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Y Gweinidog Iechyd a Gwasanaethau Cymdeithasol
Minister for Health and Social Services



Llywodraeth Cymru
Welsh Government

Dr Dai Lloyd
Chair
Health, Social Care and Sport Committee

31 October 2019

Dear Dai,

National Health Service (Indemnities) (Wales) Bill

Thank you for inviting me to give evidence to the Committee on 23 October concerning the above Bill. During the session, I undertook to provide clarification on the matter of the £100m of liabilities referred to in the Bill's Explanatory Memorandum and Regulatory Impact Assessment. There are also some matters which I consider need further clarification for the Committee. For ease of reference I have structured this letter under respective headings.

Indemnity cover

During my responses to the Committee, on occasions I used the terms "indemnity insurance" or "insurance" or "indemnity premiums". For clarity, I was referring to the provision of indemnity, which is not an insurance product.

Both the Future Liabilities Scheme (FLS) for clinical negligence claims arising after 1 April 2019 and the proposed Existing Liabilities Scheme (ELS) for clinical negligence claims arising before April 2019 are discretionary "occurrence based" indemnity cover.

"Occurrence based" indemnity cover contrasts with "claims made" cover which is the nature of an insurance policy. Under "claims made" cover, if a GP did something negligent and then retired the next day, the GP will need to have "run-off" arrangements in place to cover any claims that are made after payment of policy premiums has stopped. These "run-off" arrangements are sometimes built into the policy, but in other cases require additional payments to be made. However, with "occurrence based cover", as long as the GP has paid the MDO subscription at the time the incident occurred that later gave rise to a claim, the GP will be covered in perpetuity. This means that even if the GP did something negligent but retired the next day and stopped subscriptions, even if the complaint and legal claim is made against the GP three years later, the GP will be covered.

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

Under the ELS and FLS schemes, indemnity for clinical negligence is discretionary which mirrors the ELS and FLS arrangements in England and the medical defence organisation (MDO) indemnity arrangements. Under discretionary indemnity, Welsh Ministers will have the discretion to settle a claim for clinical negligence. Exercising discretion would only be made in unique circumstances.

Limitation periods for bringing clinical negligence claims

Limitation periods for bringing claims are set out in the Limitation Act 1980. In essence, the period for clinical negligence claims is three years from the incident date or from the date of knowledge if that is later (as it often is). Children have until their 21st birthday and persons without capacity are not subject to a limitation period at all.

The scope of the ELS and FLS

The ELS and FLS scheme will cover the activities of all contractors who provide primary medical services which will include clinical liabilities arising from the activities of GP practice staff and other medical professionals such as salaried GPs, locum GPs, practice pharmacists, practice nurses. The scheme will not cover private work, complaints, involvement in coroners' cases, GMC hearings and other matters. The scheme will not cover primary care dentistry, community care dentistry community pharmacy, and optometry.

ELS Liabilities to be transferred to Welsh Government

The Welsh Government is bound by non-disclosure agreements with all three MDOs due to the sensitive nature of the information and discussions. Therefore, only limited information can be provided to the Committee.

The Welsh Government has commissioned external financial advisors to undertake financial due diligence in relation to the three MDOs covering actuarial advice in relation to potential clinical negligence liabilities incurred before 1 April 2019. The financial due diligence has included actuarial advice in relation to potential clinical negligence liabilities incurred before 1 April 2019. The actual value of the liabilities may fluctuate according to claims incidence patterns, claims notifications and the value of settled claims. These liabilities will only be taken on by the Welsh Government if an appropriate transfer of assets can be agreed with the participating MDO. The £100m estimate of liabilities is not the expected cost to the Welsh Government because it does not take account of any asset transfers from MDOs. The Welsh Government is confident that the estimate of liabilities provided by the external advisors is robust.

In the event of liabilities being greater than the estimate, Welsh Government will bear the risk of claims values being greater than those anticipated through due diligence work. Equally, the Welsh Government will benefit from any claims being settled at a lower value since liabilities may fluctuate according to claims incidence patterns, claims notifications and value of settled claims. In addition, there is some level of protection within the contracts being negotiated in the event of the liabilities value turning out to be significantly higher than anticipated in the form of some sharing of financial risk with participating MDOs.

The anticipated net financial exposure of Welsh Government in relation to each participating MDO cannot be disclosed because this would breach the non-disclosure agreements between MDOs and Welsh Government. The anticipated net financial exposure to Welsh Government is expected to be within the parameters set out when it was decided to commit to ELS, in return for which the ELS arrangements would strengthen the stability of indemnity provision which will provide assurance for patients in relation to pre-April 2019 clinical

negligence claims for redress. The ELS arrangements will also ensure that GPs in Wales are not treated at a disadvantage relative to GPs in England where ELS arrangements are being introduced. This will help to ensure that there is no negative impact on GP recruitment and retention and cross border activity.

The effect of the proposed Bill on medical defence organisations

The Bill has no effect on the MDOs. It provides the enabling power for the drafting of Regulations that will create the ELS.

The Market

It would be helpful to clarify my reply to Angela Burns AM final questions regarding the MDOs business and my reference to a “failing market”. My reference to the market failing was made in the context of MDOs being able to offer an affordable product. My response reflected that Government intervened in the MDO indemnity market given the increasing cost of GP professional indemnity and, in particular, the impact of the decision taken by the UK Government to change the Personal Injury Discount Rate (PIDR) 2.5% to minus 0.75% in February 2017 which would have resulted in the cost of indemnity cover for GPs increasing substantially, perhaps by 20% -25%, which would have been untenable for GPs. The decision to introduce the Future Liability Scheme (FLS) in April 2019 helped to address the concerns of GPs about the affordability of professional indemnity costs and has helped to deliver a sustainable, long term solution to address the increasing costs of professional indemnity.

My reference to the market failing in terms of an affordable product was made in this context. The Scottish Government has not introduced a state backed scheme for GP professional indemnity. I note the subsequent evidence given by MDDUS. I am happy to note that MDDUS is a very well respected, well managed, medical defence organisation which is underpinned by prudent financial management.

Conclusion

I consider that the ELS arrangements will strengthen the resilience of general medical services and will provide assurance for patients in relation to pre April 2019 clinical negligence claims for redress. The ELS arrangements, which will be aligned with ELS arrangements in England, will also help to ensure there is no negative impact on cross border activity in terms of GP recruitment, which could be the case if Wales ELS arrangements are not introduced, and if arrangements in Wales differ from those in England.

I am providing a copy this letter to the Chair of the Finance Committee.

Yours sincerely,



Vaughan Gething AC/AM

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Minister for Health and Social Services