



## **Dental Patient Protection – Bridging The Gap**

**25th October 2013 is the last possible date for the Coalition Government to give effect to the European Directive 2011/24/EU on the application of patients' rights in cross-border healthcare, and in particular the requirements of the Directive that mechanisms, both for protecting patients and for seeking remedies in the event of harm arising out of healthcare, are in place appropriate to the nature and extent of the risk posed.**

**Although the Directive is framed to give effect to Article 114 of the Treaty on the Functioning of the European Union, namely to improve the functioning of the internal market and the free movement of goods, persons and services, its effect is not limited to patients receiving cross-border healthcare within the Union but rather it seeks to establish for the benefit of all EU citizens, 'a set of operating principles that are shared by health systems throughout the Union'.**

**In this paper we consider some aspects of the current mechanisms of patient protection in the UK, and explore in particular the difficulties of seeking a remedy for dental patients who sustain harm as a result of dental treatment in the UK. We explain why we believe that the existing UK healthcare mechanisms are currently failing to meet the requirements of the Directive.**

**We review the current proposals for changes in the existing mechanisms both of patient protection in dental care, and of obtaining redress after harm has been caused, and suggest where additional modifications may be needed in order to give effect to the Directive.**

### **Current UK mechanisms for the protection of dental patients**

In order to practise dentistry in the UK, all dental care professionals in the UK must be registered with the relevant UK Regulatory Body, the General Dental Council (GDC). The GDC ensures that all registrants meet stipulated criteria in relation to their training, qualification and professional development. However currently there

is no legal requirement in the UK for such registered individuals to obtain professional liability insurance or professional indemnity cover in respect of their dental practice.

Instead the GDC places reliance upon dental professionals' adherence to professional ethical standards codified within the GDC's guidance, 'Standards for Dental Professionals'. In this Standards document, the extent of the

consideration that a requirement for professional liability insurance or indemnity cover is afforded is at s1.4, where the GDC exhorts Registrants to protect patients by, 'making sure you are protected against claims at all times.'

There are currently no pre-emptive checks made by the GDC which ensure that prospective or current Registrants have professional liability insurance cover or indemnity cover of any type. The Regulator does not check pre-emptively that there is cover of sufficient duration to protect patients during or after the period of registration, nor are any checks made as to the nature or financial liability protection of any insurance or cover. Indeed the GDC only considers, and applies sanctions retrospectively in respect of, failures by Registrants in this area, that is, after failures on the part of Registrants to purchase professional liability insurance or indemnity cover for historic periods of registration.

In the UK there is no information made available to dental patients as to the existence of professional liability insurance or indemnity cover in respect of a particular dental professional's practice. There is no obligation upon an individual dental professional to divulge such information, and currently in the UK when a dental patient seeks clear information regarding the possession of professional liability insurance or indemnity cover by a registered dental care professional from the GDC, the Regulator will not provide any information to that patient regarding the identity of the organisation providing professional liability insurance or indemnity cover, citing the Data Protection Act 1998 (DPA) as the basis for non-disclosure.

Furthermore the commercial organisations which provide professional liability insurance or indemnity cover for dental

professionals also consistently rely on an interpretation of the DPA to withhold disclosure of information regarding possession of professional liability insurance or indemnity cover by individual dental professionals.

### **Coalition Government proposals regarding patient protection**

Following Finlay Scott's Independent Review of the requirement to have insurance or indemnity as a condition of registration as a healthcare professional, published in June 2010, the Coalition Government published its Command Paper, Enabling Excellence in February 2011 which accepted that when patients receive substandard care from a healthcare professional, they should have available to them, or their advocates, a means to seek redress. It was proposed by the Coalition Government that there should be a consistent requirement across the healthcare professions that Registrants should hold professional liability insurance or indemnity cover, either in their own right or through their employers.

The Secretary of State for Health referred the regulation of healthcare professionals for tripartite Law Commission review and their proposals were published 1<sup>st</sup> March 2012. The Law Commissions propose an Act of Parliament to provide a single legal framework for all healthcare regulation and, inter alia at 5.64(3), a statutory requirement that in order to be registered with a healthcare Regulator, an applicant must have 'adequate indemnity or insurance arrangements'.

**We commend the proposed creation of a statutory duty upon healthcare providers, including all dental care professionals, to hold professional liability insurance or indemnity cover. However the question arises as to whether or not the Law Commissions' statutory**

**proposals as drafted are sufficient to satisfy the requirements of the European Directive on the application of patients' rights in cross-border healthcare.**

In particular, the Directive at Article 4 para 2(b) requires that healthcare providers should provide relevant information to help individual patients to make an informed choice, including on treatment options and on treatment safety. The Directive imposes the express requirement that healthcare providers should provide clear information to patients before treatment on, 'their insurance cover or other means of personal or collective protection with regard to professional liability'.

Our analysis indicates that this requirement has been overlooked by the Law Commissions. We submit that the Commissions' proposals fail to meet the requirements of the Directive, and should be revised so that there is a statutory requirement upon all healthcare professionals to provide clear information regarding the professionals' professional liability insurance or indemnity cover.

In order to comply with the Directive, the following criteria must be met:

1. Professional liability insurance or indemnity cover information must be public
2. Professional liability insurance or indemnity cover information must be available to patients before treatment, and therefore available to inform patient choice.
3. Professional liability insurance or indemnity cover information must be comprehensive regarding extent of cover, duration, financial and other restrictions etc in order to allow patients to make informed decisions about the safety of healthcare

**We propose that the Coalition Government should legislate to impose a statutory obligation upon healthcare professionals to provide the clear information required by the Directive. It is proposed that mandatory publication of full professional liability insurance or indemnity cover information, as set out above, in respect of each Registrant by the relevant Regulator, including the GDC, would meet the requirements of the Directive.**

### **Mechanisms for dental patients to seek remedies after they have been harmed**

Finlay Scott's Independent Review recognised that, notwithstanding the creation of a statutory duty upon healthcare professionals to obtain professional liability insurance or indemnity cover, there would be a 'residual risk' that patients who had sustained avoidable harm as a result of breach of duty by healthcare professionals may not receive redress to which they are entitled.

We are aware that a failure to co-operate by dental professionals with the civil legal system and the Dental Regulator in the UK will allow perpetuation of that risk, even in the proposed new statutory environment. Neither the Law Commissions, the four UK Healthcare Administrations nor the Coalition Government have publicly considered this risk.

The scope of the perpetuated risk may be determined by reviewing the GDC's professional conduct committee completed determinations for the period 2005-2011.

Our analysis of the GDC's data between 2005 and 2011, reveals that by 2011 the percentage of concluded conduct committee determinations involving absent and unrepresented dental Registrants, who had failed to

acknowledge or co-operate in any way with the Regulatory disciplinary process, had risen to nearly 30% of all concluded determinations. We submit that this is evidence of an increasing tendency for Dental Registrants to fail to engage with systems of regulation and remedy.

Coupled with the failure of a rising proportion of dental Registrants to engage with the Regulator, we note that the Dental Defence Union (DDU), the dental division of the Medical Defence Union, and the largest providers of professional liability insurance to dentists in the UK has adopted the egregious policy, when their own insured dental professionals fail to co-operate with DDU terms, of relying upon that non-cooperation to consistently deny compensation to harmed patients of their insured. This denial on the part of the DDU is maintained even when there is evidence of the existence of DDU professional liability insurance policies having been sold to the relevant dentists, and of insurance premia having been paid to the DDU by the insured.

The Dental Defence Union's denial of insurance information to patients and its failure to engage with patients or their representatives even when the relevant dental practitioner has purchased insurance cover in the UK has the effect of preventing dental patients, who have sustained harm during dental treatment, from seeking remedies and obtaining appropriate redress.

We conclude that the approach of the Dental Defence Union is distorting the market in professional liability insurance and indemnity cover, is notably at odds with their promotion of professional liability insurance cover as a superior indemnity product for the protection of dental patients compared to discretionary indemnity models, and would persist even in a revised statutory environment.

It is the combination of a failure on the part of an increasing proportion of Dental Registrants to engage with systems of regulation and remedy, and the policies of some professional liability insurers in the event of failures by their insured, which leads us to conclude that there will be a significant perpetuated risk under a statutory environment as conceived by the Law Commissions.

**We propose that, in order to give effect to Directive Article 4 para 2(d), which requires that Member States shall ensure that 'systems of professional liability insurance, or a guarantee or essentially comparable as regards its purpose...are in place' and in order to address the perpetuated risk to patients, the Coalition Government should incorporate a requirement within the proposed legal framework that all healthcare professional liability insurers and indemnity providers have an overriding duty to co-operate with patients and patient representatives in enabling remedies to harm sustained.**

## **Conclusion**

We support the proposed creation of a statutory duty upon healthcare providers, including all dental care professionals, to hold professional liability insurance or indemnity cover.

We have demonstrated that an additional requirement for a statutory duty upon healthcare professionals to provide clear information regarding professional liability cover is required by the Directive, and we propose that mandatory publication of full detailed professional liability insurance or indemnity cover information in respect of each Registrant by the relevant Regulator, including the GDC, would meet the requirements of the Directive.

We conclude that there will be a significant perpetuated risk to patients, even in a new statutory environment and propose a statutory duty of co-operation with patients and patient representatives upon the insurers and

indemnifiers of all healthcare professionals

**We commend our proposals to the Coalition Government and the Department of Health for consideration.**

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### **About the Bridge The Gap campaign**

In 2011 the Dental Law Partnership, a specialist solicitors' company, became aware of developing trends within the dental profession which threatened dental patient protection. In particular we identified that increasing numbers of dentists were failing to obtain professional liability cover, or were failing to co-operate when claims were made, leading to increasing numbers of dental patients being unable to obtain justice.

To find out more, we turned to the sector regulator, the General Dental Council, and to the Department of Health, but Freedom of Information requests revealed that there was no monitoring of the problems, nor was there any recognition of the trends by either organisation.

As the leading specialist solicitors' company in the UK acting exclusively for dental patients, and with Directors who are doubly qualified dentists and solicitors, the Dental Law Partnership is in a privileged position to comment upon matters of dental patient safety and has a special responsibility to voice concerns in areas of patient safety when all other agencies are silent, hence the Bridge the Gap campaign.

The campaign aims to improve protection, and access to justice, for dental patients by pressing for changes in the law. We hope that you will join us in bridging the gap.

For more information please contact Dr Chris Dean through the campaign press office on 0161 486 9102 or email us at [pressoffice@btgcampaign.co.uk](mailto:pressoffice@btgcampaign.co.uk)

The campaign website is at [www.btgcampaign.co.uk](http://www.btgcampaign.co.uk)