Health (Tobacco, Nicotine etc. and Care) (Scotland) Bill

BMA Scotland briefing for Stage 1 debate, November 2015

Introduction

The British Medical Association (BMA) is a registered trade union and professional association representing doctors from all branches of medicine. The BMA has a total membership of around 150,000 representing around two-thirds of all practising doctors in the UK. In Scotland, the BMA represents around 16,000 members.

General principles of the bill

- We support the bill’s approach to nicotine vapour products
- We are broadly supportive of the duty of candour provisions
- We would question the need for legislation creating a new offence of ill treatment and wilful neglect.

Part 1 – Tobacco, nicotine vapour products and smoking

It is widely recognised that the health risks associated with electronic cigarette use are likely to be significantly lower than the well-established risks associated with smoking tobacco. The BMA recognises e-cigarettes’ potential for supporting tobacco harm reduction, however, there is still a lack of robust research and evidence in this area.

Sale and purchase of nicotine vapour products

The BMA supports an age restriction for the purchase of e-cigarettes and their refills and agrees that they shouldn’t be sold to anyone under the age of 18 years, in line with current tobacco regulation. We also support making ‘proxy purchase’ of nicotine vapour products an offence and welcome the enabling power to extend vending machine prohibition to include nicotine vapour products. Doctors have expressed significant concern over the proliferation, promotion and increasing availability of nicotine vapour products in the form of e-cigarettes. We are concerned that these products are likely to appeal to children and young people, and have the potential to increase the risk of them using tobacco. It is estimated that the number of 11-18 year olds in Great Britain who have ‘ever’ tried e-cigarettes increased from five per cent in 2013 to eight per cent in 2014, though
‘regular’ use of e-cigarettes among children has remained low.¹ Data from Wales demonstrate an association between e-cigarette use and weaker anti-smoking intentions among 10-11 year olds.²

Experiences in other countries such as Italy, Korea and the US – where e-cigarette use has rapidly increased over a similar time period as in the UK, highlight the need to closely monitor use among children and young people.³⁴⁵

**Inclusion of electronic cigarettes on the Scottish Tobacco Retailer Register**

The BMA agrees that e-cigarettes and their refills should be an age restricted product and therefore supports the need to extend the Scottish Tobacco Retailer Register to include these items, allowing for guidance and advice to be directed at those trading in these items to avoid illegal sales, and for easier enforcement of the law.

**Advertising and promotion of e-cigarettes**

Concerns have been expressed by BMA members over the use of marketing methods to promote e-cigarettes which are likely to appeal to children, young people and non-smokers. The Tobacco Products Directive will prohibit cross-border advertising of NVPs (including TV/radio broadcasting). We support provisions to extend this to include domestic advertising of NVPs (point-of-sale, billboards, free distribution). The BMA is also concerned that e-cigarette marketing may have an adverse impact, reinforcing conventional cigarette smoking habits, as well as indirectly promoting smoking and increasing the likelihood of young people starting to smoke.⁶⁷⁸

Analysis of the growing market for e-cigarettes suggests that marketing targets two distinct audiences: current smokers who want to quit, and children/young people and non-smokers.⁹¹⁰ For children/young people and non-smokers, e-cigarettes are positioned as socially attractive appealing and popular, using flavouring, promotional discounts, sports sponsorship and celebrity endorsement to attract new customers.¹¹¹² A review by the US Senate in 2014 concluded that e-cigarette companies are employing the same marketing tactics that the tobacco industry first pioneered to attract young customers to their products.¹³

---

⁹ ibid
Part 2 – Duty of Candour

BMA Scotland believes that just as all NHS staff must be honest and transparent in everything that they do in order to best serve and protect their patients, the organisations that they work in should equally always be open and honest with patients about their care.

We have concerns, however, around the potential administrative burden and additional costs on NHS bodies, and in particular, on GP practices, of introducing the additional responsibilities for a duty of candour, as set out in this bill, at a time of increasing pressure on the NHS. Any additional workload would need to be fully resourced, particularly training and ongoing support for NHS staff, and any new procedures implemented in such a way as to avoid introducing unnecessary bureaucracy that might divert scarce resources away from frontline patient care.

**Duty of candour procedure**

Any incident/near miss which occurs should be seen as an opportunity for improvement and learning and this should be set out as a fundamental objective of the process. Supporting guidance should demonstrate how this can be achieved.

**Apologies**

BMA Scotland is reassured to hear that the GMC is working with the Scottish Government with the aim of ensuring that the organisational and professional duties of candour are in alignment. It is essential that there is clarity on the status of an apology made under the duty of candour within the professional regulatory framework.

Part 3 – Ill treatment and wilful neglect

While the BMA supports the broad principles of person-centred care and safe care which lie behind the proposals set out in this part of the bill, we have some serious concerns about the rationale for the specific proposals and the balance of benefit against the costs and unintended consequences/risks.

We are not aware of any evidence that the wide range of existing criminal, civil and professional sanctions have proven to be inadequate to deal with serious failings in health care delivery in Scotland.

**Offences by care workers and care providers**

The BMA would welcome assurances that a criminal conviction would not be imposed on someone accused of wilful neglect because of issues outwith their control. For example, where a unit is so understaffed that an individual is unable to provide adequate cover. There would need to be very clear guidelines in place outlining the circumstances in which prosecution would follow. Appropriate safeguards would also need to be in place to protect effective clinical management and decisions about the best use of resources in the interests of all patients.

The development of a culture where open and transparent reporting is the norm requires employers to establish clear, no-blame incident reporting systems from which to learn and improve. The threat of criminal prosecution seems likely to deter the development of such a culture, and to deter information sharing at the “near miss” level.

**Need for legislation**

One difficulty in supporting this part of the bill is the implication that there is a widespread problem of ill-treatment and wilful neglect in Scotland which requires greater legal protection. From a medical
perspective, this is not the case. Doctors can already be subject to multiple investigations relating to a single incident, and adding a criminal offence would not provide any additional protection for patients.

We are concerned about the impact this new offence will have on the clinical decision making of doctors in particular. We rely on doctors to make treatment decisions for individuals based not only on their individual and specific symptoms, but on a more holistic assessment of their needs, the potential quality of life improvements which would result from treatment, and on the much wider assessment of whole population prioritisation. Any mechanism which incentivises doctor to err on the side of caution to protect themselves, for example by over-prescribing or over-treating, will not be in the best interest of the patient.

_Duty of candour alongside ill-treatment and wilful neglect_

We are concerned that the new offence of wilful neglect and ill-treatment may contradict the duty of candour provisions in the bill. If a reportable patient safety incident occurs then health professionals need to be confident they can offer an apology without fear of criminal proceedings.

**For more information, contact:**

Helen Reilly, BMA Scotland Public Affairs Officer  
T: 0131 247 3050  E: hreilly@bma.org.uk