

**DEPARTMENT OF HEALTH (DoH)**

**MEDICAL ACT 1983 (AMENDMENT) AND MISCELLANEOUS  
AMENDMENTS ORDER 2006  
A PAPER FOR CONSULTATION**

**A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS  
(APIL03/06)**

**JANUARY 2006**

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has around 5,000 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise
- To provide a communication network for members.

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## MEDICAL ACT 1983 (AMENDMENT) AND MISCELLANEOUS AMENDMENTS ORDER 2006

### Executive Summary

- APIL believes that there should be a requirement for all doctors to have mandatory clinical negligence indemnity insurance. Yet we feel that the definition of ‘insurance’ within the proposed *‘Medical Act 1983 (Amendment) and Miscellaneous Amendments Order 2006’* fails to provide such *‘a sensible requirement for the protection of patients and the public’*.
- APIL believes that allowing doctors to practice without the need for full insurance is contrary to the indemnity arrangements required by other healthcare regulatory bodies in this country as well as those internationally.
- APIL suggests that doctors should be required to have full indemnity insurance regardless of whether they are already indemnified by the NHS.
- APIL suggests, in the absence of any change to the definition of ‘insurance’ within the draft order, the GMC should *“make regulations specifying the conditions an indemnity arrangement must satisfy in order to be regarded as adequate and appropriate”*.

## Introduction

1. APIL welcomes the opportunity to put forward its comments in relation to the Department of Health's (DoH) consultation on the *'Medical Act 1983 (Amendment) and Miscellaneous Amendments Order 2006'*. The draft order proposes various changes to the way doctors are regulated and the way in which the General Medical Council (GMC) conducts its affairs. Please note, however, that APIL's response is limited to answering consultation question 15 and the potential registration requirement of mandatory professional indemnity / insurance cover for doctors.
2. APIL previously responded to the DoH consultation *'Strengthening the General Dental Council (GDC)'* in October 2004 where we detailed our concerns over the need for dental professionals to hold only *'adequate and appropriate insurance'*. APIL felt that the definition of 'insurance' within the suggested Dentists Act 1984 (Amendment) Order 2005 - under a new section 26A (10) – failed to offer adequate protection to patients injured through dental negligence. APIL suggests that many of the issues surrounding insurance for dentists appear to be similar to those relating to doctors within the current consultation.

**Question 15 – Do you consider the requirement for mandatory professional indemnity / insurance to be a sensible requirement for the protection of patients and the public? Could the requirement for professional indemnity / insurance cover be more clearly defined, or can satisfactory public protection be achieved in other ways?**

3. APIL believes that there should be a requirement for all doctors to have mandatory clinical negligence indemnity insurance. Yet we feel that the definition of 'insurance' within the proposed *'Medical Act 1983*

*(Amendment) and Miscellaneous Amendments Order 2006* fails to provide such “*a sensible requirement for the protection of patients and the public*”<sup>1</sup>. Under the new section 44C<sup>2</sup>, the description of ‘insurance’ specifies several types of ‘indemnity arrangements’ which would be considered ‘adequate and appropriate’ in order to be granted a license as a medical practitioner. While APIL is fully supportive of the need for doctors to have “*a policy of insurance*” (section a and the first half of section c), we feel that the inclusion of “*an arrangement made for the purposes of indemnifying a person*” (section b and the second half of section c) as an option fails to provide adequate protection for patients.

4. In terms of these ‘indemnity arrangements’, APIL believes that the ability to choose section (b) will leave negligent doctors without the necessary cover, and consequently injured patients without appropriate redress. Under section (a) an insurance contract will provide a doctor with indemnity in the event of a patient proving negligence, yet there are not such safeguards under section (b). The proposed section (b) will continue to allow doctors to be granted a license to practise - via registration with the GMC - even if they are only covered by discretionary indemnity<sup>3</sup>. A discretionary indemnity policy operates, as the name suggests, at the discretion of the insuring organisation. Therefore if the insuring organisation does not want to indemnify the doctor on consideration of the facts of the claim, the injured patient will have to sue the negligent doctor individually. Considering patients who are severely damaged by medical negligence can be awarded damages of thousands of pounds, and awards for severe and long-term injuries such as neurological damage can be well over £4 million, the injured person is unlikely to receive his full and much-needed compensation from the individual doctor. In

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<sup>1</sup> See consultation question 15 – page 15

<sup>2</sup> See page A22 in the consultation document.

<sup>3</sup> Discretionary indemnity is offered to doctors by a number of medical defence schemes.

contrast to a discretionary indemnity policy, a policy of insurance will be provided by a regulated organisation and will provide a contractual right of assistance, subject only to the terms of the original policy. APIL therefore feels that it is patently unfair to allow doctors to continue operating under discretionary indemnity. For example, UK citizens are not allowed to insure their cars on a discretionary basis, so why should doctors be allowed to rely on discretionary insurance when practising?

5. APIL also believes that allowing doctors to practice without the need for full insurance is contrary to the indemnity arrangements required by other healthcare regulatory bodies<sup>4</sup> in this country as well as those internationally. For example, the General Optical Council (GOC) recently announced that all “[r]egistrants must hold professional indemnity insurance valid for UK purposes”<sup>5</sup>. This decision was taken after insurance cover became a registration requirement on 1 July last year. APIL notes that the reference to ‘professional indemnity insurance’ within the GOC is governed by the stipulation that “[a] registered optometrist or registered dispensing optician must be covered by adequate and appropriate insurance throughout the period during which he is registered in the appropriate register”<sup>6</sup>. The GOC has therefore chosen to interpret ‘adequate and appropriate insurance’ to mean full professional indemnity insurance. APIL believes that the General Medical Council (GMC) should follow suit, and provide similar clarity to this phrase within its own registration process.
6. In terms of international practice, APIL understands that the requirement that practising doctors are required to have full indemnity insurance to protect patients is a requirement in most developed

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<sup>4</sup> The General Optical, Osteopathic and Chiropractic Councils already require healthcare professionals registered with them to have an insurance policy.

<sup>5</sup> See general Optical Council Press release – 17 November 2005 – ‘Insurance requirements clarified’ (see [http://www.optical.org/index\\_files/news\\_room/news\\_11.asp](http://www.optical.org/index_files/news_room/news_11.asp) for further details).

<sup>6</sup> The Opticians Act 1989 (Amendment) Order 2005 (S.I. 2005 / 848) – Part 2, section 12

countries. For instance, in Australia in the early 2000s an organisation offering discretionary indemnity went into liquidation leading to the Government passing the Medical Indemnity (Prudential Supervision and Product Standards) Act 2003 outlawing the provision of discretionary indemnity insurance. Discretionary insurance is also not allowed in the majority of EU states and in most states of the USA.

7. APIL suggests that doctors should be required to have full indemnity insurance regardless of whether they are already indemnified by the NHS. APIL is not suggesting that NHS indemnity is inadequate in terms of ensuring that patients are compensated, but the terms of NHS indemnity is limited in certain respects. For example, NHS indemnity does not cover category 2 work, Good Samaritan Acts and, of course, any private work a doctor may undertake. It is therefore essential that mandatory insurance is extended to doctors who may already be indemnified via the NHS.
  
8. APIL suggests, in the absence of any change to the definition of 'insurance' within the draft order, the GMC should "*make regulations specifying the conditions an indemnity arrangement must satisfy in order to be regarded as adequate and appropriate*"<sup>7</sup>. While APIL encourages the GMC to adopt the same interpretation of 'adequate and appropriate' as the GOC – i.e. all registrants must hold professional indemnity insurance – if this interpretation is rejected, APIL would recommend the adoption of the Medical Defence Union's (MDU) suggested criteria and minimum terms and conditions – see Appendix A. APIL is encouraged by the MDU's suggested minimum terms and conditions as they are based on the Law Society of England and Wales own insistence upon minimum levels of professional

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<sup>7</sup> Consultation document – page 14, paragraph 14

indemnity insurance cover in order for solicitors to obtain the annual practising certificate.



**Appendix A**

SUGGESTED CRITERIA AND MINIMUM CONDITIONS FOR CLINICAL  
NEGLIGENCE INDEMNITY

AS PROPOSED BY THE MEDICAL DEFENCE UNION (MDU)

## **Suggested criteria for indemnity**

To ensure that *'the practitioner will be in a position to pay'* damages to patients who have been harmed and can prove clinical negligence, APIL suggests that any policy of insurance or other arrangement should satisfy the following Medical Defence Union (MDU) criteria:

1. The indemnifier must give an explicit and enforceable undertaking to pay for negligence claims that arise from normal clinical practice.
2. The indemnifier and the terms and conditions of indemnity must meet the requisite minimum terms and conditions.
3. There must be certainty that the doctor is properly indemnified. Evidence should be presented on application for a licence to practise and on each annual renewal.
4. There must be a mechanism to ensure that patients are compensated even if a doctor is unindemnified for whatever reason. For example, a fund could be set up, in a similar manner to that for motor insurance, to protect patients of uninsured practitioners.

## **Suggested minimum terms and conditions for indemnity**

### Indemnity supplier

5. Indemnifier subject to a statutory scheme if there is a dispute on indemnity e.g. Financial Ombudsman Service.
6. Financial Services Compensation Scheme (FSCS) applies, which means that the FSCS can pay compensation if a firm is unable, or unlikely to be able, to pay claims against it.

7. Indemnity may only be provided by regulated insurers authorised to carry out the appropriate class of insurance business in any member state of the European Union and entitled to carry out such class of insurance business in the UK.

#### Indemnity

8. Specified minimum limit of indemnity – reviewable every year – per claim and in the aggregate.
9. Scope of cover defined as clinical negligence claims arising from the doctor's provision of clinical services.
10. Cover to include costs and damages payments, including claimants' legal costs and defence costs.
11. Claims-made policy, retroactive i.e. picks up all claims notified within the term of the policy.
12. Provisions for run-off cover for death, disability or retirement and for those who change insurance provider, or cease to practise in the UK.
13. GMC to specify minimum period of run-off cover (MDU suggest 21 years).
14. Term of policy to be coterminous with registration.
15. Policy to include Good Samaritan cover i.e. provision of clinical services as a bystander in a clinical emergency, accident or disaster.