

Insurance/indemnity guidance for the commissioners of clinical services

Summary

Commissioners have an important role to play in ensuring that providers possess adequate indemnity. Crucially, they need to understand that in certain circumstances they will have to take over directly the liabilities of providers.

Introduction

This guidance aims to provide advice for commissioners seeking to ensure that providers with which they are proposing to contract have in place adequate indemnity arrangements. Commissioners need to understand and take account of the differences in cover for clinical negligence risks purchased by healthcare organisations.

Insurance/indemnity cover may be provided by commercial insurers or through the Clinical Negligence Scheme for Trusts (CNST), a risk-pooling scheme funded by its members and administered by NHS Resolution. In some circumstances, particularly if a provider becomes insolvent, liabilities may pass back to the commissioner and therefore it is important that commissioners assure themselves of the financial stability of non-NHS providers.

Important features of clinical insurance/indemnity cover

There are varying insurance providers, some based in the UK and some abroad. Terms and conditions will all be different, but the following are standard features:

- Insurance policies will have a limit of indemnity per claim and also, probably, per policy period (aggregate limit). CNST has no limits per claim or per policy period.
- Insurance policies usually have excesses which may be substantial. CNST has no excesses.
- Cover is usually on an annual basis.
- Insurance policies do not stipulate a minimum period of cover. CNST has a minimum membership period of three years.
- Insurance cover for clinical negligence is almost always on a “claims made” basis, i.e. claims initiated during the policy period will be covered, as usually will incidents notified

to the insurer as being likely to give rise to a claim – although individual policies will have different wordings on this topic.

- Insurance policies usually have a stipulation that cover will not apply to negligence occurring before a particular date (retroactive date) – it is most important to check this, because such a provision gives rise to the possibility of an uninsured period. CNST only covers incidents occurring on or after the joining date.
- If an organisation leaves CNST, it must take its liabilities with it: this could have very significant implications for an organisation without substantial financial resources, because commercial insurers may not offer substitute cover for these liabilities.
- If a provider loses all its relevant NHS contracts, and these are covered by an insurance arrangement, commissioners should ensure that the provider maintains its claims-made cover because claims relating to negligence during the period the contracts were in force may arise after they have ceased. However if the provider in such a situation has CNST cover, the organisation ceases to be eligible for CNST membership, which is likely therefore to be cancelled by NHS Resolution. In that case, the provider will have to take back its liabilities, and commissioners should ensure that the provider purchases appropriate insurance protection if possible. However, this may be both difficult to secure and expensive, and in such cases NHS Resolution is likely to ask the commissioner to take on those liabilities under its own membership of CNST.
- UK/EU-based insurers are subject to minimum solvency requirements, but those based elsewhere may not be, so commissioners need to scrutinise carefully cover offered by non-UK/EU insurers.
- Insurance policies provide cover for the organisation and may or may not extend to individual clinicians. If clinicians are not covered, they must take out their own personal indemnity, usually via a Medical Defence Organisation but sometimes via an insurance policy. CNST covers both organisations and their clinicians (on the basis of the organisation's vicarious liability).
- Insurance policies usually do not cover sub-contractors and this point needs to be checked. CNST provides cover for sub-contractors, although in practice most sub-contractors take out their own cover. To provide assurance to commissioners, staff and patients, the NHS Standard Contract requires that providers ensure that their sub-contractors have indemnity arrangements in place.
- In the event of insolvency of an NHS provider, a claimant has rights of enforcement against its insurers under the Third Parties (Rights Against Insurers) Act 2010, provided he/she can establish legal liability against the insolvent organisation. In other words there must be a valid claim, covered by the policy, and if the policyholder is insolvent a patient can claim directly against the insurer.

- If a member of CNST becomes insolvent its membership will be terminated and, under the scheme regulations, its liabilities are treated as those of the commissioner. This is a very important provision, of which some commissioners may be unaware. It serves to demonstrate the importance of establishing the financial standing of organisations to which contracts are awarded, and also of understanding if any sub-contractors are to be used and their financial/professional standing. If insolvency occurs after the loss of NHS contracts, NHS Resolution will ask the commissioner to assume liability for claims under its own membership of CNST.

In view of the wide range of policies available, it is important to check the policy documents to establish their terms.

Non-Clinical liabilities

NHS bodies are eligible to join NHS Resolution's non-clinical scheme, Liabilities to Third Parties Scheme (LTPS). This covers a huge variety of risks such as public liability, employer's liability, professional indemnity and directors' and officers' liability. As with CNST, nearly all cover is without financial limit. There are, however, excesses for some classes of risk.

Private providers of NHS healthcare are not able to join LTPS and must therefore take out commercial insurance cover against these risks. Please refer to the comments above in respect of insurance cover.