Department of Health

Health Care and Associated Professions (Indemnity Arrangements) Order 2013

Joint response to the consultation paper from the Medical Professional Liability Company Limited (MPLC) and Kennedys

16 May 2013

Kennedys

Legal advice in black and white

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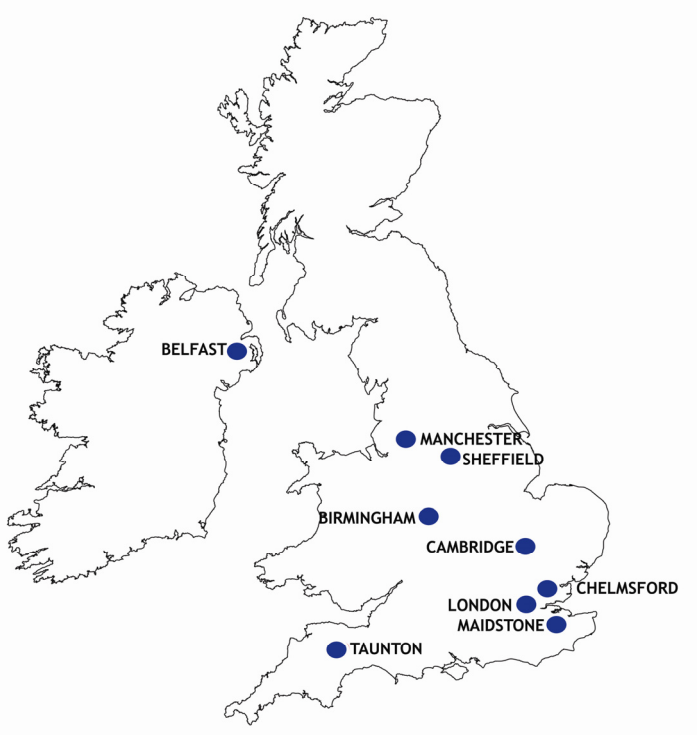
Kennedys

"The firm is one of the largest and strongest dispute resolution practices in the country" and "has a deep understanding of the pressures of the client's bottom-line and has developed a reputation for providing straightforward, pragmatic advice cost effectively." **Chambers and Partners**

Kennedys is a top 30 specialist national and international legal firm with unrivalled expertise in litigation and dispute resolution. We have over 1,100 people globally across nine UK and nine international locations. This includes 157 partners, of whom 40 (plus their teams) specialise in personal injury cases. Our fee income in 2011-12 was £109 million.

Our lawyers provide a range of specialist legal services across many areas such as healthcare, insurance/reinsurance, general liability, personal injury, employers' and public liability and product liability, as well as professional indemnity, occupational disease, employment and health, safety and environment.

Kennedys' healthcare department has been advising hospitals, their insurers, trusts, healthcare professionals and other medical bodies on clinical negligence claims and healthcare law for over 25 years.



Kennedys' healthcare department now acts for the National Health Service Litigation Authority, 60 trusts and PCTs, the Medical Protection Society, medical malpractice insurers including the MPLC, private hospitals and individual practitioners (chiropractors, osteopaths, GPs, dentists and optometrists) in civil, healthcare and regulatory matters.

The healthcare department consists of six partners and some 40 lawyers in London and Cambridge.

Kennedys' healthcare department are a Tier 1 firm in both Chambers and Legal 500 and their partners are individually recommended within these publications as healthcare specialists.

The Medical Professional Liability Company Limited

The Medical Professional Liability Company Limited (MPLC) is one of the leading, independently owned providers of specialised medical liability insurance in the world. Established in Gibraltar in 2001 and with an office in London, our senior underwriters have over 50 years of experience in this highly specialised area. As a Lloyd's cover holder we have the backing of the world's leading insurance market and can provide cover up to £20M for any one claim and £40M in the annual aggregate or currency equivalent.

We are able to offer a wealth of knowledge and experience gained from many years' underwriting international medical malpractice and are regarded as having one of the most experienced and specialist claims handling teams within the medical malpractice liability market.

We act on behalf of four syndicates at Lloyd's of London. Our panel of four leading syndicates (detailed below) not only provides the security of a Lloyd's policy, it also serves to reduce and spread the counter-party and reputational risks for the insured.

Brit Insurance	www.britinsurance.com
Pembroke Managing Agency Ltd	www.pembrokeunderwriting.com
Amlin	www.amlin.co.uk
Ark Syndicate Management Ltd	www.arkunderwriting.com

As at April 2013, Lloyd's enjoys market ratings from A.M. Best A (Excellent), Standard & Poor's A+ (Strong), Fitch Ratings A+ (Strong).

The Managing Director of MPLC, Mr John Young, has 25 years' experience in underwriting medical professional liability insurance both for individuals and healthcare institutions in the UK and throughout the world. Dr John Hickey, a Non-Executive Director of The MPLC, was formerly Chief Executive of the Medical Protection Society Limited, the world's largest indemnifier of doctors, dentists and allied healthcare professionals. He also led the team that set up the Clinical Negligence Scheme for Trusts (CNST) in the 1990s.

MPLC has retained Kennedys Law LLP as their specialist healthcare solicitors since 2001 to provide claims handling, panel solicitor and gatekeeping functions in respect of claims for their insured hospitals, clinics and practitioners in the UK and globally.

Summary

The legislation proposes the implementation of Directive 2011/24/EU. Article 4(2)(d) requires Member States to ensure professional liability insurance or a guarantee of similar arrangement (that is appropriate to the nature and extent of the risk), is in place for independent healthcare professionals. The implementation of the Directive is from 25 October 2013.

MPLC and Kennedys consider that patients harmed due to the negligence of healthcare professionals should be able to seek redress through compensation. It is unacceptable that there may be a risk to the public in not being compensated if negligently injured by an uninsured practitioner. All patients must have access to justice to seek compensation.

MPLC and Kennedys welcome the consultation for the implementation of legislation requiring all regulated healthcare professionals to hold indemnity insurance to practise. In particular, we consider that individual healthcare professionals should be required to ensure that they are covered by an insurance or indemnity arrangement appropriate to their scope of practise.

MPLC and Kennedys concur with the principles of the Independent Review Group that the requirement to hold indemnity or insurance should involve a statutory condition of registration.

The lack of insurance for any healthcare professional is of concern. The General Dental Council (GDC) has been reviewed by the Dental Law Partnership in respect of its regulatory hearings. It is reported that between 2005-2012, 128 practitioners had no or inappropriate professional liability cover whilst practising. Accordingly, such cover should be a statutory requirement of registration, such that a failure to obtain it would preclude an individual practitioner registering with their professional body and practising.

In addition, MPLC and Kennedys consider that the implementation of the Directive could go further by including a recommendation that guidance should be provided by the healthcare regulators in respect of adequate levels of cover for their members, commensurate with their practise. Unless this level of cover is obtained, individual healthcare professionals should not be allowed to register and practise. This provision is not clearly set out in the consultation. This should ensure that patients who are negligently injured by the healthcare professionals are not undercompensated.

MPLC and Kennedys consider that if a healthcare professional benefits from an indemnity arrangement through their employer, this should be sufficient. This will allow registration for the employed healthcare professional. If, however, the healthcare professional provides services on a self employed basis in any capacity,

then they must have an indemnity arrangement in place as a condition of registration.

It is acknowledged that this consultation does not address the issues of indemnity cover for corporate healthcare providers and provisions are not being made in respect of those individuals who are seeking entry to student registers or social workers.

Further Information

Any enquiries about the response or requests for further information should be addressed, in the first instance, to:

Nico Fabri
Partner for Kennedys LLP
25 Fenchurch Avenue
London
EC3M 5AD
T: 020 7667 9104
E: n.fabri@kennedys-law.com

John Young
Managing Director
The MPLC Ltd
107 Fenchurch Street
London, EC3M 5JF
T: 020 3100 5152
E: john.young@the-mplc.com

Question 1

Do you agree that the requirement for healthcare professionals to have an indemnity arrangement in place should match the requirements set out in the Directive and place an obligation on healthcare professionals themselves to ensure that any indemnity arrangement in place is appropriate to their duties, scope of practise, and to the nature and extent of the risk? Please set out your reasons in your response.

MPLC and Kennedys agree with this proposition. The healthcare professional should ensure that patients have the benefit of appropriate levels of cover under indemnity arrangements to ensure financial security. It is of fundamental public interest to ensure that civil claims are capable of being covered by the negligent practitioner. This is also important so as to maintain public confidence in the integrity of healthcare professionals.

The healthcare professional should ensure that their indemnity arrangements are appropriate to allow registration to practise. This is to avoid an onerous administrative burden on the regulatory authority. The regulators should not have to prove to their satisfaction that arrangements are in place for their member or potential member. This should fall to the healthcare professional.

It should also be for the healthcare professional to obtain sufficient levels of insurance/indemnity cover relevant to their duties, scope of practise and the nature and extent of the risk. It is anticipated that there will be variations of cover for individual healthcare professionals. The healthcare professional should be advised to seek professional advice from their insurance broker or relevant association as to what is the sufficient level of insurance/indemnity cover.

MPLC and Kennedys consider that the implementation of the Health Care and Associated Professions (Indemnity Arrangements) Order 2013 could include guidance to the regulators on their recommending levels of minimal cover for their registrants or potential registrants. It can then be a requirement for registration of those registrants to confirm that they have obtained such insurance/indemnity cover. The level of cover can be determined by independent brokers or insurers based upon the healthcare professional's (individual or collective) claims history, categories of work, revenue derived from practice and any other risk factors. This should ensure that levels of sufficient cover are appropriately maintained.

When formulating any guidance on the levels of cover required, consideration needs to be given to the type of cover purchased by the individual and the policy/indemnity limits. This is a complicated area that, in our experience, is poorly understood by individual practitioners.

There are essentially two types of cover available for healthcare practitioners and providers: (i) Claims Made and (ii) Occurrence.

The cover afforded to individuals by Claims Made polices is significantly different from Occurrence indemnity. Occurrence indemnity will cover all claims arising from incidents occurring during the cover period whenever those claims are made i.e. the practitioner does not have to have cover in force at the time the claim is made. A Claims Made indemnity will cover claims which are made and notified within the policy period of insurance. The policy will not however respond to a claim that arises from an incident date that precedes the retroactive date of the policy. Similarly, the policy will not respond to a claim that is made after the expiry of the policy arising from an incident occurring during the period of the policy, if the incident had not been notified during the relevant policy period.

Extra cover can be purchased for both sets of circumstances: retroactive (or "nose" cover) for the former and run off (or "tail" cover) for the latter.

This is important when healthcare professionals with Claims Made cover:

1) Change insurers/indemnifiers (including when the insurer/indemnifier refuses renewal to the practitioner).

2) Retire from practice.

3) Cease practice for other reason (e.g. death, disability, maternity leave etc.).

4) Change their type of practice (e.g. moving from higher risk practice to lower risk practice).

5) Convert from self-employed status (when they purchase their own cover) to employed status (when they will depend on the employer's cover) or vice versa.

The need for run off cover is also important in respect of foreign based practitioners who may fly in, treat patients and then return to their home country (e.g. in the cosmetic healthcare industry) and who will have to purchase cover for the period of UK practise.

Run off cover will also be important where insurers or indemnifiers refuse to renew cover for an individual practitioner who may then be unable to obtain cover elsewhere. In such cases, the insurer or indemnifier should be compelled to offer run off cover for purchase by such practitioners.

In all these cases retroactive and run off cover, as the case may be, will need to be purchased by the healthcare professional to ensure adequate protection for

patients. The rules determined by regulators need to take account of such insurance issues.

The issue of run off cover was addressed by the Australian government in the medical indemnity reforms introduced over a decade ago by the establishment of the ROCS scheme - details can be found at:

http://www.health.gov.au/internet/main/publishing.nsf/Content/health-medicalindemnity-faq-rocs.htm

Full details of the Australian medical indemnity reforms can be found at:

http://www.health.gov.au/internet/main/publishing.nsf/content/medical-indemnity.htm

With respect to policy limits, it is MPLC's experience that some individual practitioners are purchasing limits that are inadequate for their specialty or modality of practice. This means an award or settlement against the practitioner in excess of those limits may leave the patient partly uncompensated.

Taking all these issues into account, MPLC and Kennedys recommend that the Health Care and Associated Professions (Indemnity Arrangements) Order 2013 includes guidance to the regulators on their recommending levels of minimum cover for their registrants or potential registrants. The Order could also determine a process for defining and reviewing, on a regular basis, minimum product standards for insurance/indemnity cover for healthcare professionals. This should be done through an industry body in consultation with representatives of the healthcare professionals.

Question 2

Do you agree with the proposed definition of an indemnity arrangement? Please set out your reasons in your response.

It appears that an indemnity arrangement is defined as an insurance policy or an arrangement for the purposes of indemnification or a combination of both. This is intended to provide that insurance or indemnity cover is sufficient to meet the relevant requirements of the healthcare professional. This allows cover through employers' indemnity arrangements, sufficient to meet the requirements of the practitioner who is not self-employed.

The definition is also wide enough to include discretionary indemnity arrangements such as those offered by the medical defence organisations (MDOs) which provide cover for a large majority of doctors and dentists practising in the UK and some

allied healthcare professionals for their self-employed practice and insofar as general practitioners are concerned, for their NHS practice. It should be noted that NHS employees obtain their cover through their employer which, for most NHS bodies, is the discretionary cover provided by the Clinical Negligence Scheme for Trusts (CNST). MPLC and Kennedys believe it is appropriate that such discretionary cover should be included in the definition.

In the circumstances, MPLC and Kennedys agree that the proposed definition of an indemnity arrangement is appropriate insofar as it covers indemnity by an employer and an individual healthcare professional who requires their own indemnity insurance or similar arrangement.

Question 3

Do you agree with the proposed provisions that set out:

(a) What information needs to be provided by healthcare professionals, and when, in relation to the indemnity arrangement they have in place;

(b) The requirement to inform the Regulator when cover ceases; and

(c) The requirement for healthcare professionals to inform their regulatory body if their indemnity arrangement is one provided by an employer?

Please set out your reasons in your response.

MPLC and Kennedys agree with the proposed provisions to allow the regulators the power to make rules in relation to the nature of the information they require from the healthcare professionals and the timing of that information together with the extent of the indemnity arrangements themselves. This allows the healthcare regulatory bodies to introduce rules which are appropriate to their own needs to regulate their members. This should require that the relevant healthcare professional declares on registration or renewal etc. that they have the appropriate cover in place and when doing so, provide evidence of this. There should also be a signed declaration by the healthcare professional to the effect that the cover purchased is appropriate for the specialty or modality in which they practise, that they will maintain this cover throughout the registration year and will inform the regulator if cover for any reason ceases. This will remove the burden on the regulatory body to establish such arrangements themselves.

There are however a number of issues that need to be considered when determining what information needs to be provided by healthcare professionals because of the differences in the type of cover.

Where a person is employed, and so benefits from indemnity arrangements provided by their employer, they will be able to rely upon this to establish their indemnity cover is in place. There is no requirement to obtain duplicate personal cover.

We do however consider there is potential for a shortfall in the indemnity arrangements provided through the healthcare professional's employment. These include:

1) The lack of a legal requirement for employers/corporate health providers to carry medical professional liability cover and to extend that cover to their employees means that some may not buy cover, may buy inadequate cover or may not choose to buy cover for their employed staff. While this is an unlikely scenario for the larger providers, it is possible for smaller providers especially in the start-up phases of operation. Therefore, in the absence of such a legal requirement on employers, we believe that the onus should be on the healthcare professional to determine that the cover provided by the employer is appropriate for the specialty or modality in which they practise. In the vast majority of cases (e.g. NHS employees) this will not be a problem.

2) Where a healthcare professional has provided clinical services as a self-employed practitioner and has been insured/indemnified on a Claims Made basis prior to becoming employed, the employer's policy will not cover any claims which are made in the future from the healthcare professional's prior work as a self-employed practitioner. The healthcare professional will have to purchase run off cover in such circumstances. This issue is a subset of the wider issue of Claims Made cover for individuals that we refer to in answer 1 above.

3) The cover provided by the employer will normally be medical malpractice insurance to cover civil claims and associated costs. The cover for employees may not provide for regulatory proceedings in respect of fitness to practise or misconduct matters. In those circumstances, the practitioner may be uninsured to cover the defence costs of such proceedings. It is though acknowledged that there is not such a public interest in relation to cover for these types of regulatory proceedings as they do not involve compensation or redress to patients for injuries.

It is acknowledged that those individuals who may not be working are allowed to submit to the regulatory body what information about their indemnity arrangements will be in place at the time they commence their practice. This will allow registration without first having to take out indemnity insurance.

We repeat our submissions with regard to the provision of guidance as the appropriate levels of insurance/indemnity cover for healthcare professionals, as set out in answer 1 above.

Question 4

Do you agree with the proposal to allow healthcare professional regulatory bodies the ability to refuse to allow a healthcare professional to join, remain on, or return to, their register, or, for the GMC, to hold a licence to practise unless they have an indemnity arrangements in place? Please set out your reasons in your response.

MPLC and Kennedys concur with the proposition that the intention of the EU Directive is for healthcare professionals to have appropriate indemnity arrangements in place in order to register and practise. This is a fundamental requirement of professional practice. There should be an inextricable link between appropriate indemnity arrangements and registration, failing which the healthcare professionals should not be allowed to practice and hold themselves out as professionally qualified practitioners.

It is acknowledged that unregistered practitioners may still attempt to practise by informing members of the public that they are not registered healthcare professionals. For example, individuals may call themselves spinal manipulators rather than chiropractors, thereby not requiring registration with the General Chiropractic Council. Nevertheless, this provision should prevent practitioners without indemnity practising in the majority of cases.

Question 5

Do you agree with the proposal to permit healthcare professional regulatory bodies to remove a healthcare professional from their register, withdraw their licence to practise, or take fitness to practise action against them, in the event of there being an inadequate indemnity arrangement in place? Please set out your reasons in your response.

MPLC and Kennedys agree with the proposition that healthcare professional regulatory bodies should have the power to remove a healthcare professional from their register/withdraw their licence to practise or take fitness to practise action against them in the event that there is not an indemnity arrangement in place.

The primary position should be that the failure to provide evidence of an indemnity arrangement should preclude registration and allow the professional body to pursue fitness to practise/misconduct proceedings. It is agreed that such proceedings would not be necessary in all cases and, more particularly, when the applicant attempts to register at first instance and is not aware of the requirements to have such an indemnity in place as a self-employed rather than an employed practitioner. Regulatory proceedings may however be appropriate where individuals have failed to honestly declare their indemnity arrangements on renewal or have an inappropriate level of cover. This would also be the case if a member cancels insurance having only obtained it for the purposes of securing registration.

MPLC and Kennedys do not agree with Recommendation 15 of the Independent Review. This states that in the event that personal cover for self-employed practise is alleged to be inadequate or inappropiate, registrants should be entitled to rely upon the defence that they acted in accordance with the proposals of their insurer or indemnifier.

The insurer or indemnifier does not recommend the level (and scope) of cover which is purchased by a policyholder. This is the role of the insurance broker/adviser. As such, it seems inappropriate for the healthcare professional to rely on the defence that they have acted in accordance with the proposals of the insurers. Otherwise, this may lead to healthcare professionals (or their brokers) asking insurers to provide terms for the lowest policy limit of indemnity (e.g. £100K) or the most basic of cover (e.g. retroactive date inception) and then seek to rely upon Recommendation 15 as their defence. This may leave a patient undercompensated.

Inadequate levels of cover for the healthcare professional have resulted in patients seeking to claim the difference from co-defendants, who may not be responsible for the acts or omissions of the practitioner. For example, an independent private hospital who retains (but does not employ) an independent practitioner as a consultant surgeon is brought into the proceedings when it is discovered that the surgeon has inadequate levels of cover to meet the potential value of a civil claim. The patient will attempt to pursue the claim on a joint and several liability basis with the independent consultant surgeon and the hospital. It is unjust for the independent hospital to be responsible for the practitioner's inappropriate cover.

Whether the adequacy of the cover provided can be indicated, is to be determined. We refer to our answer to question 1 above.

Question 6

Please provide any information with regard to the potential barriers to independent midwives moving to alternative governance and delivery practices in order to obtain appropriate indemnity arrangements.

MPLC and Kennedys do not have any specific comments to make with regard to the potential barriers to independent midwives changing their governance to obtain indemnity arrangements. It is acknowledged that this may affect approximately 170 independent midwives but this should be counter balanced with the need to protect the public and thereby prevent public confidence in the integrity and standing of healthcare practitioners being undermined.

Question 7

Do you agree that the provisions in the Draft Order should only apply to qualified healthcare professionals and not students? Please set out your reasons in your response.

MPLC and Kennedys agree that the activities of students should be covered by indemnity arrangements in place relating to their training and those who supervise them. There are circumstances which allow students to obtain professional indemnity cover and this should be encouraged for the sake of completeness. However, it is acknowledged that students are not considered as qualified and regulated healthcare professionals and therefore may not be party to the same indemnity arrangements.

Question 8

Are there any equalities issues that would result from the implementation of the Draft Order which require consideration? If so, please provide evidence of the issue and the potential impact on people sharing the protected characteristics covered by the Equality Act 2010: disability; race; age; sex; gender reassignment; religion and belief; pregnancy and maternity and sexual orientation and carers (by association).

MPLC and Kennedys do not have any comments on the possible impact on equalities from the implementation of the Draft Order.

Question 9

Please provide comments as to the accuracy of the costs and benefits assessment of the proposed changes set out in the Impact Assessment (including, if possible, the provision of data to support your comments).

MPLC and Kennedys have considered the Impact Assessment and the data contained therein. We acknowledge that this data may not be reliable but we are unable to comment upon its accuracy. We do not have any data available.

Question 10

Please provide information on the numbers of self-employed registered healthcare professionals and whether they are in possession of indemnity cover or business insurance which includes professional liability insurance and professional indemnity insurance.

MPLC and Kennedys do not retain this type of data.

Question 11

Please provide information on the numbers of employed healthcare professionals who, in addition to working in an employed capacity covered by an employer's arrangement for indemnity or insurance, also undertake self-employed practice. Where possible, please provide information as to whether they are in possession of indemnity cover or business insurance which includes public liability insurance and professional indemnity insurance for that self-employed element of their practice.

MPLC and Kennedys do not retain this type of data.

Question 12

Do you have views or evidence as to the likely effect on costs or the administrative burden of the proposed changes set out in the draft Order? Please provide information/examples in support of your comments.

MPLC and Kennedys do not retain any information in respect of the anticipated costs of the administrative burden on healthcare regulatory bodies arising out of the proposed changes. There will inevitably be a costs impact in administering a change of registration and ensuring that all members or potential members of that regulatory body are informed of this. Nevertheless, any such costs would be proportionate to the overall effect of the change particularly where the healthcare professional is required to prove a positive (namely of the presence of cover) rather than the healthcare regulatory body having to prove a negative, being the absence of cover.

Question 13

Do you think there are any benefits that are not already discussed relating to the proposed changes? Please provide information/examples in support of your comments.

The primary point of the legislation is to ensure that a healthcare professional has adequate cover so that patients are not left without redress. While agreeing with this premise, MPLC and Kennedys believe that safeguards need to be implemented to ensure that fair and equitable procedures are implemented by insurers/indemnifiers before a refusal to renew cover to an individual is made. A refusal to renew is a serious matter that may well result in practitioners being unable to practise their profession because they are unable to obtain cover. While healthcare professionals refused cover by insurers will have a right to access the financial ombudsman's service (albeit that they may not be able to practise while their case is being determined), those obtaining cover through non-regulated organisations such as the MDOs will merely have to rely on common or contract law for redress. Therefore a benefit of this legislation may be an improvement in the manner in which refusals to renew cover are made.

Question 14

Do you have any further comments on the Draft Order itself?

MPLC and Kennedys do not have any specific comments on the Draft Order insofar as they will not be involved in implementing any changes to their practices as a result of the provisions of Health Care and Associated Professions (Indemnity Arrangements) Order 2013.

Question 15

What are your views on extending the requirement to hold an indemnity arrangement as a condition of registration to all professionals statutorily regulated by the Health and Care Professions Council? This would cover Social Workers in England only.

MPLC and Kennedys would welcome any provisions which require professional indemnity arrangements to be in place for all healthcare professionals. However social workers are not healthcare professionals as such and are primarily employees, therefore not required to maintain their own insurance.