

# Financial implications of the National Health Service (Indemnities) (Wales) Bill

November 2019



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# About the Committee

The Committee was established on 22 June 2016. Its remit can be found at:  
[www.assembly.wales/SeneddFinance](http://www.assembly.wales/SeneddFinance)

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## Committee Chair:



**Llyr Gruffydd AM**  
Plaid Cymru

## Current Committee membership:



**Rhun ap Iorwerth AM**  
Plaid Cymru



**Alun Davies AM**  
Welsh Labour



**Mike Hedges AM**  
Welsh Labour



**Rhianon Passmore AM**  
Welsh Labour



**Nick Ramsay AM**  
Welsh Conservatives



**Mark Reckless AM**  
Brexit Party

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## Recommendations and Conclusion

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## 1. Introduction

**1.** The National Health Service (Indemnities) (Wales) Bill (the Bill) and Explanatory Memorandum (EM), including the Regulatory Impact Assessment (RIA), was introduced by Vaughan Gething AM, Minister for Health and Social Services (the Minister) on 14 October 2019.

**2.** The EM states the purpose of the Bill is to amend Section 30 of the National Health Service (Wales) Act 2006 (the NHS Wales Act) (Schemes for meeting losses and liabilities etc. of certain health service bodies) in order to make provision about indemnifying a body or person's expenses and liabilities arising in connection with the provision of health services.

**3.** The Finance Committee (the Committee) took evidence on the financial implications of the Bill on 23 October 2019, from:

- Vaughan Gething AM, Minister for Health and Social Services;
- Alex Slade, Deputy Director Primary Care Division, Welsh Government; and
- Tim Edds, Lawyer, General Medical Services, Welsh Government

**4.** Policy scrutiny of the Bill was undertaken by the Health, Social Care and Sport Committee (HSCSC).



## 2. Background

**5.** Clinical negligence cover is a condition of registration in the UK for all regulated healthcare professionals, and in the case of medical practitioners (i.e. GPs), a condition of licence under [section 44C of the Medical Act 1983](#).<sup>1</sup>

**6.** The EM explains the cover can be an insurance policy, an indemnity arrangement, or a combination of both. The majority of GPs in the UK typically secure discretionary clinical negligence indemnity as a benefit of their membership from one of the three long established Medical Defence Organisations (MDOs), mutual non-profit making organisations owned by their members which focus entirely on the provision of indemnity and advice to healthcare professionals.<sup>2</sup>

**7.** The EM notes it is estimated that the cost of indemnity has increased by 7 per cent per year on average between 2013 and 2017. Among the factors driving the increasing cost of indemnity is an ageing population; technological innovations in medicine which keep people alive longer; an increase in people living with complex conditions and an increasing claims culture.<sup>3</sup> The EM states:

“there is no evidence to suggest that deterioration in the quality of care has acted as a driver to increase the cost of indemnity.”<sup>4</sup>

**8.** The EM mentions 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 2017/18, to develop a solution to address this issue.<sup>5</sup>

### UK changes impacting GP indemnities

**9.** On 27 February 2017, the Lord Chancellor announced<sup>6</sup> a change to the Personal Injury Discount Rate (PIDR) (the rate used to calculate the damages that are payable in respect of future pecuniary losses) from 2.5 per cent to minus 0.75

<sup>1</sup> Explanatory Memorandum, page 4

<sup>2</sup> Explanatory Memorandum, page 4

<sup>3</sup> Explanatory Memorandum, page 4

<sup>4</sup> Explanatory Memorandum, page 4

<sup>5</sup> Explanatory Memorandum, page 4

<sup>6</sup> <https://gov.wales/written-statement-gp-professional-indemnity>

per cent. The EM states that as a result of this change, the cost of large personal injury claims increased significantly. This has led to large increases in the cost of meeting historic liabilities for the MDOs, the current providers of professional indemnity cover for medical practitioners. As MDOs are mutual bodies, this increase could only be covered by increasing GP membership subscription costs further. It was estimated that indemnity premiums would need to increase by 25 per cent to fund the change in PIDR.<sup>7</sup>

**10.** In response to the impact on the medical defence market of the change to the PIDR and the wider rising cost of indemnity, in October 2017 the Secretary of State for Health and Social Care in England announced an intention to establish a government funded state backed scheme to provide clinical negligence indemnity cover for providers of GP services in England.<sup>8</sup>

## Welsh Context

**11.** On the 14 May 2018,<sup>9</sup> the Minister announced that the Welsh Government would also introduce a state-backed scheme to provide clinical negligence indemnity for providers of GP services in Wales.

**12.** The National Health Service (Clinical Negligence Scheme) (Wales) Regulations 2019 established a Future Liabilities Scheme (FLS) which came into force on 1 April 2019 to cover all GPs with a GMS contract and other health professionals working in NHS general practice from that date. The FLS is being administered by NHS Wales Shared Services Partnership, Legal and Risk Services in accordance with the Clinical Negligence Scheme for NHS Trusts and Local Health Boards (Administration) (Wales) Directions 2019.

**13.** The EM notes the FLS in Wales has been aligned as far as possible to the scheme introduced by the UK Government on 1 April 2019 for England. The EM states 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>10</sup>

**14.** On 15 November 2018<sup>11</sup> the Minister confirmed the commitment by the Welsh Government, as part of the state backed scheme, to assume responsibility to consider the liability of GPs for those historic clinical negligence claims that

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<sup>7</sup> Explanatory Memorandum, page 5

<sup>8</sup> Explanatory Memorandum, page 5

<sup>9</sup> <https://gov.wales/written-statement-gp-professional-indemnity>

<sup>10</sup> Explanatory Memorandum, page 6

<sup>11</sup> <https://gov.wales/preferred-partner-new-gp-indemnity-scheme-wales-announced-0>

had been reported, or incurred but not reported, prior to 1 April 2019. The Existing Liabilities Scheme (ELS) will be subject to the completion of legal and financial due diligence and satisfactory negotiations with the MDOs.<sup>12</sup>

## Related costs

**15.** The RIA explains there are costs associated with the implementation of the Bill, once section 30 of the NHS Wales Act has been amended. These costs, anticipated to be £30,000 which will be incurred in 2019/20, included external legal support to implement the Bill utilising the new Direct Indemnity Scheme regulation making powers delivered by the Bill.<sup>13</sup>

**16.** The Minister noted that external legal support had been used rather than utilising legal advisers within Welsh Government as a “matter of expediency to make sure we’re able to undertake the Bill and the regulations in the requisite period of time”.<sup>14</sup> He continued:

“It’s the same sort of cost envelope that we would otherwise have for introducing a scheme of regulations.”<sup>15</sup>

## Estimated liabilities

**17.** The RIA notes that currently no MDO has signed an ELS agreement and the Minister acknowledged that negotiations are on-going between the Welsh Government and the three MDOs.<sup>16</sup> He said:

“Two of the three, we’re in a position where agreement is imminent. Two out of the three have already signed agreements with the UK Government for England. We’re in a good position with those as well. The third, we’re looking to have more open conversations with them. They’ve held back from doing so up to now, but we’re hopeful that that will now crystallise into more constructive and open conversations with us.”<sup>17</sup>

**18.** The EM details the current estimate of liabilities that would be assumed by Welsh Government were an ELS agreement to be signed with each MDO, which is in the region of £100m before any transfer of assets. The £100m estimate of

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<sup>12</sup> Explanatory Memorandum, page 6

<sup>13</sup> Explanatory Memorandum, page 19

<sup>14</sup> RoP, paragraph 165, 23 October 2019

<sup>15</sup> RoP, paragraph 165, 23 October 2019

<sup>16</sup> Explanatory Memorandum, page 19

<sup>17</sup> RoP, paragraph 183, 23 October 2019

liabilities is not the expected cost to Welsh Government because it does not take account of any asset transfers from MDOs.<sup>18</sup>

**19.** The Minister confirmed that the Welsh Government was utilising the same financial and legal advice as the UK Government to assess “what the nature of those assets and liabilities are”. He said that the £100m was a “fair assessment, pre the transfer of assets”.<sup>19</sup> He added:

“But, of course, that’s the figure before we undertake the transfer of assets in the exchange of liabilities. So, the actual number will be smaller, but, of course, we have engaged some external legal and financial support in the whole of this scheme, and we’ve done that consistently with the UK Government as well.”<sup>20</sup>

**20.** The Committee asked the Minister how he would deal with any additional liabilities exceeding the £100 million. The Minister reassured the Committee that the Welsh Government already has “some experience” in operating a similar scheme, the Welsh Risk Pool, “that takes account of secondary care clinicians in Wales”.<sup>21</sup> He added:

“Given that the £100 million figure would reduce when you do then factor in the transfer of assets, following negotiation with those three MDOs, I think people should take a measure of confidence that we’ve got the resource and the ability to be able to run that and to be able to stand behind the costs that exist. But, of course, there is always a caveat in any insurance environment that it depends on the claims that you do or don’t get. But, within that, I’ve indicated—and perhaps we can copy the letter to you—the way that we expect the scheme to work in terms of some capping provision against future claims to be made. So we can provide you with the same letter we’re going to send to the Health, Social Care and Sport Committee as well, just for completeness’ sake.”<sup>22</sup>

**21.** Subsequently, the Minister wrote to the Health, Social Care and Sport Committee, the letter stated:

“The actual value of the liabilities may fluctuate according to claims incidence patterns, claims notifications and the value of settled claims.

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<sup>18</sup> Explanatory Memorandum, page 19

<sup>19</sup> RoP, paragraph 170, 23 October 2019

<sup>20</sup> RoP, paragraph 170, 23 October 2019

<sup>21</sup> RoP, paragraph 172, 23 October 2019

<sup>22</sup> RoP, paragraph 172, 23 October 2019

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.”

**22.** The letter continued:

“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 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.”

**23.** The Minister was unable to give the Committee any indication of what the level of asset transfers would be as the information was “part of the commercial confidential nature of the conversations” he was having with the MDOs.<sup>23</sup> The Minister said:

“I think you’ll understand why they wouldn’t necessarily want to make open the nature of the assets and liabilities they think they’re carrying.”<sup>24</sup>

**24.** The Minister’s official outlined how the Welsh Government would manage and maximise the value of the assets:

“... the intention is that the transfer of assets would be aligned with how the Department of Health and Social Care in England have transferred those assets into HM Treasury. The decisions around the utilisation of those assets would align with strategic budgeting, in terms of the budget process that, of course, goes to the Assembly. So, it’s a new

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<sup>23</sup> RoP, paragraph 187, 23 October 2019

<sup>24</sup> RoP, paragraph 187, 23 October 2019

activity for Welsh Government to have that block of assets to utilise, and so consideration and engagement has taken place to ensure that it aligns with the budget and we use those effectively.”<sup>25</sup>

**25.** The Committee questioned why an estimate for the cost of managing the existing liabilities scheme was not included in the RIA. The Minister’s official said:

“The handling of claims up until April 2021 will be undertaken by the participating MDO, such that the operational responsibility remains with those MDOs who we reach an agreement with. After April 2021, the activity will be undertaken by NHS Wales Shared Services Partnership Legal and Risk Services.”<sup>26</sup>

**26.** He continued:

“As things stand, we do not anticipate that they need to expand their operating costs. So, at this moment in time, we believe they can take on the management of existing liability claims, which, of course, we’ve got another window up until 2021 ... And they reduce over time. We do not think there needs to be a change at this point, but we need to be open to have that discussion with them.”<sup>27</sup>

## Committee view

**27.** The Committee is broadly content with the estimated cost of the Bill of £30,000, which includes external legal support to implement the Bill using the new Direct Indemnity Scheme regulation making powers. The Committee accepts the assurance by the Minister that external legal support was used as a matter of expediency and that costs would have been similar utilising legal advisers within Welsh Government.

**28.** The Committee notes that the Welsh Government has sought expertise and advice from the same financial and legal advisers used by the UK Government in order to ensure that the liabilities and assets have been fairly assessed for Wales.

**29.** The Committee acknowledges the estimated liabilities are in the region of £100m before any transfer of assets. Whilst, the Minister told the Committee that this figure would reduce once the transfer of assets is factored in, the level of asset transfers is currently unavailable. This information is restricted due to its commercial sensitivity and nondisclosure agreements between the Welsh

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<sup>25</sup> RoP, paragraph 195, 23 October 2019

<sup>26</sup> RoP, paragraph 201, 23 October 2019

<sup>27</sup> RoP, paragraph 201 & 203, 23 October 2019

Government and MDOs. The Committee believes this information should be made available to the Committee when feasible.

**30.** The Committee notes that the existing liabilities scheme will be undertaken by the participating MDOs for handling claims up until April 2021. The Committee heard that the Welsh Government does not anticipate additional costs for the NHS Wales Shared Services Partnership when it begins managing the scheme from April 2021. The Committee believes this information is relevant and should have been included in the RIA.

**Conclusion 1.** The Committee is broadly content with the financial implications of the Bill as set out in the Regulatory Impact Assessment.

**Recommendation 1.** The Committee recommends the Welsh Government identifies the total value of the asset transfer from the Medical Defence Organisations in its consolidated accounts laid before the Assembly.

**Recommendation 2.** The Committee recommends the Welsh Government revises the Regulatory Impact Assessment to reflect that it does not anticipate any additional costs for the NHS Wales Shared Services Partnership when it begins managing the existing liabilities scheme from April 2021.