UK INDEMNITY, ADVICE & SUPPORT

HEALTH, SOCIAL CARE AND SPORT COMMITTEE: CONSIDERATION OF THE GENERAL PRINCIPLES OF THE NATIONAL HEALTH SERVICES (INDEMNITIES) (WALES) BILL

MEMORANDUM FROM THE MEDICAL AND DENTAL DEFENCE UNION OF SCOTLAND

1. The Medical and Dental Defence Union of Scotland (MDDUS) is a mutual Medical Defence Organisation (MDO) founded in 1902 by and for healthcare professionals, with an expert staff of doctors, dentists, lawyers and risk advisers who are leaders in the medico-legal and dento-legal field.

2. MDDUS provides its nearly 50,000 members throughout the UK access to professional indemnity and expert medico-legal and dento-legal advice. As the fastest growing not for profit mutual in the sector, we have a reputation for both value for money and operational excellence.

3. The MDDUS welcomes the Health, Social Care and Sport Committee's scrutiny of the proposed NHS (Indemnities) (Wales) Bill. The absence of proper public debate and consultation at all stages of recent policy development on state-backed indemnity has been an unfortunate feature of Government activity in both England and Wales to date. Private, separate discussion with individual stakeholders, whilst necessary, should have been in addition to, rather than a replacement for, such standard and desirable features of policy development.

STATE-BACKED INDEMNITY FOR GPS – A MISSED OPPORTUNITY FOR REFORM

4. MDDUS considers that the question of whether the State should pay directly for GP and other primary care team members' indemnity is, essentially, a public policy issue for Government and a contractual one for the profession.

5. As a mutual indemnifier, MDDUS recognises the impact of the required increases in indemnity costs on recruitment and retention of GPs in recent years. MDDUS is, however, dismayed at the process undertaken in the development and implementation of indemnity policy and, in particular, the distraction of effort from the more central issues facing the NHS and clinical negligence as a result.

6. The decision to move to state-backed indemnity arose, in large part, because of changes made to the Personal Injury Discount Rate (PIDR). The decisions to set the PIDR at minus 0.75 in 2017, and to increase this to just minus 0.25 in 2019 following the Lord Chancellor's review, are based on a widely criticised assumption that a rational investor would opt to receive a negative return. One clear result of these changes has been making the bringing of clinical negligence claims more attractive and hence potentially more expensive to the NHS. The failure of both the

Department for Health and Social Care and the Welsh Government to have any apparent impact on the Lord Chancellor's decision represents a significant failure of joined-up Government thinking on the main driver of rising clinical negligence claims and GP indemnity fees.

7. We contend that the focus of Government should have been to make changes to the tort of clinical negligence in medical malpractice to help restrain costs and remove the incentive to run cases which are less than well-founded. The evidence base for tort reform being successful in reducing cost to the health care system of such claims is well documented in Australia and the United States. The UK's three MDOs have individually, and at different times, put forward comprehensive proposals for change in this area; none of which have been pursued.

8. In the absence of such change, the shift of responsibility for Government funding claims is likely to lead to an increase in claims activity, given perceptions of Government's larger resources and, importantly, the fact that the rebuttal rate – i.e. those claims which are dismissed at nil cost – is significantly better in the industry than for Government.

9. MDDUS believes a further missed opportunity for reform is the very tentative nature of changes to the regime of fixed recoverable costs. Despite the then Secretary of State for Health calling for action in this area in mid-2015, changes have still not been put in place. The number of cases on which the proposed cap is to be set is at a level that, in our judgement, is more likely to lead to an increase in costs, rather than a decrease.

10. The decision to put state-backed indemnity in place was made without a full public consultation, and this has inhibited debate on these issues. We consider wider engagement on possible alternative approaches could, in the long term, have produced greater benefits for the NHS and the profession in the long-term. State backed indemnity as implemented simply shifts ever increasing liabilities between parties, and will commit a greater percentage of a finite health budget to fund these costs.

STATE-BACKED INDEMNITY FOR GPS – A FLAWED OPERATING MODEL

11. A further problem is the operational model adopted for state-backed indemnity. We are dismayed that there was no consultation on the model to be adopted in either England or Wales and nor was any public procurement process undertaken.

12. We believe this failure is likely to lead to significant jeopardy for individual GPs as the state-backed monopolistic provider envisaged in both England and Wales will not have any responsibility to protect the professional standing of the doctor concerned in a claim. This will potentially increase the chances of the doctor being subject to calls for action and complaints to the General Medical Council. MDOs' offerings covered both claims management and this wider cover. The wilful destruction of this integrated service and the failure to at least offer GPs a meaningful choice of opting to retain it, (with a transfer payment for claims cover being made by Government to the relevant MDO) will, we believe, place the credibility of the scheme at risk in the medium-term.

13. Whilst relieving financial burdens on GPs therefore, we consider that the models adopted for delivery of the scheme are sub-optimal from the point of view of the taxpayer and the profession.

THE WAY FORWARD

14. MDDUS accepts that these decisions have been made and are working with each of the respective Governments constructively to seek to ameliorate their potentially harmful impact.

15. In that regard, we have agreed an Existing Liability Scheme (ELS) transaction with the UK Government to transfer our existing GP liabilities to them. We remain in discussions with the Welsh Government on the same issue. Our position, as has been made clear on many occasions, remains that the ELS is a poor piece of public policy, as we do not need any form of public support to be able to give assurance to our existing GP members that we could meet all of their expected and estimated past liabilities. However, the Board of MDDUS has concluded that it is in the best interests of existing and potential members to make the transaction. This is especially so, given that the UK Government has proceeded with an ELS transaction with one of our competitors which would distort competition in the absence of a similar agreement with us.

16. MDDUS has developed GP Protection to continue to provide for our GP members and wider primary care team, the protection they previously enjoyed before the introduction of the Future Liabilities Scheme on the 1st April 2019. This provides a 24/7 helpline supporting on matters of ethics and other issues and representation and advice on complaints, disciplinary, regulatory, ombudsman, alleged criminal and inquest matters together with claims benefits for good Samaritan acts and non NHS activities.

THE CURRENT BILL

17. Turning to the Bill itself, MDDUS does not wish to comment on any specific provisions. We think that it makes sense for the Welsh Government and Assembly to have the same decision-making scope on questions of medical negligence as is open to the UK Government and Parliament.

18. We trust that in future these new powers will be used in a way that has a far stronger evidence base, addresses the core rather than peripheral issues and engages properly with stakeholders to ensure optimal outcome for taxpayer, practitioner and the medical defence sector as a whole in a way that we fear will not be the case from the recent changes.

MDDUS
October 2019