Independent Midwives UK

Current Situation with regard to the forthcoming requirement for mandatory Professional Indemnity Insurance

December 2012

In October 2013, an EU Directive will make Professional Indemnity Insurance (PII) mandatory for all healthcare professionals in the UK. Midwives practising independently are currently unable to obtain affordable indemnity cover. This paper outlines the current situation in the search to find a sustainable solution so independent midwifery remains an option for childbearing women and midwives in the UK.

(i) Insurance Background

Since 2002, Independent Midwives (IMs) have been unable to obtain PII. The last insurer withdrew from the market because there are too few IMs to make PII commercially viable in light of potential payouts. IMs inform clients of their lack of insurance before booking as set out by the Nursing and Midwifery Council (NMC) in The code: Standards of conduct, performance and ethics for nurses and midwives 2008:

> *"The NMC recommends that a registered nurse, midwife or specialist community public health nurse, in advising, treating and caring for patients/clients, has professional indemnity insurance. This is in the interests of clients, patients and registrants in the event of claims of professional negligence.*
>
> *Whilst employers have vicarious liability for the negligent acts and/or omissions of their employees, such cover does not normally extend to activities undertaken outside the registrant's employment. Independent practice would not be covered by vicarious liability. It is the individual registrant's responsibility to establish their insurance status and take appropriate action.*
>
> *In situations where an employer does not have vicarious liability, the NMC recommends that registrants obtain adequate professional indemnity insurance. If unable to secure professional indemnity insurance, a registrant will need to demonstrate that all their clients/patients are fully informed of this fact and the implications this might have in the event of a claim for professional negligence."*

In 2006 the UK government introduced a policy, independent of the later EU Directive, to implement mandatory PII for all healthcare professionals. It was intended to be implemented profession by profession, with nursing and midwifery amongst the last remaining.

(ii) EU Directive 2011/24/EU

The move for mandatory PII for healthcare professionals also comes from the EU. At the beginning of 2011 the UK government signed up to a new EU Directive on the application of patients' rights and cross-border healthcare which necessitates mandatory PII. (Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011– Article 4 (d)).[1]

EU member states have 30 months to implement the Directive and it is this that has introduced a definite timescale for implementation by Oct 2013.

(iii) Finlay Scott review

The Government commissioned, in 2009, an Independent Review of the Requirement to have Insurance or Indemnity as a Condition of Registration as a Healthcare Professional (Finlay Scott June 2010)[2] after trade unions raised many questions.

The review recommended making PII a statutory condition of registration (as a midwife) with the NMC. It addressed the issue regarding independent midwives with the following:

> *Groups who cannot obtain affordable cover in the market*
>
> *140. There are groups of self-employed registered healthcare professionals who, through no fault of their own, cannot obtain insurance or indemnity in the market or can do so only at a cost that is unaffordable. It follows that, in the absence of a solution, those individuals would be unable to secure or retain registration.*
>
> *141. It is important to stress that the impediment to a market solution is not quality of care. The impediment is that the number of individuals is too small to enable the risk to be pooled and spread in a way that produces an affordable premium.*
>
> *142. The potential problem arises from the policy objective that all registered healthcare professionals must have insurance or indemnity. It does not arise from the statutory condition of registration as the means of delivering the policy objective. To that extent, strictly the problem falls outside the remit of this review.*
>
> *143. Nevertheless, the position of such groups is relevant to the acceptability of making insurance or indemnity a condition of registration and to securing confidence and support. It will not help if some self-employed registered healthcare professionals, who are providing good quality and valued services, are unable to continue to practise because they cannot, through no fault of their own, meet a condition of registration despite their willingness to do so.*
>
> *144. It is a well established principle that governments may need to intervene when the functioning of the market does not, or cannot, provide an affordable solution.*
>
> ***Recommendation 20**: In relation to groups for whom the market does not provide affordable insurance or indemnity, the four health departments should consider*

---

[1] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:088:0045:0065:EN:PDF

[2] http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/@ps/documents/digitalasset/dh_117457.pdf

whether it is necessary to enable the continued availability of the services provided by those groups; and, if so, the health departments should seek to facilitate a solution.

The Four UK Health Administrations response to the Independent Review accepted all Finlay Scott's recommendations.[3]

(iv) Department of Health 'solution'

Independent Midwives UK (IMUK) was informed that the DoH in England (health provision is a devolved responsibility to the four countries) saw as the 'solution' for lack of affordable commercial PII, for independent midwives to provide their services to women via NHS contracts. They envisaged that the Clinical Negligence Scheme for Trusts (CNST) run by the NHS Litigation Authority (NHSLA) would be opened up to allow access to such outside providers of NHS services.

IM UK's vision has been to enable all women the choice of continuity of care by her own midwife throughout her pregnancy, birth and after the baby is born, available on the NHS. Therefore contracting our services to the NHS would be a welcome step towards our vision as well as solving the indemnity issue.

However it appears that the legal basis on which the NHSLA was set up did not allow for it to be available to outside providers. There are some examples of exceptions to this (eg Independent Treatment Centres) but it is seen as problematic for these providers and there is no government appetite to extend these exceptions.

Interestingly, in a paper published on 30 October 2012 for the NHSLA (CNST and commercial alternatives - independent briefing paper) it is said:

'It is worth noting that the Health and Social Care Act 2012 will lead to changes in the provision of healthcare services and this will have implications for clinical negligence insurance cover. Currently, independent sector providers are not able to be members of the CNST in their own right, although DH is currently exploring how this should change.'

Until the creation of NHS Foundation Trusts, NHS Trusts were prohibited from obtaining clinical negligence insurance from the commercial insurance market. Foundation Trusts have the option of using the commercial insurance market as an alternative to the NHSLA, and this has encouraged commercial insurers to recently offer cover in the UK health provider sector. Independent Midwives have now been encouraged to look at commercial insurance as a 'solution' to the previous problem of no availability of PII. In a question raised in the House of Lords on 16th July 2012 the written response was as follows:

Q – What steps they are taking to ensure that professional indemnity insurance in available to independent midwives by October 2012 (2013), in view of the provision

[3] http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/@ps/documents/digitalasset/dh_122610.pdf

of the European Directive on Patient Rights in Cross-Border Healthcare which make such insurance mandatory.

A.- A number of independent midwives have formed themselves into corporate bodies and have now obtained insurance from a commercial organisation, covering the whole of the maternity care pathway. This is in line with the research by the Nursing and Midwifery Council and the Royal College of Midwives (RCM) on the insurability of independent midwifery. This may address the issue of the general unavailability of professional indemnity insurance for midwives; adoption of the European Union Cross Border Healthcare Directive will make indemnity insurance mandatory. The Department is discussing with key stakeholders, such as the RCM, to determine whether indemnity insurance remains an issue and whether further steps need to be taken.

The DoH has not adopted a clear or consistent position on what steps it could take to make insurance available. Up until now it seems that it is encouraging IMs to obtain commercial insurance as corporate bodies and contract into the NHS, but at the end of November it has shared its plans to open up the CNST to small independent providers such as social enterprisers with a predicted timetable of April 2013.[4]

(v) Contracting into the NHS

In order to contract services into the NHS, midwives need to become a group that has its own legal entity as opposed to sole traders. IM UK successfully gained funding as a Social Enterprise to develop its first new model of working, Neighbourhood Midwives Ltd. This is an employment model. It is now a separate stand alone business set up to contract into the NHS using commercial PII.

A second model using a form of social franchising is being developed which is looking at the possibility of having a mixed income stream of both NHS contracts and also allowing some women to pay for care they cannot get elsewhere. This will enable small groups of midwives to set up as a provider. This is dependent on accessing funding to set up the model, without which the development work cannot be done.

IMUK continues to explore all options including the women taking out insurance themselves. To be financially viable it may require a limit of liability and would still need to be judged as “adequate and appropriate” cover.

Commercial PII for individual midwives is not financially viable as the annual cost of premium per midwife is estimated to be in the region of £80,000.

No fault compensation schemes have been explored by the government in the past and deemed to be too expensive for England and thought to be not possible due to EU human

[4] http://www.dh.gov.uk/health/2012/11/webchat-cnst-nhs/

rights law. However a recent Scottish Review found this not to be the case.[5] However claimants would still retain the right to sue therefore indemnity / PII cover would still be required. A public consultation on the subject has recently been held. (Recommendations for No-Fault Compensation in Scotland for Injuries Resulting from Clinical Treatment Sunday, August 19, 2012)[6]

If the solution to mandatory PII involves independent midwives caring for woman through NHS contracts then it is essential that there is adequate funding to ensure it is sustainable. Currently the 'Payment by Results' tariffs are inappropriate to provide quality midwifery care by any provider and this is a major reason why, for example, post natal care in the NHS is poor.

For safety, it is vital that independent midwives have protected 'access rights' to care for women in labour in both midwifery led units and hospital labour wards. It is imperative that this is a national policy and not left to the discretion of each Trust resulting in a post code lottery. Currently woman have no choice but to birth at home if they want to be cared for by their independent midwife as NHS Trusts are unwilling to allow access on the grounds of no PII. Guaranteed 'Access Rights' for Independent midwives would protect women's choice to birth where they feel safest.

It is crucial a 'sustainable solution' is found. Currently independent midwives not only offer a choice to women in midwifery care that would otherwise be an NHS monopoly in most parts of the country but provide a service where the NHS Trusts have failed to provide midwifery care for normal breech, twin and other situations. It is a major concern that without Independent Midwives to turn to, some women will be abandoned to birth alone.

(vi) Conclusion

IM UK continues to explore all the possible options. There are a number of potential solutions. Work continues in establishing alternative models of working for independent midwives that will enable them to continue to be able to practise in a way that supports a true case loading model, gives women a choice of midwifery care and midwives some professional autonomy and choice in the way they work. This is also likely to make an important contribution in solving the to date insurmountable problem of midwife retention in the profession. However there is no guarantee that these will succeed and funding is required if the social franchising type model is to move forward. IM UK will keep interested parties updated.

[5] **http://www.scotland.gov.uk/Topics/Health/Policy/No-Fault-Compensation**
[6] **http://www.scotland.gov.uk/Publications/2012/08/4456**