

Update on re-opening of dental practices for clinicians who seek to treat their patients under a private contract.

Dear Client,

Taylor Defence Services Ltd and TDS E&W Ltd (both known as TDS) would like to take this opportunity to acknowledge the very difficult times experienced recently due to COVID-19 and the impact this has had on you all, both professionally and personally. We offer our sincerest condolences to our clients who have sadly lost loved ones during this time and extend our thanks to those who have and continue to make themselves available in redeployment, including working in urgent dental centres. Despite the uncertainty of when we will as a society reach a point of normality again, please be assured that TDS continues to be here 24/7 to support and advise clients.

TDS are proud to have been able to provide a non-restricted service, despite working remotely on government advice, during these unprecedented times. In fact, we have found ourselves carrying out a wider scope of advisory services including webinars to ensure our clients are fully supported. We are presently in unprecedented times, and the situation is dynamic and fast-moving. We wish to reassure our clients that we are keeping abreast of all developments in order to keep you apprised with the best possible advice.

TDS has been inundated with the same questions, up and above the routine day-to-day service we provide to all clients.

The questions we are routinely being asked are:

1. Do I have appropriate indemnity cover if I were to reopen my dental surgery and treat my patients under a private contract arrangement?
2. I have heard rumours on social media about certain practices doing certain things, what is TDS view on this from an indemnifier's perspective?
3. Why have I closed my surgery on the advice of the CDO, who advised that all routine dentistry must cease, and face to face care can only be provided in designated hubs?
4. When can I re-open my surgery to treat patients face to face?

Dealing with each question in turn.

1. Do I have appropriate indemnity cover if I were to reopen my dental surgery and treat my patients under a private contract arrangement?

The answer is yes. Your cover has never been diluted or have any reduced sessions been applied to your cover. It would not have been in your best interests to ask insurers to do this for you when lockdown commenced. You also require in terms of the Dentists Act 1984 an indemnity arrangement which comprises a policy of insurance or an arrangement made for the purposes of indemnifying a person or a combination of both, in order to be registered with the GDC.

As you will be aware a 25% reduction in premiums of the insurance aspect of your cover will be applied to each policy at renewal. Administratively, this was the only way to apply this reduction, as TDS does not collect your insurance premiums. This reduction will be applied on the basis that TDS has ceded its respective commission on all policies accordingly. This is designed to assist you all financially and at cost to TDS, brokers and insurers. To avoid any confusion this reduction does not apply to your annual TDS fees for servicing your policy, dealing with your day to day patient cases, complaints, GDC cases (of which we have seen an acute upturn of) and issues such as addressed in this letter. TDS continues to advise, support and represent clients in their professional practice. It is fair to say we have been busier than ever over these last few months. We anticipate that there will be an increase in cases related to not treating patients as a backdrop to surgery closures. All insurance cover remains intact as per your cover pre COVID-19 or any lockdown, as advised by TDS to insurers.

It is of fundamental importance to TDS that you, as a client, have appropriate cover and that this cover remains in place unless you cancel your policy. If any dentist was unaware of what the UK Government's preferred option for cover is, then you already have the preferred policy which is a malpractice policy regulated by the Financial Conduct Authority (FCA) and Prudential Regulation Authority (PRA).

As previously advised, those who work with you may not have this at present and you are advised that if you are a principal dentist, to ensure your associates have appropriate cover in place that will represent claims on a guaranteed basis including their past liabilities.

2. I have heard rumours on social media about certain practices doing certain things about opening; what is TDS view from an indemnifier's perspective on this?

Put simply TDS has no view on social media posts or information that you may have obtained from a colleague, whether directly or via social media. It is fundamentally important that TDS represents our clients and legally *only* our clients. It is for our advisers to advise our clients on an individual basis which may include advising clients to correct any of their social media posts which are incorrect or misleading. That having been said, I am apprised of all group activities on social media and am acutely aware of most views of the various and numerous organisations that have appeared in recent times.

I move to deal with questions 3 and 4 together with split for jurisdiction between Scotland and England. In Wales you have remained open to treat urgent cases in practice and following your CDO's advice. We await an update on Northern Ireland, however the same applies with respect to treating urgent cases. You will be updated as soon as we have the relevant information to pass to you.

3. Why have I closed my surgery on the advice of CDO that all routine dentistry must cease, and face to face care can only be provided in designated hubs?
4. When can I re-open my surgery to treat patients face to face?

Scotland:

On 23/03/20, it is our understanding at TDS, that the Chief Dental Officer of Scotland wrote to all practitioners advising that the provision of routine dentistry should cease immediately. Urgent emergency treatment was only to take place in designated centres until further notice. Subsequent guidance was issued by the Scottish Dental Clinical Effectiveness Programme ('SDCEP'). This sets out the types of treatment to be undertaken at the designated urgent dental centres (UDCs). The care to be provided by GDPs would be limited to triage telephone calls with advice, analgesia and antimicrobials as necessary.

The de facto closure of primary care dental practice has presented significant challenges to our clients in both financial terms and in providing certain types of emergency dental care to their patients on a face-to-face basis. Whilst the wider NHS, has set up emergency hubs (we believe 56 in Scotland), relatively low numbers of patients have been able to receive face-to-face treatment. ^[1] As a result a large number of our clients have been requesting advice regarding opening their practices and their ability to provide urgent treatment to patients on a private basis. This is understandable given your obligation as a GDC registrant to put your patients' interests first.

Dentistry in the UK is regulated primarily by the Dentist Act 1984 with the General Dental Council appointed to regulate the profession. Accordingly, all dentists must be registered with the GDC. The CDO, on the other hand, is not a regulator per se. His is a non-political appointment, with his main aim being to advise the Scottish Government as to the provision of dentistry services in Scotland. The regulation of dentistry is a reserved matter in terms of the Scotland Act 1998 Schedule 5. There is no power on the part of the Scottish Ministers, or the CDO as their appointee, to regulate dentists in Scotland. The CDO is employed by government to provide policy advice on the provision of dental services in Scotland.

TDS has been working tirelessly behind the scenes to support our clients through this difficult period and to provide the most accurate information possible to clients. Our clients have continually asked us what powers are available to the CDO to restrict the provision of care in private practice.

The CDO is responsible for advice that can shape the provision of dentistry in Scotland. Moreover, he chairs the Scottish Dental Practice Board, which is responsible for various duties imposed by the National Health Service (General Dental Services) (Scotland) Regulations 2010. It may have been thought by some that the CDO is also responsible for the whole profession including the private practitioners.

In short, the CDO does not have the power to place restrictions on private dental practice, however, practitioners should ensure they follow all appropriate legislation regarding PPE, social distancing and Health and Safety. With such a bold statement it was my view that TDS should seek Senior Counsel's opinion. Senior counsel was instructed by TDS to give an opinion on 08/05/20 to answer two key questions. TDS are and remain acutely aware of the webinar on 13/05/20 on this very topic.

1) What powers are conferred on the CDO to prevent or restrict clinicians from providing private dental treatment to patients in a dental practice, which is not a designated urgent dental centre?

Senior Counsel has concluded that there is no such power. Senior Counsel advises TDS that whilst ministers acting on the advice of the CDO can *‘as a matter of practical reality’* stop the provision of NHS dental services (although there is no obvious and clear statutory power to do so), however, *‘there is no equivalent ability for dental services which are not provided under the NHS. The regulations discussed do not apply thereto, and thus cannot be used to circumscribe the provision thereof.’*

Senior Counsel further opines this is consistent with the advice tendered by the GDC on 26th of March 2020:

“Practitioners providing NHS services will of course need to adhere to the directions given by the nation’s Chief Dental Officer; *other practitioners will want to take that into account in making decisions.*”

Senior Counsel concludes that the GDC give ‘clear recognition’ that the CDO has no power to give directions to dentists who do not operate under the NHS.

The GDC further advised on 15th May 2020:

“We’ve received some questions from professionals in private dental practice about whether they’re able to continue to see their patients who have urgent dental treatment needs, and whether this might put their registration at risk.

We have no powers to direct a professional either to offer treatment or to refuse to offer treatment. That decision can only be taken by the professional responsible. As always, all professionals should work in a way which ensures the health, safety and wellbeing of their patients and colleagues and should only provide treatment where it is safe for them to do so. The process of determining whether it is safe will involve carrying out the necessary risk assessments and having regard to relevant guidance issued by professional bodies, the government, other statutory bodies and the NHS.

As is always the case, should a concern be raised with the GDC that indicates patients or others have been put at risk, we are duty bound to investigate. Evidence that the treatment given followed an appropriate and well-informed risk assessment will be extremely important in determining the outcome.”

Again, this statement involves recognition that it is not within the power of the CDO or the GDC to prohibit beforehand the provision of dental services on a private basis. On the basis this was correct, TDS asked, within the same instruction, the second question.

2) If no such powers exist, can a registered dental practitioner who wishes to treat their consenting patients under a private contract do so? This is on the understanding that the dental practitioner and the dental surgery in which the treatment would be carried out follows all of the guidance given to the NHS practitioners treating patients in designated urgent dental centers.

Senior Counsel's opinion is:

'yes: given that there is no power to prohibit private dental provision, and indeed given that there has not been any purported prohibition thereof, there is nothing to stop the treatment of private patients in this manner.'

However Senior Counsel stressed, and I strongly reinforce this,

'that dentists undertaking treatment must do so with the strictest of care. He advises that under the Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020 dentists have an obligation to consider the following:

4.-(1) A person who is responsible for carrying on a business or providing a service listed in Part 3 of schedule 1 [including dentistry] must, during the emergency period—

(a) Take all reasonable measures to ensure that a distance of two metres is maintained between any persons on the premises (except between two members of the same household, or a carer and the person assisted by the carer),

(b) Take all reasonable measures to ensure that it only admits people to its premises in sufficiently small numbers to make it possible to maintain that distance,

(c) Take all reasonable measures to ensure that a distance of two metres is maintained between any person waiting to enter its premises (except between two members of the same household, or a carer and the person assisted by the carer).

Plainly, the maintenance of a two metre distance is not possible during the provision of dental treatment. Nevertheless, the "all reasonable measures" requirement applies at all other times, and accordingly should be observed before and after the treatment. Moreover, it would be advisable to minimize the number of persons involved in the treatment to the absolute minimum, standing reg.4(1)(b).

Over and above those regulations, any private dentist will wish to take every reasonably practicable mitigation measure, including liberal use of PPE and putting in place the various measures envisaged in the SDCEP guidance for urgent dental centres. That is not, perhaps, a legal requirement, but it is essential in order to provide the greatest possible protection – against COVID-19 itself, of course, but also against the possibility of disciplinary action at the instance of the GDC as regulator in due course.

Standing the legal position as discussed above, it is perhaps difficult to imagine a dentist providing treatment reasonably considered necessary and advisable being the subject of disciplinary action. However, it has to be recognized that we are in very uncertain times. If a dentist were to act in such a way that exposed a patient or a member of staff unnecessarily to the risk of COVID-19, one could expect the GDC to take action. It is thus imperative that all reasonably practicable safety measures are observed.'

Senior Counsel's conclusions are;

- 1. 'For the foregoing reasons, in my view the dictat of the CDO plainly does not, indeed cannot, prohibit the provision of private dentistry in Scotland.*
- 2. However, for obvious reasons (to do with health and safety as well as to do with regulatory requirements) extreme care would need to be taken in such provision. The 2020 Regulations would need to be complied with, and moreover safety measures will*

need to be put in place. The dentists in question will be far better qualified than am I to assess what those measures might be.'

It is essential for all patients in Scotland registered under a NHS contract that practitioners continue to follow the advice of the CDO, providing advice, analgesia, antibiotics and referring to urgent care centres, as appropriate or amended. You are currently being funded to provide this care, and this is something that TDS hopes will continue during this phase.

England:

Despite the differing legal systems, with devolved powers to Scotland, Wales and Northern Ireland the majority of what is stated above for Scotland will apply in other jurisdictions with the additional layers of legislation and variations for each jurisdiction. Senior Counsel's opinion from the English bar is awaited with an anticipation that both questions will have similar answers and possibly enhancing and supporting the opinion and further advice relating to question 2. In the event of Senior Counsel's opinion becoming available, the contents will be disseminated to all clients.

With respect to all clients in all of the four nations, it is not the role of TDS to advise a client who is a private practitioner wishing to treat a consenting patient on a private basis of the changes that are required to their standard operating procedures. However, we would advise any client wishing to provide private care within their own practice to ensure they follow all relevant legislation as well as having robust standard operating procedures and risk assessments in place for the protection of patients and staff.

In terms of risk assessments, PPE and Standard operating procedures we would direct you to review the guidance issued by professional bodies including but not limited to FGDP, SCDEP, the government, and other organisations such as the CQC, HIS and HPS along with following carefully the Health and Safety legislation.

Please also note that the UK and devolved governments have, at the time of writing this letter, in place restrictions on movement. Essentially, a patient can only leave their house, with respect to medical care, if that care is essential. It is important that clients understand this overarching restriction when considering the re-opening of any practice to treat any patient.

We trust that this information is useful to our clients in making their decisions regarding the provision of dental care on a private basis. For the avoidance of doubt, TDS cannot and will not make the business decision for you of whether to open your practice to provide dental care on a private basis or not; this is a decision for each and every client to make on an individual basis.

We understand that you may wish to share this letter with other colleagues; however, non-TDS clients should seek advice from their own insurers before deciding to provide private dental care at this time. TDS is not responsible for the actions of clinicians who are not TDS clients.

TDS is very pleased to be of assistance to our clients, and out with our contractual terms to provide this information to you. TDS holds no political position or exhibits any political preference within the four nations of the UK with respect to this matter and provides this information only to assist our clients in these difficult times.

If you have any questions arising from this letter please email:
claims@taylordefenceservices.com

[1] <https://bda.org/advice/Coronavirus/Documents/Scotland%20Urgent%20Dental%20Centres%20-%20Stats%20April%202020.pdf>

Neil Taylor

Head of Services | Taylor Defence Services | TDS E&W

Office: 0141 772 0178 | **Mobile:** 07577 486 909

Address: Eadie House, 74 Kirkintilloch Road, Bishopbriggs, G64 2AH



TDS E&W Ltd
Professional Dental Defence
COVERING ENGLAND AND WALES

Taylor Defence Services Limited and TDS E&W Limited are Appointed Representatives of Arthur J. Gallagher Insurance Brokers Limited, which is authorised and regulated by the Financial Conduct Authority. Registered Office: Spectrum Building, 7th Floor, 55 Blythswood Street, Glasgow, G2 7AT. Registered in Scotland. Company Number: SC108909.