MIIAA Submission
to the
Senate Community Affairs Committee
inquiry into
Health Legislation Amendment (Midwives and Nurse Practitioners) Bill 2009 and two related Bills

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The MIIAA

The Medical Indemnity Industry Association of Australia (MIIAA) is the peak body for the Australian Medical Indemnity Industry and represents its members on issues of common interest or concern. The MIIAA is an industry association and its members include Australian based medical indemnity insurers and medical defence organisations. Members of the MIIAA represent approximately 75per cent of insured doctors in Australia.

Submissions on the Midwife Professional Indemnity (Commonwealth Contribution) Scheme Bill 2009

The MIIAA submits that, if midwives are practising independently, it is essential that they be provided with appropriate professional indemnity insurance. Otherwise this could potentially create an incentive to sue medical practitioners preferentially over midwives based on their insurance coverage.

The MIIAA makes the following submissions regarding the Midwife Professional Indemnity (Commonwealth Contribution) Scheme Bill 2009 ("the bill"):

1. Clause 11(3) of the bill states that insurance cover will apply if a claim occurs in the course of the midwife's practice as an eligible midwife. Clause 11(3)(m) indicates that a claim will not qualify if it relates to a 'type of midwifery practice specified in Rules'. Clause 5(1) of the bill in defining 'eligible midwives' indicates it will exclude 'a class of persons specified in the Rules', but no indication has been given as to what this Rule will contain. How are potential bidders to become the contracted insurer to assess the risk profile of a midwife when the bill is silent as to role it is intended knowledgeable midwives will play?

2. Clause 63(4) of the bill indicates that a determination of the Medicare CEO will be published in the Gazette. It is understood that this is intended to apply only to determinations as to what documents have to be retained, but there is an ambiguity in that it could be construed to mean that determinations as to qualifying certificates and other matters the Medicare CEO determines have to be published in the Gazette. If the latter interpretation is the correct one, then there are privacy issues for the midwife concerned who will be publicly identified. Clarification of this clause is sought.

3. The midwife legislative package makes it compulsory to insure eligible midwives but if an eligible midwife is a "high risk" eligible midwife based on abnormally high numbers of high cost claims it would seem desirable as a policy decision for the contracted insurer to be able to impose a deductible or loading on such eligible midwives.

4. The bill provides that any changes brought into effect by Rules made by the Minister will not have effect during the currency of an insurance policy. Such Rules will only operate after the renewal of the policy following the coming into operation of the Rule. While a Rule altering the circumstances in which a Commonwealth contribution is payable can be made at any time, an insurance policy can only be changed to reflect that Rule at renewal. This mismatch could result in unfairness, as the contracted insurer would have to insert a policy clause to the effect that cover will be amended during the currency of a policy, to match any Rule change.

5. The bill allows by clause 5(1) for indemnity to be provided 'subject to the terms and conditions of the contract', but does not specify the degree by which the cover may be restricted. A similar provision to section 22(1A) of Medical Indemnity (Prudential Supervision and Product Standards) Act 2003 could be inserted to permit exclusions from cover that are reasonable and appropriate having regard to exclusions usually provided for in contracts of this nature.

6. The bill is ambiguous as to what is meant by the 'aggregation of claims'. Under clause 11(3)(j) a claim is not a qualifying claim if it is in substance an aggregation of two or more separate claims against the midwife. A 'claim' by clause 5(1) includes compensation claims, proceedings before an administrative tribunal, disciplinary proceedings or an inquiry or investigations. From a single incident, for example a negligently managed delivery of a child, a number of differing claims can be made. This could include a claim for compensation before a civil court and a disciplinary hearing before the midwife's registration body. It is submitted that claims arising from the same incident should be aggregated and this should be clarified by a definition of aggregation in clause 5(1).

7. The Medicare CEO's right to accept or reject a proposed apportionment under clause 51 should be subject to the following:

   (a) An exclusion where an apportionment agreement is entered into bona fide and at arms length between defendants who are represented by different insurers; and
   (b) That the contracted insurer and the Medicare CEO should be bound by the determination of an independent solicitor following a review of the papers in all other circumstances.

   The proposal set out in (a) above will overcome the situation where two insurers agree on contribution so they may move forward to resolve the claim against the plaintiff. This has tactical advantages and usually results in a cheaper resolution of the claim. This valuable process would be derailed if the agreement could be cast aside by the Medicare CEO. Such an outcome would be likely to produce a situation where no insurer will enter into an apportionment agreement for fear of losing a significant part of its Commonwealth contribution. The insurer would be unable to recover the amount beyond the percentage decided on by the Medicare CEO. This would increase litigation and the likely amount of damages and legal costs. If an insurer of an obstetrician is also the insurer of a midwife then any apportionment arrangement will not be at arms length and so it will not bind the Commonwealth.

   The proposal set out in (b) above is very effectively employed in relation to the IBNR Scheme and the High Costs Claim Scheme.

8. There is no provision in clause 16 permitting a review by the AAT for a Level 1 contribution. This means that for claims up to $2 million an insurer has no recourse against a decision under this section. While clause 11(7) allows for a review of a qualifying certificate by the AAT, this is only one of the requirements in clause 16 for the payment of a Commonwealth contribution. It is submitted that such a provision is required for review of a decision under clause 16.

9. Some of the proposed Rules should be formulated into the bill which will encourage potential tenders for the role of the contracted insurer for the following reasons:

   (a) Potential contracted insurers need to be able to understand the framework that they will have to operate in; and

   (b) The risk to the contracted insurer of Rule changes with the attendant risk not recovering Commonwealth contributions will be avoided.

Should you have any queries in relation to this submission contact should be made with:

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