

EXPLANATORY STATEMENT

National Health Act 1953

National Health (Collaborative Arrangements for Midwives) Instrument 2022

Authority

The *National Health (Collaborative Arrangements for Midwives) Instrument 2022* (the Principal Instrument) is a legislative instrument made under subsection 84(1) of the *National Health Act 1953* (the Act) for the purposes of the definition of ‘authorised midwife’ (which deals with eligible midwives providing midwifery treatment in collaborative arrangements with medical practitioners).

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 Instrument is to repeal and remake the *National Health (Collaborative arrangements for midwives) Determination 2010* (the Former Instrument). 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 *Legislation Act 2003*. The practical effect of remaking the Former Instrument is to continue, without any change, the existing collaborative arrangements under which an authorised midwife may prescribe certain medicines under the Pharmaceutical Benefits Scheme (PBS).

Since 1 November 2010, a midwife who is approved under subsection 84AAF(2) 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 purposes of the definition, with one or more medical practitioners of a kind or kinds specified in the legislative instrument.

The Principal Instrument specifies the kinds of medical practitioners and collaborative arrangements for the purposes of the definition of ‘authorised midwife’ in subsection 84(1) of the Act. The medical practitioners are specified in section 6 of the Principal Instrument as the kinds of medical practitioners mentioned in a description of the collaborative arrangements specified in section 7 of the Principal Instrument.

The kinds of collaborative arrangements specified in subsection 7(1) of the Principal Instrument are the following collaborative arrangements, provided those arrangements comply with the requirements in subsection 7(2):

- (a) a collaborative arrangement in which the eligible midwife: (i) is employed or engaged by one or more obstetric medical practitioners (being, an obstetrician or a medical practitioner who provides obstetric services); or (ii) is employed

- or engaged by an entity that employs or engages one or more obstetric medical practitioners; or (iii) has an agreement with an entity (other than a hospital) that employs or engages one or more obstetric medical practitioners;
- (b) a collaborative arrangement in which an obstetric medical practitioner or hospital-authorised medical practitioner refers a patient to the eligible midwife for midwifery treatment, in writing;
 - (c) a collaborative arrangement in which the eligible midwife and one or more obstetric medical practitioners or hospital-authorised medical practitioners have an agreement, in writing, signed by each party;
 - (d) a collaborative arrangement in which the eligible midwife has an acknowledgement from one or more obstetric medical practitioners or hospital-authorised medical practitioners that the practitioner will be collaborating with the eligible midwife to provide care to one or more patients within the arrangement, and the midwife makes records required by section 8 of the Principal Instrument in relation to each patient to whom the collaborative arrangement applies;
 - (e) a collaborative arrangement in which a hospital (that employs or engages one or more obstetric medical practitioners) formally assesses the competence, performance and professional suitability of the eligible midwife; gives the eligible midwife clinical privileges for a defined scope of clinical practice; and permits the eligible midwife to provide care to the midwife's own patients at the hospital.

Subsection 7(2) of the Principal Instrument provides that each collaborative arrangement must make provision for consultation between the eligible midwife and an obstetric medical practitioner; referral of the patient by the midwife to an obstetric medical practitioner or hospital-authorised medical practitioner; and transfer of a patient's care by the midwife to an obstetric medical practitioner.

Consultation

The Principal Instrument makes no substantive changes to the kinds of medical practitioners and collaborative arrangements determined under the Former Instrument. However, some stylistic and legal technical changes have been made to the Principal Instrument in accordance with the Office of Parliamentary Counsel's Drafting Directions to improve the drafting standard and otherwise to enhance the construction of the Principal Instrument under the enabling provision of the Act.

These stylistic and legal technical changes are consistent with the complementary provisions for 'participating midwives' in sections 5 and 6 of the *Health Insurance Regulations 2018*. The substantive elements of the Former Instrument have not changed. The Principal Instrument maintains the original policy intent to mirror the complementary provisions in the *Health Insurance Regulations 2018* and thereby promotes consistent application and administration under the legislation.

On this basis, the Principal Instrument is considered minor and machinery in nature and no formal consultation was undertaken by the Department.

Commencement

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

Details of the Principal Instrument are set out in **Attachment A**. The Principal Instrument is compatible with the rights and freedoms recognised or declared by 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 (Collaborative Arrangements for Midwives) Instrument 2022*

Part 1 – Preliminary

Section 1 - Name

Section 1 provides that the name of the instrument is the *National Health (Collaborative Arrangements for Midwives) Instrument 2022* (the Principal Instrument).

Section 2 - Commencement

Section 2 provides that the Principal Instrument 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 Instrument is subsection 84(1) of the *National Health Act 1953* (the Act).

Section 4 - Definitions

Section 4 defines terms used in the Principal Instrument, including some terms from the *Health Insurance Regulations 2018* to promote consistent use of expression.

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 – Specified medical practitioners and collaborative arrangements

Section 6 - Authorised midwives—specified medical practitioners

Section 6 specifies the kinds of medical practitioners for the purposes of the definition of ‘authorised midwife’ in subsection 84(1) of the Act. These are the medical practitioners mentioned in a description of a collaborative arrangement specified in section 7 of the Principal Instrument; namely, obstetric medical practitioners and hospital-authorised medical practitioners. These terms are both defined in the *Health Insurance Regulations 2018*.

The term ‘obstetric medical practitioner’ means an obstetrician or medical practitioner who provides obstetric services. The term ‘hospital-authorised medical practitioner’ means a medical practitioner employed or engaged by a hospital authority (within the meaning of subsection 84(1) of the Act) who is authorised by the hospital authority to participate in a collaborative arrangement with a midwife.

While there is no requirement for a hospital-authorised medical practitioner to have knowledge or training in obstetrics, a collaborative arrangement must provide for consultation and transfer

of a patient between an eligible midwife and an obstetric medical practitioner (subsection 7(2) of the Principal Instrument refers).

Section 7 - Authorised midwives—specified collaborative arrangements

Subsection 7(1) specifies the kinds of collaborative arrangements for the purposes of the definition of ‘authorised midwife’ in subsection 84(1) of the Act provided those arrangements comply with subsection 7(2). The arrangements are summarised below.

Arrangement where eligible midwife is employed or engaged by medical practice

Paragraph 7(1)(a) specifies a kind of collaborative arrangement in which the eligible midwife: (i) is employed or engaged by one or more obstetric medical practitioners (being, an obstetrician or a medical practitioner who provides obstetric services); or (ii) is employed or engaged by an entity that employs or engages one or more obstetric medical practitioners; or (iii) has an agreement with an entity (other than a hospital) that employs or engages one or more obstetric medical practitioners. The reference to ‘employs or engages’ covers both employees and contractors. This arrangement will cover an eligible midwife who is employed or engaged by a medical practice so long as the medical practice employs or engages one or more obstetric medical practitioners.

Arrangement where eligible midwife is referred patients from an obstetric medical practitioner or hospital-authorised medical practitioner

Paragraph 7(1)(b) specifies a kind of collaborative arrangement in which an obstetric medical practitioner or hospital-authorised medical practitioner refers a patient in writing to the eligible midwife for midwifery treatment.

Arrangement where there is an agreement between eligible midwife and one or more obstetric medical practitioners or hospital-authorised medical practitioners

Paragraph 7(1)(c) specifies a collaborative arrangement in which there is a written agreement between the eligible midwife and one or more obstetric medical practitioners or hospital-authorised medical practitioners and the agreement is signed by each party.

Arrangement where eligible midwife has acknowledgement from one or more obstetric medical practitioners or hospital-authorised medical practitioners, and keeps written records regarding patients

Paragraph 7(1)(d) specifies a collaborative arrangement in which the eligible midwife has acknowledgement from one or more obstetric medical practitioners or hospital-authorised medical practitioners that the practitioner will be collaborating with the eligible midwife to provide care to one or more patients within the arrangement; the eligible midwife tells the relevant patient or patients that they will be providing care in an arrangement that complies with subsection 7(2); and the eligible midwife makes records required by section 8 of the Principal Instrument in relation to each patient to whom the collaborative arrangement applies.

Arrangement where hospital formally assesses eligible midwife and provides clinical privileges

Paragraph 7(1)(e) specifies a collaborative arrangement in which a hospital (that employs or engages one or more obstetric medical practitioners) formally assesses the eligible midwife's competence, performance and professional suitability; gives the eligible midwife clinical privileges for a defined scope of clinical practice; and permits the eligible midwife to provide care to the midwife's own patients at the hospital. This kind of collaborative arrangement was first introduced in 2013 to make it easier for midwives to work collaboratively with medical practitioners employed or engaged by hospitals.

Irrespective of the kind of collaborative arrangement, subsection 7(2) provides that a collaborative arrangement must provide for:

- (a) consultation between the midwife and an obstetric medical practitioner;
- (b) referral of a patient by the midwife to an obstetric medical practitioner or hospital-
authorised medical practitioner; and
- (c) transfer of a patient's care by the midwife to an obstetric medical practitioner.

This ensures that that all kinds of collaborative arrangements must deal expressly with how the collaboration is to occur regarding consultation, referral and transfer.

Subsection 7(3) provides that a collaborative arrangement may apply for more than one patient.

Subsection 7(4) makes clear, for the avoidance of doubt, that a collaborative arrangement may involve obstetric medical practitioners in either the public or private sectors.

Section 8 - Midwife record-keeping requirements for certain collaborative arrangements

Subsection 8(1) provides the general record-keeping requirements for the purposes of subparagraph 7(1)(d)(iii) of the Principal Instrument. The eligible midwife must record the following in their written records in relation to each patient to whom the collaborative arrangement in paragraph 7(1)(d) applies:

- (a) the name of at least one obstetric medical practitioner or hospital-
authorised medical practitioner who has given the midwife an acknowledgement mentioned in paragraph 7(1)(d)(i) (the '**named medical practitioner**');
- (b) the midwife has informed the patient the midwife will be providing midwifery care to the patient in a collaborative arrangement with one or more medical practitioners;
- (c) the circumstances in which the midwife will consult with an obstetric medical practitioner about the patient's care, refer the patient to an obstetric medical practitioner or hospital-
authorised medical practitioner, and transfer the patient's care to an obstetric medical practitioner.

Subsection 8(2) provides the record-keeping requirements for the purposes of subparagraph 7(1)(d)(iii) of the Principal Instrument in relation to particular events. The eligible midwife must record the following in the midwife's written records as soon as practicable after the event occurs:

- (a) any consultation or other communication between the midwife and an obstetric medical practitioner about the patient's care;
- (b) any referral of the patient by the midwife to an obstetric medical practitioner or hospital-
authorised medical practitioner;
- (c) any transfer of the patient's care by the midwife to an obstetric medical practitioner;

- (d) when the midwife gives a copy of the patient’s hospital booking letter (however described) to a named medical practitioner—acknowledgement that the named practitioner has received a copy;
- (e) when the midwife gives a copy of the patient’s maternity care plan prepared by the midwife to a named medical practitioner—acknowledgement that the named practitioner has received a copy;
- (f) if the midwife requests diagnostic imaging or pathology services for the patient—when the midwife gives the results to a named medical practitioner);
- (g) when the midwife gives a discharge summary (however described) at the end of the midwife’s care of the patient to a named medical practitioner and the patient’s usual general practitioner.

Subsection 8(3) defines the term ‘usual general practitioner’ for the purposes section 8 of the Principal Instrument to include a medical practitioner nominated by the patient.

Schedule 1—Repeals

Schedule 1 repeals the *National Health (Collaborative arrangements for 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 (Collaborative Arrangements for Midwives) Instrument 2022

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 purpose of the *National Health (Collaborative Arrangements for Midwives) Instrument 2022* (the instrument) is to repeal and remake the *National Health (Collaborative arrangements for midwives) Determination 2010* (the former instrument). The instrument is made under subsection 84(1) of the *National Health Act 1953* (the Act) for the purposes of the definition of ‘authorised midwife’ (which deals with eligible midwives providing midwifery treatment in collaborative arrangements with medical practitioners). The former instrument is required to be remade on or before 1 October 2022, being the date on which the former instrument will 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 collaborative arrangements under which an authorised midwife may prescribe certain medicines under the Pharmaceutical Benefits Scheme (PBS).

Since 1 November 2010, a midwife who is approved under subsection 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 purposes of the definition, with one or more medical practitioners of a kind or kinds specified in the legislative instrument.

The instrument specifies the kinds of medical practitioners and collaborative arrangements for the purposes of the definition of ‘authorised midwife’ in subsection 84(1) of the Act. The medical practitioners are specified in section 6 of the instrument as the kinds of medical practitioners mentioned in a description of a collaborative arrangement specified in section 7 of the instrument.

The kinds of collaborative arrangements specified in subsection 7(1) of the instrument are the following collaborative arrangements, provided those arrangements comply with the requirements in subsection 7(2):

- (a) a collaborative arrangement in which the eligible midwife: (i) is employed or engaged by one or more obstetric medical practitioners (being, an obstetrician or a medical practitioner who provides obstetric services); or (ii) is employed or engaged by an entity that employs or engages one or more obstetric medical practitioners; or (iii) has an agreement with an entity (other than a hospital) that employs or engages one or more obstetric medical practitioners;

- (b) a collaborative arrangement in which an obstetric medical practitioner or hospital-
authorised medical practitioner refers a patient to the eligible midwife for midwifery
treatment, in writing;
- (c) a collaborative arrangement in which the eligible midwife and one or more obstetric
medical practitioners or hospital-
authorised medical practitioners have an agreement, in
writing, signed by each party;
- (d) a collaborative arrangement in which the eligible midwife has an acknowledgement from
one or more obstetric medical practitioners or hospital-
authorised medical practitioners
that the practitioner will be collaborating with the eligible midwife to provide care to one
or more patients within the arrangement, and the midwife makes records required by
section 8 of the Principal Instrument in relation to each patient to whom the collaborative
arrangement applies;
- (e) a collaborative arrangement in which a hospital (that employs or engages one or more
obstetric medical practitioners) formally assesses the competence, performance and
professional suitability of the eligible midwife; gives the eligible midwife clinical
privileges for a defined scope of clinical practice; and permits the eligible midwife to
provide care to the midwife's own patients at the hospital.

Subsection 7(2) of the instrument provides that each collaborative arrangement must make provision for consultation between the eligible midwife and an obstetric medical practitioner; referral of the patient by the midwife to an obstetric medical practitioner or hospital-
authorised medical practitioner; and transfer of a patient's care to an obstetric medical practitioner.

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 is 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 specifies the kinds of medical practitioners and collaborative arrangements for the purposes of the definition of ‘authorised midwife’ in subsection 84(1) of the Act. It supports the approval of eligible midwives under subsection 84AAF(2) of the Act as ‘authorised midwives’ to prescribe certain medicines under the PBS. This instrument maintains the rights to health and social security by ensuring that authorised 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.

Travis Haslam
Acting First Assistant Secretary
Medical Benefits Division
Health Resourcing Group
Department of Health and Aged Care