

26.09.2012

Margaret Mitchell MSP

Dear Ms Mitchell

Apologies (Scotland) Bill consultation

Thank you for the opportunity to comment on your proposed Bill. Action against Medical Accidents (AvMA) is the charity for patient safety and justice registered in Scotland (SCO39683) and England (299123). We have a strong interest in the issues covered by your Bill that pertain to healthcare and 30 years of experience in dealing with related matters in Scotland and elsewhere in the UK.

Firstly, we applaud the overall intentions of the Bill provided there are appropriate safeguards as explained below. However, we believe that it would be a missed opportunity to legislate over apologies without at the same time legislating for a statutory Duty of Candour in healthcare (a duty to be open and honest with patients or their families when things go wrong and cause harm). Failure to be open and honest when such accidents occur is a huge problem and can not be explained away or justified by fears of litigation. It is a perfectly reasonable civil right for people to take legal action to recover compensation for injuries caused by negligence. It is also, most people would agree, a moral and ethical duty for those working in healthcare to be open and honest when such incidents occur regardless of the potential consequences for them or the organisation. However, it is well known that far too often this does not happen. We have no doubt that often it is fear of litigation which contributes to such behaviour. However, the root problem here is not litigation, or that apologies and explanations can be misused in any way. It is that the system tolerates a situation where healthcare workers and institutions can be less than honest about these incidents. There is no statutory rule that there should be openness and honesty when it is known an error or omission has caused harm, or formal means of holding organisations who 'cover up' accountable. Therefore, to treat the symptom (a reluctance to provide apologies) by protecting apologies without taking action to establish unequivocally that 'candour' (to be fully open and honest) is a statutory requirement, might actually make things worse. It may add to the tendency for people to seek to justify their lack of candour because of fear of litigation or other potential consequences. We can however see that clarifying the legal status of apologies at the same time as introducing a statutory Duty of Candour could be a very good thing. Ideally, coupled with both these things, would be the introduction of a 'no-fault' compensation scheme in healthcare, along the lines currently being considered.

We would also like to say a bit more about 'apologies'. There is a lot of confusion in healthcare about what an apology is. Your own consultation document itself uses differing descriptions of what an apology is, or should be. People can sometimes confuse an expression of regret or sympathy for something having happened with an apology. However, to be meaningful, an apology has to include an acknowledgement that something has happened, not happened, or gone wrong which should not have done, and the person or organisation apologising accepts some responsibility for this. (It is important to note that even this kind of fulsome apology can not be taken as an admission of liability). All too often we see the provision of a meaningless apology which does more harm than good. For example if you or a loved one is harmed as a result of sub-standard care and what you receive is an 'apology' for the outcome having been as it was, without any acknowledgement of that person or organisation's

responsibility for things having been done the way they were, I would suggest you would be angry and upset. (I am not saying that it isn't perfectly reasonable behaviour to express regret at an outcome, or sympathise with a death or injury having been sustained. Just that that should not be confused with an apology). It is therefore of the utmost importance if your Bill does go ahead, that steps are taken to ensure that as an unintended consequence people are encouraged to give less than full apologies coupled with explanations or to seek to avoid accountability by misusing the spirit of the Bill. For example it must be made impossible for someone to seek to make a complaint or claim 'go-away' by seeming to offer an acknowledgement that things go wrong and then denying everything when the matter is taken up in another context. It should be encouraged that apologies contain factual explanations, and it should be possible for all of this to be taken into consideration, in a balanced way, in deciding whether there is a liability. To do otherwise would risk bad practice and injustice.

I hope you find these comments useful. I would be more than happy to discuss these issues in more detail and provide more background information on the need for and possible ways of bringing in a Duty of Candour if that would be helpful.

Yours sincerely

Peter Walsh

Peter Walsh
Chief Executive