

## **NWSSP Legal and Risk Services**

### **Existing Liabilities Scheme Guidelines**

**Issue Date: 20 July 2020**

## Contents

1. Introduction .....	1
2. Framework of the Scheme.....	2
3. Scope of the Scheme – Existing Liabilities.....	3
4. Eligible Persons under the Scheme.....	6
5. Level of Indemnity under the Scheme.....	7
6. How to contact NWSSP - L&R? .....	9
7. Existing claims transferring to NWSSP - L&R from an MDO.....	9
8. Reporting a new pre-April 2019 liability to NWSSP - L&R .....	10
9. What will happen after a claim has been reported to NWSSP - L&R.....	11
10. Claims Handling / Legal Services.....	12
11. Conflicts of Interest / Confidentiality.....	14
12. Complaints.....	15
13. Data Protection.....	16
14. Managing complaints under PTR.....	16
15. Using PTR to manage claims.....	17

## 1) Introduction

- a) The National Health Service (Existing Liabilities Scheme for General Practice) (Wales) Regulations 2020 (“the Regulations”) established the Existing Liabilities Scheme for General Practice (“the Scheme”). Nothing in these guidelines seek to limit, amend or expand the provisions or scope of the Regulations or the terms of any Existing Liabilities agreement concluded between a Medical Defence Organisation (“MDO”) and the Welsh Ministers.
- b) NWSSP – Legal and Risk Services (“NWSSP - L&R”) will operate and administer the Scheme on behalf of the Welsh Ministers.
- c) Under the Scheme, the Welsh Ministers may provide a discretionary indemnity for eligible claims. NWSSP - L&R (on behalf of the Welsh Ministers) will consider indemnifying clinical negligence claims made against a GP and others working in a general practice setting as a result of an act or omission that occurred prior to 1 April 2019 and which gives rise to a tortious liability in connection with the provision of primary medical services and other NHS services provided by a general practice.

- d) The Scheme is only available to 'Eligible Persons' (as set out below) and will only cover 'Existing Liabilities' (as set out below).
- e) The 'Existing Liabilities' covered by the Scheme will, in the main, be clinical negligence liabilities. The scope of the Scheme is set out in more detail below.
- f) The Scheme will only apply where a transaction to transfer the legal responsibility to consider indemnifying Existing Liability claims from a MDO to the Welsh Ministers has been completed, and from a specified date agreed as part of such a transaction. For MDDUS, this will be 30<sup>th</sup> June 2020. For MPS, this will be 1<sup>st</sup> April 2021.
- g) The Scheme is in no way to be viewed as creating or implying a contract or a contract of insurance. Neither should it be understood at any point that indemnity under the Scheme is anything other than discretionary.
- h) The Scheme Guidelines may be updated and amended by NWSSP - L&R as is appropriate.
- i) The Scheme is governed by the law of England and Wales.

## 2) Framework of the Scheme

- a) NWSSP - L&R are the operators of the Scheme on behalf of the Welsh Ministers and provide claims handling and legal services to the Scheme in order to manage, defend and facilitate indemnity arrangements under the Scheme.
- b) Where external solicitors are instructed in respect of a claim falling with scope of the Scheme, they will be instructed by NWSSP - L&R. All such instructions will be in accordance with the terms of a service level agreement entered into between NWSSP - L&R as Scheme operators and the external solicitors.
- c) Where NWSSP - L&R provide the legal services, those legal services are provided under the Scheme.

- d) Those persons involved in general practice who qualify for indemnity under the Scheme are known as 'Eligible Persons'.
- e) Use of the Scheme by Eligible Persons is not mandatory. The indemnity provided by the Scheme is however only available to those who are eligible under the Regulations and in line with these Scheme Guidelines.
- f) If a claim is brought against an Eligible Person (who will in most cases be the named defendant in proceedings), and that claim is within the scope of the Scheme, the Eligible Person can request indemnity under the Scheme.
- g) By requesting NWSSP – L&R to consider the provision of indemnity under the Scheme, Eligible Persons agree that they have read and understood the rules of the Scheme as they are set out in the Regulations and these guidelines.
- h) When seeking indemnity under the Scheme, the Eligible Person will agree for NWSSP - L&R and / or any external appointed solicitor to accept service of proceedings on their behalf.

### 3) Scope of the Scheme – Existing Liabilities

- a) NWSSP - L&R will assess whether any claim is within the scope of the Scheme or not, in accordance with the Regulations.
- b) Any indemnity provided under the Scheme may only be for 'Existing Liabilities'. These are potential liabilities attaching to you as an Eligible Person as a result of an act or omission by you which amounts to a breach of duty prior to 1<sup>st</sup> April 2019. Not all breaches of duty are covered by the scheme. Only breaches arising from tortious liabilities are covered. These will be clinical negligence liabilities in the main.
- c) The Scheme does not cover the following (this is not an exhaustive list and so if in doubt you should contact your MDO or NWSSP - L&R);
  - i) Private Work / non NHS Work / Non GMS Contract Work

- ii) Disclosure of record requests from patients (unless there is a claim for compensation as well)
- iii) Complaints that are not clinical negligence related
- iv) Regulator (GMC/NMC/HPC) Referrals and Hearings
- v) Regulatory disputes
- vi) Criminal Proceedings
- vii) Healthcare Inspectorate Wales (HIW) investigations
- viii) Inquest Representation
- ix) Disciplinary proceedings against you or your staff
- x) Awards made by the Public Services Ombudsman for Wales (unless there is an overlap with compensation payable for an injury resulting from clinical negligence)
- xi) Ex-gratia payments
- xii) Defamation claims
- xiii) Breach of Data Protection Regulations
- xiv) Employers' liability claims
- xv) Public liability claims
- xvi) Property or Occupiers' liability claims
- xvii) Primary care dentistry claims
- xviii) Community care dentistry claims
- xix) Community pharmacy claims
- xx) Optometry claims

- d) To fall within the scope of the Scheme, the act amounting to an Existing Liability must;
- i) Have occurred before 1<sup>st</sup> April 2019,
  - ii) Have been connected to your provision of or your making arrangements for, the provision of or carrying out, an activity in connection with;
    - (1) Primary medical services – i.e. services the Local Health Board is under a duty to secure in accordance with section 41 of the NHS (Wales) Act 2006,
    - (2) Ancillary health services – i.e. services, other than primary medical services, provided as part of the health service by a person who, at the time of providing the services, was—
      - (a) A Part 4 contractor, i.e. a person providing, or making arrangements for the provision of primary medical services in accordance with a contractual arrangement (including a contractual arrangement or agreement that is part of a set of arrangements for the provision of services in addition to the primary medical services) made with that person under one of the following provisions of the 2006 Act—
        - (i) section 41(2)(b) (primary medical services),
        - (ii) section 42(1) (general medical services contracts: introductory), or
        - (iii) section 50 (arrangements by a Local Health Board for the provision of primary medical services); whose principal activity consisted of the provision of primary medical services,
      - (b) a primary medical services sub-contractor whose principal activity consisted of the provision of primary medical services, or
      - (c) a person providing the services under a contractual arrangement with either of the above.

iii) result, or resulted, in personal injury or loss to the patient / third party, and

iv) was an act or omission on the part of the Eligible Person or an employee of the Eligible Person, connected to the diagnosis of an illness or the care or treatment of any person.

#### 4) Eligible Persons under the Scheme

- a) NWSSP - L&R will assess whether you are an Eligible Person according to the Regulations.
- b) In order to be an Eligible Person and to access the indemnity provided by the Scheme certain criteria need to be met;
  - i) You (or the person who engaged / authorised you) must have been a member of an MDO at the time the alleged act or omission giving rise to a potential Existing Liability occurred, and;
    - ii) You were at the time;
      - (1) a Part 4 contractor (as described in section 3(d) above) or,
      - (2) a primary medical services sub-contractor (as described in section 3(d) above), or
      - (3) a person providing ancillary health services (as described in section 3(d) above).
- c) In addition, your MDO must have concluded an agreement with the Welsh Ministers for the transfer of legal responsibility to consider indemnifying Existing Liabilities of their members to the Welsh Ministers, and;
- d) The transaction specifying the date on which the formal legal transfer of responsibility for Existing Liability claims to the Welsh Ministers takes place has completed. For MDDUS, this will be on 30<sup>th</sup> June 2020. For MPS, this will be on 1<sup>st</sup> April 2021.
- e) Where the Eligible Person is no longer present (i.e. they have died or the relevant legal organisation has ceased), eligibility under the

scheme will be assessed by NWSSP - L&R as at the time the potential existing liability accrued.

## 5) Level of Indemnity under the Scheme

- a) Those Existing Liabilities of Eligible Persons which fall within scope of the Scheme will benefit from an indemnity without excess and without a financial limit (subject to the total funds available for the scheme). This includes (where appropriate) payment of agreed or awarded damages, DWP / NHS charges, adverse legal costs and legal costs accrued by the Scheme in the defence of a claim.
- b) Indemnity is however discretionary and may be limited, withheld or withdrawn in such instances including but not limited to where;
  - i) the Eligible Person has made an admission of liability, without first obtaining written consent from NWSSP - L&R,
  - ii) liability has been determined by a court in proceedings conducted by, or on behalf of, the Eligible Person, otherwise than in consultation with NWSSP - L&R,
  - iii) the Eligible Person has not complied with a condition imposed by NWSSP - L&R in relation to a claim,
  - iv) a payment falls to be made by the Eligible Person and, without first obtaining written consent from NWSSP - L&R, the Eligible Person agrees to—
    - (1) be bound by the determination of any person as to the making of a payment in respect of a relevant liability to which the Scheme applies, or
    - (2) make any other payment in respect of the relevant liability, otherwise than in the course of legal proceedings or agrees to make a payment in consequence of a settlement of legal proceedings,
  - v) the payment would be an amount less than any amount specified by the Welsh Ministers as being the minimum amount payable

under the Scheme in respect of a relevant liability (there is currently no minimum amount), or

- vi) the Eligible Person has failed (whether fully or in part) to provide the required level of assistance, documentation, information requested by the Scheme or has failed to comply with a notice under regulation 11 of the National Health Service (Existing Liabilities Scheme for General Practice) (Wales) Regulations 2020.
- vii) the Eligible Person has failed to notify a new pre-April 2019 claim to NWSSP - L&R as soon as was reasonably practicable.
- c) Nothing in the Scheme is intended to contradict other legal duties or professional obligations to which Eligible Persons may be subject. Furthermore, indemnity will not be withheld because a practitioner has taken reasonable action to comply with their ethical, professional or statutory obligations.
- d) Should an Eligible Person be entitled to any other source of indemnity in respect of an Existing Liability (such as a policy of insurance), that indemnity should be made known and applied to the claim unless NWSSP - L&R determine otherwise.

## 6) How to contact NWSSP - L&R?

- a) If you have any concerns regarding whether a claim falls within Scheme, whether you are an Eligible Person or whether a matter should be reported please contact NWSSP - L&R by:

- i) Email – [ELS@wales.nhs.uk](mailto:ELS@wales.nhs.uk) - setting out the basis of your enquiry and details of your MDO at the time of the alleged act. NWSSP - L&R will respond by email or telephone to discuss the issue further.

- ii) Telephone – Call NWSSP - L&R Claims Helpline on 029 21 500 554 during standard business hours 9.00am – 5.00pm Monday

Friday, to speak to a legal advisor on any Scheme coverage issues.

- b) When sending confidential or personal data to NWSSP - L&R, you should ensure that documents and / or information are sent via one of the following routes:

i) Electronically;

- (1) Secure NHS email account;
- (2) For a non-NHS email account, please ensure any documents are encrypted (password protected);
- (3) NWSSP - L&R secure web portal (internet access required), please contact the team to request access;
- (4) The NHS Wales Secure File Sharing Portal (also known as MOVEit).

## 7) Existing claims transferring to NWSSP - L&R from an MDO

- a) If you have a claim which is within the scope of the Scheme and is currently being handled by your MDO, you should continue to correspond with your MDO.
- b) The claim will automatically be transferred into the Scheme once your MDO has transferred their responsibility for Existing Liabilities. NWSSP - L&R will contact you within 5 - 10 business days once this has taken place. Details of the solicitor at NWSSP - L&R who the claim has been assigned to will also be provided to you.
- c) NWSSP - L&R will send you a copy of the Scheme Guidelines and will ask you to confirm your acceptance of the same. Once you have accepted the Scheme Guidelines, NWSSP - L&R will commence work on the claim.
- d) Claims currently with MDDUS are due to transfer into the Scheme on 30<sup>th</sup> June 2020. Claims currently with MPS are due to transfer into the Scheme on 1<sup>st</sup> April 2021.
- e) NWSSP - L&R will review all claims received. If an external solicitor has been instructed in respect of your claim, NWSSP - L&R will review the necessity of maintaining that instruction and may opt to take over conduct of the claim on behalf of the Scheme. You will however be consulted.

## 8) Reporting a new pre-April 2019 claim to NWSSP - L&R

- a) If your MDO is yet to reach agreement to transfer its responsibilities for Existing Liabilities to the Welsh Ministers, you should report any new claims to them.
- b) If your MDO has reached agreement with the Welsh Ministers and transferred its responsibilities for Existing Liabilities so that they are covered by the Scheme, you should report a pre-1<sup>st</sup> April 2019 claim to NWSSP - L&R as soon as reasonably practicable.
- c) Claims currently with MDDUS are covered by the Scheme from 30<sup>th</sup> June 2020. Claims currently with MPS will be covered by the Scheme from 1<sup>st</sup> April 2021. MDU members should report all claims to the MDU until further notice.
- d) It is essential when providing documents and information that you do so securely to ensure a patient's personal data is protected. When reporting a claim to NWSSP - L&R, complete the ELS Contact & Information Form – see Appendix A and where available, send us the following documents:
  - i) Patient's complete set of GP records;
  - ii) Letter of Claim or some other request for compensation from the patient or their solicitors;
  - iii) Claim Form, Particulars of Claim – court documents commencing a clinical negligence claim;
  - iv) All correspondence with the patient or their solicitors;
  - v) All correspondence relating to any complaint that may have been made by the patient;
  - vi) Written comments, witness statements and reports you may have previously prepared, for example in preparation for a complaint response, inquest or regulatory hearing that relates to the relevant incident that is, or may be, the subject of a claim;

- vii) Any independent expert evidence that may have previously been obtained, for example in preparation for an inquest or regulatory hearing (if provided to you by your MDO);
  - viii) Notes or associated documents from any inquest, including the details of the Coroner's conclusion (if provided to you by your MDO);
  - ix) Any Serious Incident Investigation Report or any other report into a patient safety incident;
  - x) Any documentation generated under Putting Things Right.
- e) The documents listed ii - ix above should not be included in a patient's GP notes and should be kept separately.

#### 9) What will happen after a claim has been reported to NWSSP - L&R?

- a) Once a claim has been reported to NWSSP - L&R, it will need to be assessed to determine whether;
  - i) You are an Eligible Person in accordance with the Regulations; and
  - ii) The claim falls within the scope of the Scheme.
- b) NWSSP - L&R will contact you by email or telephone to acknowledge receipt of the claim with 2 working days.
- c) NWSSP - L&R will confirm within 5 - 10 working days whether the claim is eligible for indemnity under the Scheme. If there is delay in verifying your MDO details, NWSSP - L&R will contact you to explain the delay.
- d) Once scope and eligibility have been confirmed, you will be asked to confirm your agreement to the Scheme Guidelines. Once you have confirmed your agreement to the Scheme Guidelines, you be allocated a dedicated solicitor who will contact you at a time convenient to you to set the investigation in motion.

- e) NWSSP - L&R will aim to avoid formal court proceedings wherever possible. Your timely input to the investigation and resolution of the claim is critical. NWSSP - L&R may consider recommending the PTR process or the option of mediation.
- f) Claims will be managed in accordance with NWSSP - L&R Claims Handling Guidelines.
- g) Once an outcome has been reached, anonymised learning from the incident and others like it will be used for safety improvement in Primary Care.

## 10) Claims Handling / Legal Services

- a) NWSSP - L&R will handle in scope claims in accordance with their Claims Handling Guidelines.
- b) Where multiple parties are involved, NWSSP - L&R will manage any such claim, including agreeing any apportionment of liability, as they consider appropriate in the best interests of the Scheme and in full consultation with Eligible Persons.
- c) Eligible Persons are required to co-operate and to provide NWSSP - L&R with such information, documents and assistance as is required to allow NWSSP - L&R to process any claim within the Scheme.
- d) NWSSP - L&R will appoint barristers, external solicitors, cost lawyers, experts and any other third parties they consider are required to assist with a claim under the Scheme. To that extent, NWSSP - L&R may exercise any contractual or other rights or powers of an Eligible Person.
- e) NWSSP - L&R will work with Eligible Persons, will keep them up to date and will consult with Eligible Persons regarding claims decisions. Ultimately however, claims decisions will be made as follows;
  - i) For claims with a damages estimate up to £1 million, by the Scheme operator (NWSSP - L&R) pursuant to a delegated authority from the Welsh Ministers.

- ii) For claims with a damages estimate in excess of £1 million, by the Welsh Ministers.
- f) If an Eligible Person does not agree with a proposed claims decision, they will have the option to remove the claim from the Scheme. Indemnity under the Scheme will however likely cease once a claim has been removed. Each claim will be considered on an individual basis.
- g) Where NWSSP – L&R are providing litigation services, those services will be provided by Solicitors who are authorised by the Solicitors Regulation Authority and / or Legal Executives who are regulated by the Chartered Institute of Legal Executives to carry out reserved legal services pursuant to the Legal Services Act 2007. All non-regulated staff (e.g. junior legal staff, paralegals etc.) will be supervised by authorised persons
- h) NWSSP – L&R employed solicitors, legal executives and staff have the benefit of NHS indemnity via Velindre NHS Trust and its membership of the Welsh Risk Pooling arrangements for any claims brought against them arising from the operation of the Scheme. Adequate and appropriate cover is in place in respect of the services provided pursuant to the Scheme.

## 11) Conflicts of Interest / Confidentiality

- a) The Eligible Person who is seeking indemnity at the discretion of the Scheme will be the named party in any litigation.
- b) NWSSP - L&R do however recognise that confidential claims information will be collected in the course of operating the Scheme. In particular, NWSSP - L&R represent NHS bodies in Wales who may be co-defendants to a claim to which an Eligible Person may also be a party. To ensure the appropriate safeguards are in place to address conflicts of interest or significant risks of such conflicts;
- i) NWSSP - L&R will ensure all claims falling within the Scheme will be managed exclusively within their Primary Care Clinical Negligence Team.

- ii) NWSSP - L&R will put mechanisms and safeguards in place to ensure claims falling within the Scheme are only be accessed by members of the Primary Care Clinical Negligence Team.
  - iii) Where appropriate, external solicitors may be instructed at the discretion of NWSSP - L&R.
- c) By seeking indemnity under the Scheme, Eligible Persons consent to other teams within NWSSP – L&R representing NHS bodies in Wales who may be co-defendants in the same claim in accordance with the arrangements set out in 11 b (i) – (iii) above.
- d) Where a claim involves multiple Eligible Persons from various MDOs, those Eligible Persons consent and agree to share confidential information such that NWSSP - L&R can conduct the claim as efficiently as possible and in consultation with all Eligible Persons to ensure all interests are taken fully into account.

## 12) Reviews and Complaints

- a) Scope / Eligible Person Decisions;
- i) If you have been notified that you do not meet the Eligible Person criteria or the claim you have notified has been deemed out of scope (i.e. it does not amount to an Existing Liability), you can request that this decision be reconsidered by writing to the Primary Care Clinical Negligence Team Manager ([ELS@Wales.nhs.uk](mailto:ELS@Wales.nhs.uk)) within 10 working days of notification.
  - ii) Your request will be reviewed and responded to within 10 working days.
  - iii) If you remain dissatisfied, you can request a referral of your case to the Director / Deputy Director of NWSSP - L&R for a further review and determination. This request should be made within 10 working days of the response to the initial request for reconsideration.

iv) A final response will be provided within 10 working days of NWSSP – L&R having received the request to refer the case to the Director / Deputy Direction.

b) Complaints relating to NWSSP - L&R service levels;

i) If you are dissatisfied with any aspect of the operation of the Scheme by NWSSP - L&R personnel please e-mail your concerns to [ELS@wales.nhs.uk](mailto:ELS@wales.nhs.uk). Your concern will be investigated and a response will be provided to you within 20 working days of NWSSP – L&R having received your email.

ii) If you remain dissatisfied after having received the initial response, you can request a referral of your complaint to the Director / Deputy Director of NWSSP - L&R for determination. This request should be made within 10 working days of the first complaint response.

iii) A final response will be provided within 10 working days of NWSSP – L&R having received the request to refer the case to the Director / Deputy Director.

iv) Finally, if having exhausted the internal NWSSP – L&R complaints process set out above, you still do not consider your complaint has been resolved you can refer your complaint to the Legal Ombudsman;

Legal Ombudsman  
PO Box 6806  
Wolverhampton  
WV1 9WJ

### 13) Data Protection

a) NWSSP - L&R will at all times comply with the provisions of the Data Protection Act 2018 (incorporating the GDPR). Our Privacy Notice can be found at; <http://www.nwssp.wales.nhs.uk/privacy-notice-1>.

### 14) Managing complaints under PTR (post MDO transfer to NWSSP - L&R)

- a) In Wales, all concerns (any complaint or notification of an incident concerning patient safety) are managed under Putting Things Right (PTR).
- b) General Medical Practices will already have procedures and processes in place for dealing with a PTR Concern. Those procedures will be based upon The National Health Service (Concerns, Complaints and Redress Arrangements) Wales Regulations 2011 and the "Putting Things Right" Guidance Version 3 (November 2013).
- c) General Medical Practices are expected to continue to deal with and investigate concerns in accordance with the PTR process. The General Medical Practice may continue to ask the Health Board for assistance.
- d) Eligible Persons may seek guidance and assistance about pre-1<sup>st</sup> April 2019 complaints from their MDOs or NWSSP - L&R. Where the complaint is likely to fall within the scope of the Scheme, NWSSP - L&R is happy to review a draft complaint response.
- e) NWSSP - L&R do not require Eligible Persons to contact them in relation to routine pre-1<sup>st</sup> April 2019 complaints, however where the patient or relative is complaining that the treatment received has caused harm or death, this should be notified to NWSSP - L&R without delay.
- f) Eligible Persons must contact NWSSP - L&R before issuing any complaint response letter which could reasonably be interpreted as making an admission of liability (including any admission of breach of duty alone) for the purposes of the Scheme or holding a meeting or taking any step which could lead to such an outcome in respect of a claim (whether made or in contemplation) falling within the scope of the Scheme.
- g) The Eligible Person may also require advice from their relevant MDO. For example, if there is an inquest in addition to a complaint or if there are potential regulatory issues.
- h) Non-clinical complaints (for example a complaint that a staff member was rude to a patient) are not included within the Scheme.

## 15) Using PTR to Manage Claims (post MDO transfer to NWSSP - L&R)

- a) Whilst General Medical Practices are subject to the requirements under the PTR Regulations, there is no obligation on General Medical Practices to deal with claims for financial compensation under the PTR regime. However, under the Scheme, there may be circumstances in which a claim for financial compensation is valued at £25,000 or less (excluding CRU, NHS Charges and costs). NWSSP - L&R will consider in such cases whether it is appropriate to offer to engage in the Redress Process on a voluntary basis for such claims.
- b) The process is based upon The National Health Service (Concerns, Complaints and Redress Arrangements) Wales Regulations 2011 and the Putting Things Right Guidance Version 3 (November 2013).
- c) The main advantages of engaging the PTR/Redress Process is that the claim can be resolved more quickly and Claimant's costs are limited to fixed costs (as opposed to costs on the standard basis if a civil claim is pursued).
- d) Fixed recoverable costs are currently being considered for clinical negligence litigation in England and Wales. This document will be updated once such a regime is published.