

Report on the National Health Service (Indemnities) (Wales) Bill

November 2019



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About the Committee

The Committee was established on 15 June 2016. Its remit can be found at:
www.assembly.wales/SeneddCLA

Committee Chair:



Mick Antoniw AM
Welsh Labour

Current Committee membership:



Suzy Davies AM
Welsh Conservatives



Carwyn Jones AM
Welsh Labour



Dai Lloyd AM
Plaid Cymru

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Recommendations

Recommendation 1. The Minister should, during the Stage 1 debate, clarify the timescales that led to the introduction of the Bill, including confirming the point at which the Minister was aware that primary legislation would be needed to deliver the policy objective. Page 16

Recommendation 2. The Minister should, during the Stage 1 debate, clarify the rationale behind the power being sought in section 1(8), specifically regarding new subsection (10) to be inserted into the National Health Service (Wales) Act 2006. Page 17

Recommendation 3. The Bill should be amended so that the affirmative procedure is applied to the first regulations made under section 1(8) of the Bill, followed by the negative procedure on subsequent occasions. Page 17

1. Introduction

On 14 May 2018, Vaughan Gething AM, the Minister for Health and Social Services (the Minister), announced the introduction of a state backed scheme to provide clinical negligence indemnity for providers of GP services in Wales (the state backed scheme).¹

Background

1. The state backed scheme was launched on 1 April 2019 and is contained in the National Health Service (Clinical Negligence Scheme) (Wales) Regulations 2019.² The Regulations were made in exercise of the powers conferred by section 30 of the *National Health Service (Wales) Act 2006* (the NHS Wales Act) by negative procedure (as set by that Act), and is referred to in the Explanatory Memorandum as the “Future Liabilities Scheme” (FLS). The FLS only covers liability arising from acts, or omissions to act, occurring on or after 1 April 2019.

2. On 15 November 2018, the Minister confirmed the commitment of the Welsh Government, as part of the state backed scheme, to assume responsibility to consider the liability of GPs for historic clinical negligence claims that had been reported, or incurred but not reported prior to 1 April 2019, i.e. an Existing Liabilities Scheme (ELS).³

Introduction of the Bill

3. On 14 October 2019, the Minister introduced the National Health Service (Indemnities) (Wales) Bill⁴ (the Bill) and accompanying Explanatory Memorandum (the EM)⁵.

¹ Welsh Government, [Written Statement - GP Professional Indemnity](#), May 2018

² [The National Health Service \(Clinical Negligence Scheme\) \(Wales\) Regulations 2019](#)

³ Welsh Government, [Written Statement - GP Professional Indemnity](#), November 2018

⁴ Available on the National Assembly's [website](#)

⁵ Welsh Government: [Explanatory Memorandum on the National Health Service \(Indemnities\) \(Wales\) Bill](#) (Explanatory Memorandum)

4. The National Assembly's Business Committee referred the Bill to the Health, Social Care and Sport Committee on 24 September 2019, and set a deadline of 12 November 2019 for reporting on its general principles.⁶

5. On 14 October 2019 the Minister issued a Statement of Policy Intent to accompany the Bill, which:

“(…) 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...”⁷

The Committee's remit

6. The remit of the Constitutional and Legislative Affairs Committee is to carry out the functions of the responsible committee set out in Standing Order 21 (with the exception of Standing Order 21.8) and to consider any other constitutional, legislative or governmental matter within or relating to the competence of the National Assembly or the Welsh Ministers, including the quality of legislation.

7. In our scrutiny of Bills introduced in the National Assembly, our approach is to consider:

- matters relating to the competence of the National Assembly, including compatibility with the European Convention on Human Rights (ECHR);
- the balance between the information that is included on the face of the Bill and that which is left to subordinate legislation;
- whether an appropriate legislative procedure has been chosen, in relation to the granting of powers to the Welsh Ministers, to make subordinate legislation; and
- any other matter we consider relevant to the quality of legislation.

8. We took evidence from the Minister at our meeting on 21 October 2019.⁸

⁶ Business Committee, [Report on the timetable for consideration of the Timetable for the National Health Service \(Indemnities\) \(Wales\) Bill](#), October 2019

⁷ Welsh Government: National Health Service (Indemnities) (Wales) Bill - [Statement of Policy Intent for Subordinate Legislation to be made under this Bill](#), 14 October 2019

⁸ [Constitutional and Legislative Affairs Committee, 21 October 2019](#)

9. The Health, Social Care and Sport Committee⁹ and the Finance Committee¹⁰ took evidence from the Minister on 23 October 2019.

⁹ Health, Social Care and Sport Committee, 23 October 2019.

¹⁰ Finance Committee, 23 October 2019.

2. Legislative competence

The Welsh Government is satisfied that the Bill is within the competence of the National Assembly.

General

10. We considered this Bill under the reserved powers model of legislative competence, as set out in Section 108A of the *Government of Wales Act 2006* (the 2006 Act).

11. The Welsh Government is satisfied that the Bill is within the legislative competence of the National Assembly. Paragraph 2.1 of the Explanatory Memorandum sets out the Welsh Government's position.¹¹

12. In her statement on legislative competence,¹² the Llywydd, Elin Jones AM, stated that in her view the provisions of the Bill would be within the legislative competence of the National Assembly for Wales.

Human rights

13. To be within the legislative competence of the National Assembly, section 108A(2)(e) of the 2006 Act requires all provisions of a Bill to comply with the European Convention on Human Rights (ECHR).

14. We asked the Minister about his consideration of human rights issues when developing the Bill. He told us that human rights issues had been taken account of by the Welsh Government, and added:

“(...) we don't think that there are any human rights issues that arise from the legislation.”¹³

Our view

15. We note the evidence from the Minister and the information provided in the Explanatory Memorandum, including in Part 2 and with regards to the Impact Assessments undertaken in relation to the Bill .

¹¹ See also Constitutional and Legislative Affairs (CLA) Committee, 21 October 2019, Record of Proceedings (RoP), [5]

¹² ~~Presiding Officer's Statement on Legislative Competence: National Health Service (Indemnities) (Wales) Bill~~, 14 October 2019

¹³ CLA Committee, 21 October 2019, RoP, [5]

16. We take the opportunity to re-iterate a conclusion made most recently in our report on the Children (Abolition of Defence of Reasonable Punishment) (Wales) Bill - it is important that full and thorough explanations of assessments undertaken in relation to human rights are available in Explanatory Memoranda that accompany Bills laid before the National Assembly.

3. General observations

Stage 1 scrutiny of the Bill

17. The Business Committee agreed, following a proposal from the Welsh Government, that the responsible committee (the Health, Social Care and Sport Committee) should report to the National Assembly by 12 November 2019. Any other committee wishing to report on the Bill should also report by the same date. This reporting deadline provided a little under three and a half weeks within which the committees could seek and receive evidence and produce reports on the Bill.

18. We asked the Minister why he had sought the use of an expedited timetable for Stage 1 of the legislative scrutiny process. He told us:

“To make sure we have a scheme in place for the start of April next year. If we’d gone through the, if you like, normal procedure then we wouldn’t have had regulations in place and it would not have been good either for GPs based in Wales or indeed people who use services in England across the border for us to have our regulations in place at a different time. We’re looking at a scheme of regulations that are as similar as possible and that is the work that is going on between the two Governments. So, to make sure that everything is in place at the right point of time we’re using the expedited procedure and I’m glad that the Business Committee agreed to do so.”¹⁴

19. The Minister went on to say:

“(…) it’s a short Bill of a technical nature and it’s a discrete subject matter as well. We’ve had regular conversation with stakeholders directly involved in their representative groups, and there’s widespread agreement, which isn’t always the case when legislation is being provided, both by general practitioners but also by the medical defence organisations themselves. And, again, if we go through the longer and extended process that we’d normally do for legislation, then we won’t be ready to have the regulations in place. And, given the widespread agreement that this is the right thing to do, we’re following a process

¹⁴ CLA Committee, 21 October 2019, RoP, [13]

that allows us to do that but still with proper engagement with all of our stakeholders.”¹⁵

20. Two medical defence organisations, as key stakeholders, provided evidence to the Health, Social Care and Sport Committee on 23 October 2019, during which the dialogue and negotiations with the Welsh Government was discussed in detail.¹⁶

The need for legislation

21. The EM states:

“The policy intention is to deliver... regulations to establish the [Existing Liabilities Scheme] ELS. (...)”

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 scope of these powers is not sufficient to allow the Welsh Ministers to establish a scheme by regulations to directly indemnify providers of primary medical services.”¹⁷

22. Section 1 of the Bill amends section 30 of the NHS Wales Act, and expands the bodies that may be included in a “mutual indemnity scheme” (as defined by the section 1(2) of the Bill). The additional bodies inserted into section 30(2) of the NHS Wales Act by section 1(3) of 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 services, the provision of which is the subject of arrangements with a Local Health Board, NHS trust or Special Health Authority.

23. Section 1(8) of the Bill further amends section 30 of the NHS Wales Act and creates a power for the Welsh Ministers to establish a statutory scheme through which they may indemnify the persons or bodies listed in section 30(2) of the NHS Wales Act (as amended by section 1(3) of the Bill). The Bill names these as “direct indemnity schemes”.

¹⁵ CLA Committee, 21 October 2019, RoP, [15]

¹⁶ Health, Social Care and Sport Committee, 23 October 2019, RoP

¹⁷ Explanatory Memorandum, paragraphs 3.8 to 3.10

24. The statutory scheme proposed to be made under section 1(8) of the Bill will apply to historic clinical negligence claims that have either been reported, or which have been incurred or not reported prior to 1 April 2019, i.e. the ELS.¹⁸

25. New subsection (10) to be inserted in section 30 of the NHS Wales Act (by section 1(8) of the Bill) enables Welsh Ministers to provide indemnities other than those listed in subsection (2) of section 30, or to provide different kinds of indemnities to those bodies mentioned in subsections (1) and (8) of section 30. Given the breadth of this power, we asked the Minister to outline what other bodies or other persons he envisages this might cover in the future and, therefore, why the power is necessary. The Minister told us:

“That new [sub]section is to make clear that it doesn’t limit the powers that already exist, because the section says that nothing in this section limits or affects the powers of the Welsh Ministers under this Act. So, it’s being clear that we’re not trying to trammel the powers that already exist; we’re making a specific provision to allow us to provide an indemnity scheme on the existing liabilities that are already there. So, we’re trying to make clear that we’re not trying to unduly or by accident affect the other powers that exist, so it’s about trying to clarify that in the way that it’s drafted. (...)”

...if we needed to do something different, then we’ve got powers that exist through the way that the contracts work, because the existing powers that we use to make the future liability scheme would exist in any event. So, for people employed by a health board, we could do that in any event. We have a range of contract provision, so we could do that through the contracts that exist—for example, the pharmaceutical contract. There are contracts that exist. This is about those existing liabilities, and it’s about dealing with that particular issue in general practice, and that’s why [we] have this Bill. And, like I say, we’re trying to make sure that we don’t cut off other avenues for the future and unduly and by mistake affect the powers that Welsh Ministers already have under the piece of legislation that we’re seeking to amend.”¹⁹

26. The regulation-making powers are discussed in more detail in the next part of the report.

¹⁸ Explanatory Memorandum, paragraph 3.15

¹⁹ CLA Committee, 21 October 2019, RoP, [30] and [32]

Balance between what is on the face of the Bill and what is left to subordinate legislation

27. The Bill contains two sections, and provides three powers to the Welsh Ministers to make subordinate legislation; two of these are regulation-making powers and the third is a power to direct. The delegated powers are summarised in Chapter 5 of the EM, and the Statement of Policy Intent provides an indication of how those powers may be used (based on the current policy intention).

28. As mentioned earlier in the report, sections 1(2) and 1(3) of the Bill amend a pre-existing power under sections 30(1) and (2) of the NHS Wales Act to enable the Welsh Ministers, by regulations, to establish mutual indemnity schemes. The regulations are subject to the negative procedure. This procedure is set by the NHS Wales Act.

29. Section 1(5) of the Bill amends section 30(4) of the NHS Wales Act. The amendment made inserts the names of bodies that the Welsh Ministers may direct to participate in a mutual indemnity scheme in accordance with their power under section 30(4) of the NHS Wales Act. This amendment is required as a result of the expanded list of bodies to be included in subsection (2) of section 30 of the NHS Wales Act. This power to direct is not subject a scrutiny procedure in the National Assembly. The procedure is set by section 203 of the NHS Wales Act.

30. Section 1(8) of the Bill inserts new subsection (8) into section 30 of the NHS Wales Act and creates a power for the Welsh Ministers to make regulations to establish direct indemnity schemes. The regulations are subject to the negative procedure.

31. We asked the Minister if he was content with the balance of powers as regards what is on the face of the Bill and what is left to subordinate legislation, and how that balance was determined. He said:

“(…) the legislative amendment that is required on the face of the Bill is to make sure that we do have powers to indemnify individual GPs for contributions they’ve made in the past. That’s in contrast to the future scheme that we’ve provided—the future liability scheme—because we’re able to do that through local health boards and the contract; we can’t do that for existing liabilities. So, actually, the legislative amendment that’s required is short and discrete. That’s why we have the Bill that we have in front of us. The nature of the regulations themselves—. The short answer is, ‘Yes, I am satisfied at the balance between the face of the Bill and the regulations’, and we followed a relatively similar process for the

future liabilities scheme successfully, with agreement from stakeholders, as well, and I think a similar balance here is the right way to move forward.”²⁰

32. The power to establish a direct indemnity scheme is a discretionary power. We asked the Minister what consideration was given to making this power a duty on the Welsh Ministers. The Minister told us:

“(…) we’re taking the powers because the pre-existing situation, where Ministers had no duty through a scheme of this sort, had lasted relatively well up until more recent years. And we’re acting because of the practical reality of where we are, where indemnity insurance, if left to itself, would mean that a number of people [...] would withdraw from areas of general practice. Now, that’s a discrete area, if you like, of people involved in providing general practitioner services, but, actually, there’s a significant public interest in making sure they’re able to do so. So, it’s about the ability to do so, but it may well be that in the future you might not need to have a scheme of this sort. So, I think requiring regulations to be made isn’t necessary, so we’re taking a power to enable us to do so. We set out in the explanatory memorandum the sort of areas that we’d want to look at and how we’d want to go about that.”²¹

33. Given the significance of the power to establish a direct indemnity scheme by regulations, and the non-exhaustive list of what such a scheme may specify or require as set out in section 1(8) of the Bill, we asked the Minister why the regulations to be made under section 1(8) will not be subject to the affirmative procedure. The Minister said:

“As we’ve rehearsed and gone through, the regulations themselves would be pretty technical in nature, but also there’s a point of consistency and the powers that exist. So, the powers to issue the regulations come from the National Health Service (Wales) Act 2006, and it’s sections 203 and 204 of that Act that prescribe the procedure to be followed. So, we would potentially take out a wholly novel way of making regulations under this Act if we decided to have the affirmative, not the negative.

And it’s also worth again reminding ourselves that the future liability scheme regulations were produced under the negative procedure

²⁰ CLA Committee, 21 October 2019, RoP, [18]

²¹ CLA Committee, 21 October 2019, RoP, [20]

following consultation and working through with stakeholders, and the Assembly didn't raise a particular issue about those."²²

34. The Minister also told us that, subject to the Bill receiving Royal Assent, his attention is to “bring forward regulations in pretty short order”, by the end of February so that they may be in place at the start of April.²³

Our view

35. We note the evidence from the Minister on the curtailed period for Stage 1 scrutiny, the need for the legislation, and the balance between what is on the face of the Bill and what is left to subordinate legislation.

36. We do not regard Stage 1 as an extended process, as suggested by the Minister. It is an important part of the National Assembly's legislative scrutiny procedures, not least because Stage 1 provides members and stakeholders with the opportunity to fully understand the practical implications of proposed legislation. We believe the Stage 1 period also affords the proposer of the legislation time and opportunity to reflect on their own proposals.

37. Further, given the fact that the Welsh Government announced the background policy decision in May 2018, and the regulations for a future liability scheme were brought forward in March of this year, it is not clear to us why the Bill was not brought forward earlier. This would have allowed for more time for Stage 1 scrutiny and for engagement between stakeholders and committees. Consultation and engagement by the Welsh Government is not the same as, and nor should it replace, consultation and engagement by Assembly committees on a specific Bill.

Recommendation 1. The Minister should, during the Stage 1 debate, clarify the timescales that led to the introduction of the Bill, including confirming the point at which the Minister was aware that primary legislation would be needed to deliver the policy objective.

38. Within this context, we note the broad power provided to Welsh Ministers by section 1(8) of the Bill which inserts new subsection (10) into the National Health Service (Wales) Act 2006. We also note the Minister's comments about how this provision will help facilitate the prevention of the accidental or mistaken impact on the existing powers of Welsh Ministers. However, it is not clear whether the

²² CLA Committee, 21 October 2019, RoP, [26] and [27]

²³ CLA Committee, 21 October 2019, RoP, [22]

Minister was suggesting that the power would not have been taken if he was confident of the effect this Bill will have on existing legislation.

Recommendation 2. The Minister should, during the Stage 1 debate, clarify the rationale behind the power being sought in section 1(8), specifically regarding new subsection (10) to be inserted into the National Health Service (Wales) Act 2006.

39. With regards to the balance between the detail on the face of the Bill and what is left to subordinate legislation, we note that the Bill provides three powers to the Welsh Ministers to make subordinate legislation.

40. We acknowledge the Minister's explanation regarding the choice to bring forward regulations made under section 1(8) of the Bill using the negative procedure. However, in our view, it is questionable whether it is fair and appropriate to compare the making of regulations that will bring forward an existing liability scheme (ELS) to those which brought forward the future liabilities scheme earlier this year. Our concerns on this matter are based on the fact that this Bill, which provides the primary legislative footing for the ELS regulations, has not been afforded the full opportunity for Stage 1 scrutiny, and nor is it clear at this point who and what will be covered by and in an ELS.

Recommendation 3. The Bill should be amended so that the affirmative procedure is applied to the first regulations made under section 1(8) of the Bill, followed by the negative procedure on subsequent occasions.