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Medical Indemnity Legislation Amendment (Run-off Cover Indemnity and Other Measures) Bill 2004

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Medical Indemnity Legislation Amendment (Run-off Cover
Indemnity and Other Measures) Bill 2004

Medical Indemnity (Run-off Cover Support Payment) Bill
2004

Susan Dudley
Law and Bills Digest Group
30 June 2004

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Medical Indemnity Legislation Amendment (Run-off Cover Indemnity and Other Measures) Bill 2004

Medical Indemnity (Run-off Cover Support Payment) Bill 2004

Date Introduced: 13 May 2004

House: House of Representatives

Portfolio: Health and Ageing

Commencement: The Bills commence on a number of dates.

Purpose

The purpose of these Bills is to put in place arrangements so that a medical practitioner who has retired, is on maternity leave, has a permanent disability or has not practised medicine for more than three years, and a deceased medical practitioners legal representative, can obtain run-off insurance cover through a government co-ordinated run-off cover indemnity scheme.

Background

The Medical Indemnity Legislation Amendment (Run-off Cover Indemnity and Other Measures) Bill 2004 (MILAB) and the Medical Indemnity (Run-off Cover Support Payment) Bill 2004 (MIB) are the latest bills implementing the Government's response to the medical indemnity crisis. They put in place arrangements for the provision of a government co-ordinated run-off cover scheme.

As a result of the regulatory changes made to the arrangements for the provision of medical indemnities in 2002, medical insurers no longer offer 'claims incurred' cover to practitioners.¹ The only cover supplied to medical insurers is 'claims made' cover. As the name suggests, 'claims made' cover only insures doctors for claims made during the term of the policy and not for any claims made subsequently. Therefore, if for example, a doctor retires, he or she will not be insured for claims that are made in this retirement

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period. A doctor will need to purchase a separate form of insurance, known as run-off cover, to insure him or herself for this period.

Prior to the regulatory change in 2002, many doctors held claims incurred cover and therefore did not need to obtain run-off cover, as they were covered for 'run-off' scenarios by their claims incurred policy.

Doctors have expressed strong dissatisfaction with the 2002 regulatory changes which have brought about the increased need for run-off cover. The key concern held by doctors was explained in the following extract from a letter written to *The Mercury* by William Turner, president of the Medical Protection Society of Tasmania:

Under Senator Coonan's legislation doctors will only be able to buy claims made cover from 1 July 2003. As a result they will only be covered in any one year for claims which are made during that year. This means that in the event of death, disablement or retirement, the doctor or his or her estate, will need to buy run-off cover at a cost which is expected to be in the order of three times the annual premium at the time of retirement.

This will provide a significant incentive for doctors to divest themselves of their assets and to go 'bare' [divest assets]. The effect of this will be to leave patients without any protection at all.²

The Government attempted to address issues associated with run-off cover by mandating that insurers provide run-off cover to doctors for up to six years, at a reasonable price.³ However concerns regarding the issue of run-off cover continued in 2003.

In October 2003, the Government announced that it would convene a panel of experts to consider outstanding issues regarding the medical indemnity crisis. This panel (which became known as the Medical Indemnity Policy Review Panel (the Panel)) considered the issues associated with the supply of run-off cover.

The Panel described the problem with run-off cover as follows:

47. In the current medical indemnity insurance market only claims made cover is available. This is clearly an inferior product to claims incurred cover in terms of the security it offers doctors and patients. Under claims incurred cover doctors pay a premium for a year and know that they will be covered forever for any incident in that year (providing that their insurer remains solvent).

48. Under claims made arrangements doctors have to maintain cover by continuing to pay annual premiums to an indemnity provider. If they want to change provider they have to either purchase run-off cover from their old provider or cover for past events from their new one. If they want to leave practice for a period of time they have to purchase run-off cover. If they employ a locum the employing doctor needs to be sure that the locum will continue to be covered by some sort of indemnity arrangement. And finally, if doctors wish to retire they need to have access to run-off cover.

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49. The current arrangements are providing run-off cover at a nominal cost for retiring doctors with long periods of membership, and the Government has regulated to require MDO/MII's to offer run-off cover for up to six years for retiring doctors. This does not mean that every doctor can easily afford run-off cover. Nor does it give certainty for doctors or their patients beyond the six-year period.⁴

The Panel went on to recommend that:

71. The Government should assess security issues by ensuring that run-off cover is available to all doctors who cease practice either permanently or temporarily.

72. For doctors permanently exiting the Australian private medical workforce due to death, disability, age retirement or transfer to solely public practice, and for those going on maternity leave, cover would be provided at no cost to the doctors receiving the cover through a Government Run-off Reinsurance Vehicle (RRV). Doctors in these categories would receive cover under the scheme immediately they stopped work. The RRV would also cover claims (again at no cost to the doctor) against doctors made three years after they had left private medical practice for any other reason. The RRV should have a Government guarantee underpinning its security. The RRV would be funded by a charge on insurers, in turn funded through premiums and calculated on an emerging cost basis (ie as the costs of claims are identified).⁵

Under the Panel's proposed arrangements, certain groups of doctors (such as retirees, doctors on maternity leave and doctors who have suffered a permanent disability) will be able to access run-off cover free of charge. The advantages of these arrangements are quite clear:

- doctors will avoid the prospect of large insurance bills in retirement, and
- plaintiffs will avoid the possibility of doctors 'going bare' divesting themselves of their assets and therefore being unable to recover compensation for injuries.

The amendments

The Bills set up the Government co-ordinated run-off cover scheme (referred to in the Panel's report as the Run-off Reinsurance Vehicle).

Cost of funding the arrangements

The explanatory memorandum to the Bill states that:

Under the run-off cover scheme eligible medical indemnity claims will be paid out by the Australian Government and the costs of this scheme will be funded by a levy on medical indemnity insurers. Preliminary actuarial analysis suggests that the total cost of claims for the cohort of doctors entering the scheme each year will be of the order of \$15 million to \$20 million.

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Therefore, according to the explanatory memorandum the run-off cover scheme will be fully self funded.

Views on proposed amendments

The Australian Medical Association (AMA) strongly supports the proposed run-off cover scheme. The AMA considers that the medical indemnity crisis is nearly over. It views the run-off cover initiative by the Government as the final measure needed to secure the end of the medical indemnity crisis.⁶

Main Provisions

The Bills set out the arrangements for the Government's run-off cover scheme. The following discussion refers to sections in the MILAB, unless otherwise specified.

Free run-off cover

The Bill amends the *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003*, so that a medical insurer will be required to provide, free of charge, run-off cover to a medical practitioner if:

- the medical insurer was the last insurer to have provided cover to the practitioner (**schedule 3, item 9**), and
- the practitioner:
 - is aged 65 years or older and has permanently retired from private medical practice
 - has not engaged in private medical practice for three years
 - has ceased private medical practice either temporarily or permanently private medical practice because of maternity
 - has ceased private medical practice because of a permanent disability
 - is the legal personal representative of a deceased person who was a medical practitioner in private practice, or
 - is listed in the regulations (**schedule 3, item 9, proposed section 26A**).

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The nature and range of incidents covered by the run-off cover must be the same as the nature and range of incidents that the doctor was insured against under the policy that he or she held prior to retirement (**schedule 3, item 9, proposed paragraph 26A(4)(b)**).

Failure to provide run-off cover to a doctor is an offence with a penalty of twelve months imprisonment (**schedule 3, item 9, proposed section 26A**).

The run-cover is regarded as taking the form of an insurance contract (**schedule 3, item 9, proposed section 26E**).

Reimbursement to MDO or medical insurer for cost of run-off cover claims

Practitioners may make insurance claims under the compulsorily supplied run-off cover policy and the MDO or medical insurer will be liable to pay the claim. Under the Bill, the MDO or medical insurer will be able to seek reimbursement for this payment from the Commonwealth (known as run-off cover indemnity). Specifically, the Bill states that an MDO or medical insurer who provides free run-off cover to eligible medical practitioners (as set out above), will be entitled to receive a run-off cover indemnity from the Commonwealth if:

- the medical practitioner makes a claim that relates to an incident that occurred whilst the person was practising medicine
- the person would have been covered by the indemnity provided to them at the time of the incident
- the claim is made by a person who holds run-off cover as mandated under the *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003* or the person has ‘incident occurring based cover’ (that is claims incurred cover) provided by the MDO, and
- the MDO or medical indemnity insurer makes a payment or is liable to make a payment in relation to the claim (**proposed section 34ZB and 34ZC**).

Funding

The Commonwealth will fund the run-off cover indemnity by imposing a tax on all medical insurers.

The funding arrangements for the run-off cover scheme are set out in the Medical Indemnity (Run-off Cover Support Payment) Bill 2004 (MIB).

Under the Bill, all medical insurers will be taxed at a rate set out in the legislation or regulations (**clause 4 MIB**). The size of the tax is set as a proportion of the insurer’s premium income for the period of 12 months ending on 31 May, not including run-off

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cover payments (**clause 6 and 7 MIB**). The MIB states that the maximum amount that can be imposed is 15%. The Government proposes to put in place a regulation to set the tax at 8.5%.

The medical insurers will pay for the tax by passing the cost onto doctors in the form of higher premiums. Medical insurers will be required to include information regarding the proportion of the premium that makes up the payment for the run-off cover support scheme in their premium invoice to doctors (**proposed section 34ZV**).

Therefore, in effect, doctors who are still in practise provide the funding for running the run-off cover vehicle.

Run-off cover indemnity scheme

Where a doctor has contributed to paying for the cost of the run-off cover indemnity scheme through their premiums and the Commonwealth decides to terminate the scheme, the Commonwealth must reimburse medical practitioners for these payments if the medical practitioners use these funds to purchase run-off cover.

Administration costs

The Commonwealth will reimburse MDOs and medical insurers for the costs associated with administering the run-off cover scheme (**see proposed section 34ZN**).

Concluding Comments

The Bill puts in place arrangements for the provision of run-off cover for medical practitioners. It implements the recommendations of the Medical Indemnity Policy Review Panel to set up a run-off cover scheme. It forms part of the Government's package of reforms to resolve the medical indemnity crisis.

The Government considers that this is the final legislative measure in its medical indemnity package.⁷ This is supported by the Australian Medical Association who, as stated above, is of the opinion that the medical indemnity crisis is 'all but over'. Of course, long term issues still remain. There is no doubt that at present the Government is providing extensive support to the medical insurance industry. Without this support indemnities would be unaffordable. Therefore, there obviously is further scope for developing the system so that it can operate without being buttressed by Commonwealth funding and 'rescue packages'.

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Endnotes

- 1 Under a claims incurred policy, doctors are insured against injuries to patients brought about through conduct which took place during the term of the policy. The patient's claim could be notified to the MDO at any time; that is either during the term of the policy or after the policy has lapsed.
- 2 William Turner, 'Hot Topic Medical Indemnity', *The Mercury*, 1 May 2003.
- 3 *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003*, section 23 and 24.
- 4 Medical Indemnity Policy Review Panel, *Affordable, secure and fair; Report to the Prime Minister*, 10 December 2003.
- 5 *ibid.*, p. 16.
- 6 Australian Medical Association, 'Medical Indemnity ROCS Legislation', *Media Release*, 13 May 2004.
- 7 Mr Tony Abbott, Minister for Health and Ageing, 'Medical Indemnity Legislation Amendment (Run-off Cover Indemnity and Other Measures) Bill 2004', *Second Reading Speech*, p. 1.

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