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Welsh Risk Pool Services

**All Wales Policy on insurance,
NHS Indemnity and related risk
management for potential losses
and special payments**

Policy Details:

Author(s):	Helen MacArthur	Head of Finance and Risk Management
	Tim Heywood	Solicitor, Legal and Risk Services
Update Author(s):	Jonathan Webb	Head of Safety & Learning
	Martin Riley	Head of Finance
Document Type	All Wales Policy	
Current review changes:	Updated to reflect inclusion of Special Health Authority in risk pooling arrangements. Reference adjusted to Health Bodies, with definition of these outlined to include NHS Trusts, Local Health Boards and Special Health Authorities.	
Review Ratified by	Welsh Risk Pool Committee & SSP Committee	
Date ratified:	11 th September 2018	
Date operational:	Immediate	
Date to be reviewed:	24 months	

Review History:

First Operational:	15th September 2015			
Previously Reviewed:	24/05/17	11/09/18		
Updated yes/no:	No	Yes		



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All Wales Policy on insurance, NHS Indemnity and related risk management for potential losses and special payments

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1.0 SCOPE OF THIS POLICY

- 1.1 This document sets out the all Wales Policy for the use of insurance, contract management and the indemnity arrangements for the financial administration of potential losses and special payments. This Policy replaces Welsh Health Circular (98) 8 and incorporates the requirements of WHC (2000) 04. The principles and scope of NHS Indemnity are unchanged.

2.0 EXTENT OF LOSSES & SPECIAL PAYMENTS COVERED BY THIS POLICY

- 2.1 This policy applies to potential and actual negligence claims. It does not apply to other types of legal claim that might be made in respect of purely commercial or employment contracts. Other losses including building, equipment and consumable losses are dealt with under the section on the use of Insurance and Indemnity Arrangements (Section 6)

3.0 ORGANISATIONS INCLUDED BY THIS POLICY AND ACTION REQUIRED

- 3.1 This policy applies to Health Bodies within NHS Wales. A Health Body is defined as a Local Health Board, NHS Trust, Special Health Authority or other organisation enacted under an establishment order by the Welsh Government.
- 3.2 A full list of organisations covered by this policy is outlined in Schedule 1.
- 3.3 Compliance with this Policy is a condition of participation in the Welsh Risk Pool and Health Bodies in Wales must:-
- 3.3.1 Review their procedures, contract documentation and management practices for the provision and commissioning of healthcare and other services to ensure that they are consistent with the key principles set out in this policy
 - 3.3.2 Ensure there is an indemnity or insurance arrangement which provides appropriate cover for all activities which fall outside of the scope of NHS Indemnity
 - 3.3.3 Ensure they have a clear written policy, procedure and financial arrangements for meeting liabilities arising from negligence claims which are fully consistent with this document and the risk pooling arrangements of the Welsh Risk Pool Service and associated Technical Notes.



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4.0 OUTLINE OF LOSSES & SPECIAL PAYMENTS, INSURANCE AND NHS INDEMNITY

- 4.1 Losses and special payments are items which, ideally, should not arise and are not routine in nature. Such items are, therefore, subject to additional control measures above those which are applicable to the normal and routine payments.
- 4.2 Detailed guidance on the management of Losses and Special Payments is provided within the Losses and Special Payments Chapter within the NHS Wales Manual for Accounts and all NHS Wales health bodies should ensure that arrangements are in place for compliance with the requirements of the Manual.
- 4.3 In particular the Losses and Special Payments Manual requires that Health Bodies in NHS Wales have effective systems for:
- 4.3.1 The control and safe custody of health service property
 - 4.3.2 Administration of property including that of patients, and
 - 4.3.3 Recording, reporting and investigation of losses and special payments
- 4.4 An essential element of the decision making around service delivery options should be an objective assessment of the potential risks and clarity of approach to manage these risks.
- 4.5 The purpose of this document is therefore to confirm the policy for NHS Wales on the use of insurance, indemnity and contractual arrangements to manage the financial impact of potential losses and special payments and to confirm the risk pooling arrangements when they do arise.

5.0 POLICY

- 5.1 The modernisation of NHS Wales has seen the development of integrated services with an increased propensity for new and innovative service delivery models. Such innovation is to be encouraged although the need to consider the associated risks becomes even more important. It is clear from the enquiries received by the Welsh Risk Pool Service that care is now routinely delivered using a blend of NHS directly provided and externally commissioned arrangements. Within this document the distinction is made between the following:
- Directly provided service by Health Bodies and
 - Externally commissioned services.



- 5.2 NHS Indemnity will apply in respect of losses arising from services provided by Health Bodies in NHS Wales and commercial insurance should not routinely be purchased to mitigate the effect of such losses.
- 5.3 For externally commissioned services, the contractual arrangements entered into with the external service provider should ensure that the provider bears financial responsibility for its own acts and omissions. For the purpose of clarity, a service is deemed to be directly provided if the Health Body retains responsibility for the delivery of the service including the overarching supervision and management arrangements.
- 5.4 Directly provided services may include using the services of non NHS persons but overall management and control and duty of care to the patient is retained by the Health Body.
- 5.5 An externally commissioned service is one whereby either the whole service or a discrete element of a service is managed and delivered by a person or body external to NHS Wales pursuant to a contract. External providers in this context includes independent contractors. It is important when designing or developing service delivery options that care is taken to properly establish the clinical substance of each option and the underlying governance and management arrangements are clearly thought through.
- 5.6 Where there is any uncertainty or the issue is novel or potentially sensitive then further clarification and guidance may be sought from the Welsh Risk Pool Service using the Indemnity Query Form (Appendix A provides a copy and the form is also available on the WRPS Intranet site or directly from the WRPS). Where appropriate the query will be presented to the WRP Committee for a formal decision.

6.0 USE OF INSURANCE AND INDEMNITY ARRANGEMENTS

- 6.1 Save where one of the exceptions applies, NHS Wales health bodies are not permitted to enter into commercial insurance arrangements to manage the potential financial risks arising from losses and special payments.
- 6.2 Losses arising in respect of buildings, equipment and consumables are borne by NHS Wales, albeit that, on occasions, the financial impact on individual bodies is mitigated through the use of the risk pooling arrangement (see Section 9).
- 6.3 The following exceptions apply to losses which are outside of the scope of the risk pooling arrangement. Appropriate insurance or indemnity may be purchased by individual NHS Wales health bodies in relation to:-



- 6.3.1 Income Generating activities;
 - 6.3.2 Motor vehicles, (excluding emergency response vehicles and patient transport vehicles operated by Welsh Ambulance Service Trust);
 - 6.3.3 Insurance and indemnity arrangements specified within PFI contracts;
 - 6.3.4 Buildings cover on advice from Specialist Estate Service where NHS is not the main occupier;
 - 6.3.5 Personal Accident cover for non-negligent harm arising during the course of employment with the health body;
- 6.4 The restrictions on the use of commercial insurance increase the need for robust risk management arrangements. One area of note relates to ensuring that design, construction, alternation and refurbishment work undertaken by third party contractors on the NHS properties is underpinned by insurance cover in line with industry standards (e.g. JCT and NEC) to ensure that NHS Wales is not unduly exposed to significant financial risks.

7.0 NHS INDEMNITY ARRANGEMENTS

- 7.1 The concept of an indemnity in this context is that, in specified circumstances, Health Bodies accept legal and financial responsibility for the actions and omissions of their employees and others who are directly involved in NHS service provision.
- 7.2 Acceptance of such responsibility is an essential element of delivering a modern healthcare service and ensures that the consequences of financial losses arising from service provision are properly managed. It is a necessary part of ensuring that there is appropriate allocation of responsibility and that there is clarity for patients and staff alike. Due to the varied nature of the organisations and the increasingly complex arrangements for healthcare provision, it is important that there is clarity about the circumstances in which NHS Indemnity applies and those when it does not.
- 7.3 This Policy seeks to express the core principles that apply whatever the circumstances. It does not attempt to anticipate every eventuality but provides a workable framework and guidance to support local decision making. Health Bodies must ensure they have the correct governance and risk management arrangements in place to ensure that NHS Wales is not exposed to unnecessary or unanticipated financial demands. NHS Indemnity applies only to NHS directly provided activities arising from the actions of:
- 7.3.1 NHS employees who, at the relevant time (i.e. at the time alleged negligence occurred), are providing services as employees of a Health Body, or



- 7.3.2 Others who, at the relevant time, are providing services not as employees of the Health Body but nevertheless under the Health Body's management, supervision and control. These will include, but are not limited to, Independent Members, agency staff, locums, clinical placements, work experience placements, volunteers, those with honorary contracts and certain sessional arrangements.
- 7.4 It does not apply in any other situation, unless extraordinary contractual arrangements are approved in advance by the WRP Committee. Where such approval is required an Indemnity Query Form (Appendix A) must be completed and submitted to the Welsh Risk Pool Service. Where NHS Indemnity applies it is not necessary for individuals to enter into separate indemnity arrangements.
- 7.5 It is important that Health Bodies have adequate internal communication to ensure that healthcare professionals recognise the scope of NHS indemnity and that this specifically excludes any private work for which an individual receives direct payment.
- 7.6 In addition, it should be noted that NHS Indemnity does not provide full protection in the event of a disciplinary or criminal investigation against an individual and Health Bodies should advise healthcare professionals to liaise directly with their own defence organisation in the event that they consider that additional assistance may be required.
- 7.7 In certain circumstances employees might, as part of their contract of employment, be involved in service delivery outside of the scope of NHS services (e.g. employee secondment to a non NHS body or income generating schemes). It should be noted that providing such arrangements are undertaken as part of their contract of employment the Health Body retains responsibility for the actions of the individual unless this has been mitigated by securing an indemnity from the other body (backed by appropriate insurance or indemnity arrangement). It is essential that securing such an indemnity is always addressed as part of such arrangements. Without such an indemnity, NHS Wales will be exposed to unnecessary financial risk.
- 7.8 The key question for health bodies to ask is "does the action fall within the definitions of either (7.3.1) or (7.3.2)". If the answer to both is "no" then NHS Indemnity is not applicable.
- 7.9 Health bodies should also avoid unnecessary acceptance of any risk which should properly be borne by another body. This will require the exercise of a degree of judgement on a case by case basis but clearly any risk that does not fall within the scope of NHS Indemnity should be borne by another party. Health bodies should avoid any local arrangements which would have the effect of extending the scope of NHS Indemnity beyond the scope set out in this document.



8.0 EFFECTIVE CONTRACT ARRANGEMENTS

- 8.1 If services are externally commissioned / procured from outside the NHS (for example, from a private hospital or diagnostic service provider) the contract awarded to that provider must not offer NHS Indemnity to that provider; but must instead expressly require the provider to manage the risk of negligence claims itself and must have in force an arrangement which provides appropriate cover.
- 8.2 Such an arrangement may comprise of:
- 8.2.1 A policy of insurance or
 - 8.2.2 An arrangement for the purpose of indemnifying a person or
 - 8.2.3 A combination of the two
- 8.3 Appropriate cover means cover against liabilities that may be incurred which is appropriate, having regard to the nature and extent of the risks. This is an essential aspect of managing public money and ensuring safe patient care. If there is any doubt about how to achieve the allocation of risk in the draft contract then specialist legal advice, from NWSSP Legal and Risk Services should be obtained well in advance of contract signature.
- 8.4 The clinical governance and inherent risks will need to be fully considered as an integral part of this process and the contract developed in a way that clearly identifies the respective responsibilities and allocates risk correctly. The risk of poor patient service must remain firmly with the external provider.
- 8.5 For the avoidance of doubt, GP practices (unless directly managed by a Health Board) providing healthcare services to patients on their own Lists are outside of the scope of NHS Indemnity and must make external provision. Those services to patients do not fall within NHS Indemnity. For all contracting purposes therefore, and in relation to NHS Indemnity, GP Practices must be treated the same way as other private sector (and third sector) providers.
- 8.6 The 'externally commissioned service' may well require a formal contract award procedure to be run under the public procurement rules. In any event, a formal contract will need to be entered into which allocates risk appropriately and specifies robust performance management provisions. This will also include a requirement for the provider to indemnify the commissioning body as set out above.



9.0 RISK POOLING ARRANGEMENTS

- 9.1 NHS Wales Health Bodies are responsible for managing their own financial risks and it is essential that robust and sound risk management principles are followed. However, in certain circumstances, where such losses and special payments do arise their impact is managed through an all-Wales risk pooling arrangement.
- 9.2 The risk pooling arrangement is administered by the Welsh Risk Pool Service (WRPS) under the governance of NHS Wales Shared Service Partnership (NWSWP). The NWSWP Committee discharges its management responsibilities through a formal Sub-Committee, known as the WRP Committee.
- 9.3 The WRP Committee (with the approval of the NWSWP Committee) determines the risks that will fall within the scope of the WRP arrangement. The scope of the risk pool arrangement is formally documented and supplemented with Technical Notes on specific issues which should be read in conjunction with this document. Appendix B provides further information the current Technical Notes available.
- 9.4 The scope of the risk pooling arrangement administered by the Welsh Risk Pool Service is predicated on the principles of this document. Losses arising from outside of the principles of this document and which cannot be recouped under contractual arrangements with third parties will not fall within scope of the WRPS scheme and must be met by the individual Health Body.

SCHEDULE 1 – LIST OF NHS WALES HEALTH BODIES COVERED BY THIS POLICY

The organisations covered by this policy and included in the Welsh Risk Pooling arrangements are:

Abertawe Bro Morgannwg University Health Board

Aneurin Bevan University Health Board

Betsi Cadwaladr University Health Board

Cardiff & Vale University Health Board

Cwm Taf University Health Board

Health Education & Improvement Wales

Hywel Dda University Health Board

Powys Teaching Health Board

Public Health Wales

Velindre University NHS Trust

Welsh Ambulance Services NHS Trust

LIST UPDATED: SEPTEMBER 2018



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APPENDIX A – INDEMNITY QUERY FORM

Appendix A form to be used to submit a query to the WRPS on whether an item is within scope of the risk pooling scheme. Please email to: Welsh.RiskPool@wales.nhs.uk

Health Body:

Name of person raising the request:

Contact details:

Date of request:

Has a risk assessment been undertaken: Y / N

Background and details of query (including date by when response is required):



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For use by WRPS only:

WRP Committee approval: Y / N

Date of Committee:

WRP Committee decision:



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APPENDIX B - SCOPE OF THE WELSH RISK POOL AND TECHNICAL NOTES

Scope of the Risk Pooling Arrangement

A detailed document is available from the WRPS to provide further advice and guidance.

This is an overarching document which confirms the losses which fall within scope of the risk pool and associated excess levels.

Technical Notes

Where more detailed guidance is required on a specific matter a Technical Note is prepared. The following technical notes will be available to supplement this Policy:

- Buildings including owned and leased
- Equipment and consumables
- Use of Voluntary Services and Military Vehicles
- Income Generating Activities
- Training provided to non NHS bodies
- GP Out of Hours
- Clinical Research
- Private Patients
- Integrated care/joint working arrangements