

# National Health Service (Indemnities) (Wales) Bill

November 2019



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# National Health Service (Indemnities) (Wales) Bill

November 2019



# About the Committee

The Committee was established on 28 June 2016. Its remit can be found at:  
[www.assembly.wales/SeneddHealth](http://www.assembly.wales/SeneddHealth)

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## Committee Chair:



**Dai Lloyd AM**  
Plaid Cymru

## Current Committee membership:



**Jayne Bryant AM**  
Welsh Labour



**Angela Burns AM**  
Welsh Conservatives



**Helen Mary Jones AM**  
Plaid Cymru



**Lynne Neagle AM**  
Welsh Labour



**David Rees AM**  
Welsh Labour



# Contents

<b>Recommendations .....</b>	<b>5</b>
<b>1. Introduction .....</b>	<b>6</b>
The Committee's approach.....	6
Other Committee's consideration of the Bill.....	7
<b>2. General principles and the need for legislation .....</b>	<b>8</b>
The Bill's purpose and intended effect.....	8
Requirement for GPs to have indemnity cover.....	8
The Future Liabilities Scheme (FLS) and the proposed Existing Liabilities Scheme (ELS).....	9
Evidence from stakeholders.....	10
Evidence from the Minister .....	12
Our view .....	13
<b>3. Matters relating to the Bill .....</b>	<b>15</b>
Costs of the Bill and asset transfer arrangements.....	15
Coverage of the scheme .....	18
Power to make subordinate legislation.....	18
Our view .....	19
<b>4. Wider law reform.....</b>	<b>20</b>
Evidence from the Minister .....	20
Our view .....	21



## Recommendations

**Recommendation 1.** We recommend that the National Assembly agrees the general principles of the National Health Service (Indemnities) (Wales) Bill.  
..... Page 13

**Recommendation 2.** We recommend that the Welsh Government provides a commitment to the Assembly that a state-backed existing liabilities scheme will not represent a lesser offer to GPs in terms of the defence of their professional standing. Further, that claims against GPs for clinical negligence will be defended as robustly under a state-backed scheme as they would be by the medical defence organisations. The Minister for Health and Social Services should provide this commitment as part of the Stage 1 debate..... Page 13

**Recommendation 3.** The Welsh Government must engage in meaningful discussions with the MDU to reach agreement about the levels of asset transfer which represent a fair and proportionate settlement for the purposes of indemnifying GPs against historic claims and achieving value for public money. It must do this as a matter of priority..... Page 19

## 1. Introduction

1. On 14 October 2019, Vaughan Gething AM, Minister for Health and Social Services introduced the National Health Service (Indemnities) (Wales) Bill<sup>1</sup> (the Bill) and accompanying Explanatory Memorandum<sup>2</sup>. He made a statement on the Bill<sup>3</sup> in plenary on 15 October, and provided a Statement of Policy Intent on 19 June<sup>4</sup>.
2. At its meeting on 24 September 2019, the Assembly's Business Committee agreed in principle to refer the Bill to the Health, Social Care and Sport Committee for Stage 1 scrutiny. It deferred a decision on the proposed timetable for the Bill to allow the Committee time to consider it.
3. In bringing forward the Bill, the Welsh Government proposed that it follow a curtailed timetable for scrutiny, as it was anticipated that the Bill needed to be enacted and implemented by 1 April 2020. The timetable put forward by the Minister for Finance and Trefnydd for consideration of the general principles proposed a date to report by Tuesday 12 November 2019. The timetable also proposed a deadline for Stage 2 Committee proceedings of Friday 13 December 2019.
4. At its meeting on 3 October, the Health, Social Care and Sport Committee agreed to the proposal for a curtailed scrutiny process but expressed its disappointment that the timetable limited the opportunity for engagement with stakeholders.<sup>5</sup>

### The Committee's approach

5. As a result of the curtailed timetable, it was not possible to hold a public consultation exercise. The Committee did, however, invite interested parties to submit their views on the Bill in writing. We received six responses, which are published on the Assembly's website.
6. The Committee held one oral evidence session on 23 October, when we heard evidence from:
  - Minister for Health and Social Services;

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<sup>1</sup> National Health Service (Indemnities) (Wales) Bill

<sup>2</sup> Explanatory Memorandum

<sup>3</sup> Record of Proceedings, 15 October 2019

<sup>4</sup> Statement of Policy Intent, 19 June 2019

<sup>5</sup> Letter from Chair to the Business Committee regarding the timetable for the consideration of the National Health Service (Indemnities) Bill, 4 October 2019



- Medical Defence Union;
- Medical and Dental Defence Union of Scotland.

7. The Committee wishes to thank all those who contributed to this inquiry.

### Other Committee's consideration of the Bill

8. The Assembly's Finance Committee took evidence from the Minister on the financial implications of the Bill on 23 October 2019. It reported on its conclusions on 12 November 2019

9. The Assembly's Constitutional and Legislative Affairs Committee took evidence from the Minister on the appropriateness of the provisions in the Bill that grant powers to make subordinate legislation on 21 October 2019. It reported on its conclusions on 12 November 2019.

## 2. General principles and the need for legislation

### The Bill's purpose and intended effect

**10.** The purpose of the Bill is to amend section 30 of the National Health Service (Wales) Act 2006. This will give the Welsh Ministers a regulation-making power to establish an “Existing Liabilities Scheme”, to indemnify General Practitioners (GPs) in Wales for historic clinical negligence claims relating to care given prior to 1 April 2019.

**11.** The Existing Liabilities Scheme (ELS) is intended to complement the Future Liabilities Scheme (FLS) which is already in operation. The FLS provides cover for claims incurred after 1 April 2019. A similar scheme – the Clinical Negligence Scheme for General Practice (CNSGP) - was established in England in April 2019.

### Requirement for GPs to have indemnity cover

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**12.** All regulated healthcare professionals in the UK are required to have clinical negligence cover as a condition of their registration. In the case of medical practitioners (including GPs), this is a condition of licence under the Medical Act 1983. In the UK, GPs typically obtain indemnity cover from one of three medical defence organisations (MDOs). These are MPS (Medical Protection Society), MDDUS (Medical and Dental Defence Union of Scotland), and MDU (Medical Defence Union).

**13.** The Explanatory Memorandum (EM) states that the cost of indemnity increased by an estimated 7% per year between 2013 and 2017, driven by factors including an ageing population, innovations in medical technology keeping people alive longer, more people living with complex conditions, and an increasing “claims culture”.<sup>6</sup>

**14.** Additionally, changes to the Personal Injury Discount Rate (PIDR) in February 2017 led to significant increases in the cost of meeting historic liabilities for MDOs, and therefore higher indemnity premiums for GPs. The EM highlights the potential negative impact of rising indemnity costs on GP recruitment and retention<sup>7</sup>:

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<sup>6</sup> Explanatory Memorandum, paragraph 3.2

<sup>7</sup> Explanatory Memorandum, paragraphs 3.3 and 3.4

“The rising cost of indemnity (as reflected in MDO subscriptions) has been cited as one of the reasons why GPs are reducing their hours, and if the trend continues, may create a further shortage of GPs as they will increasingly be driven away from the profession resulting in an impact on the provision of health services in Wales.

The Welsh Government made a commitment to GPs in Wales, as part of the changes to the General Medical Services contract for 2017/18, to develop a solution to address this issue.”<sup>8</sup>

### The Future Liabilities Scheme (FLS) and the proposed Existing Liabilities Scheme (ELS)

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**15.** In May 2018, the Minister announced his intention to introduce a state-backed scheme to provide indemnity for providers of GP services in Wales from April 2019. The National Health Service (Clinical Negligence Scheme) (Wales) Regulations 2019 established the Future Liabilities Scheme (FLS) to provide cover for claims incurred after 1 April 2019.

**16.** A similar scheme has been established in England, and the Minister has stated that the Welsh scheme has been aligned to the English scheme “as far as possible”:

“This has ensured that GPs in Wales are not at a disadvantage relative to GPs in England and will also help to ensure that GP recruitment and cross border activity will not be adversely affected by different schemes operating in England and Wales.”<sup>9</sup>

**17.** In November 2018, the Minister made a commitment to extend the state-backed scheme to provide cover for historic clinical negligence claims, i.e. those reported or incurred but not reported, prior to 1 April 2019. This is subject to the completion of legal and financial due diligence and satisfactory negotiations with Medical Defence Organisations (MDOs).<sup>10</sup> This mirrors the commitment made in England to extend the state-backed scheme to cover existing liabilities.

**18.** The Welsh Government will assume responsibility for GPs’ existing liabilities in return for a transfer of assets from the MDOs. The EM states that “discussions with MDOs on ELS arrangements are ongoing”.<sup>11</sup>

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<sup>8</sup> Explanatory Memorandum, paragraph 3.3

<sup>9</sup> Explanatory Memorandum, paragraph 3.6

<sup>10</sup> **Written statement – GP professional indemnity**: 15 November 2018

<sup>11</sup> Explanatory Memorandum, paragraph 3.7

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## The position in Scotland

**19.** The Scottish Government has not announced any similar plans for a state-backed GP Indemnity Scheme in Scotland. Therefore, a person working as a GP in Scotland currently must arrange adequate and appropriate indemnity insurance in order to practice.

**20.** We were advised that the claims environment in Scotland is “massively benign” when compared to England and Wales and that indemnity costs are a fraction of what they have been in England and Wales. Further, we heard that “the legal environment in Scotland has not encouraged claimant law firms to move in and try and progress medical negligence cases. So, the law in Scotland has never encouraged the sort of problems that we’ve seen in England and Wales”.<sup>12</sup>

## Evidence from stakeholders

**21.** Both the British Medical Association (BMA) Cymru and Royal College of GPs (RCGP) Cymru were in favour of the Bill. The BMA said it was “supportive of the Welsh Government’s intention to introduce an ELS scheme through this course of action”. It stated that its main priority was to:

“ensure that the created scheme does not put Welsh GPs at a disadvantage when compared to English colleagues, which could create a barrier to recruitment and retention.”<sup>13</sup>

**22.** It welcomed the commitment set out in the EM that the Welsh and English schemes will be aligned as far as possible.

**23.** Similarly, the RCGP was supportive of the Bill and believed it was the right approach to dealing with the issue of existing liabilities:

“there is a serious risk that if this Bill is not enacted that GPs in Wales may be at a disadvantage relative to GPs in England and GP recruitment and cross border activity could be adversely affected.”<sup>14</sup>

**24.** It also encouraged the Welsh Government to maintain engagement with GP representative bodies.

**25.** The MPS described the Bill as “necessary and important” and offered the legislation its “full support”, saying that it was “important that the profession has

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<sup>12</sup> RoP, 23 October 2019, paragraph 273

<sup>13</sup> Written evidence, BMA Cymru

<sup>14</sup> Written evidence, RCGP

clarity on their indemnity arrangements” and that the Bill was an “important component of achieving that clarity”.<sup>15</sup> It went on:

“We are eager for GP members in Wales to have parity with their English colleagues, and for this to be achieved as soon as possible. The passage of this legislation is essential for that to be achieved.”<sup>16</sup>

**26.** MDU was also “supportive of this move towards state indemnity”, which it felt was inevitable in the absence of wider law reforms (discussed in Chapter 4). It described the Bill as a piece of enabling legislation, which was needed to put in place schemes that the MDU agreed were necessary. However, it felt that “this should have happened quite a long time ago”.<sup>17</sup> It also questioned whether the holistic support provided to GPs would be of the same standard when provided by a government body as it would be by an organisation that existed solely to look after its members:

“GPs themselves are independent contractors—it’s their whole life, providing care to their patients. When a patient sues them, personally and professionally it is a massive life event. It’s not just writing a witness statement for a trust; it’s all-encompassing. And we will speak to them 24 hours on the phone, we will sit down with them at their practice, we’ll have an individual lawyer instructed for that doctor and we will hold their hand all the way through to winning that claim, if we can win the claim.”<sup>18</sup>

**27.** MDDUS, however, referred to state-backed indemnity for GPs as “a flawed operating model”, saying it was “dismayed that there was no consultation on the model to be adopted in either England or Wales and nor was any public procurement process undertaken”.<sup>19</sup>

**28.** In its view, the indemnity model pursued by the Welsh Government could lead to “significant jeopardy for individual GPs” as a state-backed provider of indemnity would not have any responsibility to protect the professional standing of the doctor concerned in a claim. This wider cover, it said, was part of the service provided to its Members, and the loss of it “will, we believe, place the credibility of the scheme at risk in the medium-term”.<sup>20</sup>

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<sup>15</sup> Written evidence, MPS

<sup>16</sup> Written evidence, MPS

<sup>17</sup> RoP, 23 October 2019, paragraph 216

<sup>18</sup> RoP, 23 October 2019, paragraph 221

<sup>19</sup> Written evidence, MDDUS

<sup>20</sup> Written evidence, MDDUS

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**29.** However, MDDUS said that it accepted that the decisions in favour of state-backed indemnity had been made. It further stated that, while it did not wish to comment on any specific provisions in the Bill, it believed it made sense for the Welsh Government and Assembly to have the same decision-making scope on questions of medical negligence as was open to the UK Government and Parliament.<sup>21</sup>

### Evidence from the Minister

**30.** The Minister told us that the progressive rise in indemnity insurance fees was causing a real problem for a number of GPs, who, as a result, were looking at whether they wanted to remain in practice, or remain in practice for the same number of sessions. This was further exacerbated by the Personal Injury Discount Rate change which, he told us, produced a significant increase in indemnity insurance rates. He said:

“for a number of GPs, they really were looking for the door to leave. So, Governments across the UK recognised that there was a need to intervene to make sure that indemnity insurance was on a footing where it was affordable, and that’s why we now have state-backed schemes being introduced.”<sup>22</sup>

**31.** The Minister told us that it was necessary to amend the primary legislation to provide for a state-backed indemnity scheme because:

“the powers that we’re able to use to deal with future liabilities don’t specifically apply to providing an individual indemnity to individual general practitioners who have paid a premium in the past—so it’s, if you like, lifetime cover going backwards.”

**32.** He went on to say that, “if we don’t take the powers, then there’s a real risk we won’t be able to provide the scheme”.<sup>23</sup>

**33.** Further, he told us that, in spite of differences between the UK and Welsh Governments:

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<sup>21</sup> Written evidence, MDDUS

<sup>22</sup> RoP, 23 October 2019, paragraph 68

<sup>23</sup> RoP, 23 October 2019, paragraph 69

“there is a practical and constructive relationship on this, where there’s a recognition that it’s not in the interest of GPs, whether they practice in England or Wales, to have significantly different systems.”<sup>24</sup>

## Our view

**34.** Arrangements are in train in England to transfer historic clinical negligence liabilities for GPs from private indemnity providers to the state. We are keen to ensure that GPs practising in Wales are not disadvantaged compared to their colleagues in England as a consequence of this policy decision, and we are satisfied that the Bill is necessary in order to achieve this. As such, we are content to recommend that the Assembly agrees the general principles of the Bill.

**35.** However, we note the evidence of the risk that a state-backed indemnity provider will not have the same responsibility to protect the professional standing of the doctor concerned in any given claim, or to provide additional support during the course of a claim. We are keen to ensure that any state-backed scheme will not represent a poorer offer in this regard than is currently available via a private provider and we ask the Minister to provide reassurance on this point during the Stage 1 debate.

**Recommendation 1.** We recommend that the National Assembly agrees the general principles of the National Health Service (Indemnities) (Wales) Bill.

**Recommendation 2.** We recommend that the Welsh Government provides a commitment to the Assembly that a state-backed existing liabilities scheme will not represent a lesser offer to GPs in terms of the defence of their professional standing. Further, that claims against GPs for clinical negligence will be defended as robustly under a state-backed scheme as they would be by the medical defence organisations. The Minister for Health and Social Services should provide this commitment as part of the Stage 1 debate.

**36.** We do, however, have a number of specific comments about the Bill, including the asset transfer arrangements and the engagement between the Welsh Government and the MDOs. These are set out in the Chapters that follow.

**37.** Notwithstanding our support for the general principles, we feel that the use of a curtailed procedure for scrutiny of legislation does not allow for robust examination of the evidence, not least because it limits the opportunities for meaningful engagement with those affected by the Bill.

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<sup>24</sup> RoP, 23 October 2019, paragraph 70

**38.** In this case, we understand the practical reasons for the Welsh Government to pursue a quick passage for the Bill through the Assembly to enable it to put in place arrangements for historic clinical negligence liabilities. However, having already made provision for a future liabilities scheme, the Welsh Government must have been aware, some time ago, of the need for arrangements for an existing liabilities scheme. More timely action on its part may have negated the need for a curtailed process.



## 3. Matters relating to the Bill

### Costs of the Bill and asset transfer arrangements

**39.** The Regulatory Impact Assessment (RIA) that accompanies the Bill sets out administrative costs of £30,000 relating to the drafting of the regulations to establish the ELS and implement the Bill. These costs will be incurred in 2019-20, and will fall on the Welsh Government.

**40.** Under the Bill, the Welsh Government will assume responsibility for GPs' existing liabilities in return for a transfer of assets from the MDOs. The RIA sets out that the current estimate of liabilities that would be assumed by Welsh Government is in the region of £100m, subject to successful negotiation and agreement with the three MDOs.

**41.** The EM states that “discussions with MDOs on ELS arrangements are ongoing”.<sup>25</sup> During our evidence session, the Minister confirmed that discussions were at a more advanced stage with two of the three medical defence organisations [MPS and MDDUS], “because we’ve been able to have a more open conversation with them based on information about how they’re operating and what the asset transfer may or may not look like”.<sup>26</sup>

**42.** MDDUS confirmed that it had agreed an Existing Liability Scheme (ELS) transaction with the UK Government to transfer existing GP liabilities to them and remained in discussions with the Welsh Government on the same issue:

“Our position, as has been made clear on many occasions, remains that the ELS is a poor piece of public policy, as we do not need any form of public support to be able to give assurance to our existing GP members that we could meet all of their expected and estimated past liabilities. However, the Board of MDDUS has concluded that it is in the best interests of existing and potential members to make the transaction.”

“This is especially so, given that the UK Government has proceeded with an ELS transaction with one of our competitors which would distort competition in the absence of a similar agreement with us.”

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<sup>25</sup> Explanatory Memorandum, para 3,7

<sup>26</sup> RoP, 23 October 2019, paragraph 97

**43.** MPS told us that it “hoped to finalise plans for the transfer of assets to a Welsh Government ELS in the near future”, and that it “valued the constructive and collaborative way in which the Welsh Government have conducted negotiations over the (...) ELS with us”.<sup>27</sup>

**44.** In contrast, the MDU’s evidence did not present a positive picture of negotiations with the Welsh Government, saying:

“To date (...) the Welsh Government has not entered substantive discussions with the MDU regarding the level of asset transfer that may be required.”<sup>28</sup>

**45.** The MDU stated that dialogue with the Welsh Government had started to move forward slightly, but:

“realistically, we are disappointed at the level of progress we’ve made towards an existing liabilities scheme that includes MDU members, which will be around about 40 to 43 per cent of Welsh GPs included within those members.”<sup>29</sup>

Further:

“I think we would struggle to characterise the dialogue to date as a proper negotiation. There has been dialogue, and there’s quite a long way to go from our perspective.”<sup>30</sup>

**46.** It also reported that failings on the part of the Welsh Government to put in place arrangements for historic negligence claims prior to 1 April 2019 had resulted in a “financial gap” for that organisation. MDU said that this was because arrangements for the FLS meant that GPs were now state-indemnified for future claims and, as such, no longer paid subscriptions for their indemnity which the MDU relied upon to meet historic claims.

**47.** The MDU told us that, as efforts to reach agreement with the Welsh Government had not been successful, it “had to resort to judicial review proceedings” against both the UK and Welsh governments.<sup>31 32</sup>

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<sup>27</sup> Additional written evidence, MPS, 24 October 2019

<sup>28</sup> Written evidence, MDU

<sup>29</sup> RoP, 23 October 2019, paragraph 194

<sup>30</sup> RoP, 23 October 2019, paragraph 196

<sup>31</sup> Written evidence, MDU

<sup>32</sup> RoP, 23 October 2019, paragraph 235

“There is legal action that is ongoing. To give a very broad overview, [it] looks at issues of fairness and whether or not the negotiations to date are likely to achieve the purposes that they were set out to achieve.”<sup>33</sup>

**48.** We heard from the MPS and MDDUS that their arrangements for collecting subscriptions from their members and holding a long-term surplus were different to MDU and as such would not result in a financial gap for those organisations.<sup>34</sup>

**49.** Responding to evidence from the MDU about a lack of engagement from the Welsh Government, the Minister stated:

“MDU is a big player (...) and we are keen to get to the point where we can reach agreement with them. So, we are keen to move on and we’ve made offers about how that could be done. And mediation is a possibility, if it helps.

We are not on a mission to force them to transfer their assets, because part of the point is that the Bill is one thing and it’s about giving us the powers to introduce a scheme. What that scheme will look like and how we then use the resource behind that is different, because that isn’t really the Bill; that’s the practical operation.”<sup>35</sup>

**50.** The Minister confirmed that the Bill would not be affected if agreement with all three MDOs could not be reached:

“No, it won’t affect the Bill, because the Bill will give us the powers, but the challenge will then be about how far a state scheme goes. And if the MDU don’t reach agreement, then the current MDU members will proceed on the basis that their cover is with the MDU, not with a state-backed scheme. So, the powers to deliver the scheme—that’s what the Bill is about.”<sup>36</sup>

**51.** We asked the Minister if he was confident that the asset transfers would cover 100 per cent of the Welsh Government’s liabilities as a consequence of the Bill. He told us:

“no, we can’t be robustly confident about that, but that’s part of the point about insurance and the way that it works.

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<sup>33</sup> RoP, 23 October 2019, paragraph 232

<sup>34</sup> RoP, 23 October 2019, paragraph 203 and additional written evidence, MPS, 24 October 2019

<sup>35</sup> RoP, 23 October 2019, paragraph 103

<sup>36</sup> RoP, 23 October 2019, paragraph 106

That's part of the evidence you get about the nature of the assets being transferred, about the understanding of the liabilities. But, as we know, there are some things that you won't know are there until they're crystallised, and that may not crystallise until some point in the future, when a claim is made."<sup>37</sup>

## Coverage of the scheme

**52.** The Statement of Policy Intent published alongside the Bill indicates that “any indemnity provided under the ELS would need to cover the clinical negligence liabilities of GPs and others working in a general practice setting” as long as a policy of indemnity cover with one of the relevant MDOs was in place at the time the claim relates to.

**53.** We sought clarification from the Minister on this matter and he confirmed that “all those individuals who have paid a premium in the past (...) will be covered by the existing liabilities scheme”.<sup>38</sup>

**54.** Further, the Minister's official confirmed that staff employed within a GP practice would be covered<sup>39</sup> and that this included:

“practice staff, whether they be salaried GPs, locum GPs, practice pharmacists, practice nurses, et cetera.”<sup>40</sup>

**55.** The Minister went on to say that the main areas that the Bill would not cover were “private work, complaints involved in coroners' cases, GMC hearings”.<sup>41</sup>

## Power to make subordinate legislation

**56.** The EM states that the regulation-making powers in the Bill will be subject to the negative procedure. The Minister confirmed that use of the negative procedure was consistent with the procedure previously used for the future liabilities scheme”<sup>42</sup>

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<sup>37</sup> RoP, 23 October 2019, paragraph 114

<sup>38</sup> RoP, 23 October 2019, paragraph 121

<sup>39</sup> RoP, 23 October 2019, paragraphs 168-171

<sup>40</sup> RoP, 23 October 2019, paragraph 122

<sup>41</sup> RoP, 23 October 2019, paragraph 133

<sup>42</sup> RoP, 23 October 2019, paragraphs 117-119

## Our view

**57.** The Welsh Government has estimated that the liabilities it will assume under this Bill are in the region of £100m, subject to successful negotiation and agreement with the three MDOs.

**58.** We note that the Welsh Government is close to an agreement on asset transfer with two of the three MDOs. We were, however, very disappointed to hear from the MDU that the Welsh Government has failed to engage in any meaningful discussions with it on this matter.

**59.** Without detailed discussions and negotiations having taken place, it is difficult to be confident in the Welsh Government's assessments of liabilities arising out of the legislation. This could have serious implications for the public purse, which will doubtless be called upon to make up any shortfall in the assets available to the Welsh Government to meet historic claims.

**60.** We believe it is desirable for the effective operation of a state-backed scheme that agreement is reached with all three MDOs about the levels of asset transfer, and that the levels agreed represent a fair and proportionate settlement, based on detailed negotiations about the liabilities being assumed. As such we urge the Welsh Government to commit to meaningful discussions with the MDU with greater vigour.

**Recommendation 3.** The Welsh Government must engage in meaningful discussions with the MDU to reach agreement about the levels of asset transfer which represent a fair and proportionate settlement for the purposes of indemnifying GPs against historic claims and achieving value for public money. It must do this as a matter of priority.

**61.** We understand that arrangements for collecting subscriptions and holding long-term surpluses for meeting historic claims vary amongst the three MDOs. That said, it was concerning to hear evidence of a "financial gap" developing in the MDU's assets as a result of the timing of this Bill, particularly as the Welsh Government is seeking an appropriate transfer of these assets in order to limit its own liabilities under the Bill. More timely action on the part of the Welsh Government in bringing forward this legislation could have addressed this issue.

**62.** We note the Minister's evidence about the coverage of the scheme. Further, we note that the use of the negative procedure for regulations under the Bill is consistent with the same procedure used for the regulations made for the introduction of the future liabilities scheme.

## 4. Wider law reform

**63.** We heard evidence that the three MDOs were in favour of legal reform to address the rising costs of clinical negligence.

**64.** MDDUS stated that the policy of state-backed indemnity for GPs was a “missed opportunity” for clinical negligence law reform, arguing that the policy pursued through the Bill is a “distraction of effort from the more central issues facing the NHS and clinical negligence”.

**65.** Similarly, MPS called for a “package of legal reforms” to address the rising cost of clinical negligence, which it said was responsible for diverting money away from front-line care at a time when the NHS is facing increasing financial pressures.<sup>43</sup>

**66.** MDDUS told us that the changes to the Personal Injury Discount Rate (PIDR) in 2017 had resulted in the bringing of clinical negligence claims being more attractive, and therefore more expensive to the NHS. It argued:

“the failure of both the Department for Health and Social Care and the Welsh Government to have any apparent impact on the Lord Chancellor’s decision represents a significant failure of joined-up Government thinking on the main driver of rising clinical negligence claims and GP indemnity fees.”<sup>44</sup>

**67.** In the view of MDDUS, the focus of government should have been to “make changes to the tort of clinical negligence in medical malpractice to help restrain costs and remove the incentive to run cases which are less than well-founded”. It cited Australia and the United States as examples of tort reform which have reduced the costs of clinical negligence claims to their respective health care systems.<sup>45</sup>

### Evidence from the Minister

**68.** In response to evidence from MDDUS about a lack of impact by the Welsh Government on the decision to change the PIDR, the Minister stated:

“when the Lord Chancellor made decisions about the discount rate, it wasn’t something that any health department in the UK was clear-

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<sup>43</sup> Additional written evidence, MPS, 24 October 2019

<sup>44</sup> Written evidence, MDDUS

<sup>45</sup> Written evidence, MDDUS

sighted on or had taken into account, but it had really big consequences. (...) it really upset and threw up in the air an already difficult indemnity insurance market for medical professionals.”<sup>46</sup>

**69.** More broadly, in relation to evidence about the need for reform of tort law, the Minister told us:

“there are really difficult questions there about access to justice and the bids to say there should be more fixed costs—well, I think that’s an issue that if you wanted to get into, bearing in mind that that’s not devolved, but if you chose, as a policy committee, to look at that, I think you’d need to look at access to justice on more than one side, and not simply about the business of operating an indemnity insurance operator, whether they’re a mutual, or whether they’re, if you like, an alternative form of insurance provider.”<sup>47</sup>

## Our view

**70.** The rising cost of clinical negligence, and the financial impact of this on the NHS, is clearly a live issue. Whilst this Bill represents an attempt by the Welsh Government to mitigate the impact of these rising costs for GPs, and deal with issues around recruitment and retention of general practitioners in Wales, it does not address the root causes of the problem.

**71.** Given that these root causes have not been addressed, and neither have fundamental changes to the law in this area been considered, money which could otherwise be used for healthcare provision may be diverted to meet the rising costs of claims.

**72.** As such, we believe that there is merit in a wider examination of the law around clinical negligence, and there are examples from other countries which could usefully be considered in more detail. This is a matter that the Welsh Government should pursue with its UK counterparts.

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<sup>46</sup> RoP, 23 October 2019, paragraph 163

<sup>47</sup> RoP, 23 October 2019, paragraph 164