

Annex C: Claims and liabilities FAQs for delegated commissioning arrangements

When the Delegation Agreement was published, we received a number of queries about claims and liabilities. These were addressed in the addendum to the delegation agreement which we issued on 25 March 2015. However, in addition we were asked to develop some frequently asked questions to confirm:

- responsibility for claims prior and post 1 April;
- NHS England's rights to step in and step out of claims; and
- responsibility for liabilities and losses

1. What is a 'claim'? What is the relevance of the NHS Litigation Authority?

In relation to primary care co-commissioning, it is likely that the majority of claims will relate to contractual disputes and challenges to decision-making. These sorts of claims are not covered by the NHS Litigation Authority's (NHS LA) indemnity scheme. In the rare instance where an NHS LA indemnity scheme claim might arise, there is a separate system for managing such claims, through the NHS LA's own solicitors, of which CCGs will be aware.

2. Who is responsible for any claims arising before 31 March 2015?

Any such claims will sit with NHS England. If a CCG is notified of such a claim, it should immediately pass it to NHS England via the following email address:
england.legal@nhs.net

3. What about claims after 1 April 2015?

CCGs are required to deal with claims that arise after 1 April 2015 (clause 14.2 of the Delegation Agreement), as the CCG will be in a better position to understand how such a claim has arisen. However, under the delegation, ultimate liability for the discharge of primary medical services functions rests with NHS England. As such NHS England has reserved the right to require the CCG to comply with guidance or policy issued in respect of the management of claims and clause 14.4 of the Delegation Agreement. Clause 14.4 specifies provisions regarding approval of the choice of solicitors firms, notification of claims and the provision of documents to NHS England, compliance with guidance issued and co-operating with NHS England (cooperating with the NHSLA is also covered in relation to other claims).

4. What about using solicitors to deal with the claims on behalf of the CCG?

NHS England recognises that a CCG may wish to instruct external solicitors to deal with claims, but a CCG must comply with Clause 14.4 of the Delegation Agreement as outlined above, and obtain confirmation from the NHS England legal team that their choice of solicitors firm is approved. It is always best practice for a CCG to check if a

claim needs to be dealt with by the NHSLA before instructing external solicitors. That way, they can determine whether the claim is or is not covered by the indemnity schemes.

4. Why can NHS England step into claims?

There may be occasions where a claim being brought is of wider significance to NHS England, for example where it is high profile or where the consequences of any outcome could have an impact across the wider health environment than just the CCG in question. In such cases NHS England needs the right to step into such cases and take over the conduct of them from the CCG, and this has been reserved under Clause 14.7 in the Delegation Agreement. If NHS England wishes to exercise this power, notice will be given to the CCG. Such decisions will be on a case by case basis and are likely to be unusual occurrences.

5. What about stepping out of claims?

It might be that following NHS England taking over the conduct of a matter it subsequently asks the CCG to resume looking after it. This might be because the matter is no longer of potential national importance or because a position has been reached whereby it can be managed in the normal course of the business of exercising the delegated functions. In such cases NHS England will send a notice to the CCG under Clause 14.8 of the Delegation Agreement, and will pass the claim back to the CCG.

6. Under what circumstances will the CCG be liable for Claim Losses?

NHS England pays all the funds that are attributable to the Delegated Functions to the CCG, and Claim Losses are to be paid/discharged from these funds. As a consequence if the CCG receives a claim in respect of a matter that it is exercising on behalf of NHS England under the Delegation, it will need to settle such a claim out of the funds that it holds. If NHS England has settled or paid a claim on behalf of a CCG where it has stepped in, it can require the CCG to make payment for that settlement, or may make adjustments to the Delegated Funds to take into account the Claim Loss amount.

7. If paying a Claim Loss will result in a CCG not having enough Delegated Funds to discharge its functions, what can it do?

Where a CCG believes that there will be a shortfall of Delegated Funds due to Claim Losses, the Delegation Agreement provides that the CCG should notify NHS England if it thinks that the delegated funds are not enough to cover the Claim Loss and discharge its functions; and for the parties to meet to agree any adjustments that may be needed.