There is considerable confusion and misinformation in relation to professional indemnity insurance. It is strongly recommended that nurses and midwives who are self-employed carry their own professional indemnity insurance. These guidelines are designed to provide a framework in which nurses can make an informed decision about whether they require professional indemnity insurance. It is not necessary for employees to carry professional indemnity insurance. Employees are indemnified by their employer’s vicarious liability.

A Review of Professional Indemnity Arrangements for Health Care Professionals was established by the Commonwealth Government in 1991 to examine the arrangements relating to professional indemnity insurance and the experience of consumers with compensation for adverse outcomes.

The Final Report, titled *Compensation and Professional Indemnity in Health Care*, was released in November 1995. The Report noted the concerns about the adequacy of professional indemnity cover for health professionals, as well as the confusion about when health professionals are covered by their employer, and when they must carry their own professional indemnity cover. The Report concluded that adequate professional indemnity cover is crucial for health professionals and recommended legislation requiring all health professionals to have professional indemnity cover, either through their own cover, or through adequate cover by their employer in the case of vicarious liability (Recommendations 128–135).

Central to any discussion of professional indemnity arrangements in health care is the need to differentiate between employed and self-employed health care practitioners. No health care practitioner is currently required as a matter of law to carry professional indemnity cover, although some health care practitioner associations do require evidence of professional indemnity cover as a condition of membership.

There is a general lack of understanding by many health care practitioners of the doctrine of vicarious liability, by which an employer is made liable for a tort committed by an employee. While ordinarily, the law holds an individual solely liable for the consequences of negligent conduct, at common law, an employer is held to be vicariously liable for the negligent conduct of an employee acting in the course of their employment. The key issue in determining whether an employee/employer relationship exists, and thus whether vicarious liability arises, is whether the relationship between the health care employer and the health care professional is a contract of employment or a contract for services.

The two tests adopted by the courts to determine whether a contract of employment or a contract for services exists are the control test and the organisation test. Health care practitioners need to clarify their employment status to determine whether or not they are covered by their employer’s vicarious liability.
Additionally, in NSW, the Employees Liability Act 1991 abolishes the common law right of employers to seek to recover damages from an employee for whom the employer has been held vicariously liable.

It is important to remember also, that employers have no obligation as a matter of law, to bear the legal costs of their employees related to disciplinary action, police investigations, or coronial enquiries. The NSW Nurses’ Association provides free legal cover to all members, regardless of employment status, in relation to disciplinary proceedings, appearances before the Nurses and Midwives Board of NSW, the NSW Health Care Complaints Commission, coronial enquiries, and royal commissions.

As the majority of nurses and midwives are employees, insurance issues have not been a major concern. However, for the relatively small number of self-employed nurses and midwives insurance issues remain significant. This is particularly so for independent midwives who have been unable to obtain professional indemnity insurance since, in response to the high compensation costs for adverse obstetric cases and the small market in Australia, the insurance industry has withdrawn from providing this cover to midwives. (Independent midwives seeking to obtain professional indemnity insurance should contact the Australian College of Midwives Incorporated for current information on this process)

Nurses and midwives who are self-employed should be also aware of the need for additional insurance for workers’ compensation and income protection, in addition to professional indemnity and associated legal costs.

References