Independent Healthcare Providers Network
NHS CONFEDERATION

# Department of Health and Social Care (DHSC)
# Appropriate clinical negligence cover

## INTRODUCTION

The Independent Healthcare Providers Network (IHPN) is the representative body for independent sector healthcare providers across the UK. Our members deliver a very diverse range of services to NHS and private patients including acute care, primary care, community care, clinical home healthcare, diagnostics and dentistry. Our members are drawn from both the "for profit" and "not for profit" sectors and include large international hospital groups and small specialist providers.

The Network was established in 2005 as a body to represent independent sector providers of NHS clinical services and was incorporated into the broader NHS Confederation in June 2007. In 2018 the Network expanded its remit to cover all services delivered by our members including NHS and privately-funded care. We are a voluntary membership body and our three main areas of focus are advocacy and influencing on behalf of the independent healthcare sector; facilitating sharing, learning and networking opportunities for members; and assisting with regulatory compliance.

## SUPPORT FOR LEGISLATIVE CHANGE

IHPN has long called for the introduction of fully comprehensive insurance indemnity cover that works for the benefit of patients, not doctors. We believe that patients should always be compensated when things have gone wrong and they have been harmed.

It is our position that the discretionary model of indemnity cover for healthcare professionals operating in the independent sector must cease. Medical Defence Organisations or insurers should not be able to avoid compensating private patients when harm has been caused to them through negligence on the part of their members/insured.

IHPN therefore support the DHSC's Option 2 as set out in this consultation:
*Option 2: change legislation to ensure that all regulated healthcare professionals in the UK not covered by a state-backed indemnity scheme hold appropriate clinical negligence cover that is subject to appropriate supervision, in the case of UK insurers, by the Financial Conduct Authority (FCA) and Prudential Regulation Authority (PRA).*

IHPN does not take a particular view on how the legislative change might best be achieved and understands it could happen through amendments to healthcare professional standards legislation, amendments to financial regulation legislation, or a combination of the two.

In terms of timescales, we note that if, following the outcome of this consultation, Government is minded to introduce regulation, this would require further consultation on the shape of any professional and financial regulation and specific changes to legislation. And that the process of consultation and laying of regulations could take a further 18 to 24 months. IHPN members have expressed disappointment at the length of time a policy change will take to achieve, particularly given the evident concern about private patients not being able to access compensation when they have been harmed and when things have gone wrong.

## CONSIDERATIONS FOR THIS POLICY CHANGE

Compulsory and affordable fully comprehensive insurance would be one practical solution to ensure that all healthcare professionals not covered by a state-backed indemnity scheme hold appropriate clinical negligence cover. However, it is critical to bear in mind that insurers do not insure against criminal acts. Therefore, in instances such as the recent Ian Paterson case, an insurer would not necessarily have taken a different approach to the medical defence organisation involved. A mechanism such as an industry-wide risk-pool would be a means to ensure patients subjected to criminal acts by healthcare professionals receive adequate compensation.

A case study the DHSC might usefully explore is the Solicitors' Indemnity Fund:

In September 2000, the Solicitors' Indemnity Fund (SIF) ceased to provide indemnity to solicitor practices in England and Wales. At that stage the Fund stood at some £240m. When commercial insurance was introduced this pushed the premium pot down to around £150m, although it recovered to around £180m the following year. 17 years after the mutual was folded, the premium pot is at about the same level as it was in the fund's last year.

The solicitors' profession and its regulator took the opportunity at the outset to define the cover that should be accepted as a minimum. While they did not stipulate a policy wording, they did set out certain terms that would be mandatory. In independent healthcare, minimum terms could be set to include:

*Minimum limit of indemnity (currently £10m is seen as an adequate and appropriate standard amount of indemnity cover for the majority of consultant procedures performed in the independent sector);
*Minimum run-off period of 21 years at full indemnity limit;
*Cover to be included for deliberate acts (the "Paterson clause"); and
*Innocent non-disclosure clause (where a consultant does not disclose something material but is free from fraudulent intent).

The government has already acknowledged the potential cost implications of this proposed policy change. The general regulatory costs associated with insurance, Insurance Premium Tax and the need for reserves are likely to have an impact. There may well been an additional impact on the cost of certain high-risk specialties where cost is already high, e.g. neuro and spinal surgery.

There is also the potential that this policy change could create a situation where there is to all intents and purposes double cover in circumstances where healthcare employees have secondary cover through their employers for anything done lawfully in the course of their employment. While some healthcare professionals will have their "back up" cover through membership of bodies (for example the Society of Radiographers) others will not, and the costs involved in obtaining that cover when it is not necessary may well be disproportionate. There will therefore need to be some consideration of the position of employed healthcare professionals in the independent healthcare sector in the context of the overall arrangements.

IHPN are also aware that the DHSC are considering and will in due course be consulting on rising clinical negligence costs. That policy area has relevance here too and we will respond to that consultation when it is issued.

This change would lead to a certain amount of instability in the market, and the above example suggests that this process might take around a year to resolve itself. However, clearly the medical defence organisations and relevant insurers are already alive to this proposed change and market instability will be mitigated by an extended implementation period.

There will certainly be a need for a significant education campaign for healthcare professionals during the transition period so that they are aware of any new requirements placed upon them. and it is essential that they understand the limits and exclusions of any cover they purchase. We cannot have a situation where the discretionary model of medical defence organisations is simply replaced by an insurance system with significant exclusions and limits. The ultimate purpose of this policy change should be to strengthen patient recourse and the transition towards that should be a smooth as possible.

**CONCLUSION**

There is a real opportunity for the Department of Health and Social Care and the independent healthcare sector to shape the future of appropriate clinical negligence cover for regulated healthcare professionals. While we do not have a strong preference for exactly how legislative change might best be achieved, we do believe it is crucial that all parts of the sector are involved in the process.

We therefore look forward to continuing to work with the DHSC, medical defence organisations and the insurance industry to ensure that private patients are afforded the same legal and financial protections as NHS patients, by ensuring that all regulated healthcare professionals in the UK not covered by a state-backed indemnity scheme hold appropriate clinical negligence cover that is subject to appropriate supervision.

---

**IHPN**
**28 February 2019**