

The Paterson inquiry recommendations have implications for healthcare professionals, healthcare indemnifiers and insurers as **Stephen King** of Mills & Reeve explains



# What next in the Ian Paterson affair?

**The independent inquiry into the affairs of disgraced surgeon Ian Paterson, led by the Bishop of Norwich, reported in early-2020 and made 15 recommendations to enhance patient protection and safety. The government's delayed response was published on the 16 December 2021. It acknowledged that between 1997 and 2011 there were 'failures across the entire healthcare system' including regulatory, management and oversight failures, which allowed Paterson's 'shocking' malpractice to go unchecked.**

## Themes

The government identified three themes from the inquiry report covering:

- Initial consultations with a clinician, and information provided during treatment to ensure patients get a high standard of care
- The fitness of clinicians to practise
- Post-treatment activity to ensure ongoing scrutiny and measurement of outcomes, pathways for raising concerns, and rapid action when something has gone wrong

Most of the recommendations have been accepted or accepted in principle. One of the recommendations was that: *As a matter of urgency the govern-*

*ment should reform the current regulation of indemnity products for healthcare professionals in light of the serious shortcomings identified by the inquiry and introduce a nationwide safety net to ensure patients are not disadvantaged.*

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The government's full response and reaction to this recommendation is pending but it is worth understanding the context, both of the recommendation, and the government wanting to act on it.

After the misdeeds of Paterson had come to light, and a large number of his former patients had sued him for damages, his indemnity organisation – The Medical Defence Union (MDU) – exercised its discretion to decline him an indemnity for those claims, as it was perfectly entitled to.

That event was a wake-up call for patients and doctors, to understand that membership of an MDO or Medical Defence Organisation, like the MDU, was not insurance as the ordinary person, patient or doctor might understand. What membership of an MDO allowed was to be able, for example, to notify a claim to the MDO and allow the MDO to exercise its discretion whether to offer indemnity for the claim, or not.

Provided a decision to decline indemnity by an MDO was not malicious or irrational, there was no appeal against that exercise of discretion, and no means of enforcing a right to an indemnity.

That remains the position.

MDOs are not regulated, nor are they contracted to their members. That means that the indemnity they offer is not contractually enforceable. Contrast that to professional indemnity insurance which most non-medical professionals carry by way of indemnity cover, which is regulated by the Financial Conduct Authority and which is contractually enforceable.

This scenario of a patient being left without effective redress, presented a



problem.

Would a ‘Paterson’ or ‘rogue surgeon’ event happen again, and if so, would the same thing happen, potentially leaving injured patients without redress, that is to say without the means of securing compensation except against any limited private wealth of the medical professional concerned?

Interestingly, in all the years of existence of the MDOs, the type of discretionary indemnity they offer has always been accepted by the General Medical Council (GMC) as ‘adequate and appropriate’. The GMC require all practising doctors to have such ‘adequate and appropriate’ indemnity.

But, given the events of Paterson, was this type of discretionary, unregulated and non-enforceable indemnity still fit for purpose?

Medical professionals working in the NHS are covered by Crown indemnity. Those working outside the NHS, with some limited exceptions, are not and therefore require indemnity cover.

The government launched a consultation on appropriate indemnity cover for regulated healthcare professionals in 2018, after this issue arose.

It sought views on whether legislation was required to ensure that all such medical professionals not covered by Crown indemnity should hold indemnity akin to regulated insurance, rather than the unregulated discretionary indemnity offered by traditional defence organisations such as the MDU, Medical Protection Society (MPS) and Medical and Dental Defence Union of Scotland (MDDUS).

The government has recently extended

this programme to consider the issues raised by the Paterson Inquiry and is committed to bringing forward proposals for reform in 2022.

## Conclusion

The government’s response envisages a survey of doctors to gauge interest in the subject, test and consider possible solutions.

The nature of the 2018 consultation envisaged change – the driver being clear avenues available to patients and their families to ensure effective redress when patients are injured, and no doubt (given the adverse publicity around the Paterson affair) an improved public confidence in the redress process.