



RESPONSE TO

Health Care and Associated Professions (Indemnity Arrangements) Order 2013

May 2013

Action against Medical Accidents

Action against Medical Accidents (AvMA) was established in 1982. It is the leading UK Charity specialising in advice and support for patients and their families affected by medical accidents. Since its inception, AvMA has provided advice and support to over 100,000 people affected by medical accidents. AvMA has in turn used the experiences of patients to successfully campaign to move patient safety higher up the agenda in the UK.

In addition to our work with patients and campaigning on patient safety, AvMA has also succeeded in bringing about significant changes to the way that the legal system deals with clinical negligence and is also responsible for making clinical negligence a specialism within legal practice. AvMA continues to accredit solicitors for its specialist panel and promote good practice through a range of services to claimant solicitors.

AvMA's experience of failures in healthcare indemnity arrangements

AvMA regularly receives feedback from clinical negligence practitioners about difficulties experienced in obtaining appropriate financial redress for injured patients and their families as a result of inadequate indemnity arrangements for claims arising both in the United Kingdom but also increasingly within the EU.

The following sets out some of the issues most commonly reported to AvMA:

- Practitioners being found to be without indemnity cover. This includes practitioners who are already required by their professional bodies to have such cover in place as well as practitioners entering the UK from the EU and overseas.
- Being unable to identify the provider of the practitioner's indemnity cover, particularly where the practitioner refuses to cooperate or is no longer resident in the UK.
- Refusal to indemnify a claim on the basis that the actions of the practitioner are considered to fall outside the terms of the policy, the practitioner is deceased or the indemnity arrangement does not cover past events once the arrangement has come to an end.
- Healthcare practitioners from outside the UK having insurance based in their home country and those insurers refusing to respond or co-operate making cases uneconomic or impossible to pursue. This is an increasingly common problem.
- Indemnity which fails to cover the range of possible claims against a practitioner. One such example would be claims under the Sale of Goods and Services Act e.g. faulty surgical implants. The practitioner may well not be aware that they are not indemnified or that they may require this type of cover.
- Disputes as to which party is liable where there is a chain of parties involved e.g. locum agencies, out of hours services, individual practitioners. This again will impact on costs and can effectively bar the patient from pursuing a claim.
- NHS services provided by the independent sector where there is a dispute over how the care is indemnified.

- A lack of clarity over the employment status of a healthcare professional in terms of whether they are 'employed' or 'contracted'. AvMA has seen examples where the organisation has argued that they were not liable but where the healthcare professional may not have been aware that they required separate indemnity insurance.

AvMA welcomes any steps that will help to ensure healthcare professionals are in a position through their indemnity arrangements to properly compensate patients who have suffered avoidable harm both within the United Kingdom but also wherever treatment is provided within the EU. However, the lack of equivalence across Europe in terms of professional regulation, access to effective systems of legal redress and the costs of pursuing legal action in a foreign jurisdiction, is still likely to leave many injured patients without the ability to successfully claim compensation. In other words, the availability of indemnity insurance is of limited value for patients seeking cross border healthcare if in practice they are prevented from exercising their right to claim compensation. Considerably more work will need to be done to ensure that universal indemnity for healthcare practitioners within the EU is in fact going to benefit patients in the way intended. It is however a significant first step.

It is important that these proposals do not have the unintended consequence of healthcare organisations further divesting themselves of responsibility for the standard of care being provided within their facilities. AvMA has seen many examples within the independent healthcare sector where hospitals and clinics have been quick to dissociate themselves from any responsibility for failures in care within their facilities on the basis that the responsibility is seen to rest entirely with the admitting consultant. This has the consequence that failures in the provision of care are not addressed and patients continue to be put at risk. Even where there has been clear fault on the part of the admitting consultant, it is rare that there are not significant contributory factors arising from the care and services provided by the facility that if addressed could have prevented or reduced the risk of significant harm. If independent providers were required to have comprehensive indemnity arrangements for all aspects of care including that of their admitting consultants, this would provide greater safeguards for patients in terms of placing the onus on the provider to ensure care provided both directly by the facility and by the admitting practitioners was of a high standard. An additional but important factor for the patient receiving care in the independent sector is that one incident of care may give rise to multiple defendants because of the current indemnity arrangements. This increases the costs and complexity and may bar the patient and their relatives from seeking redress.

Recommendations

To ensure the proposed changes to healthcare practitioners' indemnity arrangements provide effective protection for patients, AvMA would make the following recommendations:

1. Details of a healthcare professional's indemnity arrangements should be held by the professional regulator on the registrant's record. The fact that a registrant has indemnity cover is of limited value if it is not possible for the patient to identify the organisation providing that cover.

2. There should be a duty on professional regulators to check and verify that insurance is held and is adequate and appropriate. It is not sufficient to place this duty primarily on registrants in the form of a self-declaration. There is a significant risk that individuals who are either dishonest or who fail to obtain appropriate indemnity cover may also pose the greatest risk to patients. This is often reflected in cases reported to AvMA particularly in relation to areas such as cosmetic surgery and dentistry.
3. Clear guidance needs to be provided to registrants to ensure they understand what is required, the scope of the indemnity cover required and in what circumstances.
4. Insurers across the EU should be encouraged/required to provide standardised certificates of insurance which clearly sets out the cover provided including the countries covered and specifically any exclusions from the cover. This would reduce the burden on the regulators.
5. For those covered by their employer's indemnity arrangements, that an equivalent standardised certificate of indemnity is provided and including any exclusions.
6. There should be an onus on employers and particularly independent healthcare providers and agencies to check and verify the insurance status of employed or contracted healthcare professionals e.g. where employed by a locum agency, or that the employing organisation has appropriate indemnity insurance.

It should be included in the requirements for registration with the Care Quality Commission (and its equivalents in the rest of the UK) for any registered provider of healthcare to ensure adequate and appropriate indemnity cover is in place for all of the treatment it provides.

7. Clinical Commissioning Groups must have robust systems in place to ensure contracted services are fully and properly indemnified including any healthcare professionals employed by those services. This is to avoid a repetition of the problems experienced in relation to Independent Treatment Centres.
8. Anyone practising within the UK should be required to have UK based insurance from an accredited source.
9. There is a risk that the EU directive will result in rogue or less scrupulous companies entering the insurance market. This is why indemnity arrangements need to be subject to some form of checking or accreditation.
10. That a central compensation fund is set up for those cases involving practitioners who are found to be without indemnity cover.

Health Care and Associated Professions (Indemnity Arrangements) Order 2013

Consultation Questions

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Freedom of Information

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes. The relevant legislation in this context is the Freedom of Information Act 2000 (FOIA) and the Data Protection Act 1998 (DPA).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals amongst other things, with obligations of confidence. In view of this, it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

The Department will process your personal data in accordance with the DPA and in most circumstances this will mean that your personal data will not be disclosed to third parties. However, the information you send us may need to be passed on to colleagues within

the UK Health Departments and/or published in a summary of responses to this consultation.

I do not wish my response to be passed to other UK Health Departments

I do not wish my response to be published in a summary of responses

Please indicate all the countries to which your comments relate:

UK-wide and/or

England Northern Ireland

Scotland Wales

Are you responding:
- as a member of the public
- as a health or social care professional
- on behalf of an organisation

If you are responding as a health or social care professional, please supply the following details:

Profession:

Country of qualification Please indicate as appropriate:

UK Other EEA Rest of World

Area of work

NHS Social Care Private Health
Voluntary Regulatory Body Professional Body
Education Union Local Authority
Trade Body Other (please give details)

If you are responding on behalf of an organisation, please supply the following details:

NHS Social Care Private Health
Voluntary Regulatory Body Professional Body
Education Union Local Authority
Trade Body Other (please give details)

Please indicate whether your comments refer to requirements to be introduced generally, or to a particular healthcare professional regulatory body or bodies

Generally	<input checked="" type="checkbox"/>	GCC	<input type="checkbox"/>	GDC	<input type="checkbox"/>
GMC	<input type="checkbox"/>	GOC	<input type="checkbox"/>	GOsC	<input type="checkbox"/>
GPhC	<input type="checkbox"/>	HCPC	<input type="checkbox"/>	NMC	<input type="checkbox"/>

Consultation Questions

Q1: Do you agree that the requirement for healthcare professionals to have an indemnity arrangement in place should match the requirements set out in the Directive and place an obligation on healthcare professionals themselves to ensure that any indemnity arrangement in place is appropriate to their duties, scope of practise, and to the nature and the extent of the risk?

Agree () Disagree () Unsure () Other (✓)

Please set out your reasons in your response.

Comments

Please refer to the recommendations listed above. Whilst we would agree that there should be a professional duty on practitioners to ensure they have appropriate indemnity arrangements in place, there should also be a duty on the professional regulators to firstly check and verify that these arrangements are in place and secondly that it is from an accredited source. A system of self-declaration provides insufficient public protection. Organisations providing indemnity should be encouraged where they do not already do so, to provide standardised and transparent policy information to aid both the practitioner and the regulator in making these judgements and for these to be adopted across the EU. The regulators should provide guidance for their registrants on the matters they should be considering when arranging indemnity cover to avoid situations where the registrant finds themselves without adequate protection and patients without recourse to financial redress.

One of the consequences of the EU legislation is that it is likely to encourage new players to enter the professional indemnity market who may be less scrupulous in their dealings with both the insured and potential claimants. These claims involve vulnerable individuals who have suffered harm during the course of medical treatment by those caring for them and is therefore an area of insurance where perhaps more than any other, the highest standard of ethical behaviour is required both for the benefit of the patient but also the registrant.

Q2: Do you agree with the proposed definition of an indemnity arrangement?

Agree (✓) **Disagree** () **Unsure** ()

Please set out your reasons in your response.

Comments

Q3: Do you agree with the proposed provisions that set out:

(a) What information needs to be provided by healthcare professionals, and when, in relation to the indemnity arrangement they have in place;

Agree (✓) **Disagree** () **Unsure** ()

(b) The requirement to inform the Regulator when cover ceases;

Agree (✓) **Disagree** () **Unsure** ()

(c) The requirement for healthcare professionals to inform their regulatory body if their indemnity arrangement is one provided by an employer?

Agree (✓) **Disagree** () **Unsure** ()

Please set out your reasons in your response.

Comments

This is on the basis that it should not simply be a process of self-declaration and that the professional regulators will be required to verify and hold details of the registrant's indemnity arrangements on the registrant's record.

Q4: Do you agree with the proposal to allow healthcare professional regulatory bodies the ability to refuse to allow a healthcare professional to join, remain on, or return to, their register, or, for the GMC, to hold a licence to practise unless they have an indemnity arrangement in place?

Agree (✓) **Disagree** () **Unsure** ()

Please set out your reasons in your response.

Comments

The indemnity arrangements must be appropriate and verified as such by the regulator.

Q5: Do you agree with the proposal to permit healthcare professional regulatory bodies to remove a healthcare professional from their register, withdraw their license to practise, or take fitness to practise action against them, in the event of there being an inadequate indemnity arrangement in place?

Agree (✓) **Disagree** () **Unsure** ()

Please set out your reasons in your response.

Comments

Whilst it is important this power is in place, it is equally important that the professional regulators undertake appropriate checks at the time of registration to avoid a situation where a practitioner is found to have inadequate indemnity arrangements in place when it is too late to protect patients.

Q6: Please provide any information with regard to the potential barriers to independent midwives moving to alternative governance and delivery practices in order to obtain appropriate indemnity arrangements.

Comments

If the Government remains committed to providing choice in childbirth then it is essential that indemnity arrangements for independent midwives are made available. At the present time there remains uncertainty about the availability of such cover. It is completely unacceptable that a situation has been allowed to continue for over 10 years where independent midwives have been practising in a high risk area without indemnity and mothers and their babies without recourse to compensation. In the absence of viable alternatives, a method should be found that can bring independent midwives under the umbrella of the CNST.

Q7: Do you agree that the provisions in the Draft order should only apply to qualified healthcare professionals and not students?

Agree (✓) **Disagree** () **Unsure** ()

Please set out your reasons in your response.

Comments

This is providing there are no situations during the course of their training where a student would not automatically be indemnified.

Q8: Are there any equalities issues that would result from the implementation of the Draft Order which require consideration? If so, please provide evidence of the issue and the potential impact on people sharing the protected characteristics covered by the Equality Act 2010: disability; race; age; sex; gender reassignment; religion & belief; pregnancy and maternity and sexual orientation and carers (by association).

Agree () **Disagree** () **Unsure** (✓)

Comments

Not that we are aware of.

Q9: Please provide comments as to the accuracy of the costs and benefits assessment of the proposed changes as set out in the Impact Assessment (including, if possible, the provision of data to support your comments).

Comments

We do not have access to this data. However, costs for professional regulators could be ameliorated by the regulators working with insurance companies and other organisations providing professional indemnity to standardise policies according to the core requirements of the individual professions to make checking and verifying cover less onerous.

Q10: Please provide information on the numbers of self employed registered healthcare professionals and whether they are in possession of indemnity cover or business insurance which includes public liability insurance and professional indemnity insurance.

Comments

Not within our remit.

Q11: Please provide information on the numbers of employed healthcare professionals who, in addition to working in an employed capacity covered by an employer's arrangement for indemnity or insurance, undertake self-employed practice. Where possible, please provide information as to whether they are in possession of indemnity cover or business insurance which includes public liability insurance and professional indemnity insurance for that self-employed element of their practice.

Comments

Not within our remit.

Q12: Do you have views or evidence as to the likely effect on costs or the administrative burden of the proposed changes set out in the Draft Order?

Agree () **Disagree** () **Unsure** ()

Please provide information/examples in support of your comments.

Comments

Not within our remit.

Q13: Do you think there are any benefits or drawbacks that are not already discussed relating to the proposed changes?

Please provide information/examples in support of your comments.

Agree () **Disagree** () **Unsure** ()

Comments

Please refer to our comments at the head of this document.

There is a risk that less scrupulous insurance companies will take advantage of practitioners' and provide cover that is either not warranted or is inadequate.

Q14: Do you have any comments on the draft order itself?

Yes () **No** ()

Comments

Not considered in detail.

Q15: What are your views on extending the requirement to hold an indemnity arrangement as a condition of registration to all professionals statutorily regulated by the Health and Care Professions Council? This would cover Social Workers in England only.

Agree (✓) **Disagree** () **Unsure** ()

Comments