The Scottish Government
Directorate for Finance, eHealth and Analytics

Dear Colleague

CLINICAL NEGLIGENCE AND OTHER RISKS INDEMNITY SCHEME (CNORIS)

Organisations are legally liable for the acts and omissions of their employees and those working under their direction and control. This is the principle of vicarious liability.

Accordingly, public bodies accept responsibility for the work not only of their employees but others working in public organisations such as volunteers and people undergoing further professional education, training and examinations. In the case of NHS bodies, this also includes locums, medical academic staff with honorary contracts, students and those conducting clinical trials on NHS patients.

Since 1 April 2000, the risk attached to such liability where it relates to NHS activity has been managed through the risk sharing scheme introduced by The National Health Service (Clinical Negligence and Other Risks Indemnity Scheme) (Scotland) Regulations 2000 (Regulations (SSI 2000 No.54).

Since 1 April 2015, integrated joint boards established under the Public Bodies (Joint Working) (Scotland) Act 2014 and local authorities in respect of integration functions can apply to join the Scheme.

The attached document provides updated advice on the Scheme's coverage and operation. This document does not, however, address the procedures that apply to claims that predate the introduction of the Scheme.

Chief Executives should ensure that copies of this document are distributed to key staff with responsibility for dealing with negligence claims and financial losses.

Yours faithfully

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Addresses

For action

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CLINICAL NEGLIGENCE AND OTHER RISKS INDEMNITY SCHEME (CNORIS)

A. Membership of the Scheme

Regulation 3 lists the members of the Scheme being NHS Scotland bodies and the Mental Welfare Commission for Scotland. The bodies covered are:

- Health Boards;
- Special Health Boards (currently the Scottish Ambulance Service Board, the State Hospitals Board for Scotland, NHS Education for Scotland, NHS Health Scotland, the National Waiting Times Centre Board and NHS 24);
- The Common Services Agency (commonly known as National Services Scotland);
- Healthcare Improvement Scotland; and
- The Mental Welfare Commission for Scotland.

Since April 2015, integration joint boards and local authorities can apply to be members of the Scheme for the management of liabilities relating to integration functions. Applications are made under regulation 3A to the Scottish Ministers with information on relevant functions, the number of employees engaged in the performance of relevant functions, their qualifications and experience and the nature and extent of any personal injury claims made against the applicant as a result of carrying out a relevant function in the previous five year period.

Applicants will receive at least 30 days' notice of the date membership commences, with details of how contributions will be determined. During that 30 day period the applicant is free to withdraw the application. In respect of applications made on or after 31 October 2016, membership will commence on 1 April following the date of expiry of the 30 days' notice period.

Membership may be terminated by an integrated joint board or local authority at the end of a financial year (31 March) provided membership has endured for at least 3 years and 12 months' notice is given.

B. Liabilities to which the Scheme applies

Regulation 4 details the liabilities and financial losses to which the Scheme applies. In short these are:

- settled clinical negligence claims and claims relating to failures in the provision of care delivered by medical, dental and other healthcare practitioners and care providers, nurses, midwives, ambulance personnel, laboratory staff and relevant technicians employed or engaged by a member acting in the course of their employment or engagement in connection with a "relevant function".

- settled non-clinical claims in respect of legal liability arising from the exercise of the member's functions for breach of a duty of care, breach of statutory duty, wrongful or fraudulent act on the part of the member and persons

employed or engaged by the member acting in the course of employment or engagement.

For the NHS bodies, a relevant function means a function providing services in Scotland for the purposes of the National Health Service (Scotland) Act 1978. Since April 2015, relevant functions also include integration functions and the provision of forensic services in Scotland under the income generation powers conferred by the Health and Medicines Act 1988.

For integration joint boards and local authorities, relevant functions are integration functions.

The Scheme therefore applies to manage liabilities and losses arising in connection with the delivery of the member's relevant functions by employees of the member and those working under the direction and control of the member such as:

- employers' liability;
- public liability (including Directors' and Officers' liability);
- product liability;
- professional indemnity;
- fidelity, including Trustees of Endowment Funds; and
- money.

The functions of NHS bodies are detailed in the 1978 Act and relevant functions orders. Integration functions will be determined by reference to integration schemes and any subsequent enactment.

The Scheme does not apply to liabilities arising as a result of activity not connected to delivery of the relevant functions of members. That does not affect the position of the employees and others working under the direction and control of the member; members remain vicariously liable for the acts and omissions of employees and others working under their direction and control regardless of whether any resultant claims are managed through the Scheme.

Accordingly, the Scheme is not used to manage risks arising in the course of income generation activity, other than forensic services. Further guidance with particular reference to the management of clinical negligence claims is provided in the Annex to this document.

C. Independent Contractors

Organisations are not responsible for the work of independent contractors *except* in situations where the courts have held that vicarious liability is appropriate because of factors supporting an assumption of responsibility by the organisation engaging the independent contractor, such as:

- the extent to which the organisation exercises a degree of control or direction over the work of the independent contractor;
- the level of integration of the contractor's activity within the organisation; and

- the extent to which the contractor's activity is central to the aims of the organisation.

It is therefore important that the allocation of liability between members and independent contractors with whom they contract is agreed in advance and clearly documented.

For many independent contractors the position will be clear, but where contractors and those working under a services contract (as opposed to a contract of employment) are engaged to provide healthcare to patients in NHS facilities or deliver other NHS functions, it will be important to consider the implications of the contract.

Where independent contractors work on their own account, taking responsibility for organising their activities distinct from NHS activity, and working to their own standards and procedures, it will generally be appropriate for the independent contractor to accept responsibility for any liability arising from the work involved and obtain appropriate insurance, including employer's and professional indemnity insurance as required to cover the activities.

Where an independent healthcare provider provides care to NHS patients in NHS facilities under the direction and control of an NHS body, the NHS body will be responsible for the care delivered. The NHS body may require an indemnity in respect of potential claims from the healthcare provider supported by insurance or, alternatively, the NHS body may accept vicarious responsibility for the work of the healthcare provider and manage any claims through the Scheme; the Scheme being applicable where a member has *engaged* a healthcare professional to provide care as well as where the member has employed the healthcare professional.

Certain independent contractors are clearly working as distinct entities responsible for their own organisation and insurance, including private hospitals (even when treating NHS patients), independent general medical practices, general dental practices, pharmacists and opticians' practices, chiropodists and midwives. Such contractors are responsible for arranging insurance for their organisations and employees.

D. Recovery of losses

Where a member accepts responsibility for the acts and omissions of employees and others engaged by them, the member should generally accept full financial liability where negligent harm has occurred. They should not seek to recover their costs either in part or in full from the health care professional or other individuals concerned.

A health care professional will, however, be liable for any additional expenses of an NHS body if he/she has elected to be separately defended. If he/she unreasonably fails to co-operate fully in the defence of the claim or action against the NHS body, the NHS body may, at its discretion, seek to recover part or all of any liability which it may incur.

E. Risks not relevant to the Scheme

The following risks are not managed through the Scheme:

- motor vehicles and motor third party risks;
- Business Interruption;
- Personal Accident, not involving negligence (equivalent to personal accident insurance);
- property damage, including endowment property and plant and equipment;
- risk arising which are transferred to third party contractors, such as PFI/PPP contractors;
- liability arising as a result of contractual risk transfer that would not otherwise attach to the member; and
- liabilities arising as a result of activity that is not a relevant function of a member, such as income generation activity other than forensic services.

It should be appreciated that the above listings are not exhaustive. Specific advice should be sought if required, and queries should be referred to the Scheme Manager, for whom contact details are available at the following link:

https://clo.scot.nhs.uk/our-services/cnoris/cnoris-contacts.aspx

F. Administration and Management of the Scheme

Regulation 5 confirms that Scottish Ministers are responsible for the Scheme's administration but they may appoint managers to deal with the operational requirements.

NHS National Services Scotland (NSS) manages the Scheme and provides the following services:

- financial: issuing contribution demands, monitoring and reporting on budgetary issues; and
- claims management: recording and routing of claim activity, control for reimbursements from the pool.

The CNORIS Steering Group has been established to assist in administration and management. The CNORIS Steering Group membership is drawn from senior staff in the Scottish Government, Health Boards, Special Health Boards and NSS (including Central Legal Office (CLO)). The Group meets regularly to review the Scheme's structure and effectiveness and, more generally, to reflect members' interests.

G. Provision of Information

Regulation 6 enables Ministers or, as authorised, the Scheme Managers, to obtain information from members or their agents (e.g. CLO, loss adjusters, etc.) for the purposes of managing or administering the Scheme. A primary need for information is for determining contribution levels and processing applications for reimbursement

from the pool. However, the Scheme Managers will also use the information to produce reports for funding applications for regular issue to members.

H. Contributions to the Scheme

Regulation 7 requires members to pay into the pool an annual contribution that is calculated and collected having regard to the amount paid out under the Scheme, the nature of the member's relevant functions, the number of employees engaged in the performance of relevant functions and the qualifications and experience of those employees. For integration joint boards and local authorities, the contribution will also be set by reference to the nature and extent of any personal injury claims made against the applicant as a result of carrying out a relevant function in the previous five year period.

Notice of estimated contributions to be made in each financial year is provided to members by 31 December in the preceding year. Final contributions are notified to members annually in arrears by 31 March.

Further details are available on the CLO web site:

http://clo.scot.nhs.uk/our-services/cnoris/funding.aspx

I. Submission of Claims

Regulation 8 enables Scottish Ministers to direct how claims for compensation, which may result in a reimbursement from the pool, are notified to the Scheme Managers and handled.

Information on the submission of claims is available on the CLO web site:

http://clo.scot.nhs.uk/our-services/cnoris/cover-and-claims.aspx

J. Payments under the Scheme

Regulation 9 provides the framework for determining what may be reimbursed from the pool and under what conditions.

Where necessary, prior written approval must be sought from the Scottish Government Health and Social Care Directorates for any proposed settlement that will breach the member's delegated limit for compensation. Currently the delegated limits are £250,000 for clinical claims, £100,000 for non-clinical claims and £25,000 for financial loss.

Claims below a stated minimum (currently £25,000) agreed between members and the Scottish Ministers will not be eligible for reimbursement.

The amount of the payment made under the Scheme is determined by reference to:

- amount of award of damages made by the court, or paid by the member in respect of a claim;

- adverse expenses (if applicable);
- member's non recoverable legal costs; and
- any agreed deductable, currently £25,000.

Further details and a standard form on which to apply for a reimbursement from the pool is available on the CLO web site:

http://clo.scot.nhs.uk/our-services/cnoris/cover-and-claims/claims-process.aspx

ANNEX

CLINICAL NEGLIGENCE AND OTHER RISKS INDEMNITY SCHEME (CNORIS)

1. This Annex provides further details on the applicability of the Scheme, focussing primarily on clinical negligence claims. However, the principles of legal liability for professional negligence apply equally to failures by other professionals in the discharge of responsibilities. It contains general advice on what the Scheme covers. Further guidance and frequently asked questions are provided on the CLO website:

   http://clo.scot.nhs.uk/our-services/cnoris/frequently-asked-questions.aspx

Interpretation

2. In this Annex the terms:

   2.1. "an NHS body" and "NHS bodies" include:

      2.1.1. Health Boards, Special Health Boards, HIS and NSS but exclude all GP practices, general dental practices, pharmacists and opticians' practices other than those established and managed by an NHS body. Although not an NHS body established by NHS legislation, the guidance applies equally to the MWC;

   2.2. "health care professionals" includes:

      2.2.1. doctors, dentists, nurses, midwives, health visitors, hospital pharmacy practitioners, registered ophthalmic or registered dispensing opticians working in a hospital setting, members of other allied healthcare professions, ambulance personnel, laboratory staff and relevant technicians.

Definitions

3. Clinical negligence is:

   3.1. A breach of duty of care by members of the health care professions in connection with their diagnosis of any illness or the care or treatment of any person, by act or omission, whilst acting in their professional capacity in the course of their employment or engagement."

4. In this definition "breach of duty of care" has its legal meaning. NHS bodies will need to take legal advice in individual cases, but the general position will be that the following must all apply before liability for negligence exists:

   4.1. there must have been a duty of care owed to the person treated by the relevant professional(s);

4.2. the standard of care appropriate to such duty must not have been attained and therefore the duty breached, whether by action or inaction, advice given or failure to advise;

4.3. such a breach must be demonstrated on a balance of probabilities to have caused the injury or damage and therefore the resulting loss complained of;

4.4. any loss sustained as a result of the injury or damage must be of a kind that the courts recognise and for which they allow compensation; and

4.5. the injury and resulting loss must have been reasonably foreseeable as a possible consequence of the breach.

5. Where the principles outlined in paragraph 4 apply, NHS bodies should accept full financial liability where negligent harm has occurred. They should not seek to recover their costs either in part or in full from the health care professional concerned. A health care professional will however be liable for any additional expenses of an NHS body if he/she has elected to be separately defended. If he/she unreasonably fails to co-operate fully in the defence of the claim or action against the NHS body, the NHS body may, at its discretion, seek to recover part or all of any liability which it may incur.

Coverage

6. The Scheme **applies** to staff in the course of their employment with a member organisation carrying out relevant functions. It also covers people for whom the NHS body is vicariously liable, including, for example, locums, medical academic staff with honorary contracts, students, those conducting clinical trials on NHS patients, volunteers and people undergoing further professional education, training and examinations.

7. The Scheme **does not apply** to general medical and dental practitioners, pharmacists and opticians working as independent contractors under contract for services. General practitioners, pharmacists and opticians are responsible for making their own indemnity arrangements, as are other self-employed health care professionals, such as chiropodists and independent midwives. Neither does the Scheme apply to employees of general practices or to employees of private hospitals (even when treating NHS patients), local education authorities or voluntary organisations. However, GPs, dentists, pharmacists and opticians and others who are directly employed by Health Boards are covered.