

CORONAVIRUS BRIEFING NOTE 2
CORONAVIRUS PANDEMIC AND
HEALTH SERVICE INDEMNIFICATION
FOR DIRECTORS, CHIEF EXECUTIVE OFFICERS AND IN-HOUSE LAWYERS

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1. SUMMARY

- 1.1. The starting point for the defence of any clinical negligence action arising from the coronavirus pandemic is the source and level of indemnity that is available to the defendant.
- 1.2. The Coronavirus Act enables the secretary of state and ministers in devolved administrations to provide an indemnity for clinical negligence liabilities arising from NHS activities (“Health Service Indemnification”).
- 1.3. Health Service indemnification under the Coronavirus Act 2020 in England, Wales and Scotland does not include Social Care.
- 1.4. In Northern Ireland indemnification Under the Coronavirus Act 2020 includes both health and social care.
- 1.5. Those who rely entirely on cover through a defence organisation, professional body or through commercial insurance are not covered through this new indemnity scheme and need to check with their insurers.

2. INTRODUCTION

- 2.1. The Coronavirus Act 2000 builds on existing indemnification arrangements to provide an extra layer of indemnity which is intended to act as a ‘safety net’ where clinical negligence arising from the provision of services is not already covered under a pre-existing indemnity arrangement, for example under state indemnity schemes, private arrangements with medical defence organisations or under commercial insurance policies or through membership of a professional body.
- 2.2. The Coronavirus Act includes powers to provide indemnity coverage for clinical negligence of health care workers and others carrying out NHS activities (and for

Northern Ireland, health and social care activities) connected to care, treatment or diagnostic services provided under the arrangements for responding to the COVID-19 outbreak.

2.3. This Briefing notes sets out the structure of health service indemnification under the COVID-19 pandemic. The key provisions applicable in England, Wales, Scotland and Northern Ireland are provided at Appendix 1.

3. EXISTING INDEMNITY ARRANGEMENTS

3.1. Existing State Indemnity Arrangements include the following:

3.1.1. **England:** Clinical Negligence Scheme for Trusts and the Clinical Negligence Scheme for General Practice

3.1.2. **Wales:** Indemnity for clinical negligence provided by the Welsh Risk Pool and under the General Medical Practice Indemnity scheme.

3.1.3. **Scotland:** the Clinical Negligence and Other Risks Indemnity Scheme.

3.1.4. **Northern Ireland:** the Clinical Negligence Scheme for Trusts and indemnity arrangements for General Practice.

3.2. Private Indemnity Schemes

3.2.1. Indemnity provided to members of organisations representing certain professions;

3.2.2. Indemnity Arrangements with medical defence organisations; and

3.2.3. Insurance Policies with Insurance Companies.

APPENDIX 1: CORONA VIRUMS HEALTH SERVICE PROVISIONS

11. INDEMNITY FOR HEALTH SERVICE ACTIVITY: ENGLAND AND WALES

(1) The appropriate authority may—

(a) Indemnify a person in respect of a qualifying liability incurred by the person, or

(b) Make arrangements for a person to be indemnified, in respect of a qualifying liability incurred by the person, by an authorised person.

(2) References in this section to a qualifying liability are to a liability in tort, in respect of or consequent on death, personal injury or loss, arising out of or in connection with a breach of a duty of care owed in connection with the provision, after the coming into force of this section, of a relevant service.

(3) “Relevant service” means a service which is provided by a person as part of the health service and which—

(a) Relates to—

(i) Caring for or treating a person who has, or is suspected of having, coronavirus disease, whether or not in respect of that disease,

(ii) caring for or treating a person (other than a person within sub-paragraph (i)) who has been, or is suspected of being, infected or contaminated, in respect of that infection or contamination or suspected infection or contamination, or

(iii) Diagnosing or determining whether a person has been infected or contaminated,

(b) relates to diagnosis, care or treatment and is provided in consequence of another person who usually provides such a service (other than one within

paragraph (a)) as part of the health service being unable to do so in consequence of providing a service within paragraph (a), or
(c) relates to diagnosis, care or treatment and is provided in consequence of another person who usually provides such a service as part of the health service being unable to do so because of a reason relating to coronavirus.

- (4) In a case within subsection (1) (a), any question relating to—
(a) Whether a person has incurred a qualifying liability, or
(b) The amount of any payment by virtue of subsection (1), is to be determined by the appropriate authority.
- (5) In a case within subsection (1) (b)—
(a) Any question relating to whether a person has incurred a qualifying liability is to be determined by the authorised person;
(b) Any question relating to the amount of any payment by virtue of subsection (1) is to be determined by the authorised person in accordance with the arrangements.
- (6) Subsection (1) does not apply where arrangements are already in place (whether under an insurance policy or otherwise) for the person to be indemnified in respect of the liability.
- (7) In this section—
“the appropriate authority” means—
(a) in relation to a relevant service provided as part of the English health service, the Secretary of State;
(b) in relation to a relevant service provided as part of the Welsh health service, the Welsh Ministers;
“authorised person” means a person authorised by the appropriate authority;
“the health service” means the English health service or the Welsh health service;
“the English health service” means the health service continued under section 1(1) of the National Health Service Act 2006;
“the Welsh health service” means the health service continued under section 1(1) of the National Health Service (Wales) Act 2006.

12. INDEMNITY FOR HEALTH SERVICE ACTIVITY: SCOTLAND

- (1) The Scottish Ministers may—
(a) Indemnify a person in respect of a qualifying liability incurred by the person, or
(b) Make arrangements for a person to be indemnified, in respect of a qualifying liability incurred by the person, by an authorised person.
- (2) References in this section to a qualifying liability are to a liability in delict, in respect of or consequent on death, personal injury or loss, arising out of or in connection with a breach of a duty of care owed in connection with the provision, after the coming into force of this section, of a relevant service.
- (3) “Relevant service” means a service which is provided by a person as part of the health service and which—
(a) Relates to—
(i) Caring for or treating a person who has, or is suspected of having, coronavirus disease, whether or not in respect of that disease,

- (ii) caring for or treating a person (other than a person within sub-paragraph (i)) who has been, or is suspected of being, infected or contaminated, in respect of that infection or contamination or suspected infection or contamination, or
 - (iii) Diagnosing or determining whether a person has been infected or contaminated,
- (b) Relates to diagnosis, care or treatment and is provided in consequence of another person who usually provides such a service (other than one within paragraph (a)) as part of the health service being unable to do so in consequence of providing a service within paragraph (a), or
- (c) Relates to diagnosis, care or treatment and is provided in consequence of another person who usually provides such a service as part of the health service being unable to do so because of a reason relating to coronavirus.
- (4) In a case within subsection (1)(a), any question relating to—
 - (a) Whether a person has incurred a qualifying liability, or
 - (b) The amount of any payment by virtue of subsection (1), is to be determined by the Scottish Ministers.
- (5) In a case within subsection (1) (b)—
 - (a) Any question relating to whether a person has incurred a qualifying liability is to be determined by the authorised person;
 - (b) Any question relating to the amount of any payment by virtue of subsection (1) is to be determined by the authorised person in accordance with the arrangements.
- (6) Subsection (1) does not apply where arrangements are already in place (whether under an insurance policy or otherwise) for the person to be indemnified in respect of the liability.
- (7) In this section—
 - “authorised person” means a person authorised by the Scottish Ministers;
 - “the health service” means the health service continued under section 1(1) of the National Health Service (Scotland) Act 1978.

13. INDEMNITY FOR HEALTH AND SOCIAL CARE ACTIVITY: NORTHERN IRELAND

- (1) The Department of Health may—
 - (a) Indemnify a person in respect of a qualifying liability incurred by the person, or
 - (b) Make arrangements for a person to be indemnified, in respect of a qualifying liability incurred by the person, by an authorised person.
- (2) References in this section to a qualifying liability are to a liability in tort, in respect of or consequent on death, personal injury or loss, arising out of or in connection with a breach of a duty of care owed in connection with the provision, after the coming into force of this section, of a relevant service.
- (3) “Relevant service” means a service which is provided by a person as part of the system of health and social care and which—
 - (a) Relates to—
 - (i) Caring for or treating a person who has, or is suspected of having, coronavirus disease, whether or not in respect of that disease,

- (ii) Caring for or treating a person (other than a person within sub-paragraph (i)) who has been, or is suspected of being, infected or contaminated, in respect of that infection or contamination or suspected infection or contamination, or
 - (iii) Diagnosing or determining whether a person has been infected or contaminated,
 - (b) relates to diagnosis, care or treatment and is provided in consequence of another person who usually provides such a service (other than one within paragraph (a)) as part of the system of health and social care being unable to do so in consequence of providing a service within paragraph (a), or
 - (c) relates to diagnosis, care or treatment and is provided in consequence of another person who usually provides such a service as part of the system of health and social care being unable to do so because of a reason relating to coronavirus.
- (4) In a case within subsection (1) (a), any question relating to—
- (a) Whether a person has incurred a qualifying liability, or
 - (b) The amount of any payment by virtue of subsection (1), is to be determined by the Department of Health.
- (5) In a case within subsection (1) (b)—
- (a) Any question relating to whether a person has incurred a qualifying liability is to be determined by the authorised person;
 - (b) Any question relating to the amount of any payment by virtue of subsection (1) is to be determined by the authorised person in accordance with the arrangements.
- (6) Subsection (1) does not apply where arrangements are already in place (whether under an insurance policy or otherwise) for the person to be indemnified in respect of the liability.
- (7) In this section—
- “authorised person” means a person authorised by the Department of Health;
 - “the Department of Health” means the Department of Health in Northern Ireland;
 - “the system of health and social care” means the system promoted under section 2(1) of the Health and Social Care (Reform) Act (Northern Ireland) 2009 (c. 1(N.I.)).

Please contact us if you would like a briefing on Zoom or with any issues you would like further advice on issues identified.
