refers).

Section 6 of the instrument determines a single requirement for the purposes of subsection 84AAE(3) of the Act; being that the registration of the person in the health profession of midwifery is endorsed by the National Board under section 94 of the Health Practitioner Regulation National Law to administer, obtain, possess, prescribe, sell, supply or use a scheduled medicine or class of scheduled medicines.

The Health Practitioner Regulation National Law has the same meaning as in the *National Health Regulation 2016*. That law is principally set out in the Schedule to the *Health Practitioner Regulation National Law Act 2009* (Qld) and applied by each State or internal Territory (with or without modifications) to implement the National Registration and Accreditation Scheme for health professionals.

The registration of a person in the health profession of midwifery may only be endorsed by the National Board under section 94 of the Health Practitioner Regulation National Law if the person:

- (a) holds either of the following qualifications relevant to the endorsement—
  - (i) an approved qualification;
  - (ii) another qualification that, in the National Board’s opinion, is substantially equivalent to, or based on similar competencies to, an approved qualification;
- and
- (b) complies with any approved registration standard relevant to the endorsement.

To satisfy the requirement in section 6 of the instrument, a person registered in the health profession of midwifery must be endorsed under section 94 of the Health Practitioner Regulation National Law. A midwife may only be endorsed by the National Board if the midwife has provided satisfactory evidence to the National Board that the midwife has the relevant qualifications and complies with all approved registration standards relevant to the endorsement (section 99 of the Health Practitioner Regulation National Law refers). The National Board may subsequently provide notice to the midwife, and notate the Register of Midwives, if satisfied that the criteria for endorsement have been met.

The current registration standards for eligible midwives are made under section 38 of the Health Practitioner Regulation National Law and contain requirements relating to a midwife's qualifications and experience. These standards are approved by the Australian Health Workforce Ministerial Council and publicly available on the website of the Nursing and Midwifery Board of Australia.

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### **Human rights implications**

This instrument engages Articles 9 and 12 of the International Covenant on Economic Social and Cultural Rights (the 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 instead 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 would be legitimate for a Government to re-direct its limited resources in ways that it considered 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 (the 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**

The instrument determines the requirement that registered midwives must meet to be 'eligible midwives' under Part VII of the Act. The requirement is endorsement by the National Board under section 94 of the Health Practitioner Regulation Law, consistent with the former instrument. Being an 'eligible midwife' is a precondition for becoming an 'authorised midwife' under subsection 84AAF(2) of the Act with the ability to prescribe certain medicines under the PBS. This instrument maintains the rights to health and social security by ensuring that certain types of midwives may continue to prescribe certain medicines under the PBS beyond 1 October 2022, being the date on which the former instrument is due to sunset under section 50 of the *Legislation Act 2003*.

#### **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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