



## Midwife Professional Indemnity Legislation Amendment Bill 2011

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# Midwife Professional Indemnity Legislation Amendment Bill 2011

**Date introduced:** 3 March 2011

**House:** House of Representatives

**Portfolio:** Health and Ageing

**Commencement:** On the day of Royal Assent

**Links:** The links to the [Bill, its Explanatory Memorandum and second reading speech](#) can be found on the Bill's home page, or through <http://www.aph.gov.au/bills/>. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at <http://www.comlaw.gov.au/>.

## Purpose

The purpose of the Midwife Professional Indemnity Legislation Amendment Bill 2011 (the Bill) is to:

- amend the *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Act 2010* (Commonwealth Contribution Act) to ensure that self-employed midwives can access the Midwife Professional Indemnity Scheme, and
- amend the *Midwife Professional Indemnity (Run-off Cover Support Payment) Act 2010* (Run-off Cover Support Payment Act) to ensure that the tax on insurers of eligible midwives is correctly calculated.

## Background

In 2002–03, Australia faced a medical indemnity crisis, with large increases to insurance premiums causing some doctors to consider leaving the profession or ceasing to practise in high-risk areas.<sup>1</sup> The Government intervened by passing legislation to stabilise the medical indemnity industry and took action to subsidise premiums paid by doctors practising in higher risk areas, including obstetrics, to ensure affordability of professional indemnity cover and the continued provision of the full range of medical services for the community.

The intervention did not extend to privately practising midwives, many of whom are employed by a hospital (public or private) or medical practice, and do not need to hold their own professional indemnity insurance. Their professional liability tends to be covered by the insurance arrangements

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1. Information about the medical insurance crisis which arose in 2002 is contained in D Kehl, *Liability insurance premium increases: causes and possible Government responses*, Current issues brief, no. 10 2001–02, Parliamentary Library, Canberra, 19 March 2002, viewed 21 March 2011, <http://www.aph.gov.au/library/pubs/CIB/2001-02/02cib10.pdf>

for the relevant health care institution, supervising private medical practitioner or private medical practice—that is, by the employers.<sup>2</sup> As a result, professional indemnity insurance was not available for private midwife practitioners in Australia.

In September 2008 the Minister for Health and Ageing, Nicola Roxon, launched a discussion paper on improving maternity services in Australia.<sup>3</sup> The discussion paper, and the information provided in response to it, was the foundation for the development of a national action plan for maternity services. Issues identified by the Maternity Services Review included:

- consumer concern about the limited choices in models of care available, and
- midwives' and nurses' concerns about a lack of recognition for the services they provide and constraints on their practice caused by funding and lack of indemnity.

The Maternity Services Review report was released in February 2009.<sup>4</sup> In response to that report, the Government introduced a suite of legislation, namely:

- *Health Legislation Amendment (Midwives and Nurse Practitioners) Act 2009*<sup>5</sup>
- *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Act 2010*,<sup>6</sup> and
- *Midwife Professional Indemnity (Run-off Cover Support Payment) Act 2010*.<sup>7</sup>

In addition, the Commonwealth moved to contract with an insurer (through a national tender process) to provide this type of insurance at an affordable price to certain midwives. On 5 May 2010 the Minister announced that the insurance would be provided by Medical Insurance Group Australia (MIGA).<sup>8</sup>

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2. Maternity Services Review, *Improving maternity services in Australia*, Commonwealth of Australia, Canberra, 2009, p. 53, viewed 10 March 2011, [http://www.health.gov.au/internet/main/publishing.nsf/Content/64A5ED5A5432C985CA25756000172578/\\$File/Improving%20Maternity%20Services%20in%20Australia%20-%20The%20Report%20of%20the%20Maternity%20Services%20Review.pdf](http://www.health.gov.au/internet/main/publishing.nsf/Content/64A5ED5A5432C985CA25756000172578/$File/Improving%20Maternity%20Services%20in%20Australia%20-%20The%20Report%20of%20the%20Maternity%20Services%20Review.pdf)
  3. Secretariat, Maternity Services Review, *Maternity services discussion paper launched*, media release, 10 September 2008, viewed 10 March 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FIWJS6%22>
  4. Maternity Services Review, op. cit.
  5. R Jolly, K Magarey and P Pyburne, *Health Legislation Amendment (Midwives and Nurse Practitioners) Bill 2009*, Bills Digest, no. 11, 2009–10, Parliamentary Library, Canberra, 11 August 2009, viewed 18 March 2011, <http://www.aph.gov.au/library/pubs/bd/2009-10/10bd011.pdf>
  6. P Pyburne, K Magarey and R Jolly, *Midwife Professional Indemnity (Commonwealth Contribution) Scheme Bill 2009*, Bills Digest, no. 12, 2009–10, Parliamentary Library, Canberra, 12 August 2009, viewed 18 March 2011, <http://www.aph.gov.au/library/pubs/bd/2009-10/10bd012.pdf>
  7. P Pyburne, K Magarey and R Jolly, *Midwife Professional Indemnity (Run-off Cover Support Payment) Bill 2009*, Bills Digest, no. 13, 2009–10, Parliamentary Library, Canberra, 12 August 2009, viewed 18 March 2011, <http://www.aph.gov.au/library/pubs/bd/2009-10/10bd013.pdf>
  8. N Roxon (Minister for Health and Ageing), *Professional indemnity insurance for midwives*, media release, 5 May 2010, viewed 21 March 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F9GNW6%22>

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The latter two of the statutes listed above provide the framework within which the Government's professional indemnity scheme operates.<sup>9</sup>

## Rules about self-employed midwives

The Commonwealth Contribution Act was assented to on 12 April 2010 and commenced on 1 July 2010. The Commonwealth Contribution Act, as enacted, operates as follows:

- Part 2 of Chapter 2 provides that the Commonwealth will pay a contribution to an insurer in respect of a claim if certain criteria set out in, or under, the Act, are met
- One of the criteria that must be met for a Level 1 or Level 2 Commonwealth contribution to be paid is that the Medicare Australia CEO must certify that a claim is a 'qualifying claim' under section 11 of the Commonwealth Contribution Act
- The Medicare Australia CEO is authorised to issue a 'qualifying claim certificate' (thus allowing the Commonwealth contribution to be paid) only if the claim satisfies the common requirements in subsection 11(3)
- Part 3 of Chapter 2 of the Commonwealth Contribution Act deals with run-off cover Commonwealth contributions. Section 31 sets out the eligibility requirements for an eligible run-off claim.<sup>10</sup>

The Government tabled subordinate legislation which was intended to clarify one of the common requirements in subsection 11(3) and the eligibility requirements for a run-off claim in section 31.<sup>11</sup> Although the subordinate legislation was not tabled until 28 September 2010, the date of commencement was 1 July 2010.

The explanatory statement for the Midwife Professional Indemnity (Commonwealth Contribution) Scheme Rules 2010 (No. 2) states:

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9. Further information about the way that professional indemnity insurance for midwives operates is available on the Department of Health and Ageing Fact Sheet, *Maternity Services Reforms*, viewed 21 March 2011, [http://www.health.gov.au/internet/main/publishing.nsf/Content/873B4F0C6C7FE80ECA2576CB007FFC8B/\\$File/Maternity%20Fact%20Sheet%202%20Revised%205%20April%202010.pdf](http://www.health.gov.au/internet/main/publishing.nsf/Content/873B4F0C6C7FE80ECA2576CB007FFC8B/$File/Maternity%20Fact%20Sheet%202%20Revised%205%20April%202010.pdf)
  10. There are two types of medical indemnity insurance policy—'claims made' policies and 'claims incurred' policies. Under a 'claims incurred' policy, the policy holder pays a premium for each year and is covered for all claims that are lodged in relation to an incident in that year, regardless of when the actual claim is lodged. Under a 'claims made' policy, the policy holder pays a premium for each year and is covered for all claims that are lodged in that year and which relate to an incident that occurs in that year. Claims made in other years for an incident that occurs in that policy year will not be covered by a 'claims made' policy. If a policy holder wishes to leave practice for a period of time or retire altogether, they must take out an additional insurance policy, known as 'run-off cover', if they wish to have insurance cover for claims made in those non-practising/retirement years.
  11. The Midwife Professional Indemnity (Commonwealth Contribution) Scheme Rules 2010 (No. 2) were made on 25 June 2010 and tabled in both the House of Representatives and the Senate on 28 September 2010. Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor: Disallowable Legislative Instruments tabled in the Senate in 2010*, Commonwealth of Australia, Canberra, February 2011, p. 161, viewed 23 March 2011 [http://www.aph.gov.au/senate/committee/regord\\_ctte/mon2010/consolidated/report.pdf](http://www.aph.gov.au/senate/committee/regord_ctte/mon2010/consolidated/report.pdf)

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These Rules are required to ensure that certain self-employed midwives are included in the definition of 'eligible midwives' for the purposes of meeting the common requirements for a qualifying claim set out in section 11(3) of the Act. Section 11(3)(g) of the Act provides that a Commonwealth Contribution cannot be paid in relation to claims made against midwives who are employees where the claim relates to an incident occurring in the course of, or in connection with, their employment (employed midwives are generally covered by the vicarious liability insurance arrangements of their employers).

These Rules allow for midwives who are employed via a company that they own, either solely or jointly with other midwives, to access the Commonwealth schemes. If these Rules did not have effect, self employed midwives may have claims against them, which are otherwise eligible claims, refused. This would mean that any resulting liability would fall to the midwife, instead of the insurer and the Commonwealth. This outcome was not intended when the Act was originally drafted.<sup>12</sup>

## Committee consideration

At the time of writing this Bills Digest the Bill had not been referred to Committee for inquiry and report.

## Policy position of non-government parties/independents

The Bill represents a minor clarification of the existing law, rather than an addition to it. At the time of writing this Bills Digest, no comments had been made about the Bill.

## Financial implications

According to the Explanatory Memorandum, there is no financial impact from this Bill.<sup>13</sup>

## Main issue

Paragraphs 11(3)(d), (k), (l) and (m) and subsections 31(2), (3) and (5) of the Commonwealth Contribution Act already specify that Rules may be made in respect of those provisions.

Section 90 of the Commonwealth Contribution Act provides that:

- (1) The Minister may, by legislative instrument, make Rules providing for matters:
  - (a) required or permitted by this Act to be provided for in the Rules, or

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12. Explanatory Memorandum, Midwife Professional Indemnity (Commonwealth Contribution) Scheme Rules 2010 (No. 2), viewed 22 March 2011, <http://www.comlaw.gov.au/Details/F2010L01854/Download>

13. Explanatory Memorandum, p. 3.

- (b) necessary or convenient to be provided for in order to carry out or give effect to this Act.

Any Rules that are made by the Minister in respect of paragraphs 11(3)(d), (k), (l) and (m) will be underpinned by paragraph 90(1)(a). However, the same rule making power does not exist for Rules made under paragraphs 11(3)(g) and 31(5)(c).

Accordingly, the Midwife Professional Indemnity (Commonwealth Contribution) Scheme Rules 2010 (No. 2) are said to have been underpinned by paragraph 90(1)(b)—that is, the Minister has made rules providing for matters ‘necessary or convenient to be prescribed for carrying out or giving effect’ to the Act.<sup>14</sup>

To address this issue, the Bill inserts provisions into subsection 11(3) and section 31 which will specifically permit Rules to be made about those provisions—so that in future such Rules made by the Minister will instead be underpinned by paragraph 90(1)(a).

This will ensure that the Minister’s Rule making powers operate consistently throughout the Commonwealth Contribution Act.

## Key provisions

**Item 1** of the Bill amends the Commonwealth Contribution Act to insert **proposed subsections 11(3A)–(3B)**. The effect of the subsections will be to empower the Minister to make specific Rules in respect of paragraph 11(3)(g). The provision is consistent with the terms of existing paragraphs 11(3)(d), (k), (l) and (m).

**Item 2** of the Bill inserts **proposed subsections 31(6) and (7)**. The effect of the subsections will be to empower the Minister to make specific Rules in respect of paragraph 31(5)(c) which defines the term **‘private practice as a midwife’** in relation to eligible run-off claims.

Both **item 1** and **item 2** provide that, for the avoidance of doubt, any Rules that are made under the proposed subsections may be expressed to take effect from a date before the date on which they are registered on the Federal Register of Legislative Instruments. This is permitted by section 12 of the *Legislative Instruments Act 2003*.

Section 7 of the Run-off Cover Support Payment Act contains the method for calculating an eligible insurer’s premium income for a period. Existing subsection 7(3) contains a formula which is to be used as part of the overall calculation. **Item 3** of the Bill amends subsection 7(3) of the Run-off Cover Support Payment Act to correct a typographical error by substituting a multiplications sign for a plus sign. **Item 4** of the Bill is an applications provision which has the effect of ensuring that the correct method of calculating an eligible insurer’s premium income is used from 1 July 2010.

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14. Explanatory Memorandum, Midwife Professional Indemnity Legislation Amendment Bill 2011, p. 1.

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