

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Health

Medical Indemnity (Prudential Supervision and Product Standards) Act 2003
Determination made under subparagraph 26D(2)(b)(iii)

Medical Indemnity (Prudential Supervision and Product Standards) (Notice of Provision of Run-Off Cover) Determination 2020

Authority

Subparagraph 26D(2)(b)(iii) of the *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003* (the MIPS Act) provides that the Minister for Health may, by legislative instrument, determine particular matters that medical indemnity insurers must provide in a written notice to the Chief Executive Medicare.

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.

Background

The Run-off Cover Scheme (ROCS) was developed to address concerns about the ability of medical practitioners to pay for run-off cover once they ceased private medical practice and no longer earned an income from the private medical profession.

The Australian Government introduced the ROCS on 1 July 2004 to provide run-off insurance cover to medical practitioners who have ceased private medical practice because of retirement, disability, maternity leave, death, or if they stop working as a medical practitioner in Australia. The ongoing costs of the scheme are met by the ROCS Support Payment, a levy on the premium income of medical indemnity insurers. Under ROCS, the government guarantees to pay the cost of eligible medical indemnity insurance claims against eligible medical practitioners.

Medical indemnity insurers are required to provide ROCS cover (under sections 26A and 26C of the MIPS Act) to medical practitioners who meet the eligibility criteria of the scheme (as set out in subsection 34ZB(2) of the *Medical Indemnity Act 2002* (MI Act)). ROCS ensures that eligible medical practitioners get free medical indemnity cover that is based on the terms of their last cover (i.e. the cover that the medical practitioner held prior to 'leaving' private medical practice and meeting the eligibility criteria for the Commonwealth ROCS).

Purpose

The purpose of the *Medical Indemnity (Prudential Supervision and Product Standards) (Notice of Provision of Run-Off Cover) Determination 2020* (the Determination) is to substantially remake the *Medical Indemnity (Prudential Supervision and Product*

Standards - Notice of Provision of Run off Cover) Determination 2007 (2007 Determination) prior to its sunseting (automatic repeal).

The *Legislation Act 2003* (Legislation Act) provides that all legislative instruments, other than exempt instruments, are automatically repealed according to the progressive timetable set out in section 50 of that Act. Legislative instruments generally cease to have effect after a specific anniversary of registration unless further legislative action is taken to extend their operation, such as remaking the instrument.

The 2007 Determination was reviewed as part of the February 2018 *Thematic Review of Commonwealth Medical and Midwife Indemnity Legislation* (the Thematic Review) prepared for the Department of Health. The sunseting date for the 2007 Determination was adjusted to allow for the Thematic Review to be undertaken and then deferred so that amendments to the MIPSPS Act could be legislated. The sunseting date is now 1 October 2021.

The Thematic Review examined 17 legislative instruments, including the 2007 Determination, which collectively support the Indemnity Insurance Fund. The Indemnity Insurance Fund comprises seven related schemes that are collectively designed to promote stability of the medical indemnity insurance industry and support the availability of affordable indemnity insurance for medical practitioners, allied health professionals and eligible midwives.

The Thematic Review involved consultation with regulatory and other bodies managing or overseeing medical indemnity arrangements, relevant Departments and Government Agencies, the Law Council of Australia, medical indemnity insurers, and peak bodies representing insurers, medical practitioners and midwives. It also involved a review of recent relevant reports including those of the Australian National Audit Office and the Department of Human Services and a review of submissions made by stakeholders over the past three years.¹

The Thematic Review found that the 2007 Determination is still required in order to set out other information, in addition to the information required in subparagraphs 26D(2)(b)(i) and (ii) of the MIPSPS Act, to be provided by medical indemnity insurers in a written notice to the Chief Executive Medicare.

Operation

The Determination specifies additional information that must be provided to the Chief Executive Medicare to support the Commonwealth administration of the ROCS, including: general identifying information about the practitioner and their registration to practice; information about the level and period of medical indemnity cover provided to the practitioner; the reason that the practitioner is eligible for ROCS cover; the level of

¹ Department of Health, *Thematic Review of Commonwealth Medical and Midwife Indemnity Legislation*, February 2018

[https://www1.health.gov.au/internet/main/publishing.nsf/Content/F923F31B70D61C37CA25815C00142243/\\$File/Thematic%20Review%20of%20Commonwealth%20Medical%20and%20Midwife%20Indemnity%20Legislation.pdf](https://www1.health.gov.au/internet/main/publishing.nsf/Content/F923F31B70D61C37CA25815C00142243/$File/Thematic%20Review%20of%20Commonwealth%20Medical%20and%20Midwife%20Indemnity%20Legislation.pdf). See pages 15-16.

ROCS cover being provided, and information regarding premiums paid by the practitioner.

Information gathered under this Determination will be used by the Commonwealth in the management of the ROCS and in the preparation of the annual report on this scheme. The Secretary of the Department of Health is required under subsection 34ZW(2A) of the MI Act (as amended by the *Medical and Midwife Indemnity Legislation Amendment Act 2019*) to publish the ROCS report on the Department of Health's website within 30 days after receiving the report.

To assist in the administration of the reporting, Services Australia has developed a ROCS Data Transmission Format (DTF) document to receive and store the information from medical indemnity insurers. The DTF document describes all of the ROCS information required to be reported by medical indemnity insurers, and supports the transmission of this information. The DTF also contains instructions and technical information in order for the data to be accepted through the Services Australia gateway to its database.

Information to be provided under the Determination

Subsection 26D(2) of the MIPS Act requires medical indemnity insurers to give the Chief Executive Medicare a written notice stating the name of the medical practitioner to whom they have provided cover under the ROCS, the date on which this cover took effect and such other matters listed in the relevant determination.

This Determination describes the range of other matters which medical indemnity insurers should also provide to the Chief Executive Medicare via written notices, including:

- which of the eligibility criteria the medical practitioner met (under subsection 34ZB(2) of the MI Act);
- general identifying information about the medical practitioner and their registration to practice;
- the level and period of medical indemnity cover provided in the past; and
- information about the medical practitioner's last three periods of insurance before the medical indemnity insurer provided cover under subsections 26A(1) or 26C(1) of the MIPS Act and the premiums paid.

Timing for the provision of information to the Chief Executive Medicare

Under subsection 26D(2A) of the MIPS Act, medical indemnity insurers are required to provide information to the Chief Executive Medicare via Services Australia within the notification period of 61 days starting on the day after the day on which the medical indemnity insurer provides cover to a medical practitioner under subsections 26A(1) or 26C(1) of the MIPS Act.

The same medical indemnity insurer may provide cover to the same medical practitioner under subsections 26A(1) or 26C(1) of the MIPS Act on more than one occasion in respect to different medical practice periods.

Details of the Determination are set out in Attachment A.

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

The Determination commence on 1 July 2020.

Regulation Impact Statement

The Office of Best Practice Regulation has certified that the [First Principles Review](#) and [Thematic Review](#) of the Medical and Midwife Indemnity Schemes are equivalent to a Regulatory Impact Statement.

Consultation

The Australian Government has worked collaboratively with the Australian Medical Association, relevant peak bodies, medical indemnity insurers and relevant government agencies.

The Government has consulted extensively during the development of the medical and midwife indemnity reforms, including through the First Principles Review and Thematic Review², the development of the *Medical and Midwife Legislation Amendment Act 2019* and targeted stakeholder consultation on limited exposure drafts of the legislative instruments. The final Determination incorporates submissions received through the limited exposure draft consultation process in November 2019.

Statement of Compatibility with human rights

Subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires the rule-maker in relation to a legislative instrument to which section 42 (disallowance) of the Legislation Act applies to cause a statement of compatibility to be prepared in respect of that legislative instrument. The Statement of Compatibility has been prepared to meet that requirement. The Statement of Compatibility is included at Attachment B.

² Department of Health, *Thematic Review of Commonwealth Medical and Midwife Indemnity Legislation*, February 2018

[https://www1.health.gov.au/internet/main/publishing.nsf/Content/F923F31B70D61C37CA25815C00142243/\\$File/Thematic%20Review%20of%20Commonwealth%20Medical%20and%20Midwife%20Indemnity%20Legislation.pdf](https://www1.health.gov.au/internet/main/publishing.nsf/Content/F923F31B70D61C37CA25815C00142243/$File/Thematic%20Review%20of%20Commonwealth%20Medical%20and%20Midwife%20Indemnity%20Legislation.pdf)

Details of the Medical Indemnity (Prudential Supervision and Product Standards) (Notice of Provision of Run-Off Cover) Determination 2020

Section 1 – Name

This section provides that the name of the Determination is the *Medical Indemnity (Prudential Supervision and Product Standards) (Notice of Provision of Run-Off Cover) Determination 2020* (the Determination).

Section 2 – Commencement

This section provides that the Determination commences on 1 July 2020.

Section 3 – Authority

This section provides that the Determination is made under subparagraph 26D(2)(b)(iii) of the *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003* (the MIPS Act).

Section 4 – Schedules

This section provides that each instrument that is specified in a Schedule to this 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 Determination has effect according to its terms.

Section 5 – Definitions

This section provides definitions for words and expressions that are used within the Determination. Where a word or expression is common to the Determination and the MIPS Act, it has the same definition as given in the MIPS Act, for example, *MDO* and *provide medical indemnity cover*.

Defined words and expressions in the Determination include the following: *Act*; *associated MDO*; *GST*; *paid by*; *private medical practice*; *run-off cover*; and *standard medical indemnity cover*.

Section 6 – Matters to be stated in notice

This section sets out the other matters that medical indemnity insurers should state in the written notice to be provided to the Chief Executive Medicare in addition to those listed in subparagraph 26D(2)(b)(i) and (ii) of the MIPS Act.

Matters to be stated in the notice include, for example:

- general matters relating to the practitioner (such as their date of birth, provider number, their principal place of practice, whether the practitioner is eligible for run-off cover or if they are continuing to pay premiums, etc.)

- matters relating to the practitioner's medical indemnity cover in the 12 months prior to the insurer providing run-off cover to the practitioner (and in the 12 months prior to that period, etc.).

Schedule 1 – Repeals

This Schedule repeals the *Medical Indemnity (Prudential Supervision and Product Standards - Notice of Provision of Run off Cover) Determination 2007* (2007 Determination).

The repeal is a consequence of remaking and improving the 2007 Determination prior to their sunseting.

Statement of Compatibility with Human Rights

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

Medical Indemnity (Prudential Supervision and Product Standards) (Notice of Provision of Run-Off Cover) Determination 2020

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

Subparagraph 26D(2)(b)(iii) of the *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003* (the MIPS Act) provides that the Minister for Health may, by legislative instrument, determine particular matters that medical indemnity insurers must provide in a written notice to the Chief Executive Medicare.

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Information gathered under this Determination will be used by the Commonwealth in the management of the ROCS and in the preparation of the annual report on this scheme. The Secretary of the Department of Health is required under subsection 34ZW(2A) of the MI Act (as amended by the *Medical and Midwife Indemnity*

³ Department of Health, *Thematic Review of Commonwealth Medical and Midwife Indemnity Legislation*, February 2018

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Legislation Amendment Act 2019) to publish the ROCS report on the Department of Health's website within 30 days after receiving the report.

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The same medical indemnity insurer may provide cover to the same medical practitioner under subsections 26A(1) or 26C(1) of the MIPSPS Act on more than one occasion in respect to different medical practice periods.

Human rights implications

The instrument does not engage any of the human rights and freedoms recognised in the seven core international human rights treaties which Australia has ratified. However, the overarching purpose of the medical indemnity legislation is to enable payments to be made to medical indemnity insurers to subsidise the cost of medical indemnity insurance for medical practitioners and allied health professionals such that persons who

make legitimate claims against medical practitioners or allied health professionals are able to be compensated for any loss they have suffered. This supports Article 12(2)(d) of the International Covenant on Economic, Social and Cultural Rights such that it creates “conditions which would assure to all medical service and medical attention in the event of sickness”.

This instrument engages the right to privacy in Article 17 of the International Covenant on Civil and Political Rights (ICCPR). Article 17 prohibits unlawful or arbitrary interferences with a person's privacy, family, home and correspondence. This instrument requires medical indemnity insurers to provide personal information of medical practitioners. The interference of a medical practitioner's right to privacy in this circumstance is, however, for the benefit of the medical practitioner in that it facilitates the provision of an indemnity for valid claims once the medical practitioner ceases private medical practice.

The right to privacy is not absolute and there may be circumstances in which the guarantees in Article 17 can be outweighed by other considerations, such as the protection of the right to health. In these circumstances, it is permissible to limit the right to privacy as the provision of the personal information of medical practitioners is designed to indemnify medical practitioners in a manner which does not disadvantage the medical practitioner, and which empowers patients to access compensation.

Conclusion

This Legislative Instrument is compatible with human rights because the right to privacy is permissibly limited in order to facilitate the Commonwealth's provision of run-off cover in specific circumstances in order to provide compensation to former patients affected by a medical practitioner's private medical practice.

The Hon Greg Hunt MP, Minister for Health