

Chris Kenny
Chief Executive & Secretary



UK INDEMNITY, ADVICE & SUPPORT

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ESTABLISHED IN 1902

13 February 2018

Mr Michael Matheson MSP
Cabinet Secretary for Justice
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Dear Cabinet Secretary

The Personal Injury Discount Rate and related issues

We are writing to urge you to bring forward important reforms in the handling of clinical negligence claims and, in particular, how the Personal Injury Discount Rate is set. MDDUS is a not-for-profit mutual funded by its members, representing around 85% of the medical indemnity market in Scotland.

The rising cost of clinical negligence is unsustainable and means that vast amounts of resource which could be used more effectively have to be diverted elsewhere. Last year, the NHS in Scotland spent £38.3 million on clinical negligence claims. The financial impact on the NHS was greatly exacerbated by the decision of Scottish Ministers in March 2017 to follow the Lord Chancellor in changing the Discount Rate from 2.5% to minus 0.75%. This has had a significant impact on the size of compensation payments in personal injury cases where there is an element of future care costs and earnings. We do not have access to an equivalent figure for Scotland, but know that the Chancellor confirmed, in his Budget Speech in March 2017, that the Westminster Government had set aside £5.9 billion, just for the three years up to 2020, to *"protect the NHS from the effects of the changed personal injury discount rate."*

We fully accept that there must be reasonable compensation for patients harmed through clinical negligence, but this needs to be balanced against society's ability to pay. This is money that could be spent on frontline care. Given the wider pressures on the healthcare system, the rising cost of clinical negligence is already having an impact on what the NHS can provide. It has also led to very significant new costs for medical defence organisations (MDOs) such as the MDDUS, which in turn impacts on the subscriptions charged to individual doctors for indemnity provision.

We therefore welcomed the Scottish Government's announcement on the Damages Bill, as part of its Programme for Government for 2017/18, including a commitment to amend the law on the Discount Rate. This announcement pre-dated the publication by the Westminster Ministry of

THE MEDICAL AND DENTAL DEFENCE UNION OF SCOTLAND

Chief Executive Officer & Secretary, Chris Kenny

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Justice in September 2017 of its detailed Report on *The Personal Injury Discount Rate: How it should be set in future*. As you will know, the Ministry of Justice concluded that "the assumptions made by the present law on the setting of the discount rate as to how claimants invest are unrealistic and, as it stands, the rate may produce significantly larger awards than provide 100% compensation. The unrealistic assumptions currently being used are having a significant effect on tax payers through the additional cost of personal injury settlements paid by the National Health Service and other public sector bodies; and businesses and individual consumers through insurance premiums that are higher because awards of damages may be providing more than 100% compensation." Accordingly, alongside its Report, the MoJ produced a Command Paper setting out draft legislation to provide a fairer and better framework for the setting of the discount rate.

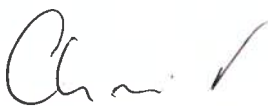
The changes proposed by the Ministry of Justice to reform the methodology for setting the discount rate will help make sure that the rate more accurately reflects the way in which most claimants choose to invest their compensation payments. This will help to create a fairer system for all concerned. It is vital that these changes are brought in as quickly as possible, both north and south of the border.

We therefore also seek clarification as to its position in relation to the Joint Consultation exercise which led to the MoJ's Report. We are particularly interested to understand whether the Scottish Government intends to publish a similar analysis of the consultation process and responses and whether we can expect a similar approach to be adopted in Scotland on issues of principle. In particular, when is it intended that the Damages Bill be introduced?

We would also like to work with you and your officials to consider a more fundamental set of reforms to control the rising cost of clinical negligence. The National Audit Office recently recommended that the Ministry of Justice and the Department of Health and Social Care should work with others to set out a coordinated strategy to manage the growth in clinical negligence costs by September 2018. It is vital that this debate also advances in Scotland and we would be very keen to work with you and others who have an interest in this area, to help bring about this fundamental reform. We are copying this letter to Annabelle Ewing (with whom we have previously corresponded on these issues) and Shona Robison, given their corresponding portfolios.

We would be grateful for the opportunity to meet with you to discuss this further and look forward to hearing from you.

Yours sincerely



Chris Kenny



Copied to:

- Annabelle Ewing MSP, Minister for Community Safety and Legal Affairs – MinisterCSLA@gov.scot
- Shona Robison MSP, Cabinet Secretary for Health and Sport – CabSecHS@gov.scot
- Jill Clark – Jill.Clark@gov.scot
- Frances MacQueen – frances.macqueen@gov.scot