

Medico Legal Committee (MLC) Written report to the ARM 2023

Whistleblowing

As a trade union the BMA wants to help members to raise concerns about patient safety without fear of reprisals. The medico legal committee has been developing its thinking about legislative reforms and whistleblowing. The committee has developed a position paper with a series of recommendations to adopt and lobby on as part of this session. The recommendations include:

- Calling for the scope of statutory whistleblowing protection to be extended, for example to medical students;
- Exploring the possibility of establishing a network of ‘freedom to speak up guardians champions’ for doctors currently not covered;
- the BMA supporting an extension to 12 months in all tribunal claims, from 3 months, as seen in Protect’s bill;
- that the BMA lobbies for the introduction of a benchmarking tool in healthcare sectors (private and NHS) as exemplified by the tool developed by Protect to help assist organisations measure the effectiveness of their whistleblowing policies;
- that more emphasis is put on how concerns need to be raised;
- that there could be a requirement, similar to the requirement for meaningful consultation on redundancies, that the employer should meaningfully consider the disclosure
- and that the BMA publicises the NHSE’s Whistleblowers’ support scheme to members.

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

This medico legal committee has been working with the medical ethics committee (MEC) to develop a series of recommendations and explore how to take forward the ARM policy on NHS clinical negligence reform passed in September 2021. This states:

‘That this meeting notes the concerns expressed by indemnity providers that the goodwill shown to clinicians in the pandemic will be lost under a deluge of litigations and demands the BMA seek:

- i) a repeal of S2(4) of the Law Reform (Personal Injuries) Act 1948;
- ii) the establishment of an independent body to define the NHS health and social care package which can give an appropriate standard of care for all patients irrespective of the cause of the patient’s care requirements;
- iii) that we move to a New Zealand no fault compensation scheme.’

The committees have considered several detailed papers on this topic over the last session about how best to take forward the ARM policy. Having reviewed the existing system, and the problems with it, the committees set out to identify proposals that would meet the following aims:

- that claims are still subject to robust expert clinical evaluation in order to ensure that they are justified, and that exaggerated or fraudulent claims are excluded
- to make the system fairer for those who are harmed by care or treatment within the NHS;
- to speed up the processing, and settlement of claims
- to reduce the stress on health professionals who are subject to negligence claims; and
- to introduce a formal system for identifying and distributing learning from errors.

The committees suggest that such a scheme should be introduced for birth injury claims first as this accounts for approx. 10% of claim volume but 50% of value with many years taken to reach a conclusion where children and families may have complex and costly needs arising from the birth injury.

The committees will now commence parliamentary activity and lobbying work on this motion. This will include arranging a meeting with - Rt Hon Maria Caulfield MP, minister of state for health and contact backbench MPs who may be supportive of clinical negligence reform. The committees are also arranging a roundtable discussion in autumn this year with relevant stakeholders to take this work forward.

Expert witness conference, report writing and courtroom skills

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. The conference last year took place on Thursday 7 July and attracted over 100 delegates. The 2023 hybrid conference took place on 9 June and attracted over 145 delegates. The event explored pertinent topics such as writing a coroner's report, maintaining high standards of practice under challenging circumstances and unconscious and cognitive bias in reports.

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. Bond Solon is a leading training and information company based in the UK. Over the last 30 years, they have designed and delivered a range of award-winning training courses and qualifications targeted specifically at a broad range of professionals whose roles and responsibilities require them to operate within relevant legislation, regulations, guidance and to industry specific national occupational standards.

The courtroom skills course explores 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.

The committee is also introducing a new course which will provide guidance on working with other experts, typically when considering producing a joint expert report to the court. This will be a half day course and the first is scheduled as a pilot.

The committee is mindful of different attitudes to remote and face to face learning and is introducing a balance of courses in person or online. Do keep checking the website if the next course is not in your preferred format.

COVID-19

The medico legal committee has raised concerns with the Solicitors Regulation Authority (SRA) about the behaviour of some solicitors who had sent letters to GPs that were aggressively threatening. These letters took an approach that we feel was a clear breach of professional standards. GPs who received these letters will have felt very distressed. 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."

The SRA has concluded their investigation in one of these cases and have made a decision to refer the BMA's concerns to the independent Solicitors Disciplinary Tribunal (SDT). The SRA's legal team will now prepare

proceedings and lodge the allegations at the SDT. The SDT will then make a decision about whether there is a case to answer. The committee is expecting an update in July 2023.

Quality and quantity of expert witnesses

Expert witnesses play an important role in the legal system by providing informed expert opinion to assist courts in understanding technical issues.

- Doctors may act as expert witnesses in the following settings:
- coroner's court - to assist the coroner in determining the fact and circumstances of the death
- criminal court
- family court - medical opinion is provided in relation to decisions where the lives and well-being of children are at stake.
- civil court - to settle claims of personal injury or clinical negligence brought by patients
- fitness to practice tribunals held by the MPTS or public enquiries.

However, in recent years, concerns have been raised that there is not only a limited number of expert witnesses but that there is a lack of diversity of expert witnesses to match the medical workforce. The committee is taking a proactive approach and publishing guidance on this agenda.

Clinical indemnity cover

The MLC along with the private practice committee have been in discussions with the Department of Health and Social Care (DHSC) regarding Recommendation 10 of the Paterson Inquiry. The recommendation states that “the government should, as a matter of urgency, reform the current regulation of indemnity products for healthcare professionals in light of the serious shortcomings identified by the inquiry and introduce a nationwide safety net to ensure patients are not disadvantaged.”

The discussions have revealed a concern that the DHSC does not understand the nature of discretionary cover provided by the Medical Defence Organisations, does not accept that requiring an insurance product will increase cost, and does not recognise that insurance products are limited in their provision exposing patients and doctors to the risk of no cover. Furthermore, we clearly stated that both insurance and indemnity covers would not provide cover for an individual acting criminally, hence removing the non-discretionary element would not solve the problem. Additionally, we highlighted that if we allowed more commercial insurers to join the market, that would introduce a substantial amount of financial motivation while the three MDOs were neutral and not-for-profit, which were important factors for the BMA. We have also emphasised that the Patterson inquiry was conflating discretionary indemnity with lack of indemnity cover for criminal acts. The committees will continue to engage robustly with this debate.

Secretariat

The BMA is rearranging secretariat support for a number of committees. Reena Zapata and Carrie Reidinger will be leaving the MLC after ARM and the chair and committee thank them both for their hard work over the years and wish them the best of luck in their new roles in the BMA.

Dr Simon Minkoff, MLC chair and Reena Zapata MLC secretariat

[BMA medico legal committee overview](#)