Health Care and Associated Professions (Indemnity Arrangements) Order 2013

Consultation Questions

Please fill in and/or tick the appropriate response.

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I do not wish my response to be passed to other UK Health Departments [ ]

I do not wish my response to be published in a summary of responses [ ]

Please indicate all the countries to which your comments relate:

- [ ] UK-wide
- [ ] England
- [ ] Northern Ireland
- [ ] Scotland
- [ ] Wales

Are you responding:
- [ ] as a member of the public
- [ ] as a health or social care professional
- [x] on behalf of an organisation

If you are responding as a health or social care professional, please supply the following details:

Profession:

Country of qualification Please indicate as appropriate:
- [ ] UK
- [ ] Other EEA
- [ ] Rest of World

Area of work

- [ ] NHS
- [ ] Voluntary
- [ ] Educational
- [ ] Trade Body
- [ ] Social Care
- [ ] Regulatory Body
- [ ] Union
- [ ] Other (please give details)
- [ ] Private Health
- [ ] Professional Body
- [ ] Local Authority

If you are responding on behalf of an organisation, please supply the following details:

NHS
Voluntary
Education
Trade Body
Social Care
Regulatory Body
Union
Other (please give details)
Private Health
Professional Body
Local Authority

Please indicate whether your comments refer to requirements to be introduced generally, or to a particular healthcare professional regulatory body or bodies

- [ ] Generally
- [ ] GMC
- [ ] GPhC
- [ ] GCC
- [ ] GOC
- [ ] HCPC
- [ ] GDC
- [ ] GOsC
- [ ] NMC
Health Care and Associated Professions (Indemnity Arrangements) Order 2013

Consultation Questions

Q1: Do you agree that the requirement for healthcare professionals to have an indemnity arrangement in place should match the requirements set out in the Directive and place an obligation on healthcare professionals themselves to ensure that any indemnity arrangement in place is appropriate to their duties, scope of practise, and to the nature and the extent of the risk?

Agree (x) Disagree ( ) Unsure ( )

Please set out your reasons in your response.

Comments

The RCN was represented on the Finlay Scott Independent Review Group, and subsequently endorsed the recommendations of that Group. We note that there is scant evidence for a gap in the provision of indemnity or insurance arrangements by health care providers (whether individuals or organisations), which is leaving injured patients unable to recover compensation where they have proved negligence. Nevertheless, we accept that it is appropriate to have a consistent approach to an indemnity requirement in respect of different registered health care professionals, and that there is a need to address the professional liability insurance requirements of the Directive. Accordingly, we endorse a duty on all registered health care professionals themselves to ensure that an ‘appropriate indemnity arrangement’ is in place for their actual practice, conditioned by the nature and extent of any risk that practice presents. We agree with the observation that it would be disproportionate to require the regulatory bodies to assess whether the arrangements are appropriate in every case, and we trust that the response of those bodies, by way of their own rules implementing this requirement, will be practical and proportionate. We must put on record a warning however, that the Departments, regulatory bodies and relevant others must be alert to one serious unintended consequence of the implementation of the general requirement, which is alluded to by the Finlay Scott Group. Our concern is a shifting of responsibility (usually, as a cost saving exercise) for insuring or indemnifying against clinical negligence claims, away from employing health care organisations responsible for the environment of care, on to the individual professionals in that organisation’s employment. It would be a highly retrograde step if this proposal led to a multiplicity of insurers and indemnifiers of providers of NHS (or private) care, whether in the public or independent sectors, with all of the costs (legal and otherwise) that were associated with the litigation environment prior to the introduction of, for example, the English Clinical Negligence Scheme for Trusts (and parallel arrangements in other countries), and the handling of such claims. This also impacts negatively on patient safety, as the costs of claims falls inappropriately on the individual employee, and not the employer responsible for the
environment and systems for delivering safe care. There is no financial incentive on such organisations, as would apply to NHS Trusts, for example, under the CNST, to systematically address patient safety issues. We take this opportunity to urge that the regulatory bodies to note the Independent Review Group’s recommendation that the ‘introduction of any requirements should not be framed so as to require individual employees to obtain personal cover themselves when they are already covered by corporate or employer cover’. Further, that ‘it should be emphasised that if a healthcare professional benefits from an indemnity arrangement as provided through their employer this would be sufficient to meet the requirement for registration as a healthcare professional’.

There is already considerable uncertainty and confusion among health professionals, their employers and others delivering health care, about indemnity and insurance arrangements for clinical negligence claims, and the implementation of the new requirement must not exacerbate that situation. Otherwise, there is a risk that registrants will be needlessly anxious about their eligibility for continuing registration as a health professional and incur significant costs in making personal arrangements for cover that are unnecessary.

Q2: Do you agree with the proposed definition of an indemnity arrangement?

Agree (x)  Disagree ( )  Unsure ( )

Please set out your reasons in your response.

Comments

Given that the vast majority of health care interventions by health professionals, in all four countries, and whether in primary or secondary care, are through an employing health care organisation, it is critical that any ‘indemnity arrangement’ is expressly defined to include the usual insurance or indemnity arrangements currently put in place by those organisations, to meet the financial risks associated with their vicarious liability for clinical negligence claims. In other words, as indicated throughout the consultation documents, ‘personal’ indemnity or insurance arrangements of the individual health care professional are unnecessary, and irrelevant if they do exist, unless that professional is working in a self-employed capacity. There is considerable confusion already in health care generally, among professionals themselves, managers and sometimes employing organisations, about indemnity or insurance in these circumstances. It is very important that this new requirement does not result in registrants being misled into believing that they need, or being pressured by their employers into taking out, personal insurance or indemnity arrangements when not required, given the nature of their practice and their employing situation. We are anxious that this proposal doesn’t allow insurance companies or indemnifying organisations to exploit the uncertainty of health
professionals, about their potential personal liability for clinical negligence claims, by encouraging them to take out unnecessary cover. It is also a concern that patients receiving NHS services, whether provided by an NHS body or an independent health care sector organisation contracting with the NHS, are equally protected in the event of a clinical negligence claim, and that the latter, in particular, are not dependent on the personal indemnity or insurance arrangements of the individual staff delivering the care. More needs to be done by NHS commissioning bodies to ensure that appropriate indemnity or insurance arrangements are made by the organisations themselves, and that reliance is not placed on individual professionals.
Q3: Do you agree with the proposed provisions that set out:

(a) What information needs to be provided by healthcare professionals, and when, in relation to the indemnity arrangement they have in place?

Agree (x) Disagree ( ) Unsure ( )

(b) The requirement to inform the Regulator when cover ceases;

Agree (x) Disagree ( ) Unsure ( )

(c) The requirement for healthcare professionals to inform their regulatory body if their indemnity arrangement is one provided by an employer?

Agree (x) Disagree ( ) Unsure ( )

Please set out your reasons in your response.

Comments

We reiterate our earlier comment that it is important that regulatory bodies take a practical and proportionate approach to any changes to their statutory rules. We urge a ‘light touch’ by those bodies, e.g. a tick box on whether the registrant is in employment or self-employed, without more. Given vicarious liability (a legal concept that has been considerably extended in recent case law), it can be assumed by the regulatory body that all employers will have appropriate indemnity or insurance arrangements for clinical negligence claims, without the need for their employees to interrogate those arrangements. We welcome the proposal that where a health professional is not in employment at the time of seeking registration/re-registration, there should be no requirement on them to arrange personal insurance or indemnity cover, when they are not actually practising their profession, and therefore no one is at risk. Only where they do become employed, or commence practice on a self-employed basis, should they be expected to notify their professional regulatory body that they then have appropriate indemnity cover.

Q4: Do you agree with the proposal to allow healthcare professional regulatory bodies the ability to refuse to allow a healthcare professional to join, remain on, or return to, their register, or, for the GMC, to hold a licence to practise unless they have an indemnity arrangement in place?

Agree (x) Disagree ( ) Unsure ( )

Please set out your reasons in your response.

Comments
Q5: Do you agree with the proposal to permit healthcare professional regulatory bodies to remove a healthcare professional from their register, withdraw their license to practise, or take fitness to practise action against them, in the event of there being an inadequate indemnity arrangement in place?

Agree (x)  Disagree ( )  Unsure ( )

Please set out your reasons in your response.

Comments

We agree that it would be inappropriate to invoke the fitness to practice procedures of the professional regulatory body to formally strike off or suspend from the relevant register a professional who doesn’t have appropriate indemnity arrangements in place. However, this is entirely dependent on the regulatory body having adopted a reasonable, proportionate and practical procedure for checking on the same, given the nature and risks associated with the registrant’s actual practice. Fitness to practice proceedings should only be relevant where there is evidence of misconduct, as that is defined under those existing procedures.

Q6: Please provide any information with regard to the potential barriers to independent midwives moving to alternative governance and delivery practices in order to obtain appropriate indemnity arrangements.

Comments

The RCN is aware of some evidence that midwives are able to access insurance through small group practice/social enterprise activities. We understand however, that this remains a challenge for some individuals who wish to practice midwifery independently.
Q7: Do you agree that the provisions in the Draft order should only apply to qualified healthcare professionals and not students?

Agree (x)  Disagree ( )  Unsure ( )

Please set out your reasons in your response.

Comments

Students should not require indemnity arrangements as the employing/training organisation should be taking appropriate responsibility for their actions, with their own indemnity or insurance arrangements, given their status and the ‘limited’ nature of their actual practice.

Q8: Are there any equalities issues that would result from the implementation of the Draft Order which require consideration? If so, please provide evidence of the issue and the potential impact on people sharing the protected characteristics covered by the Equality Act 2010: disability; race; age; sex; gender reassignment; religion & belief; pregnancy and maternity and sexual orientation and carers (by association).

Agree ( )  Disagree ( )  Unsure (x)

Comments

We cannot immediately identify any equality implications from the recommendations.

Q9: Please provide comments as to the accuracy of the costs and benefits assessment of the proposed changes as set out in the Impact Assessment (including, if possible, the provision of data to support your comments).

Comments

We have already described the potentially disruptive effect of this new requirement, should implementation of the same not be handled with sufficient awareness of, and appropriate management of, the risks associated with a. the current uncertainty/confusion about indemnity in health care b. the risk of unscrupulous employing organisations or insurance bodies exploiting the new condition of registration to pass the burden of insuring against claims to the individual professional and c. the consequent taking out of unnecessary ‘personal’ indemnity or insurance arrangements. This is of particular concern given the scant evidence of patients being left uncompensated for clinical negligence incidents.
Q10: Please provide information on the numbers of self employed registered healthcare professionals and whether they are in possession of indemnity cover or business insurance which includes public liability insurance and professional indemnity insurance.

Comments

This is not known.

Q11: Please provide information on the numbers of employed healthcare professionals who, in addition to working in an employed capacity covered by an employer’s arrangement for indemnity or insurance, undertake self-employed practice. Where possible, please provide information as to whether they are in possession of indemnity cover or business insurance which includes public liability insurance and professional indemnity insurance for that self-employed element of their practice.

Comments

This is not known.

Q12: Do you have views or evidence as to the likely effect on costs or the administrative burden of the proposed changes set out in the Draft Order?

Agree (  )  Disagree (  )  Unsure (  )

Please provide information/examples in support of your comments.

Comments

The critical issue will be a proportionate response by the professional regulatory bodies, and no shifting of responsibility for insuring against clinical negligence claims on to individual professionals who are in employment. This is a risk, given the lack of understanding about these issues in healthcare, and the actions of a small number of employers requiring their employees to have personal cover as a condition of employment, a practice that, in our view, leaves patients at risk, is unethical, an abdication of responsibility by some employers and a danger to patient safety.
Q13: Do you think there are any benefits or drawbacks that are not already discussed relating to the proposed changes? Please provide information/examples in support of your comments.

Agree ( )  Disagree ( )  Unsure ( )

Comments
See above.

Q14: Do you have any comments on the draft order itself?

Yes ( )  No (x )

Comments

Q15: What are your views on extending the requirement to hold an indemnity arrangement as a condition of registration to all professionals statutorily regulated by the Health and Care Professions Council? This would cover Social Workers in England only.

Agree ( )  Disagree ( )  Unsure ( )

Comments
No comment.