

**2004-2005**

**THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA**

**HOUSE OF REPRESENTATIVES**

**MEDICAL INDEMNITY LEGISLATION AMENDMENT BILL 2005**

**EXPLANATORY MEMORANDUM**

**(Circulated by authority of the Minister for Health and Ageing,  
the Honourable Tony Abbott MP)**

## **MEDICAL INDEMNITY LEGISLATION AMENDMENT BILL 2005**

### **OUTLINE**

This Bill is to implement changes to the *Medical Indemnity Act 2002*, the *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003* and the *Medical Indemnity (Run-Off Cover Support Payment) Act 2004*. The purpose of the changes is to improve the operation of the legislation to address minor problems that have emerged as the various schemes have been implemented.

The Bill will give effect to improvements identified through consultations with the medical indemnity insurance industry, the medical profession and the Health Insurance Commission (HIC) during the operation of the relevant schemes.

Schedule 1 amends provisions dealing with the Run-off Cover Scheme (Run-off Cover Indemnity Scheme) to ensure that insurers will be reimbursed by the Government for all liabilities arising under the run-off indemnities they are required to provide as part of the Scheme, provides legislative definitions of maternity and permanent disability as criteria for entry to the Scheme and clarifies the requirements on insurers to identify amounts of premiums attributable to run-off cover support payments on invoices. It also provides that notifications of incidents by medical practitioners to an insurer or medical defence organisation (MDO) are taken to be claims for the purposes of the Run-off Cover Indemnity Scheme.

Schedule 2 provides for the creation of a High Cost Claims Protocol which will allow for payments to be made in relation to costs associated with incidents notified by practitioners. The schedule also amends the IBNR Indemnity Scheme and Exceptional Claims Scheme to allow payments to be made under the IBNR Claims Protocol and Exceptional Claims Protocol in relation to costs associated with incidents notified.

Schedule 3 amends other provisions under the *Medical Indemnity Act 2002* to enhance their operation.

The operation of the Exceptional Claims Scheme (ECS) has been clarified to ensure that amounts that insurers are liable to pay are included with amounts that have already been paid in assessing whether a claim exceeds the threshold for payment under the Scheme.

The High Cost Claim Scheme (HCCS) provisions have been amended to ensure that any changes made by regulation to either the claims threshold or the proportion contributed by the Government which would disadvantage insurers is notified at least 12 months before coming into effect. This will allow insurers sufficient time to renegotiate their reinsurance arrangements.

The Incurred But Not Reported (IBNR) Indemnity Scheme arrangements have been amended to align the provisions dealing with when a medical defence organisation is notified of a claim with similar provisions in other payment schemes.

Division 4 has been amended so that the Minister may also formulate schemes to provide assistance to medical practitioners through other bodies, such as State agencies, which are not subject to the *Insurance Act 1973*.

## **FINANCIAL IMPACT**

The amendments will have no financial impact.

## MEDICAL INDEMNITY LEGISLATION AMENDMENT BILL 2005

### NOTES ON CLAUSES

**Clause 1** This clause sets out the short title for the Bill.

**Clause 2** This clause provides the commencement of each Schedule and item in this Act.

**Clause 3** This clause provides that each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

### **Schedule 1 — Run-off cover indemnity scheme**

#### **Amendments to the *Medical Indemnity Act 2002***

**Item 1** This item provides a note to subsection 4(1) that subsection 4(1A) extends the meaning of *claim* for the purposes of the Run-Off Cover Indemnity Scheme.

**Item 2** This item inserts an expanded definition of claim under section 4 for the purposes of the Run-off Cover Indemnity Scheme. Subsection 4(1A) sets out circumstances in which notification by a practitioner of an incident to an MDO or medical indemnity insurer is taken to constitute a claim against the person. The amendments to this provision are intended to apply from the commencement of the Run-off Cover Indemnity Scheme (1 July 2004). However, it is not intended that the amendments have a retrospective impact on criminal sanctions within the *Medical Indemnity Act 2002*

**Item 3** This item provides that the amended section 4(1A) will not apply in relation to section 34ZK of the *Medical Indemnity Act 2002* until the beginning of the day after this Act has received Royal Assent. Section 34ZK requires MDOs and medical indemnity insurers to notify the Health Insurance Commission if a run-off cover indemnity is effectively overpaid.

**Items 4 and 5** These items amend paragraph 34ZB(1)(c) so that it is no longer a criterion for assessing eligibility for a Commonwealth payment that the medical indemnity insurance would have responded if a claim had been made at the time of the incident. This amendment will ensure that insurers are reimbursed by the Commonwealth for all the liabilities they incur as a result of making available run-off cover under Division 2 of Part 3 of the *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003*.

**Item 6** This item repeals the paragraphs 34ZB(2)(c) and (d) and inserts new paragraphs 34ZB(2)(c) and (d) so that a doctor needs to have ceased all medical practice (not just private practice) because of maternity or permanent disability to be an eligible person for the purposes of the run-off indemnity scheme.

**Item 7** This item replaces the reference in subsection 34ZB(4) to notification of regulations in the *Gazette* with registration in the Federal Register of Legislative Instruments.

**Item 8** This item defines maternity and permanent disability in section 34ZB for the purpose of determining whether a person is an eligible person for the purposes of the Run-Off Cover Indemnity Scheme. While the definition of maternity does not provide for an end point, after three years women who may have initially ceased practice due to maternity will also qualify for the Run-off Cover Indemnity Scheme under paragraph 34ZB(2)(b) if they do not return to private medical practice.

**Item 9** This item amends paragraphs (a), (b) and (c) of the definition of *private medical practice* in subsection 34ZB(5) so that the circumstances are alternative rather than cumulative in their effect.

**Items 10 to 12** These items amend the requirements on insurers to notify persons paying premiums for medical indemnity cover of the impact of the *Medical Indemnity (Run-off Cover Support Payment) Act 2004*. The amended provisions will require invoices to show the amount of the premium before the impact of the *Medical Indemnity (Run-off Cover Support Payment) Act 2004* and the proportion and amount of premium due to that Act.

**Item 13** This item amends section 44B so that the HIC can inform all doctors whose medical indemnity insurer has contributed a Run-off Cover Indemnity Scheme support payment on their behalf of their run-off cover credit for a financial year, even if the Scheme has not been terminated.

**Item 14** This item inserts into paragraph 44B(c) the requirement that a termination date for the Run-off Cover Indemnity Scheme has been set before the HIC may notify a practitioner of the practitioner's total run-off cover credit.

#### **Amendments to the *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003***

**Item 15** This item extends the definition of *medical practice period* so that doctors practising in the public sector and purchasing indemnity cover and who are otherwise eligible for the Run-off Cover Indemnity Scheme can have any claims associated with their cover during this practice period covered under the Run-off Cover Indemnity Scheme when they stop practising in the public sector. (The type of cover most

frequently purchased by doctors in the public sector is what is known as “medico-legal cover”).

**Item 16** This item inserts a requirement that notice to the HIC by an insurer under paragraph 26D(2)(b) stating that a practitioner has been provided with Run-off Cover Indemnity Scheme cover must take place within 28 days after the cover has been provided by the insurer.

#### **Amendments to the *Medical Indemnity (Run-off Cover Support Payment) Act 2004***

**Item 17** This item provides that the amount of a medical insurer’s premium income for a period under subsection 7(1) is reduced by the amount calculated under subsection 7(2A).

**Item 18** This item inserts a new subsection 7(2A) which sets out how the amount referred to in paragraph 7(2)(d) is to be calculated. The effect of the amendment is to reduce the premium on which the run-off cover support payment is calculated by the proportion of the premium represented by the payment, to avoid double-counting.

#### **Schedule 2 — Claims Protocols**

##### **Amendments to the *Medical Indemnity Act 2002***

**Item 1** This item provides a note to subsection 4(1) that the definition of *high cost claim indemnity* does not cover amounts payable under the High Cost Claims Protocol.

**Item 2** This item inserts a definition of the *High Cost Claims Protocol* into section 4.

**Items 3 to 5** These items amend subsections 10(1A), 27A(2) and insert a new subsection 27A(3A). The combined effect of these amendments is to allow payments to be made under the IBNR Claims Protocol in relation to costs associated with incidents notified to MDOs or insurers, notwithstanding that claims are subsequently made in relation to such incidents.

**Item 6 and 7** These items amend section 28 to state that Division 2 of Part 2 of the Act provides for a High Cost Claims Protocol and identify where the provisions on the High Cost Claims Protocol can be found within the Division.

**Item 8** This item inserts after section 34 a new Subdivision C dealing with the High Cost Claims Protocol.

New section 34AA provides that the Minister may determine by legislative instrument a High Cost Claims Protocol, sets out the range of matters that may be dealt with in the Protocol, states that the Protocol may not modify or create offence provisions, and may extend to other matters specified in regulations.

New section 34AB provides that the HIC may request information on whether an MDO or insurer is entitled to receive a payment under the Protocol, and if so the amount of the payment, by notice in writing stating the information that is required and whether it should be verified by a statutory declaration, when it must be provided (being at least 28 days after the request is made) and stating that a failure to comply with the request is an offence.

**Item 9** This item inserts into subsection 34X(2) a provision to allow payments to be made to insurers under the Exceptional Claims Protocol in relation to costs associated with incidents notified to insurers that could give rise to claims.

**Item 10** This item inserts a new subsection 34X(3) which provides for the purposes of the Exceptional Claims Protocol it does not matter whether claims are subsequently made in relation to incidents dealt with by the Exceptional Claims Protocol.

**Item 11** This item amends subsection 39(1) to impose a record keeping obligation on persons applying for a payment under High Cost Claims Protocol.

**Item 12** This item inserts into subsection 39(2) the date from which records must be retained in relation to applications for payment under the High Cost Claims Protocol.

**Item 13** This item amends the offence provision in subsection 45(1) to add to the list of offences the offence of failing to comply with a request for information from the HIC under subsection 34AB(1) about the payability and amount of payments under the High Cost Claims Protocol.

**Item 14** This item amends section 48 to provide for an appropriation to cover amounts payable under the High Cost Claims Protocol.

### **Schedule 3 — Other amendments**

#### **Amendments to the *Medical Indemnity Act 2002***

**Item 1** This item inserts a definition of the *Federal Register of Legislative Instruments* into section 4.

**Item 2 and 3** These items amend paragraphs 8(2)(d) and subsection 14(d) to replace the requirement for payability of an IBNR indemnity that an MDO was aware of a claim with the requirement that the MDO was notified of a claim. This amendment provides consistency between the various schemes.

**Item 4** This item amends subsection 29(2) to provide that any increase in the high cost claim threshold will not be able to take effect until 12 months after any such regulations are registered on the Federal Register of Legislative Instruments.

**Item 5** This item amends the basic high cost claim indemnity payability rule in paragraph 30(1)(a) to replace the requirement that there is a claim for compensation or damages against a person with the requirement that there is a claim against the person.

**Item 6** This item amends the high cost claim indemnity payability rule in paragraph 30(1)(d) to replace the requirement that an MDO or medical indemnity insurer was aware of a claim with the requirement that the MDO or insurer was notified of a claim. This amendment provides consistency between the various schemes.

**Item 7** This item amends the high cost claim indemnity payability rule in paragraph 30(1)(f) so that the applicable threshold for a claim is the threshold that applied when the incident giving rise to the claim was notified to the insurer, regardless of any subsequent amendments to the threshold.

**Items 8 and 9** These items insert in the high cost claim indemnity payability rule in subsection 30(1) a power to make regulations specifying other conditions for payability under the Scheme, and provides that any regulations made under this section will not apply to claims made prior to the regulations taking effect.

**Item 10** This item replaces the reference in subsection 30(3) to notification of regulations in the *Gazette* with registration in the Federal Register of Legislative Instruments.

**Item 11** This item amends subsection 34(2) to require that any reduction in the percentage of a claim covered by a high cost claim indemnity under subsection 34(1) must not take effect earlier than 12 months after the regulations which reduce the percentage are registered on the Federal Register of Legislative Instruments.

**Item 12** This item amends the basic exceptional claim indemnity payability rule in paragraph 34E(1)(a) to replace the requirement that there is a claim for compensation or damages against a person with the requirement that there is a claim against the person.

**Items 13 and 14** These items replace the reference in subsections 34F(3) and (4) and 34G(2) to notification of regulations in the *Gazette* with registration in the Federal Register of Legislative Instruments.

**Item 15** This item expands subparagraphs 34L(1)(f)(ii) and (iii) to include amounts that an insurer has become liable to pay as part of the aggregate of costs which may be taken into account in determining whether a claim has exceeded the exceptional claims indemnity payment threshold.

**Item 16** This item amends subparagraph 34(L)(1)(f)(iii) to require that claims are counted against the exceptional claims indemnity threshold in the order in which they were first notified to the insurer.



**Items 17 to 19** These items replace the reference to medical indemnity insurers and MDOs in subparagraphs 43(1)(a)(ii) and (aa)(ii) and paragraphs 43(1)(b) and 43(2)(d) and (e) with a reference to medical indemnity providers. This will allow the Minister to formulate schemes to provide assistance to medical practitioners through bodies other than MDOs and insurers, such as State agencies which are not subject to the *Insurance Act 1973*.

**Item 20** This item adds to section 43 a definition of *medical indemnity provider* as an MDO, an insurer, or any other body that provides medical indemnity cover within the meaning of the *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003*.

**Item 21** This item provides that payments may be made under a scheme formulated under section 43 to a body other than an MDO or insurer in relation to costs incurred before the commencement of this item, if the costs were incurred after the commencement of the *Medical Indemnity Act 2002*.