THE CHALLENGES FACING THE MEDICAL PROFESSION ARISING OUT OF THE HIGH COST OF PROFESSIONAL MEDICAL INDEMNITY INSURANCE AND HOW THESE CHALLENGES ARE BEING MET

JOINT COMMITTEE ON HEALTH & CHILDREN- THURSDAY 22 JANUARY 2015

OPENING REMARKS, SIMON KAYLL, CEO, MEDICAL PROTECTION SOCIETY

1. On behalf of the Medical Protection Society, I wish to begin by formally thanking all members of the committee for kindly inviting me to present to you today.

2. These are unquestionably challenging times and MPS understands that the increases in its subscription rates, caused by the rise in the cost of clinical negligence, are painful and are having a significant impact on the profession.

3. As a responsible, not-for-profit organisation owned by members, we have an obligation to ensure that we collect sufficient subscription income to meet the expected future costs of claims against members so we can be in a position to defend their interests long into the future.

4. MPS considers itself part of the medical and dental community and is committed to doing all it can to work with the government and others to introduce tort and procedural reform to begin to tackle this serious problem.

5. MPS is the world’s leading protection organisation for doctors, dentists and healthcare professionals. We protect and support the professional interests of more than 290,000 members around the world and more than 16,000 in Ireland. Our benefits include access to indemnity and expert advice. MPS has had members in Ireland for over 100 years.

6. Our philosophy is to support safe practice in medicine and dentistry by helping to avert problems in the first place.

7. The vast majority of MPS members in Ireland have ‘occurrence-based’ protection although MPS recently introduced ‘claims-made’ protection. All the benefits of membership of MPS are discretionary as set out in the Memorandum and Articles of Association.

8. MPS occurrence-based protection depends on the date on which an adverse incident occurs, and not the date that the matter is reported to MPS. If the practitioner is a member at the time an adverse incident occurs, they can ask for assistance with the medicolegal consequences at any time; even if it is years later, or they are no longer a member, or have ceased practising.

9. MPS claims-made protection, depends on both the date on which an adverse incident occurs and the date that the matter is reported to MPS. One
year’s subscription provides the member with protection from claims and complaints arising from adverse incidents in that year’s practice provided that:

- They remain in continuous membership between the date of the incident and the date they report it to us; or
- Having left claims-made protection they report the adverse incident within the time allowed by any extended reporting benefits that they have purchased.

THE DETERIORATION IN THE CLAIMS EXPERIENCE

10. There has been a deterioration in the claims environment for a number of years, and significantly so in the past two years. This is a result of a large increase in both the rate at which private consultants are being sued and the average size of those claims. As a consequence, we had to increase our subscription rates.

- In 2014, when considering the claims environment for private hospital consultants, the actuarial estimates of the cost of indemnity for claims per member had increased by over 95% between 2009 and 2014
- In the same period for Irish GPs the increase in the actuarial estimates of the cost of indemnity for claims per member was 52%
- For Irish dentists the increase in the actuarial estimates of the cost of indemnity for claims per member was 62%.

11. The impact of the deteriorating claims environment is felt differently by MPS than the State Claims Agency. This is because MPS has to fund itself on a prospective or pre-funded basis – collecting money now for incidents which occur this year but for which claims may not arise for many years in the future. The State Claims Agency works on a ‘pay as you go’ basis, requiring funds this year, only for the costs paid out this year.
12. Over the past year we have lobbied the government on the need for change and made it clear that the cost of clinical negligence is too high when compared to other equivalent countries. We have argued for long term reform of the legal system, to address the root causes for the high cost of clinical negligence, and for short term relief for members, such as reducing the indemnity cap for consultant claims.

13. We believe that this deterioration (increase in severity and frequency of claims) comes as a result of many factors – but does not reflect a decline in professional standards. Whilst we cannot provide an exhaustive list, we believe, based on our experience, that contributing factors may include:

   - The economic downturn – with plaintiffs pursuing cases they may not consider when the economy is more buoyant and potentially pushing some plaintiff lawyers into clinical negligence work as more commercially orientated work has dried up
   - A growing compensation culture in Ireland
   - An increase in patient expectations.

14. These problems are further compounded by:

   - The lack of an efficient and predictable legal process – no judge-led case management or pre-action protocol
   - Lack of a speedy and transparent system leading to pressure to settle claims in circumstances where we would not do so elsewhere in the world
   - Limited opportunities for defendants to make cost protective offers or incentives for plaintiffs to settle early
   - The cost of settling a claim increasing as time goes on
   - Plaintiff costs being exceptionally high. Two examples of recent cases include:
     - A case settled for €300,000 where we have recently received a bill of costs of €440,000 (including senior and junior barrister’s fees of over €90,000).
     - In another case MPS admitted liability within 6 weeks of notification of the claim. The plaintiff’s solicitors would not engage in early settlement negotiations and issued proceedings. The case was finally settled for €625,000. The plaintiff’s solicitors submitted a bill of costs were €150,000, compared with total defence costs of €24,000.

15. Following a review of the US and Australian experience of similar deteriorations in the claims environment and their responses to this, we have put forward a number of significant recommendations which we believe could begin to tackle these concerns.

16. Whilst the deterioration in the claims experience against private hospital consultant members we have seen over the last two years may not continue at such a pace, the experience to date merits deep consideration of tort and procedural reform.
PROCEDURAL REFORM

17. **Urgent introduction of a pre-action protocol** – we have written to plaintiff lawyers with large medical negligence practices to request that they work with us to pilot this.

18. MPS acknowledges and warmly supports the considerable work that has been done by the Working Group on Medical Negligence and Periodic Payments, which was established in 2010 by the then President of the High Court, Mr Justice Quirke and subsequently chaired by Ms Justice Mary Irvine. We understand that the Working Group recommended a pre-action protocol for medical negligence claims.

19. However, there is still no pre-action protocol included in the civil procedure rules. A pre-action protocol encourages openness and transparency, and provides the opportunity to investigate a claim and resolve it prior to issuing proceedings.

20. Creation of a **specialised High Court list** comprising clinical negligence actions presided over by a High Court Judge. This would allow pro-active case management to ensure that cases are progressed as efficiently as possible.

TORT REFORM

21. GENERAL DAMAGES

- **MPS recommends that a tariff of general damages is created in statute** to achieve greater predictability and reduce the chances of over-settlement. This tariff would provide a range of damages for an extensive list of specific injuries
- **MPS recommends a limit on general damages** which we hope would contribute to a reduction in the number of claims, the value of awards and indemnity costs.

22. SPECIAL DAMAGES

- **MPS recommends a limit on future earnings and that future financial losses are limited to proven earnings** to lower costs in the system and introduce greater parity in the size of awards plaintiffs receive
- **MPS recommends a limit on future care costs** to ensure that they accurately reflect the true cost of care in Ireland.

23. FREQUENCY OF CLAIMS

- **MPS recommends a ‘Certificate of Merit’ be introduced** which requires a commitment from the solicitor that the case has merit, and is supported by independent expert opinion to affirm that he or she believes there has been a breach in the duty of care and that this breach caused the injury
- **MPS recommends a cap on lawyers’ fees in smaller value cases** to introduce proportionality to cut legal costs and potentially reduce the number of small value, unmeritorious cases.

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24. DEFINITION OF CLINICAL NEGLIGENCE

- **MPS recommends that government introduces a law that defines the tort of clinical negligence** and confirms that a tort is established by both breach of duty and that breach must have caused the injury. It would also assert that the burden of proof is placed on the plaintiff. A legal definition, where this is expressly acknowledged, will ensure that defendants could be confident they would receive a fair trial and clarify for plaintiffs what factors they need evidence of before making a claim.

25. LENGTH OF LIMITATION PERIODS

- **MPS recommends full implementation of the recommendations of the 2011 Law Reform Commission review on limitation** which has the ultimate aim of ensuring claims are brought as quickly as possible
- **MPS recommends an ultimate limitation period of ten years** to provide certainty and fairness and limit the adverse effects on the cost of professional protection.

26. Thank you for your time and your attention this morning, this concludes my opening statement and I would be happy to take any questions.