Justice Committee

Apologies (Scotland) Bill

Written submission from the British Medical Association Scotland

Introduction

1. In the NHS, a poor response to a complaint can be frustrating for patients and their relatives. Many people raising a complaint want to receive a fair hearing and to receive an apology at the very least, and in many cases to be reassured that lessons have been learned by the individual or organisation. Indeed, in many cases, if there had been an early apology, the person/people affected would not have felt the need to make a formal complaint. The provision in this Bill to provide legal protection from litigation to those who give the apology will no doubt be reassuring to staff working in the NHS. However, as detailed in our response below, we would encourage the Committee to consider how this legislation would work in practise in relation to professional regulatory bodies, such as the General Medical Council.

2. As well as providing for the removal of the possibility of an apology being used as evidence of liability, the Bill also seeks to change the culture of public sector organisations by making it easier for people to make apologies without fearing 'blame'. The BMA has actively supported the introduction of a no fault compensation scheme, which from a similar perspective, seeks to move away from the blame culture that pervades the NHS, as well as providing a more streamlined and effective means for patients and their relatives to seek compensation when things go wrong.

3. NHS Scotland provides a single route for making a complaint against any NHS service. The complaints process is intended to provide an investigation, explanation, and where appropriate, an apology. The NHS has taken great strides to improve the NHS complaints process for patients (and relatives). Efforts have also been made to improve communication and transparency and clinical governance structures are in place to assure that apologies are dealt with appropriately.

4. The Patient Rights Act (2011) modernised the NHS complaints process to provide independent support for patients wishing to take a complaint forward and ensure that organisations learn from their mistakes.

5. The NHS has also introduced measures which it claims will improve the culture within the NHS to support and encourage staff to speak out when things go wrong. PIN guidelines, an anonymous whistleblowing phone line where staff can raise concerns, and existing professional regulatory standards have all tried to end the culture where staff feel that they are unable to speak up without consequences for their career or reputation. Only recently, the Scottish Government has announced its intention to legislate for a statutory Duty of Candour in the NHS and it would be interesting for the Committee to consider how this duty of candour might work alongside this piece of proposed legislation if both were to be introduced.

6. The BMA would also ask the Committee to consider whether this legislation on its own would drive cultural change or whether our experience within the NHS

(and the wider public sector) is a clear indication that there are other, more significant factors that may help to build a more positive culture for staff.

Below please find the BMA's responses to the questions set out in the Committee's call for evidence:

Is there merit in providing legal protection to an expression of apology as set out in the Bill?

7. Yes, the BMA believes that there is potential merit in creating a situation where individuals feel that they are able to speak up to express regret or apologise where something has gone wrong without fearing legal recourse.

Do you agree with the legal proceedings covered under section 2 of the Bill, and the exceptions for fatal accident inquiries and defamation proceedings?

8. N/A

Do you agree with the definition of apology in section 3 of the Bill?

9. N/A

Do you agree that the Bill will facilitate wider cultural and social change as far as perceptions of apologies are concerned, as suggested in the Policy Memorandum on the Bill?

10. As set out in the introduction to this response, the NHS has attempted several times to improve the way that individuals and organisations deal with situations where something has gone wrong. Changes to the NHS complaints process, the introduction of PIN guidelines about raising concerns and other schemes to support staff to speak up when things go wrong have all been introduced in recent years. However despite all this, there remains a culture where many staff are unwilling to admit to mistakes or acknowledge when things go wrong, not just for fear of litigation, but also in fear of their jobs and their position within their team.

11. Within the medical profession, doctors are already expected to be open and honest with patients when things go wrong. The General Medical Council's Good Medical Practice Guidance states:

12. "30. If a patient under your care has suffered harm or distress, you must act immediately to put matters right, if that is possible. You should offer an apology and explain fully and promptly to the patient what has happened, and the likely short-term and long-term effects.

13. "31. Patients who complain about the care or treatment they have received have a right to expect a prompt, open, constructive and honest response including an explanation and, if appropriate, an apology. You must not allow a patient's complaint to affect adversely the care or treatment you provide or arrange."

14. Although this guidance is not statutory, Good Medical Practice clearly sets out the principles and values on which good practice is founded and these principles together describe medical professionalism in action. The guidance is addressed to doctors, but it is also intended to let the public know what they can expect from doctors. If doctors do not adhere to the principles outlined in Good Medical Practice, their registration can be called into question.

15. The BMA agrees that removing the threat of litigation could encourage more and better communication between doctor and patient in explaining the nature and cause of any mishap to the patient concerned, encouraging accountability by the doctor to his/her patient in line with professional guidelines.

16. However, BMA Scotland requires clarity on how this legislation would work in practise with GMC standards and their investigative and adjudicatory processes. There is a real risk, irrespective of the status of such an apology in Scottish law, that the GMC might consider one as an admission of fault or evidence of poor performance in the course of their pursuance of individual cases. Professional regulation is a reserved matter and as such, the Scottish Government has no direct authority over the GMC. Therefore it is unclear at this stage how this legislation could prevent such an apology made by a doctor being inadmissible or immune to investigation in the professional regulatory situation.

17. GMC investigative processes are often a very stressful experience for doctors and not infrequently take many months or longer to conclude. There is a real risk that a well-intentioned Bill could be to the significant detriment of some doctors who have no performance related problems, and also raises the possibility that fear of investigation may discourage doctors from making an otherwise sensible and desired apology.

18. Detailed discussion with the GMC is, in our view, absolutely necessary in this regard. The BMA would therefore caveat any general welcome of this Bill with caution based on the above concerns.

19. It is also not clear where this legislation would fit alongside the Scottish Government's proposals for a Duty of Candour and we would encourage the Committee to consider this as they approach this member's Bill.

Are there any lessons that can be learned from how apologies legislation works in practice in other legislatures?

20. N/A

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7 May 2015