

Health and Care Professions Council – 18 October 2012

Indemnity Cover Arrangements as a Condition of Registration

Introduction

1. In the coming months, the Council will need to address the issue of mandatory indemnity cover as a condition of registration because of two related policy developments.
2. First, Article 2 of Directive 2011/24/EU on patients' rights in cross-border healthcare (the Cross-Border Healthcare Directive) provides that:
The Member State of treatment shall ensure that:...
(d) systems of professional liability insurance, or a guarantee or similar arrangement that is equivalent or essentially comparable as regards its purpose and which is appropriate to the nature and the extent of the risk, are in place for treatment provided on its territory;...
3. Article 21 of that Directive (transposition) requires Member States to bring legislation into force to comply with the Directive by 25 October 2013. Consequently, the Department of Health (in consultation with the Devolved Administrations) will need to introduce domestic legislation on this issue in 2013.
4. Secondly, in June 2010 an Independent Review Group chaired by Finlay Scott, the former GMC Chief Executive, concluded that requiring health professionals to have insurance or indemnity cover as a condition of their registration was "the most cost effective and efficient means of achieving the policy objective that... individuals harmed due to the negligent activities of healthcare professionals can seek redress through compensation". That conclusion was accepted by the Government in the 2011 Command Paper *Enabling Excellence: Autonomy and Accountability for Healthcare Workers, Social Workers and Social Care Workers*.
5. Although the Directive only applies to health professionals, the Government has suggested that it will consult on whether the arrangements should extend to HCPC-registered social workers as well.
6. The regulation of social workers is a devolved function and it is unclear whether the intention would be to consult on indemnity cover for social workers throughout the UK or only in England. As they are not within the

scope of the Directive, any decision to require social workers to have indemnity cover as a condition of registration would require the agreement of the Devolved Administrations. If the requirement only applied to social workers in England, practical difficulties are likely to arise in respect of temporary practice in England by social workers registered in the other UK countries; a point which the Council may need to raise in response to any Government consultation on this issue.

Indemnity Cover

7. Typically, health professionals may be indemnified against negligence claims by insurance or some other form of indemnity arrangement provided by an employer or other organisation (which, in turn, may then be insured against liability).
8. For those in private practice, the normal approach is to secure professional indemnity insurance. Often this is offered at favourable rates via a professional body and sometimes is included within the annual subscription to that body without the need for payment of a further premium.
9. For those who are employees, cover is normally provided by the employer (who has vicarious liability for the acts and omissions of employees), who may in turn have insurance for such liability. Many NHS trusts in England will participate in the Clinical Negligence Scheme for Trusts (CNST) operated by the NHS Litigation Authority and there are equivalent arrangements in Scotland, Wales and Northern Ireland.
10. Registrants who undertake work outside of direct employment would need to ensure that they are covered in all settings and this will depend upon their contractual arrangements. For example, a person who is employed by one NHS Trust and who performs additional 'bank' work for another Trust, both of which are CNST members, should not need any separate cover. However, if the additional work is performed for a private sector provider or as an independent contractor then the situation will be different.
11. The regular performance of voluntary duties (e.g. for the Red Cross) is likely to need indemnity cover but will normally be provided by such organisations in any event. As there are no 'good Samaritan' laws in the UK, it is unclear whether cover would be needed for voluntary action taken by registrants in an emergency. Regardless of whether such cover is required by law, a registrant may still be sued for negligence in the course of good Samaritan acts (at least in theory – for the person in cardiac arrest, poorly performed CPR may not save their life but no attempt at CPR means certain death).
12. For many HCPC registrants, the most cost-effective source of indemnity cover is likely to be their professional body, many of which already operate schemes, and the introduction of mandatory indemnity requirements is likely to lead to an increase in membership for some professional bodies.

13. Obviously, it is not possible for the HCPC to offer indemnity cover to registrants (as it would be beyond the Council's statutory powers).

Implications for HCPC

14. Until the Government consultation document is available, it is difficult to predict with certainty how the process will work. However, once indemnity cover becomes a mandatory requirement for registration, it is likely that the HCPC will need statutory powers to:

- require registrants and potential registrants to provide information as to their indemnity arrangements;
- impose an obligation on registrants to inform the HCPC if cover ceases or is withdrawn for any reason;
- refuse or revoke registration if a person does not have indemnity cover or fails to comply with a requirement to provide information relating to such cover;
- deal with registrants who practise without adequate cover (and to treat them as still registered solely for the purpose of any fitness to practise proceedings even if they have no or inadequate cover).

15. One practical difficulty that will need to be addressed (hopefully in the consultation) is new registrants, who cannot practise without registration and, equally, cannot obtain registration without indemnity cover. A mechanism will need to be devised which allows new entrants to a new regulated profession to provide proof of cover after registration but before commencing practice.

“Appropriate” indemnity cover

16. The responsibility for ensuring that indemnity cover is “appropriate” or “adequate” (or whatever legislative language is finally adopted) must rest with the individual registrant concerned. Insurance contracts are governed by the principle of “utmost good faith” (*uberrimae fidei*) which requires the person seeking cover to disclose to the insurer all material facts which relate to the risk to be covered.

17. Whilst the HCPC may be able to provide generic guidance to registrants on indemnity cover, it will not be in a position to provide a definitive answer to the question of whether cover is adequate in a particular situation (other than after the event), as this would require knowledge and assessment of all of the risk factors associated with an individual registrant's practice, a task which a regulator simply cannot perform for everyone on its register.

18. This has implications for how the HCPC audits compliance. If the HCPC undertakes some form of audit which involves an assessment of the

adequacy of cover but the cover later proves to be inadequate, a person who is unable to recover damages from a registrant may seek to recover their loss from the HCPC. Whilst there is no certainty that such a claim would succeed, it might nonetheless draw the HCPC into protracted litigation.

19. That situation is compounded by the fact that, for obvious operational reasons, the majority of registrants will make declarations/disclosures about indemnity cover during their biennial renewal cycle. It is highly unlikely that registrants will have an insurance policy which (1) runs for two years and (2) is renewed to coincide with the HCPC renewal cycle. Consequently, there would be limited value in asking for the production of insurance certificates etc. as they may only be valid for a few months or possibly even days into the renewal cycle.

20. Although detailed work can only begin once the Department of Health has begun to consult on the necessary implementing legislation, it is likely that the most practical approach will be to:

- issue guidance to registrants on indemnity cover requirements; and
- require a specific declaration to be made by registrants on admission to, or renewal of, registration, to the effect that having read that guidance, they have adequate indemnity cover in place in respect of all their professional activities.

21. An example of such a declaration might be as follows:

I have read the HCPC Guidance on Indemnity Cover and understand that, as a condition of registration by the HCPC, I must have appropriate indemnity insurance or other appropriate indemnity cover (“indemnity arrangements”) in place for all of my professional activities as a registrant. I confirm that:

- I have indemnity arrangements which I am satisfied are appropriate for all of my professional activities;
- I will maintain those or other appropriate indemnity arrangements throughout my registration by the HCPC; and
- I will promptly inform the HCPC if for any reason I cease to have appropriate indemnity arrangements.

22. Article 3(14) of the Health and Social Work Professions Order 2001 requires the Council to consult before giving any “guidance under [that] Order” and guidance on indemnity cover would be within that definition, as the Order will be amended to reflect the requirements of the Directive. This is an issue on which the Council will wish to engage stakeholders in any event, particularly the professional bodies who are likely to be significant providers of indemnity insurance for work not covered by employers.

23. A further and more detailed report will be presented to Council once the Government consultation paper has been published.

Decision

The Council is invited to note the paper.

Background information

None.

Resource implications

None.

Financial implications

Changes will be required to the netregulate system and admission forms and HCPC will be required to publish guidance; costs of which are not yet known.

Appendices

None

Date of paper

26 September 2012