Chris Kenny
Chief Executive & Secretary

Please quote Our Ref on all correspondence

Our Ref: **3GMC1/CK/ACM**
Your Ref:

ESTABLISHED IN 1902

MACKINTOSH HOUSE
120 BLYTHSWOOD STREET
GLASGOW G2 4EA
Telephone: 0845 270 2034
Membership: 0845 270 2038
Fax: 0141 228 1208
Email: info@mddus.com
Website: www.mddus.com
DX 561487 Glasgow 16

11 November 2015

Mr Niall Dickson
General Medical Council
Regent's Place
350 Euston Road
London
NW1 3JN

Dear Niall

When we met a few weeks ago, we spent some time discussing the potential risk posed to patients by what we see as the incomplete effect of the regulatory requirement to have "adequate and appropriate" insurance or indemnity. It may be helpful to set out the concerns in more detail.

To go back to first principles in public policy terms, the intent of the obligation is to make sure that the patient can always receive appropriate redress, irrespective of the position of the doctor concerned at the time an award is made. Its effectiveness is never at issue in relation to those clinicians covered by NHS indemnity: the CNST will always be able to pay out a claim, irrespective of whenever it arises or whatever changes to the organisational configuration of hospital doctors have happened in the intervening period However, as currently presented, the requirement can fail the patients of private practitioners and GPs as independent contractors. Let me explain why.

It is quite rare for claims to arise in the year in which the adverse incident occurred. Even if they do, the length of the legal process and the need to gather the necessary evidence and expert opinion, means that the case is usually in train for a number of years. More usually, claims are made in respect of events which happened 3-7 years ago, but it is not uncommon for obstetric claims to be made only when the child affected reaches adulthood. So protection can need to extend over 20 years after the event occurred.

That profile of claims makes so-called "occurrence based" indemnity or insurance uniquely helpful in meeting the aim of achieving certainty for patients. This model characterises the offering of indemnifiers but can also be very occasionally found in the commercial insurance market. The premium paid gives protection in relation to all claims which arise in the period covered by the premium, *irrespective* of when the event is actually notified. This therefore gives certainty to doctors that any awards against them will be met, even if the action arises long after they have ceased to hold a license to practice and therefore are no longer bound by the obligation to have cover. Indeed, the protection stretches to their estates, so that legatees do not face any prospect of totally unforeseen legal action.

So-called "claims made" insurance is much more limited in its scope, simply providing cover against claims notified in the year in which the policy is in place. It can even be so narrow as to relate simply to claims arising from events in that year. Is that a problem in relation to public protection?

Not, obviously, in the immediate-term: the doctor concerned does have adequate and appropriate arrangements in place to meet the demands of the lawyer's letter arriving on the doorstep that day. However, the policy objective behind the regulatory requirement is not to provide protection simply at that given moment, but to provide assurance in the long-term that a patient will *always* be able to receive adequate compensation in the event of a medical accident or malpractice. By definition, claims made" cover is significantly deficient in this regard as it lapses whenever the premium ceases to be paid for whatever reason: perhaps retirement, sudden death, a major career change or a move to another jurisdiction. In the worst case, this could leave a patient or their bereaved family with nobody against whom a claim can be made or having to pursue litigation against an individual who may be unwilling, unavailable or simply unable for whatever reason to engage with the claim or pay any award made.

Run-off insurance, i.e. a policy which offers backward looking protection against liabilities which have arisen but not surfaced before a practitioner's retirement, provides certainty in these circumstances in other markets. Most notably, the Solicitors Regulation Authority insists that solicitors purchase seven years cover at the point at which they exit the market. It might therefore be argued that one way to protect more effectively patients would be to expand the current regulatory requirement to ensure the purchase of run-off cover in cases where the insurance held during a doctor's career does not give coverage when he or she leaves practice.

However, this may be problematic for a number of reasons. Firstly, the market for medical run-off cover is embryonic: it is far from certain that, even if such a regulatory requirement were in place, a doctor would always be able to find a suitable product to meet his or her needs. In a way, this is far from surprising: given the long-tail nature of the liabilities, the risk can be particularly difficult to price, especially for a firm engaging with an individual for the first time at the point of retirement.

There is also the danger of the perverse effect of creating a "barrier to exit." There is some limited evidence of this starting to arise in the legal field, where practitioners are unable to afford the seven year run-off cover and therefore stay in practice for longer than they would wish to do so, purely because they are unable to indemnify themselves against past risks. This is clearly far from ideal in terms of their own welfare. In medicine, it could be positively harmful for patients if it leads to doctors, who realise that they have reached the stage at which their competence is starting to decline, nevertheless staying in practice because they are unable to exit from it.

Finally, there is a potential enforcement issue: even if a requirement to have run-off cover is put in place, how would the Council be able to pursue somebody who had not done so if they had already surrendered their licence to practice and were therefore, by definition, beyond the reach of your regulation? So, whilst run-off cover is one theoretical answer to the protection gap which may work in some circumstances, it is by no means a panacea.

11 November 2015

Mr Niall Dickson

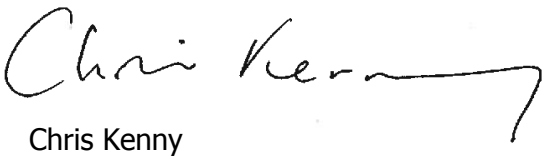
There is therefore a potential policy problem for the Council as a regulator. I can well understand that you do not wish to be prescriptive about the precise form of indemnity or insurance which a practitioner should put in place: to do so would hardly fit with better regulation practice and would take you some considerable distance beyond the Council's core mission and competencies. However, it is not really adequate to simply pass the regulatory risk back to the individual, as it is perfectly possible for a doctor to believe that he or she has the right cover at any given moment, even though the protection for their patient in perpetuity is not in place.

I would suggest therefore that the Council consider the current requirement to make clear that "adequate and appropriate" arrangements must mean the permanent protection of patients even after a licence to practice has been surrendered or make some statement in guidance to that effect and for that to be reinforced through an active communication strategy with professional bodies, via the helpline and so on.

I would be more than happy to discuss these issues further with you after you have had a chance to consider this letter.

I am sending a copy of this letter to Evlynne Gilvarry as similar concerns are also relevant in relation to dental regulation. As well as Evlynne, I am copying this to Harry Cayton, with whom I have also raised the issue briefly.

Yours sincerely



Chris Kenny

cc Evlynne Gilvarry
Harry Cayton