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Date: 13 January 2020

Dear Dr Lloyd

Re: the General Medical Practice Indemnity Scheme - claims handling and GPs

I set out for the Committee's information some concerns the MDU has on behalf of our GP members about the operation of the general medical practice indemnity scheme. We raise these concerns on behalf of the MDU's GP members, but the issues we identify are relevant to all GPs whose claims will be handled by the Welsh Government's state indemnity scheme.

The MDU noted that the Minister informed the Committee in his letter of 7 January of the reporting arrangements that will cover the working of the two schemes that will provide indemnity for GPs in Wales. There will be an Annual Report which will provide details of the technical operation of the two schemes which are:

- The Future Liabilities Scheme (FLS) will deal with all claims from NHS primary care arising from incidents that happen after 1 April 2019
- The Existing Liabilities Scheme (ELS) is intended to deal with all claims arising from incidents that happened before 1 April 2019.

As you are aware, the MDU has not yet concluded any existing liability arrangement for our GP members with the Welsh Government and we continue to handle our GP members' historic claims.

The MDU has some concerns about the way in which claims will be handled under the FLS which would apply equally to any ELS claims where arrangements are agreed with the medical defence organisations to hand their GP members' historic claims over to the Welsh Government. Our concerns are set out below.

Lack of experience of GP claims and no published information about claims handling outcomes

There was no public procurement exercise for the FLS which the Welsh Government decided will be run by the Legal & Risk Services (L&RS) department of NHS Wales Shared Services Partnership. There is no information available about how the handling of GP claims by L&RS will provide value for money for the Welsh taxpayer, though the Minister gave an undertaking to the Assembly in the 19 November plenary debate on the National Health Service (Indemnities) (Wales) Bill that:

'NHS Wales SSP is fully committed to providing GPs in Wales with a high-quality service, commensurate with the level of services GPs have become accustomed to when dealing with the three medical defence organisations.'

The MDU is concerned about the ability of L&RS to provide the same service for GPs that they received (and continue to receive for historic claims) from the medical defence organisations because L&RS has very limited experience of dealing with GP claims. Until 1 April 2019, L&RS dealt principally with claims arising from health boards and hospitals. It may have had experience of assisting GPs with claims arising from out of hours work where they were providing such services to health boards over the last couple of years, but that experience would be limited.

The Welsh Government has not provided any information about L&RS's level of service, expertise and outcomes in handling claims against health boards and hospitals. The only equivalent information available about an NHS body is that from NHS Resolution (handling claims against English NHS trusts and organisations) which settled only 44% of claims without payment of damages in the financial year 2018/19. The MDU equivalent figure for medical claims (independently audited) was over 80%. That means the MDU paid compensation in fewer than 20% of cases against our medical members, whereas NHS Resolution paid out in 56%.

GPs' professional reputations and careers are at stake

The MDU's claims outcomes are as important in terms of saving costs and value for money as they are in protecting GP members' professional reputations. One of the important differences between GP and hospital claims is that claims against GPs are made against named individuals, whereas a claim against a health board or hospital is against the institution and individual doctors are not named. For GPs claims are personal and they are exposed to professional and reputational damage if a claim is not handled well. A claim is often part of a wider 'multiple jeopardy' and there are often other medico-legal matters such as an inquest and/or a complaint to the General Medical Council and/or a disciplinary investigation arising from the same incident that gave rise to the claim. It follows that the way in which a claim is handled, including any admissions, made will have an impact on these other medico-legal matters that can also affect a GP's professional and personal reputation. GPs also have a more direct and ongoing relationship with patients which they need to maintain and, for all these reasons it is fundamentally important that they are kept fully informed as the claim progresses and included in any decisions that are made, at all stages of the claim.

Concerns for GPs if claims are made against health boards

There is a further concern about the FLS because in the Regulations governing the scheme the arrangement for the Welsh Government to handle claims is made not with the GPs but with the health boards. The Welsh Government has asked claimant lawyers to sue health boards, rather than the GPs. The MDU's experience is that claimants' lawyers continue to sue GPs direct for their historic claims but, even if they sue the health boards direct for FLS claims, individual GPs are still likely to be named in the claim. The potential concern for GPs is that in such circumstances they could have less control and less input into claims where they are named but not the lead party. Also, a health board may take a different view about the need to make an admission of liability and/or settle (pay) a claim because it has different considerations to those of one or more GPs named in the claim.

Areas to explore

The following questions and observations may help to elicit the information necessary to provide a benchmark for reporting on the way in which claims are handled now, so that L&RS's technical claims handling and service provided to GPs can be measured over the coming years.

- What is the current success rate of L&RS's claims handling, so that the quality of service can be benchmarked against what they achieve on behalf of GPs over the next 5 years
- What is L&RS's average cost of defending a claim?
- It would be helpful for GPs to be given a formal undertaking that they will be involved in all stages of the claim and kept fully informed, including being able to see in advance drafts of all relevant documents
- It would be helpful for GPs to be given an undertaking that L&RS will not do anything in the handling of the GP's claim that will obstruct the defence of the GP elsewhere – for example with the GMC or in a disciplinary investigation?
- It would be helpful for GPs to have an undertaking that L&RS won't settle a claim without the GP's consent?

Additional concerns – admissions of liability

There is another serious concern for GPs that arises as a result of the lack of clarity in the Regulations that govern the FLS. We were not aware of the content of the Regulations before they were laid but as soon as they were laid (March 2019), and we realised the potential concerns for GPs, we contacted Welsh Government officials seeking an undertaking on behalf our GP members. We have been unsuccessful so far and last wrote to the Welsh Government on this matter on 11 November 2019. We hope the Committee will appreciate the potential difficulty the Regulation causes for GPs: it requires GPs not to make admissions of liability if they wish to have their claims handled by L&RS, but it does not define what constitutes such an admission of liability.

The problem

The National Health Service (Clinical Negligence Scheme) (Wales) Regulations 2019 govern the FLS. Regulation 15 includes a number of exclusions and the MDU has a particular concern about Regulation 15 (1) (a)

(1) Except to such extent as the Welsh Ministers may determine, the following are excluded from the Scheme—

(a) any liability admitted by a member without first obtaining the Welsh Ministers' consent in writing;

because the regulation does not define the term 'any liability admitted'. This is a concern for GPs who may find themselves being investigated by one or more different bodies which could

include coroners, the GMC or the police. In such circumstances GPs will continue to turn to their medical defence organisations and we may advise them to make certain admissions to these bodies. For example, a GP who has inadvertently given a patient too high a dose of medication which has resulted in harm to the patient may be advised to make a statement to the GMC. This could include admissions that the GP had prescribed too high a dose which had harmed the patient; that the GP then told the patient what had gone wrong, what could be done to put it right and apologised to the patient. The GP may also provide the GMC with information about what had been learned from the mistake and what steps had been taken (training courses as well as changes in the practice) to ensure this sort of mistake wouldn't happen again. The patient (who had complained to the GMC) would see this GP's statement to the GMC and could share it with a solicitor who may advise the patient to sue.

Because admissions of this nature could be taken as admissions of liability and because it may be in GPs' and their patients' interests to make such admissions to investigatory, regulatory and other statutory bodies, the MDU sought an undertaking from the Welsh Government that such admissions (outside the clinical negligence procedure) would not constitute an admission of liability under Regulation 15. The definition in Regulation 15 is not clear and GPs must be confident they wouldn't be excluded from the state indemnity scheme because of admissions they are advised (and may be required) to make elsewhere.

To date, the Welsh Government has refused to provide the MDU's GP members with such an undertaking, though the MDU has received an undertaking from NHS Resolution (as the Regulations governing the English state scheme have similar exclusions) which we have shared with the Welsh Government. We hope the Welsh Government or L&RS may be persuaded to provide an undertaking similar to that from NHS Resolution so that GPs in Wales can also have confidence that they can provide information and make appropriate statements to regulatory, investigatory and other bodies as part of their statutory processes, safe in the knowledge that this will not breach the requirement in Regulation 15.

The solution

The undertaking we have suggested to the Welsh Government is derived from that provided by NHS Resolution and something along similar lines to the following:

The Welsh Government (and/or Legal & Risk Services) confirms, for the avoidance of any doubt, that it will not withhold indemnity under the GMPI because a general practitioner has taken action to comply with their ethical, professional or statutory obligations.'

I hope this briefing is helpful and please do let me know if the Committee has any questions.

With best wishes,

Yours sincerely



Mary-Lou Nesbitt

Head of Government & External Relations