

## 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 Rules 2020*

### **Authority**

Section 90 of the *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Act 2010* (the Act) provides that the Minister may make Midwife Professional (Commonwealth Contribution) 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 this 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 *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Act 2010* (the Act) is part of the legislative framework that establishes the Midwife Professional Indemnity Scheme (the Scheme). The Scheme contributes to the availability of professional midwife services in Australia by providing Commonwealth assistance to support access by eligible midwives to professional indemnity arrangements.

Since 2010, the Commonwealth has contracted a medical indemnity insurer, Medical Insurance Australia Pty Ltd, as the eligible insurer under the Scheme providing professional indemnity insurance to privately practising eligible midwives. To assist eligible insurers in providing affordable cover to eligible midwives, the Commonwealth covers 80 per cent of the costs of indemnity payouts over \$100 000 and 100 per cent of payouts over \$2 million for any claims under the Scheme.

The Act was designed to cover independently operating privately practising midwives who have an individual insurance contract for professional indemnity insurance or self-employed midwives who operate their business through a corporation all of whose shareholders and directors are practising midwives. In 2011, the Commonwealth amended the Scheme to clarify that a midwife employed by a company where they are the owner or the director will be eligible under the Scheme.

The *Midwife Professional Indemnity (Commonwealth Contribution) Schedule Rules 2020* (the Rules) support the continued operation of the Commonwealth's support for providing affordable professional indemnity insurance for eligible midwives by:

- ensuring there remains an eligible insurer to provide cover;
- setting out the interest rate payable if the eligible insurer does not pay back an amount overpaid by the Commonwealth to the insurer; and
- defining the requirements of an eligible midwife.

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

The Rules commence on 1 July 2020.

The Rules are a legislative instrument for the purposes of the *Legislation Act 2003* (Legislation Act).

### **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, the Australian College of Midwives, 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 Review, the development of the *Medical and Midwife Indemnity Legislation Amendment Act 2019* and targeted stakeholder consultation on limited exposure drafts of the legislative instruments. The final Rules 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](#).

**Details of the *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Rules 2020***

**Section 1 – Name**

This section provides for the title of the Rules is the *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Rules 2020* (the Rules).

**Section 2 – Commencement**

This section provides for the Rules commence on 1 July 2020.

**Section 3 – Authority**

This section provides for the Rules to be made under subsection 90(1) 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 Rules is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the Rules has effect according to its terms. Schedule 1 repeals the previous rules, the *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Rules 2010 (2010 Rules)*.

**Section 5 – Definitions**

This section provides for the definitions of specific terms used in the Rules.

The definition of ***general interest charge rate*** is consistent with the use of this term in other Commonwealth legislation (that is, the *Taxation Administration Act 1953*).

The incorporation of the ***general interest charge rate*** by reference to section 8AAD of the *Taxation Administration Act 1953* is incorporated as varying from quarter to quarter. This variation in the rate is inherent in the definition being incorporated from that Act. The *Legislation Act 2003* permits the incorporation by reference of material from an Act as in force from time to time. The ***general interest charge rate*** is used to enable the calculation of late payment penalty rates (refer section 9).

**Section 6 – Eligible insurer**

Subsection 5(1) of the Act provides that the definition of ***eligible insurer*** means an insurer which is included in a class of insurers. For the purposes of this definition, section 6 of the Rules provides the class of eligible insurers will comprise any insurer who has an arrangement with the Commonwealth to provide midwife professional indemnity cover and midwife professional indemnity run-off cover.

**Section 7 – Requirement for eligible midwife**

This section sets out the requirements which a person must meet in order to satisfy the definition of ***eligible midwife*** in section 5(1) of the Act.

Section 7 provides to be an *eligible midwife*, a person who is licenced, registered or authorised to practice midwifery under a Commonwealth, State or Territory law must be endorsed by the Nursing and Midwifery Board of Australia as qualified to:

- prescribe medicines included in Schedules 2, 3, 4 and 8 to the current Poisons Standard (within the meaning of the *Therapeutic Goods Act 1989*); and provide associated services required for midwifery practice in accordance with relevant State and Territory legislation.

Paragraphs (2)(a) and (b) do not incorporate by reference any material from either the *Therapeutic Goods Act 1989* or State or Territory legislation. These paragraphs only mention that Act and legislation to describe the endorsement requirement.

### **Section 8 – Claims against eligible midwives**

This section provides for the purposes of paragraph 11(3)(g) and paragraph (c) of the definition of *private practice as a midwife* in subsection 31(5) of the Act, eligible midwives who ordinarily or could reasonably be expected in the ordinary course of business to be engaged as employees will not be eligible under the Midwife Professional Indemnity Scheme (Scheme).

However, subsection 8(3) provides for an exception for the class of practice by eligible midwives who practise effectively as self-employed midwives but operate their practice through a corporation all of whose shareholders and directors are practising midwives, resulting in this class of midwives being eligible midwives for the purposes of the Scheme.

### **Section 9 – Late payment penalty rate**

This section provides specifies that the *general interest charge rate*, as applicable for the first day in the period described in paragraph (c) of subsections 28(2), 40(2) and 76(2) of the Act is specified for the purposes of paragraph (a) of these subsections. The general interest charge rate that is applied under the relevant subsections, will apply for each day in the period that the late penalty payment accrues. Fixing what is a variable rate as at a day (i.e. the first day in period described in paragraph (c) of subsections 28(2), 40(2) and 76(2) of the Act) ensures that only one rate applies for the whole of the period in which the overpaid rate is due and owing. This also ensures that the rate at which late penalty payment will accrue is known to the insurer to whom the indemnity was paid.

### **Section 10 – Applicable interest rates for financial years for working out total run-off cover credit**

Section 10 sets the interest rate to be applied in respect of a financial year for the purpose of working out total run-off cover credits to be paid to affected eligible midwives, should a termination date for the run-off cover scheme for midwives be set in the future.

Consistent with changes made to the run-off cover scheme for medical practitioners, this provision is included subsequent to amendments to section 44 of the Act that remove redundant references to the short-term bond rate and instead provide that the “applicable interest rate is the rate of interest, for the financial year, specified in the Rules for the purposes of this subsection”.

The applicable rate of interest in section 10 of the Rules is specified by reference to the ***general interest charge rate*** defined in section 5 of the instrument to have the same meaning as in section 8AAD of the *Taxation Administration Act 1953*. For the purpose of the calculation in section 44 of the Act, the applicable rate is fixed for a financial year. The rate for the financial year is fixed by reference to the general interest charge rate for the last day before the start of the financial year multiplied by the number of days in the calendar year in which that day occurs.

The general interest charge rate can readily be found on the [ATO website](#) for financial years back to the financial year starting on 1 July 2011 (the first financial year that could possibly be relevant for working out an affected eligible midwife's total run-off cover credit in accordance with section 44 of the Act).

While this section specifies the applicable interest rate for financial years occurring before it commences, as well as financial years occurring after it commences, the concept of total run-off cover credits only becomes relevant after a run-off cover termination date is set, which is necessarily at some point in the future.

### **Schedule 1 – Repeals**

Schedule 1 repeals the entirety of the *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Rules 2010*.

The repeal is a consequence of the recommendations made in the Thematic Review regarding the fit for purpose tests applied to sunseting instruments.

## **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 Rules 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**

The *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Act 2010* (the Act) is part of the legislative framework that establishes the Midwife Professional Indemnity Scheme (the Scheme). The Scheme contributes to the availability of professional midwife services in Australia by providing Commonwealth assistance to support access by eligible midwives to professional indemnity arrangements.

Since 2010, the Commonwealth has contracted a medical indemnity insurer, Medical Insurance Australia Pty Ltd, as the eligible insurer under the Scheme providing professional indemnity insurance to privately practising eligible midwives. To assist eligible insurers in providing affordable cover to eligible midwives, the Commonwealth covers 80 per cent of the costs of indemnity payouts over \$100 000 and 100 per cent of payouts over \$2 million for any claims under the Scheme.

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#### **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 (ICESCR). 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 remake of the Rules will expand the care options available to women, by subsidising premiums for privately practising midwives (to improve affordability for patients) and ensure protections for patients in the event that harm was caused and a successful claim was made.

### **Conclusion**

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

**The Hon Greg Hunt MP, Minister for Health**