



Llywodraeth Cymru
Welsh Government

National Health Service (Indemnities) (Wales) BILL

Statement of Policy Intent for Subordinate
Legislation to be made under this Bill

14 October 2019

NATIONAL HEALTH SERVICE (INDEMNITIES) (WALES) BILL

STATEMENT OF POLICY INTENT FOR SUBORDINATE LEGISLATION

1. This document provides an indication of the current policy intention for the subordinate legislation that the Welsh Ministers would be empowered to make by virtue of the amendments made to section 30 of the NHS (Wales) Act 2006 (“the 2006 Act”) by the National Health Service (Indemnities) (Wales) Bill (“the Bill”). It has been prepared in order to assist committees during the scrutiny of the Bill and should be read in conjunction with the Bill, the Explanatory Memorandum and Explanatory Notes that accompany it.

Section 30 of the NHS (Wales) Act 2006, as amended by Section 1 of the Bill

2. The primary purpose of the Bill is to amend section 30 of the 2006 Act.
3. Section 30, subsection (1) of the 2006 Act provides the Welsh Ministers with the power to make regulations to establish schemes whereby a body specified in subsection (2) may make provision to meet expenses arising from loss or damage to property, or third party liabilities for loss, damage or injury arising out of the carrying out of functions of the body which is providing the scheme. The Bill inserts the definition “mutual indemnity scheme” into subsection (1) of section 30 of the 2006 Act to cover those schemes where several health service bodies meet their expenses and liabilities by combining resources in a collective fund.
4. The Bill will amend section 30 subsection (2) so as to expand the bodies which may be included in schemes set up under section 30 of the 2006 Act. The additional bodies inserted into section 30(2) include those persons who are providing or have provided primary medical services in Wales in accordance with an arrangement pursuant to the 2006 Act, as well as bodies who is providing, or arranging the provision of, or who has provided or arranged the provision of, services provided as part of the health service (section 1(3) of the Bill inserts new paragraphs (f) and (g) into subsection (2)).
5. Subsection (8) of section 1 of the Bill inserts new subsections (8) to (11) into section 30 of the 2006 Act conferring subordinate legislation making powers on the Welsh Ministers and setting the parameters within which the Welsh Ministers may exercise those powers.
6. New subsection (8) of section 30 of the 2006 Act creates a power for the Welsh Ministers to establish, by regulations, a scheme under which they may directly indemnify bodies listed in subsection 2 (i.e. where the scheme does not involve mutual pooling of contributions in order to cover the future liabilities of its members). The Bill names these type of schemes, “direct indemnity schemes”.
7. By virtue of new subsection (8) of section 30 of the 2006 Act, direct indemnity schemes may only indemnify those bodies listed in subsection (2) of section 30 (as amended by section 1(3)(c) of the Bill) for expenses arising from loss or damage to their property, or to meet liabilities to third parties for loss, damage or injury arising out of those bodies carrying out their functions.

8. New subsection (9) of section 30 of the 2006 Act provides a non-exhaustive list of what regulations establishing a direct indemnity scheme may prescribe, for example, who is an eligible person and what liabilities are covered by the scheme.

Existing Liabilities Scheme

9. On 14th May 2018, the then Cabinet Secretary for Health and Social Services announced that the Welsh Government would introduce a state backed scheme to provide clinical negligence indemnity cover for providers of GP services in Wales.
10. One element of that scheme involves the Welsh Government agreeing to assume responsibility to consider covering liabilities for historic clinical negligence claims against GPs who were members of a Medical Defence Organisation which had either been reported, or which had been incurred but not reported, prior to 1 April 2019 in exchange for a proportion of the Medical Defence Organisations' assets. This is called an Existing Liabilities Scheme (ELS).
11. Upon the Bill receiving Royal Assent, the Welsh Ministers anticipate using the power in section 30 of the 2006 Act (as amended) to make the regulations necessary to underpin the ELS. These regulations would set the parameters within which the Welsh Ministers will deal with claims for historic clinical negligence that have either been reported, or incurred but not reported, prior to 1 April 2019 to an MDO with whom they have reached agreement ('a participating MDO').

Content of ELS Regulations

12. ELS regulations will need to establish a direct indemnity scheme setting out how the Welsh Ministers will consider indemnifying clinical negligence claims made against a GP as a result of negligence that occurred prior to 1 April 2019 (the ELS).
13. Any indemnity provided under the ELS would need to cover the clinical negligence liabilities of GPs (and others working in a general practice setting) reported, or incurred but not reported, prior to 1 April 2019 in connection with the provision of NHS services provided by general practice and at a time when a policy of indemnity cover with a participating MDO was in existence.
14. The ELS is anticipated to apply from 1 April 2020 in respect of eligible liabilities that are within scope. This means that, from that date, GPs and others who provided NHS services in a general practice setting and who held indemnity cover with a participating MDO will be indemnified under the ELS in relation to eligible liabilities. Currently, it is thought unlikely that there would be any membership requirements or other formal processes that would need to be completed for an indemnity under the ELS to apply.

15. The ELS would be an 'occurrence-based' scheme which means that, even if a person is no longer practising or working in general practice, liabilities incurred whilst they were practising and held a policy for professional indemnity cover with a participating MDO will be covered.
16. The regulations would need to make provision defining 'eligible persons' and 'eligible liabilities'. The regulations would need to specify the liabilities covered under the ELS. These would relate primarily to clinical negligence liabilities arising from a breach of a duty of care owed to a third party by an eligible person in connection with NHS activities that are within the scope of the ELS.
17. The main NHS services likely to be within the scope of the ELS are primary medical services that would have been provided under contractual arrangements and agreements made under Part 4 of the National Health Service (Wales) Act 2006 or predecessor legislation.
18. The ELS is also likely to cover clinical negligence liabilities incurred in respect of other NHS services provided by general practice, but only if a provider's principal activity at the time was to provide primary medical services. Where that is the case, the intention is for the ELS to cover GPs and others in the GP practice who were carrying out activities in connection with the provision of NHS services. Such cover would extend to historic clinical negligence liabilities arising from those activities, provided the GP practice held indemnity cover with a participating MDO at the time of the incident.
19. The ELS regulations will need to set out how any payments would be made out of the scheme, including specifying the circumstances in which no payment would be made under the ELS.
20. The regulations are also likely to include provisions to enable the Welsh Ministers to require the provision of information and assistance to the Welsh Ministers for the purposes of the ELS, as well as creating a duty upon the Welsh Ministers to make information available about directions or guidance given by the Welsh Ministers for the purposes of the ELS.

Timing of Regulations

21. Section 2(2) of the Bill provides that the Bill will come into force on the day after the day on which the Bill receives Royal Assent.
22. It is intended that ELS regulations will be made and laid before the Assembly upon the Bill becoming an Act, coming into force on 1 April 2020. This will ensure the Welsh Ministers safeguard the continuity of professional indemnity cover for historic liabilities of GPs at the earliest possible opportunity, whilst ensuring that the delivery of ELS regulations is aligned with the English scheme as soon as is reasonably possible given the need for primary legislation. Additionally it enables the ELS regulations to come into force on 1 April 2020 in line with potential ELS contractual arrangements which are currently subject to ongoing negotiation.

Consultation on subordinate legislation

23. The Welsh Government consults on the content of subordinate legislation when it considers it appropriate to do so. Whether there is a need to consult and if so the precise nature and extent of any consultation, in relation to exercising the powers to make subordinate legislation pursuant to the 2006 Act as a result of the amendments made by the Bill, will be decided at the appropriate time.