

Guidelines for professional indemnity insurance arrangements for midwives

June 2013 updated April 2016

These guidelines have been developed by the Nursing and Midwifery Board of Australia (NMBA), in conjunction with the Commonwealth Department of Health, under section 39 of the Health Practitioner Regulation National Law Act (the National Law) as in force in each state and territory.

The guidelines provide direction to midwives, their employers and education providers about the requirements for professional indemnity insurance arrangements under the National Law.

Who needs to use these guidelines?

These guidelines are relevant to:

- midwives registered under the National Law
- employers of midwives, and
- education providers.

Summary of guidelines

Under section 129 of the National Law, midwives must not practise their profession unless they are covered in the conduct of their practice by appropriate professional indemnity insurance arrangements.

These guidelines apply to

- registered midwives, and
- registered midwives currently notated as eligible midwives and those endorsed to prescribe scheduled medicines.

It does not apply to students of midwifery or to midwives who have non-practising registration.

Professional indemnity insurance (PII) arrangements

The National Registration and Accreditation Scheme (the National Scheme) for health practitioners in Australia commenced on 1 July 2010. Midwives are one of the professional groups regulated through the National Scheme under the authority of the Board.

Midwives **must** have appropriate professional indemnity insurance (PII) arrangements for midwifery practice to meet the requirements of section 129 (1) of the National Law. This provision states:

A registered health practitioner must not practise the health profession in which the practitioner is registered unless appropriate professional indemnity insurance arrangements are in force in relation to the practitioner's practice of the profession.

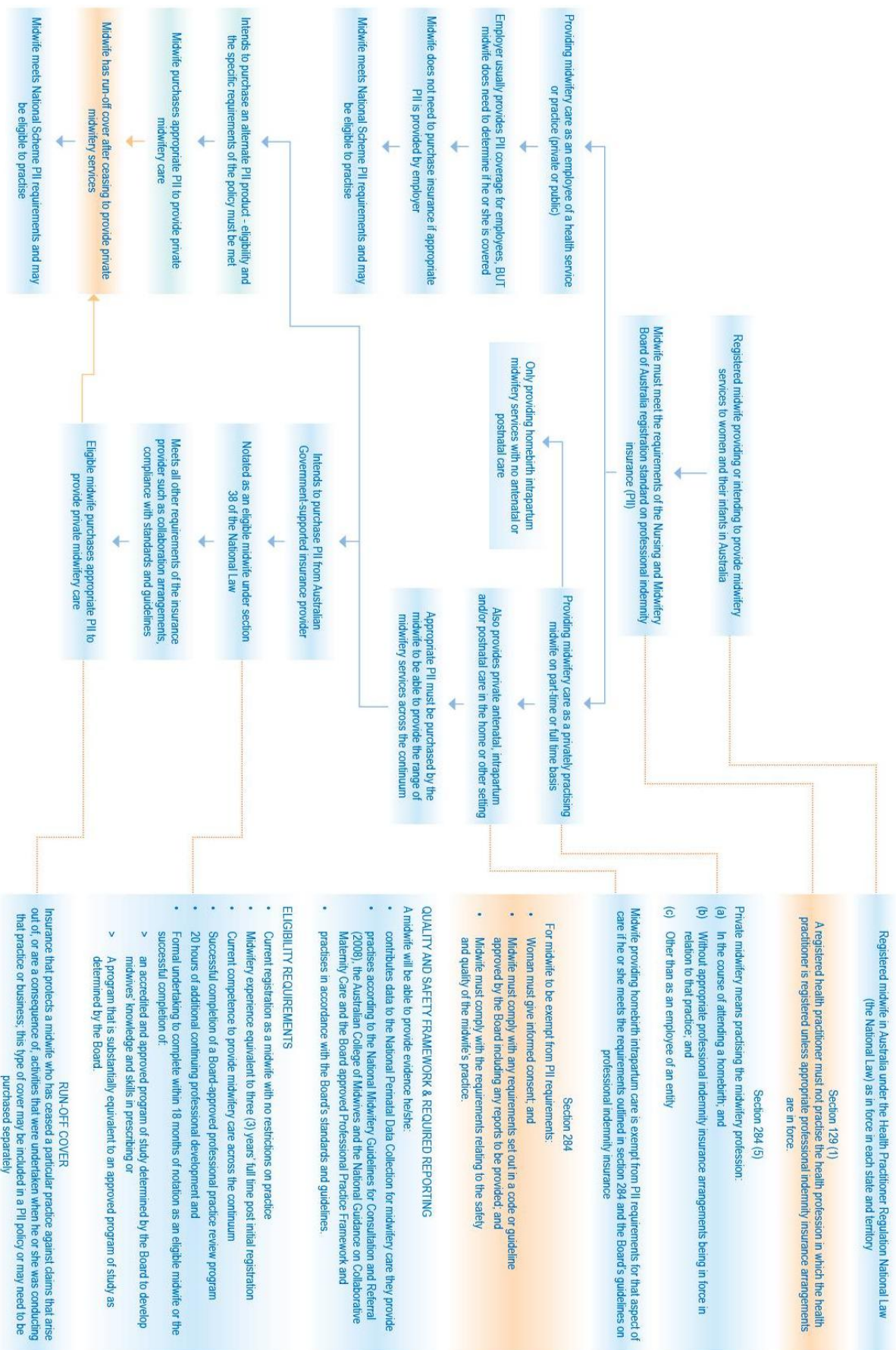
Section 5 of the National Law defines appropriate PII arrangements, in relation to a registered health

practitioner as:

... professional indemnity insurance arrangements that comply with an approved registration standard for the health profession in which the practitioner is registered.

The NMBA has developed a number of registration standards under section 38 of the National Law, including the registration standard on professional indemnity insurance arrangements for nurses and midwives which details the requirements relating to PII arrangements. This registration standard applies to all nurses and midwives registered by the NMBA in Australia. However, there are a number of considerations in relation to PII that are particular to the practice of midwifery. These guidelines outline these considerations in more detail.

Figure 1 (overleaf): PII requirements for midwives summarises the requirements for registered midwives who provide midwifery services for women and their infants in Australia. These requirements will be discussed in detail in these guidelines.



Professional indemnity insurance for midwives

Professional indemnity insurance provides midwives with insurance from civil liability¹. This insurance generally includes cover for legal claims for compensation and associated expenses arising from the practice of midwifery. The NMBA notes that PII arrangements, particularly those provided by employers, may not provide cover for matters of a disciplinary character, which do not usually lead to awards of compensation to patients, clients or other persons who have suffered detriment as a result of a practitioner's action. These matters may involve costs for individual practitioners. The NMBA does not require practitioners to have insurance cover for matters which do not involve potential of compensation against a practitioner. Examples are unlawful, unauthorised, regulatory or disciplinary matters including breaches of professional codes or ethics. However, the NMBA recommends that practitioners consider whether they have this cover as part of their PII arrangements, whether as an individual or provided by an employer and if not, whether they wish to obtain it.

For a period of time between 2001 and 2010, insurers did not offer PII to midwives in private practice. Government-subsidised and other insurance products are now available to midwives working in private practice. However, this insurance does not cover the birth of babies in the home. From 1 July 2010, under the National Law, this aspect of midwifery care has an exemption from the requirement for midwives to hold PII for homebirths. Midwives must, however, demonstrate they meet a set of specified requirements contained in these guidelines. Notwithstanding this exemption, midwives in private practice must have insurance for providing antenatal and postnatal services, regardless of the birth setting.

PII arrangements that midwives should consider include:

- civil liability cover
- unlimited retroactive cover, and
- run-off cover.

Australian Government-supported insurance scheme

From 1 July 2010, privately-practising midwives have access to Australian Government-supported PII and can purchase insurance from Medical Insurance Group Australia (MIGA).

The Government-supported insurance will not cover the planned delivery of babies in the home. The Government-sponsored insurance provider has a number of specific requirements that midwives must meet to qualify for the insurance cover.²

Exemption for intrapartum care during homebirth

There is currently no insurance company providing PII cover for midwives in private practice providing intrapartum midwifery care for women wishing to have a homebirth. Under section 284 of the National Law, there is exemption from this requirement for midwives working in private practice who provide intrapartum services for women planning to have homebirths.

This exemption is strictly limited to the provision of private intrapartum care provided in a homebirth setting. Midwives working in private practice will still require appropriate insurance to provide antenatal and postnatal care to women in their care, regardless of the planned location of the birth. The exemption is only available if midwives meet the requirements set out in section 284 of the National Law. These are discussed in more detail in these guidelines.

Section 284(2) of the National Law provides that midwives who are exempt under this section do not

¹ Liability: A person's present or prospective legal responsibility, duty, or obligation – From: Peter Butt (General Editor) (2004) Butterworths Concise Australian Legal Dictionary, 3rd edition, LexisNexis Butterworths, Chatswood (NSW).

² Available at www.miga.com.au

have to include information in their annual statement concerning their lack of PII for intrapartum care. Under normal circumstances, midwives would be required, under subsection 109(1)(a)(iv) and (v) of the National Law as part of their application for renewal of registration, to inform the NMBA of their PII arrangements for this aspect of their midwifery practice.

Section 284 of the National Law is a transitional provision and this exemption will be available only from 1 July 2010 to 31 December 2016. The NMBA will continue to work with the Commonwealth Department of Health and stakeholders to establish processes for midwife insurance.

Publicly-funded homebirths, under current arrangements based in states and territories, will be able to continue. However, midwives who are working under such arrangements should ensure they are covered by their respective employer's insurance arrangements.

Scope of the insurance required

The NMBA has described the PII arrangements required in the registration standard on PII as

Arrangements, that secure for the practitioner's professional practice, insurance against civil liability incurred by, or loss arising from, a claim that is made as a result of a negligent act, error or omission in the conduct of the practitioner. This type of insurance is available to practitioners and organisations across a range of industries and covers the cost and expenses of defending a legal claim, as well as any damages payable. Some government organisations, under policies of the owning government, are self-insured for the same range of matters.

The NMBA requires that midwives, unless exempted under the National Law for home-based intrapartum care, will require PII to cover the full scope of their practice, whether they are employed in public or private health services; or in private medical practices; or self-employed and working in private midwifery practice.

The NMBA also recognises that midwives in different types of midwifery practice will require different levels of PII cover, according to their individual scope of practice and the risks associated with that practice.

To understand what constitutes appropriate PII arrangements for each midwife, the NMBA provides the following information the midwives will be required to consider:

- the practice setting and the type of midwifery services and care delivered
- the client group
- the volume of clients to whom treatment, advice, guidance or care is provided by the midwife
- the health status of the women and their infants that make up the midwife's client group
- previous history of insurance claims and the type of claim made against the midwife in the past, if any
- the professional experience of the midwife
- advice from professional indemnity insurers, professional associations and industrial organisations, including advice regarding the history and volume of professional liability claims experience by other members of the profession, provided by a relevant professional association
- advice of an insurance broker and
- the midwife's current employment status, whether:
 - an employee working exclusively in public or private health services, or in private medical practices
 - working as a sole practitioner (either on a full-time or part-time basis) working in businesses owned solely by the midwife, or in a partnership or collective; or where a midwife is employed (full-time or part-time) by a company that is owned solely by the midwife, or that is owned solely by practising midwives, where the only directors of that company are practising midwives
 - working for part of the time as an employee and for another part of the time as a midwife in private practice, and/or
 - providing midwifery services in a voluntary, subsidised or otherwise unpaid capacity.

When applying for registration or renewal of registration, midwives are required to declare that

appropriate PII arrangements are, or will be, in place while they practise midwifery.

Run-off cover

Midwives in private practice are also required to have run-off cover, except those midwives who are exempt under the National Law for homebirth care.

Run-off cover insures midwives for claims made in the future that relate to incidents occurring when they were practising in the past. Midwives are required by the NMBA to maintain run-off cover for the whole time after they have ceased to practise privately to be protected against claims that may arise in the future.

Run-off cover scheme

A midwife who ceases private practice will be eligible for the Commonwealth Run-off Cover Scheme (at no further cost) if the midwife:

- is 65 years of age or more and has retired permanently from private practice as an eligible midwife or
- has ceased practice as an eligible midwife because of permanent disability or
- is under 65 years of age and has not engaged in private practice as an eligible midwife at any time during the preceding period of three (3) years or
- has ceased practice (temporarily or permanently) as an eligible midwife because of maternity, or
- is deceased.

A midwife who ceases private practice, but is not yet eligible for the Commonwealth Run-off Cover Scheme, can purchase standard run-off cover.

Employed midwives

The majority of midwives in Australia work as employees. In most cases, this is in public or private health services, or in private medical practices; most midwives who are employees are covered by their employers' insurance. Employed midwives are advised to check their PII arrangements with their employing organisation.

There are situations where a civil claim may be made against a midwife as an individual. This includes situations where employer-based liability cover may not apply. For example, the midwife may have acted in a way that a court would find was not within the 'course and scope of their employment'. One example would be a midwife performing an unlawful or unauthorised act such as, in the course of his or her employment, prescribing medicines for a woman and/or her infant without having endorsement as an eligible midwife for scheduled medicines. In such a case, the employer's insurance may not accept liability for the midwife's act, should any formal investigation or legal action ensue.

Employed midwives also working in private practice

Some midwives may provide midwifery care to women and their infants while employed in public or private health services, or in private medical practices; they may also conduct part of their practice in private midwifery practice where their employer's indemnity insurance would cover their practice.

This may arise in a formal business arrangement where midwives (generally with the knowledge and agreement of their employers) have established a private midwifery practice, but also work as an employee in public or private health services, or in private medical practices. Midwives working in private practice and working as an employee must have their own PII in place to cover the midwifery services they provide for their private clients.

Situations also arise where midwives, as well as being employed in public or private health services,

or in private medical practices, also provide volunteer midwifery services or subsidised services for charitable, aid or welfare organisations in Australia; and in some cases, for individual women in their local communities³.

In each of these situations midwives will be working in a professional capacity using their skills, knowledge, judgement and experience as midwives and will require PII. In some cases, the charitable or welfare organisations may have purchased PII for professionals working with them but this is not always the case and midwives may have to purchase their own insurance. Whatever the situation, it is the responsibility of each individual midwife to make the necessary enquiries and ensure the appropriate PII arrangements are in force.

Midwives in private midwifery practice

Private midwifery practice is where a midwife is working as a sole practitioner (either on a full-time or part-time basis) in a business owned solely by the midwife, or in a partnership or collective; or where a midwife is employed (full-time or part-time) by a company that is owned solely by the midwife, or that is owned solely by practising midwives, where the only directors of that company are practising midwives.

Midwives may also be deemed to be working in a private capacity when they provide midwifery services in a voluntary capacity as an individual or as part of a program run by a welfare, aid or charitable organisation where the organisation is not formally an employer and does not have PII for persons working with them as volunteers.

In all the above situations, midwives are responsible for purchasing the appropriate PII to cover the scope of their midwifery practice. In circumstances where the midwife has never met (or only met for the purposes of introduction) the woman during her antenatal period and subsequently provides intrapartum care, the midwife would be exempt from the requirements for PII as outlined in section 284 of the National Law. However, the NMBA would see this as being an exceptional circumstance and would require evidence to substantiate this situation.

In situations when a woman is receiving care from a midwife in private practice and requires admission to a health service as a public patient, the current PII arrangements for the privately-practising midwife cease.

Unless the midwife has specific arrangements with the admitting health service, including appropriate PII arrangements to provide midwifery services in the health facility, she or he should not provide midwifery services as she or he will not have PII cover and will be in breach of the NMBA's registration standard on PII arrangements, as detailed in the NMBA Position Statement 'The role of the registered midwife in private practice when the woman is admitted to a health service as a public patient'

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The registration standard on PII arrangements requires midwives who hold insurance cover in their own name to retain documentary evidence of their insurance and to provide it to the NMBA on request. Self-employed midwives must provide full disclosure of their level of PII to women who are their clients.

³ Conduct Statement 8 of the Code of Professional Conduct for Midwives in Australia requires that 'Midwives promote and preserve the trust and privilege inherent in the relationship between midwives and each woman and her infant(s)' and several of the explanatory statements under that Statement clearly contemplate the nature of the relationship where a midwife may provide care to friends and family, and that they will continue to have professional responsibilities, whatever the relationship:

8.5. Midwives fulfil roles outside the professional role, including those as family members, friends and community members. Midwives are aware that dual relationships may compromise midwifery care outcomes and always conduct professional relationships with the primary intent of benefit for the woman and her infant(s). Midwives [should] take care when giving professional advice to a woman, her partner or another person with whom they have a dual relationship (e.g. a family member or friend) and advise them to seek independent advice due to the existence of actual or potential conflicts of interest.

8.7. Midwives should not be required to provide midwifery care to a woman with whom they have a pre-existing non-professional relationship. Reassignment of the woman to other midwives for care should be sought where appropriate. (Australian Nursing and Midwifery Council (2008) Code of Professional Conduct for Midwives in Australia) available at www.nursingmidwiferyboard.gov.au/en/Codes-and-Guidelines.aspx

As noted previously, midwives working in private practice are also required to have run-off cover, except those midwives who are exempt under the National Law for homebirth care. This applies to midwives who work exclusively in private practice and those who may work in private practice for part of their working time and in an employed capacity at other times.

Requirements for exemption of midwives under section 284 of the National Law

Section 284 of the National Law outlines a number of requirements making it possible for midwives in private practice to be able to provide intrapartum care at a homebirth for women and their infants without having PII cover that is required for all other aspects of midwifery care across antenatal care and postnatal care.

The relevant provisions of the National Law and the NMBA's requirements are:

Section 284(1)(b) informed consent has been given by the woman in relation to whom the midwife is practising private midwifery

Informed consent must be given by the woman who is the client of the midwife who is in private practice. **Informed consent** is defined specifically as written consent given by a woman after she has been given a written statement by a midwife that includes:

- a statement that appropriate PII arrangements will not be in force in relation to the midwife's practice of private midwifery in attending a homebirth, and
- any other information required by the NMBA.

Section 284(c) states *the midwife complies with any requirements set out in a code or guideline approved by the National Board under section 39 about the practise of private midwifery, including—*

(i) any requirement in a code or guideline about reports to be provided by midwives practising private midwifery;

The NMBA requires that all midwives practise according to the following:

- *Code of Professional Conduct for Midwives in Australia*
- *Code of Ethics for Midwives in Australia and the*
- *National Competency Standards for the Midwife.*

These documents are approved by the NMBA under section 39 of the National Law and provide guidance on professional standards expected of a midwife, regardless of his or her place of practice. Each of the NMBA-approved codes, standards and guidelines is fundamental to the safety and quality framework for professional midwifery practice and the NMBA requires that all midwives practise in accordance with these standards, codes and guidelines, regardless of their practice context. These codes, standards and guidelines can be found on the NMBA's website at www.nursingmidwiferyNMBA.gov.au.

Requirements for reports to be provided by midwives in private practice

Under these guidelines, the NMBA requires a midwife in private practice to contribute the required data to the National Perinatal Statistics Unit (NPSU) for national perinatal data collection. Midwives are required to provide evidence of contribution to the data set, if required on audit, to the NMBA.

Section 284 (1)(c (ii) Requirements relating to safety and quality in the private practice of midwifery

The NMBA requires midwives in private practice to meet the requirements detailed in these guidelines with regard to safety and quality for the PII exemption.

The principles articulated in Primary Maternity Services in Australia - a Framework for Implementation underpin the provision of primary maternity care in Australia and provide the basis for the NMBA's safety and quality requirements in relation to midwives seeking the exemption under section 284. These are:

- ensuring services enable women to make informed and timely choices regarding their maternity care and to feel in control of their birthing experience
- ensuring that maternity services and care are provided in a culturally-appropriate and responsive manner according to the individual needs of each woman
- maximising the potential of specific knowledge, skills and attributes of midwives, obstetricians, general practitioners and, where appropriate, other health professionals such as paediatricians and Aboriginal and Torres Strait Islander health workers, to provide a collaborative, coordinated multidisciplinary approach to maternity service delivery
- offering continuity of care and, wherever possible, continuity of carer as key elements of quality care
- ensuring that maternity services are of a high quality, safe, sustainable and provided within an environment of evidence-based best practice care
- ensuring continued access to best practice maternity services and care at the local level, while recognising that the benefits of local access must be considered within a quality and safety framework
- providing the right balance between primary level care and access to appropriate levels of medical expertise as required clinically, and
- working to reduce the health inequalities faced by Aboriginal and Torres Strait Islander mothers and babies and other disadvantaged populations⁴.

The Australian College of Midwives' (ACM) *National Midwifery Guidelines for Consultation and Referral*⁵, the NMBA-endorsed ACM *Position Statement on Homebirth*⁶ and the principles and practices outlined in the National Health and Medical Research Council (NHMRC) *National Guidance on Collaborative Maternity Care*⁷ provide consistent and important professional guidance for midwives working in all areas of midwifery practice and further articulate key aspects of safe, high-quality midwifery practice.

For the PII exemption to apply, the NMBA requires that midwives are able to demonstrate they practise according to the requirements set out in the *National Midwifery Guidelines for Consultation and Referral* and the *National Guidance on Collaborative Maternity Care*.

Midwives are obliged to demonstrate they:

- have appropriate collaborative arrangements with a medical practitioner or private hospital or a care plan communicated to a public hospital providing maternity services and
- keep comprehensive documentation of:
 - informed consent, including advice provided on risks, the midwife's scope of practice and care, escalation processes and collaboration arrangements and
 - all aspects of midwifery care planning, clinical risk assessment, care provided and advice given, and
 - have obtained opinions from other maternity care professionals, including those when a woman chooses not to follow clinical advice concerning interventions or transfer.

⁴ Australian Health Ministers' Advisory Council (2008) Primary Maternity Services in Australia - a Framework for Implementation at www.ahmac.gov.au.

⁵ Australian College of Midwives Inc (2008) National Midwifery Guidelines for Consultation and Referral, at www.midwives.org.au

⁶ NMBA-endorsed ACM Position Statement on Homebirth www.nursingandmidwiferyboard.gov.au

⁷ National Health and Medical Research Council (2010) National Guidance on Collaborative Maternity Care at www.nhmrc.gov.au

The Safety and Quality Framework for demonstrating compliance with exemption requirements

For the PII exemption to apply under the National Scheme and satisfy NMBA requirements, midwives in private practice will be required to demonstrate they meet all obligations in the NMBA-approved *Safety and Quality Framework*⁸.

Definitions

Civil liability is a potential responsibility for the payment of damages for loss or injury, for example arising out of a breach of a duty of care.

Professional indemnity insurance arrangements means arrangements that secure, for the practitioner's professional practice, insurance from civil liability incurred by, or loss arising from, a claim that is made as a result of a negligent act, error or omission in the conduct of the practitioner. This type of insurance is available to practitioners and organisations across a range of industries and covers the costs and expenses of defending a legal claim, as well as any damages payable. Some government organisations under policies of the owning government are self-insured for the same range of matters.

Retroactive cover means PII arrangements which cover the insured against claims arising out of, or as a consequence of, activities that were undertaken in the course of the practitioner's professional practice, before the date of the commencement of the insurance.

Run-off cover means insurance that protects a practitioner who has ceased a particular practice against claims that arise out of, or as a consequence of, activities that were undertaken when he or she was conducting that practice or business. This type of cover may be included in a PII policy or may need to be purchased separately.

The NMBA means the Nursing and Midwifery Board of Australia.

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⁸ NMBA-approved Safety and Quality Framework (2010) available at: www.nursingmidwiferyboard.gov.au/Codes-and-Guidelines.aspx