

# National Health Service (Indemnities) (Wales) Bill Bill Summary

January 2020



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## Bill Summary

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## Introduction

**The Minister for Health and Social Services, Vaughan Gething AM, introduced the National Health Service (Indemnities) (Wales) Bill** on 14 October 2019.

The purpose of this short, technical 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 GPs in Wales for historic clinical negligence claims relating to care given prior to 1 April 2019.

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.

The Welsh Government proposed that the Bill follow a curtailed timetable for scrutiny, as it was anticipated that the Bill would need to be enacted and implemented by 1 April 2020.

The **Health, Social Care and Sport Committee** considered the general principles of the Bill on 23 October 2019, and published its Stage 1 report on 12 November 2019.

The **Finance Committee** and **Constitutional and Legislative Affairs Committee** also considered the Bill and reported on 12 November 2019.

## Legislative competence

The **Explanatory Memorandum (EM)** accompanying the Bill states:

The National Assembly for Wales (“the Assembly”) has the legislative competence to make the provisions in the National Health Service (Indemnities) (Wales) (“the Bill”) pursuant to Part 4 of the Government of Wales Act 2006 as amended by the Wales Act 2017.

The Llywydd issued a **statement** on 14 October 2019 confirming that, in her view, the provisions of the Bill would be within the Assembly’s legislative competence.

## Main elements of the Bill

The Bill has two sections.

Section 1 inserts the definition ‘mutual indemnity scheme’ into subsection (1) of section 30 of the **NHS (Wales) Act 2006**. This will distinguish schemes made in accordance with this section (such as the Future Liabilities Scheme where several health service bodies meet their expenses and liabilities by combining resources in a collective fund), from schemes made under a new subsection (8) which will be termed ‘direct indemnity schemes’.

Section 1 also expands the bodies that may be included in a ‘mutual indemnity scheme’. The additional bodies inserted into section 30(2) by the Bill will include all of those persons providing, or who have provided, primary medical services in Wales, in addition to a body or other person providing or arranging the provision of health services, under an arrangement with a Local Health Board, NHS Trust or Special Health Authority. This would include for example a person providing services under a contract with a Local Health Board.

Section 1(8) of the Bill inserts a further provision into section 30 of the NHS (Wales) Act. It creates a power for the Welsh Ministers to make regulations to:

- establish a statutory scheme where they may indemnify the persons or bodies listed in section 30(2). The Bill names these ‘direct indemnity schemes’. Paragraph 3.16 of the EM says that the regulations proposed to be made under section 1(8) will apply to those historic clinical negligence claims that have either been reported, or which have been incurred but not reported, prior to 1 April 2019 in accordance with the proposed legal agreements between the Welsh Ministers and participating Medical Defence Organisations;
- set out how the Welsh Ministers will consider the liability of General Practitioners (GPs);
- make any payments due under the indemnity provided to GPs.

Section 2 sets out the short title (National Health Service (Indemnities) (Wales) Act 2020), and that the legislation will come into force on the day after it receives Royal Assent.

## Background to the Bill

### Requirement for GPs to have indemnity cover

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).

The EM states that the cost of indemnity increased by an estimated 7% per year between 2013 and 2017. This increase was 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’. Additionally, changes to the Personal Injury Discount Rate (PIDR) in February 2017 led to significant increases in claims costs 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:

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 (“GMS”) contract for 2017/182, to develop a solution to address this issue. (EM, para 3.3)

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

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 scheme will deliver a sustainable, longer term, solution to address the increasing costs of GP professional indemnity.

The **National Health Service (Clinical Negligence Scheme) (Wales) Regulations 2019** established the Future Liabilities Scheme (FLS). The FLS has also been referred to as **GMPI (General Medical Practice Indemnity)**. As noted earlier, the FLS will provide 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. As **described** by the Minister, the Welsh scheme has been aligned to the English scheme ‘as far as possible’:

This will ensure that general medical contractors and their practice teams 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.

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’. This mirrors the commitment made in England to extend the state-backed scheme to cover existing liabilities.

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’ (EM, para 3.7).

### Difference between the FLS and ELS schemes – why the amendment to the NHS (Wales) Act is needed

The FLS is a ‘mutual indemnity scheme’, where a number of health service bodies meet their liabilities by combining resources in a collective fund. The FLS is administered by NHS Wales Shared Services Partnership (NWSSP) Legal and Risk Services (who manage the Welsh Risk Pool).

The ELS would be a ‘direct indemnity scheme’, through which the Welsh Government would directly indemnify providers of primary medical services (GPs).

Section 30 of the NHS (Wales) Act allows the Welsh Ministers to make regulations to establish indemnity schemes whereby several bodies collectively meet their liabilities. These bodies are limited to health service bodies. The amendment to section 30 is needed because the scope of these powers is not sufficient to allow the Welsh Ministers to establish a scheme to directly indemnify providers of primary medical services.

## Financial implications of the Bill

The Regulatory Impact Assessment (RIA), published as part of the EM, 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.

The RIA states that there are no other costs directly attributable to the Bill.

As set out in the RIA, 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 all three MDOs. The Welsh Government will assume responsibility for these liabilities in return for a transfer of assets from the MDOs (subject to negotiation/agreement) therefore, as described in the RIA, the £100m estimate of liabilities is not the expected 'cost' to Welsh Government and not a cost that arises from the Bill.

More detailed financial information is not available 'due to its commercial sensitivity and nondisclosure agreements between MDOs and Welsh Government' (EM, para 3.11).

According to the RIA, the estimated liabilities that would be assumed by Welsh Government are expected to materialise over the period to 2027. The RIA notes that 'the actual value of the liabilities may fluctuate according to claims incidence patterns, claims notifications and the value of settled claims', and 'the exact profile of financial exposure over this period is not known'. (EM, para 3.9-3.10)

## Response to the Bill

### GPs

The British Medical Association (BMA) Cymru Wales provided **written evidence** to the Health, Social Care and Sport Committee stating that it is supportive of the Bill and the Welsh Government's intention to introduce an Existing Liabilities Scheme. The BMA said its main priority is ensuring that the scheme in Wales is not less favourable than the English equivalent, and it welcomes the commitment set out in the EM that the Welsh and English schemes will be aligned as far as possible:

As the representative body for Welsh GPs, we anticipate being involved in the development of the scheme, in the same manner as we were for the introduction of GMPI.

The BMA states that it does not anticipate any unintended consequences for Welsh GPs from the Bill as introduced.

The **Royal College of General Practitioners (RCGP)** is also supportive of the Bill and believes this is the right approach to dealing with the issue of existing liabilities. It also encourages the Welsh Government to maintain engagement with GP representative bodies.

### Medical defence organisations (MDOs)

The **Medical Protection Society (MPS)** described the Bill as 'necessary and important' and offered the legislation its 'full support':

It is important that the profession has clarity on their indemnity arrangements, and this Bill is an important component of achieving that clarity. (...)

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.

The **Medical Defence Union (MDU)** was also 'supportive of this move towards state indemnity', which it felt was inevitable in the absence of wider law reforms to address the rising costs of claims. It described the Bill as a piece of enabling legislation, which was needed to put in place necessary indemnity schemes. However, the MDU felt that 'this should have happened quite a long time ago' and described significant concerns around a lack of engagement from the Welsh Government. It **told** the Health, Social Care and Sport Committee that the MDU has initiated legal action against the UK and Welsh Governments which, at the

time of writing, is ongoing. This ‘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’.

The **Medical and Dental Defence Union of Scotland (MDDUS)** said that it accepted that the decisions in favour of state-backed indemnity had been made, however it referred to state-backed indemnity for GPs as a ‘flawed operating model’, and said that 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’.

In MDDUS’ 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 GP involved 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’.

## Assembly Committees

The **Health, Social Care and Sport Committee** recommended that the National Assembly agrees the general principles of the Bill.

In response to the concerns about the need to protect the professional standing of individual GPs, the Committee is seeking a commitment from the Minister 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 Committee is also calling for the Welsh Government to engage in meaningful discussions with the MDU as a matter of priority, in order to reach agreement about the level of asset transfer required.

The **Finance Committee** was broadly content with the financial implications of the Bill. It recommended that the Welsh Government identifies the total value of the asset transfer from the medical defence organisations in its consolidated accounts laid before the Assembly.

The **Constitutional and Legislative Affairs Committee** were concerned that the regulations to be made under the Bill (which will establish the Existing Liabilities Scheme) are to be subject to the negative procedure. The Committee recommended that the Bill is amended so that the affirmative procedure will be applied to the first regulations made under the Bill.

## Stage 2 consideration

Stage 2 consideration of the National Health Service (Indemnities) (Wales) Bill was carried out in the Health, Social Care and Sport Committee on 11 December 2019.

No amendments were brought forward by the Welsh Government.

Two amendments were tabled. These related to: reporting arrangements on the effectiveness of the legislation, and; ensuring agreement is reached with all three medical defence organisations about the transfer of assets before the legislation comes into force.

The amendments were withdrawn however, and the Bill remains unamended at Stage 2.