AvMA's Response to Ministry of Justice consultation Reforming the Law of Apologies in England and Wales

Closing date for evidence: 3rd June 2024

Introduction to AvMA

Action against Medical Accidents (AvMA) is the UK charity for patient safety and justice. Established in 1982, AvMA provides specialist support and advice to people who have been affected by lapses in patient safety. AvMA works in partnership with government departments, health professionals, the NHS, regulatory bodies, lawyers and other patients' organisations to improve patient safety and the way injured patients and their families are treated following lapses in patient safety.

AvMA does not provide representation to the public for civil claims, we do not hold a legal aid franchise for clinical negligence and we do not engage in any form of litigation. We do refer the public to solicitors who have secured AvMA Panel accreditation. We do routinely advise the public on matters such as the legal test for clinical negligence, why their case has been turned down by specialist solicitors, the funding options which may be open to them and the pros and cons of each of those options. We also advise on issues such as proportionality which may create difficulties for people wishing to bring a claim.

AvMA also offers a number of public facing services free of charge. We have a helpline which is open Monday to Friday from 10.00 am to 3.30 pm, a written advice and information service, and a pro bono inquest service to members of the public whose loved ones have died as a result of acts and/or omissions in healthcare.

AvMA is uniquely well positioned to respond to some aspects of this consultation drawing on its experience from members of the public who turn to us for advice, information and support when they or their loved one has experienced an adverse outcome in the healthcare. We routinely ask the public what sort of redress they are looking for and most of them are simply seeking answers to their questions about the care provided, accountability, an apology, and an assurance that lessons have been learned so the same incident will not occur again and affect someone else.

We have confined our responses to those aspects of the review which we feel we can meaningfully contribute.

AvMA's general response to the call for evidence:

1. With reference to the current law of apologies (Section 2 Compensation Act 2006) the MoJ openly accepts that there is "**little empirical evidence to suggest how effective the current legislation is".**

2. **Section 2 Compensation Act 2006** reads:

   "Apologies, offers of treatment or other redress

   "An apology, an offer of treatment or other redress, shall not of itself amount to an admission of negligence or breach of statutory duty."

3. The MoJ foreword then states ***"…the general view is that it has had very little impact as parties are understandably very averse to offering apologies for fear of liability being admitted"***.

4. The foreword then goes on to explain that this consultation asks ***"…whether the Compensation Act is suitable or whether it should be replaced with new legislation…"***

5. By way of observation, AvMA considers it difficult to reconcile the view that Section 2 of the Compensation Act has had very little impact when there is little empirical evidence one way or another.

6. AvMA also observes that at Paragraph 2 of "**The Proposals**" it reads: ***"…the giving and receiving of genuine apologies may play an important role in the dispute resolution process across a whole range of areas of law by reducing adversarial behaviour …A significant example of this is the clinical negligence sphere, where sincere, unreserved and meaningful apologies have the potential to avoid litigation altogether. In some situations, a simple sorry may be what those bringing a claim had most wanted".***

7. AvMA agrees that a meaningful apology can help to de-escalate a very emotionally charged situation but an apology on its own is unlikely to avoid litigation. This is because some people will be seeking compensation to pay for the care of a loved one seriously harmed by a medical accident. However, a meaningful apology delivered alongside a willingness to provide people with answers to the questions they have raised is more likely to reduce adversarial behaviour. The answers to the questions raised needs to be delivered with an assurance that lessons have been learned, and changes have been made to prevent or reduce the likelihood of the same mistakes occurring again.

8. By way of illustrating the need for an apology to be accompanied by openness, honesty, a proper investigation, questions answered and assurances given that lessons have been learned and the same thing will not happen to someone else we refer to actual quotes from individuals who have recently approached us:

8.1 "*Help us navigate the hospital system in order to: 1. Understand what has happened…2. Help the appropriate NHS teams address their procedural failings to ensure this doesn't happen to other people 3. Help me understand why in light of the above the hospital/NHS Senior staff have not proactively discussed these issues with us..*" (FN99761)

8.2 "*During this time we have raised multiple concerns about her care and treatment none of which have been explained or resolved satisfactorily. We have reached a point where we need legal support to assist us with our concerns for negligence." (FN100353)*

8.3 "*The family can't move on…Some answers may help them to start to heal. Also we need to stop this happening to someone else…Nearly 2 years have gone by but still no answer*" (FN99096)

8.4 "*I have made a complaint with the level of care and how serious the incidents are even after a meeting with the manager these incidents have carried on*" (FN99479)

9. As the above quotes illustrate, even a sincere and heartfelt apology will not in isolation stave off litigation. However, a heartfelt apology alongside a proper investigation which answers the questions posed, acknowledges failings in the care provided and properly addresses change to prevent or minimise those same failings recurring is much more likely to be effective in heading off litigation.

10. In healthcare there is further emphasis on the importance of providing an apology through the statutory Duty of Candour (Section 20 The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014): https://www.legislation.gov.uk/ukdsi/2014/9780111117613/regulation/20

11. Section 20 (3) (d) mandates that where a notifiable safety incident has occurred a health service body must include an apology. At Section 20 (7) it stipulates: ***"In this regulation – "apology" means an expression of sorrow or regret in respect of a notifiable safety incident; …"***

12. AvMA suggests that the statutory Duty of Candour bolsters the obligations imposed by Section 2 Compensation Act 2006. This obligation is further reinforced by NHS Resolution's edict on saying sorry which can be found in its leaflet "Saying Sorry" and that it recognises that an apology is not tantamount to an admission of negligence.

13. It is AvMA's view that the Duty of Candour in healthcare is generally still poorly understood, not uniformly embedded in the culture of every trust in England and is not routinely applied.

14. Data collected from our written advice and information department showed that in 2022 – 2023 we received 419 new enquiries from the public seeking help on a range of healthcare related issues. 45% (190/419) of those new enquiries were seeking an explanation and/or an apology. 116/190 (61%) of those seeking an advice or an apology had already made a formal complaint to the healthcare provider which demonstrates that where people feel let down by an investigation or service that an apology on its own, no matter how heartfelt will not head off the need for further redress including litigation.

15. AvMA concludes that our evidence demonstrates that while the giving and receiving of genuine apologies may play an important role in the dispute resolution process an apology alone is unlikely to avoid litigation altogether. There are other factors which are equally if not more important to patients.

Questionnaire:

Q1: Do you consider that there would be merit in the Government introducing primary legislation to reform the law on apologies in civil proceedings? Please provide reasons for your answer.

We refer to our comments at paragraphs 7 – 9 above and draw on that evidence which pertains to the impact an apology alone has within healthcare.

AvMA consider that even if alternative legislative provision along the lines of that introduced by Scotland (Apologies (Scotland) Act 2016) were to be introduced that this would not be any more effective than the existing Section 2 Compensation Act.

Q2: Do you agree that this legislation should broadly reflect the approach taken in the Scotland Apologies Act 2016? Please provide reasons for your answer.

AvMA does not agree and for the reasons referred to above does not think that the wording of the Scotland Apologies Act will add anything to the existing legislation as it affects Healthcare.

The core parts of the Scotland Apologies Act recite that an apology is not admissible as evidence determining liability in that matter. It also states that the Act does not apply to an apology made in accordance with the Duty of Candour. By contrast, there is no distinction between the substance of an apology made under the Compensation Act and an apology made under the Duty of Candour so one reinforces the obligations of the other.

AvMA notes that an apology under the Duty of Candour only applies to incidents considered to be notifiable patient safety incidents. By contrast the Compensation Act does not distinguish between notifiable patient safety incidents and other incidents and therefore has wider, blanket application.

Section 2 The Compensation Act is clear and unequivocal in stating that an apology does not amount to an admission of negligence. The Scotland Apologies Act adds nothing in that regard.

The Scotland Apologies Act defines an apology. Section 20 (duty of candour) defines what an apology means within the context of a notifiable patient safety issue and while in principle the Compensation Act could provide a definition that applied to all adverse healthcare outcomes, regardless of whether they meet the definition of a notifiable patient safety issue or not, in practice AvMA has never found this to be an issue.

AvMA does not consider there to be a pressing need for an apology to be defined. It is more important for any apology given to be open, honest, heartfelt and sincere. We do not believe this can be legislated for and there is a real risk that in trying to legislate for what an apology is that it becomes over prescriptive, too legalistic and meaningless to an individual even when the apology is genuinely felt.

Q3: What do you believe the impacts and potential consequences would be on claimants or defendants should a Scottish style Apologies Act be introduced to England and Wales?

AvMA refers to its answer above. We do not believe that you can legislate for an open, honest, heartfelt and sincere apology. Anything less than this is of little or no consequence to an injured patient and/or their family.

There is a risk that a Scottish style Apologies Act would be too prescriptive and legalistic and would result in even genuine apologies appearing stylised to meet the legislative requirements detracting from the need for apologies to be genuine and sincere.

Q4: Should the legislation provide a definition of an apology? Please provide reasons for your answer.

AvMA does not consider this to be necessary. We have not seen apologies criticised for not expressing sorrow or regret. We have seen apologies criticised where they are insincere and shallow even though they recite an expression of sorrow or regret but where the genuine meaning is not evident.

We do not believe you can legislate for a genuine apology, but we do believe that by overly defining an apology through legislation it risks becoming something which needs to be legally complied with and therefore any genuine regret offered is lost in that requirement to comply.

Q5: Should the legislation apply to all types of civil proceedings, apart from defamation and public inquiries? If not, what other types of civil proceedings should be excluded? Please give reasons for your answers.

We refer to our introduction to AvMA at the beginning of this consultation and confirm that our views are based on our experience of adverse outcomes in healthcare only. We are unable to comment on how these proposals might apply to other types of civil proceedings although refer to our point that by legislating for an apology there is a real risk that the apology becomes legalised and detracts from the real intention. We suggest that this is likely to apply to other areas of law, not just clinical negligence.

Q6: Would there be any merit in the legislation making specific reference to vicarious liability (on the basis it would clarify the position on apologies in historic child sexual abuse claims)?

AvMA have not responded to this question as it falls outside of our area of expertise.

Q7: Should the legislation be clear that it would not be retrospective?

AvMA have not responded to this question as we do not consider the current legislation on apologies requires amendment.

Q8: Are there any non-legislative steps, e.g., Pre-Action Protocols, that the Government should take to improve awareness of the law in this area? If so, what should these be, and should they be instead of – or in addition to primary legislation?

The Pre Action Protocol for Resolution Clinical Disputes was last updated in March 2024: https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_rcd it does not include a specific provision for an apology to be made but it does encourage a “cards on the table” approach (para 1.3) which might be taken to imply that apologies should be made where warranted at an early stage.

Similarly, the aims of the protocol as cited at paragraph 2.1 (a) are to maintain and/or restore the patient/healthcare provider relationship in an open and transparent way. At paragraph 2.2(b) its specific objectives are described as providing an opportunity for healthcare providers to identify whether notification of a notifiable patient safety incident has been or should be sent to the claimant in accordance with the duty of candour imposed by Section 20 Health and Social Care Act 2008 (Regulated Activities) Regulations 2014. If a notifiable patient safety incident is identified, then as explained in our paragraphs 10 and 11 above an apology is mandated under Section 20(3)(d).

Although the giving of an apology is implied by reference to Section 20 Health and Social Care Act 2008 (Regulated Activities) 2014, it would be beneficial for this protocol to specifically refer to the expectation of an apology being delivered both under Section 20 but also in relation to Section 2 Compensation Act 2006.

Q9: Do you have any evidence or data to support how widely the existing legislative provisions in the Compensation Act are used?

No, AvMA does not collect data with reference to the Compensation Act but we do refer to our paragraphs 8 and 14 above which refers to data in support of the fact that an apology on its own is unlikely to be sufficient to avoid litigation.

Q10. What is your assessment of the likely financial implications (if any) of the proposals t you or your organisation?

Not applicable to AvMA

Q11: What do you consider to be the equalities impacts on individuals with protected characteristics of each of the proposed options for reform? Please give reasons.

AvMA does not collect data in a way which will help us provide an informed response to this question.

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Lisa O'Dwyer
Director Medico Legal Services

Action against Medical Accidents (AvMA)
Freedman House,
Christopher Wren Yard,
117 High Street
Croydon
CR0 1QG