

*Fighting for our rights, fighting for our future*

## MLC report to ARM 2022

### Whistleblowing

The (MLC) Medico-Legal Committee has been developing the association's thinking about the various proposals for legislative reforms with regards to whistleblowing. To that end, the MLC chair and secretariat met with Protect (formerly Public Concern at Work) in December 2021 and received an update on their work. Protect launched their legal reform campaign owing to the fact that they believed that the Public Interest Disclosure Act (PIDA) was out of date and England was slipping behind on this area, in comparison with counterparts internationally, and they wanted to hold the government to their promise to review the whistleblowing framework. Attendees at the meeting with Protect agreed that rules and regulations were just surface level, and that it was the culture that needed to be addressed in order for change to truly be enacted. Protect and BMA agreed to work collaboratively in regard to procedural and educational tools to help support doctors who were whistleblowing or raising concerns.

MLC secretariat has put together a series of recommendations that will be published soon. The committee recognises that it is important to strive to hold that delicate balance of representing all to ensure the support for member whistle-blowers as well as support for any and all members who may be involved in the process alike. It must be stressed that our unified interest is safety, quality, fairness, and adherence to the law and best practice.

### No fault compensation

The MLC was charged with developing the BMA's view on no-fault compensation in conjunction with other BMA committees. The committee has been contemplating the advantages and disadvantages of introducing a no-fault compensation system in the UK. To provide a quick overview, under the current system, the costs of litigation are high and is draining on healthcare resources. The main costs come from incidences and levels of compensation paid in obstetric claims; for though only 10%

of the claims brought forth are related to obstetrics, obstetrics account for approximately 50% of sums paid out. The negligence tort-based system currently used by the UK requires proof of fault in order for compensation to be dealt out. In a no-fault compensation regime, compensation can be given without proof of fault. No-fault compensation schemes have been considered in the UK several times in the past. However, these discussions never amounted to anything due to concerns surrounding costs and potential infringements of Article 6 of the Human Rights Act. When switching schemes, the aim would be to cut costs, to improve quality and safety of healthcare services, and to increase access to justice. Countries such as Sweden, Finland, Denmark, Norway, and New Zealand all follow a no-fault compensation regime in medical negligence. Though there are potential benefits for a no-fault compensation system, the MLC has considered potential costs which relate to the United Kingdom specifically. Concerns around introducing such a scheme in the UK involve the lack of priming for this type of scheme in UK society. The social security system of the UK would need to be more robust if it were to support compensation schemes. Furthermore, whether or not costs are saved would remain unclear. It would take decades before positive impact can be ascertained, and dedication to long term policy has not been present due to the uncertainty of result. Furthermore, within a no-fault compensation regime, funds paid out might not cover the full amount needed by the claimant. In the UK, this would mean the claimant is left with insufficient funds; for unlike Nordic nations, the UK's welfare system does not provide for such on-going care and rehabilitation. An eligibility criterion as well as causation would also have to be established. The committee also considered whether there is benefit in having a system similar to no-fault compensation for certain incidents, such as those related to obstetrics or birth, rather than switching the whole system. Additionally, in the UK, there is a potential for a no-fault compensation regime to lead to lack of accountability and cause clinical standards to deteriorate. There is also no evidence in the literature that shows that litigation improved patient safety, except in obstetrics. It should be noted that this is an exception. The MLC will continue to work with other BMA committees to address this highly complex issue.

## **Section 49**

The MLC secretariat has led the work on the creation of a BMA Guidance on Section 49 that is planned to be published in the public domain once finalised. This guidance explains Section 49 of the *Mental Capacity Act 2005 (MCA)* whilst also including BMA recommendations. Section 49 allows the Court to request a report about P which must be given by NHS health bodies and local authorities even if it isn't a party to the Court proceedings. Reports are to be written by any medical professional with the appropriate background and necessary expertise, and are often seen as an alternative to a report written by an independent expert. Section 49 reports can be advantageous to the court because it is produced free of charge to the parties. Concerns have been raised that complying with such requests to produce these reports is always a time-consuming exercise and places further burden on limited NHS resources. Additionally, clinicians are not allotted additional paid time to complete these reports, and this can result in considerable delay in reports being produced.

## **Medico legal conference, report writing and courtroom skills course**

The committee holds an annual conference which provides doctors with a comprehensive introduction to working as an expert witness. The conference offers an important forum for doctors to meet leading barristers, solicitors and medico-legal experts in the field and provides an environment to exchange learning and good practice. After being cancelled in 2020 and 2021 due to the COVID-19 pandemic, the conference is scheduled for 7 July 2022. This is planned to occur as an in person and virtual (hybrid) event.

The committee also offers report writing and courtroom skills courses. This training is provided in partnership with Bond Solon and are intensive and practical full day courses exploring the experience of giving evidence and offering an opportunity to put your learning into practice in a cross-examination exercise with a barrister. The report writing courses explore what lawyers and the courts expect and require from a medico-legal expert's report. During the training attendees are taught how to assess their own and other medico-legal experts' reports.

## **Fixed recoverable costs in lower value clinical negligence claims consultation**

The MLC led the BMA's response to the Department of Health and Social Care consultation on fixed recoverable costs in lower value clinical negligence claims. In our response, we have clearly stated that the "BMA firmly believes that expert witnesses need to provide unbiased opinions via concise written medico legal reports. If full documentary evidence is not provided, the medical expert cannot fulfil their obligation to the court."

The response also explores how it can be difficult to determine the cost of producing a medical report based on the type of claim as the complexity of the provided medical records or other interaction with the claimant will vary. The amount of time required to review a long and complex set of medical records presented by a claimant can be significant. In our response, we also welcome the opportunity to include a post-implementation review of any scheme that is introduced. It is crucial that that any new scheme is reviewed regularly to ensure that it is achieving its ultimate goal of driving timely and cost-effective resolution of claims at more proportionate cost, via a system that is straightforward, workable and fair for claimants and defendants alike.

## **COVID 19**

The Medico-Legal Committee is working in partnership with the Solicitors Regulation Authority (SRA) regarding the fact that GPs had been receiving aggressive letters from solicitors on behalf of some of their patients. These letters threaten legal action due to their patients being unhappy about not receiving an NHS exemption certificate for the covid-19 vaccine. The SRA had been helpful in stating that "the standards of behaviour we expect from solicitors include not writing in offensive, threatening or intimidatory ways. And we also do not expect solicitors to pursue

matters which they know have no legal merit.” In our letter to the SRA, we have stated that the tone of the correspondence received from some solicitors to GP surgeries, to be aggressive and the threat disproportionate and unjustified. We want to ensure that correspondence is professional and to that law firms were working according to clear professional principles, set out by the SRA including to:

- act with independence and integrity;
- maintain proper standards of work;
- act in the best interests of their clients;

**Dr Simon Minkoff, MLC Chair and Reena Zapata MLC secretariat**

**Medico Legal Committee**

[www.bma.org.uk/what-we-do/committees/medico-legal-committee/medico-legal-committee-overview](http://www.bma.org.uk/what-we-do/committees/medico-legal-committee/medico-legal-committee-overview)