

September 2021

## Medical Protection submission to the Scottish Government Inquiry into the handling of the Covid-19 pandemic in Scotland.

### Opening remarks

Medical Protection welcomes the opportunity to submit to the inquiry into the Covid-19 outbreak. There are clearly lessons that should be learned from the pandemic and we welcome the Scottish Government's proactive approach to addressing this now.

Healthcare professionals have been treating patients with a new virus of which we initially had a very limited understanding. Many have been working with stretched resources, outside of their normal area of expertise and sometimes without adequate PPE. Others made the selfless decision to join the workforce early or to return from retirement to support the NHS. In this context, healthcare professionals clearly need to be supported and protected so they can do their best for their patients.

Medical Protection is part of MPS, which has over 300,000 members around the world, including over 6,600 healthcare professionals in Scotland. Our focus throughout the pandemic has been to provide medicolegal and dentolegal advice to those grappling with these new challenges, to ensure appropriate indemnity arrangements are in place that enable healthcare professionals to practise in different ways, and to help healthcare professionals protect their mental and financial wellbeing.

In this initial submission, we aim to be entirely forward looking, highlighting the lessons that need to be learned from COVID-19 for any future pandemic. We highlight the following key points:

1. **Advice and guidance for healthcare professionals.** Doctors in Scotland and around the world faced specific and shared medicolegal challenges during the pandemic. They needed clear advice and guidance in these areas in order to do the best for their patients during a pandemic. These specific issues need to be documented so we and others are able to provide the advice and guidance healthcare professionals need from day one should there be another pandemic.
2. **Ensuring complaints and claims against healthcare professionals are fair.** Healthcare professionals who treat patients throughout a pandemic must be reassured that should they face complaint or claim in relation to their treatment during this time, such complaints will be dealt with proportionately and fairly, with the relevant authority assessing these any cases and claims in the context of the extraordinary circumstances they are working within. We propose that an independent expert committee be formed that would make recommendations on how patient complaints and claims against doctors can be dealt with fairly relating to this or any other future pandemic.

3. **Legal uncertainty around withholding and withdrawing treatment.** Doctors must be provided with much greater clarity on the issue of withholding and withdrawing treatment in an emergency situation. There is currently no national guidance on when it would be lawful for treatment to be withheld or removed from one patient in order to sustain the life of another, and if so under what conditions. Looking to the future, should even greater strain be placed on the NHS during a pandemic, it is vital that clear guidance has been developed to inform such decisions and that this is backed up by a statement of law. At the very least, in the absence of any such guidance being introduced, the government needs to be ready to introduce emergency legislation that would protect healthcare professionals and the decisions they make in good faith.
4. **Clarity of indemnity arrangements.** A pandemic situation requires healthcare professionals to practice in different ways, sometimes outside their usual scope of practice, in different settings and for some it requires them to enter practice early or return from retirement. Clarity over indemnity arrangements is essential in order to support healthcare professionals to work flexibly and do the best for their patients. Scotland and the rest of the UK approached this effectively during this pandemic and it is essential this is one of the positive lessons learned.
5. **Wellbeing and mental health support for healthcare professionals.** We recommend the implementation of a strategy that support health professionals' mental wellbeing in order to avoid huge numbers either leaving the profession or suffering in silence with psychological injuries. This should include specialist support for those struggling with PTSD, alongside measures to ensure the system has capacity, and research into the impact of the pandemic on doctors' mental wellbeing.

These are our main conclusions from supporting members in Scotland and all around the world over since the start of 2020. We would be very happy to discuss this further with the Scottish Government or give oral evidence on this matter.

A separate submission from Dental Protection, which is also part of MPS, will also be submitted that highlights the issues that faced dentistry and dental professionals during the pandemic.

### **Advice and guidance for healthcare professionals**

Healthcare professionals had an unprecedented need for advice on a range of issues to help them provide the best possible care for their patients, with many of the themes being the same across all countries. The key issues where members have sought advice include:

- Remote consultations and telemedicine
- Working in unsafe environments
- Working outside their usual scope of practise
- Working without adequate personal protection equipment
- Implications of non-emergency patient care being delayed

Telemedicine and the use of technology in delivering medical services has been slowly evolving over the years, however the Covid-19 pandemic fast-tracked large-scale adoption. The use of telemedicine has been beneficial in many cases during the pandemic, however, there are naturally concerns around its limitations, the need for support and training due to the different skills required when consulting in this way, and the desired role of virtual care beyond the pandemic.

We have been working with doctors to help them adapt to the significant increase in telemedicine and mitigate risks through our Risk Prevention programmes on the medicolegal, ethical and communication challenges which telemedicine creates.

We are looking to do further work to summarise our key learnings from advising members during the pandemic and would be happy to share this with the inquiry at a later date.

**Recommendation:** We recommend that the inquiry considers what work could be done to ensure there is a shared understanding across the health service and healthcare organisations - including Medical Defence Organisations- about the issues that faced professionals during the pandemic so that the best possible advice can be provided from the outset should we face another pandemic in the future.

### **Ensuring complaints and claims against healthcare professionals are fair**

During the pandemic healthcare professionals told us they had concerns about the decisions they were having to make in very challenging circumstances and how they can be sure that they are acting in line with relevant guidance and with the law. They also told us they had very strong concerns that they could face a claim or complaint linked to the treatment of patients during the pandemic and/or the inability to provide such treatment.

These concerns relate to how their employer (NHS Board or Trust), regulator (the GMC) and the civil and criminal courts might respond to allegations made about them. These claims and complaints may relate to treatment received during the pandemic, the inability to receive such treatment, as well as to complaints citing the Equality Act as a result of the recommendation of wearing face coverings.

The GMC, the regulator of doctors in Scotland and the rest of the UK, were proactive in issuing a joint statement with other regulators at the start of the pandemic. This stated that 'where a concern is raised about a registered professional, it will always be considered on the specific facts of the case, taking into account the factors relevant to the environment in which the professional is working'. It added that they 'would also take account of any relevant information about resource, guidelines or protocols in place at the time'. While this was a welcome statement, it was just a restatement of what approach they take to handling complaint during any time.

We continued to highlight our concerns in this area, and to give credit to the GMC they published guidance in September 2021 for its staff detailing how they should take the context of this pandemic into account when considering complaints about doctors, including additional pressures on resources and ways of working outside of normal routines, created by COVID-19. This was a welcome initiative although it still remains a concern whether the context in which doctors were practising during this time will be fully remembered if and when assessing complaints received in the years to come.

We are not aware of any statements or guidelines being made by NHS organisations about how complaints and disciplinarys during the pandemic would be handled proportionately and fairly, or from any legal authorities in terms of how clinical negligence claims or criminal investigations might be conducted.

The legitimate fears of the medical profession – that the NHS, regulatory and legal apparatus is ill-prepared to deal with any adverse incidents that have occurred during this crisis – is a fear that should be addressed ahead of any future pandemic. It is simply not fair for doctors already under immense pressure to be asked to make difficult treatment decisions, based on a hope that their employer, the courts and their regulator will treat them favourably and protect them in the future, if their decisions and actions are challenged.

There is public support for government's taking action to protect healthcare professionals. In a YouGov survey of over 2000 adults across Scotland, England and Wales, commissioned by the Medical Protection Society (MPS), and conducted in May 2020:

- 84% of the public said doctors who have been working with stretched resources, outside of their normal area of expertise, or have returned from retirement to support the NHS on Covid-19, should be able to focus on saving lives without fear of prosecution or investigation following treatment of patients during the crisis.
- 81% said that if a doctor decides they cannot safely see a Covid-19 patient because they have not been provided with adequate PPE, and a patient subsequently comes to harm, the doctor should not be held personally accountable.
- 67% said they support the introduction of emergency laws, so doctors are protected from criminal and regulatory investigation in relation to their treatment of patients during the Covid-19 crisis.

It is usually months or years before complaints and claims arise and it is too soon to know how many will come out of this pandemic. We will continue to monitor this closely and robustly defend our members.

We continue to argue that action should still be taken that would provide retrospective reassurance and protection to doctors who practised during this pandemic. We also believe that proactive action should be taken now to ensure all authorities are able to provide reassurance to doctors at the start of the next pandemic.

**Recommendation:** Medical Protection recommends that the inquiry considers the strong case for introducing protection for healthcare professionals against unfair action being taken against them by their employer, regulator or – in the most extreme of cases – by the criminal system as a result of the care they provide to their patients in good faith during this and any future pandemic. This could be pursued through the formation of an independent expert committee that makes recommendations on how patient complaints and claims against doctors can be dealt with fairly relating to this or any other future pandemic.

## **Legal uncertainty around withholding and withdrawing treatment**

On 2 November 2020, the Prime Minister rightly warned that if the NHS is overwhelmed we could face a 'medical and moral disaster' where doctors and nurses could 'be forced to choose which patients to treat, who would live and who would die'. At the time the chief medical officers determined that there was a material risk of the NHS being overwhelmed within weeks

Decisions on whether to administer or withdraw treatment have long been made on the basis of what is in the best interest of the patient in front of them. In normal times, general guidance to be followed on a case by case basis is sufficient – whether from a healthcare professional's employing Trust or Board's Ethics Committee or from their Royal College, union, regulator or NICE. However, while this guidance is valuable, it neither provides nor claims to provide legal protection. It also does not consider Covid-19 specific factors such as if and when there are surges

in demand for resources that temporarily exceed supply. There is no national guidance, backed up by a clear statement of law, on when life sustaining treatment can be lawfully withheld or withdrawn from a patient in order for it to benefit a different patient, and if so under what conditions.

Healthcare professionals at the time told us that they were worried that not only do they face being put in this position but also that they could subsequently be vulnerable to a criminal investigation by the police. In a survey of over 2,400 doctors conducted in January 2021

- 61% said they are concerned about facing an investigation as a result of a clinical decision made while working in an extremely challenging, high-pressure environment.
- 36% specifically said they are concerned about the prospect of an investigation following a decision to withdraw or withhold life prolonging treatment due to capacity and resource constraints during the pandemic.

In January 2021, Medical Protection coordinated a joint letter to the UK Secretary of State for Health, which we also sent to the then Cabinet Secretary for Health and Social Care, in which we called on the UK Government to introduce emergency laws to protect doctors and other healthcare professionals and the clinical decisions they have made – and may still have to make - during the pandemic. We stated that the legal protections should be temporary and applicable only to the duration of the coronavirus crisis and limited so that it does not apply to wilful or intentional criminal harm or reckless misconduct.

Commenting on this issue in a Number 10 Press Briefing on 18 January 2021, the then Secretary of State for Health and Social Care said “I'm very glad to say that we are not in a position where doctors have to make those sorts of choices. And I very much hope that we don't get in that situation, and that everybody can get the treatment that they deserve. And so the clear advice that I have, is that it is not necessary at this point, to change the law on this on this matter”.

The clear implication from this answer is that while a change in the law was not needed at that point based on an assessment that such clinical decisions were not needing to be made yet, there would be a case for changes to the law should it be found that doctors are being put in this position.

Whether this assessment of the pressures on the NHS at that time are accurate or not, our strong view is that this issue must not be dodged especially given it is possible we may face a pandemic in the future that places even more strain on NHS resources.

During the pandemic, neither specific guidance was published nor was emergency legislation introduced that would protect healthcare professionals put in this position.

**Recommendation:** We strongly recommend that the inquiry investigate the case for clear guidance on withholding and withdrawing treatment being developed which would inform such decisions that this is backed up by as statement of law. At the very least, in the absence of any such guidance being introduced, we recommend that the inquiry recommends that ahead of any future pandemic that steps are taken within government to ensure emergency legislation could be introduced quickly that would protect healthcare professionals and the decisions they make in good faith.

## Clarity of indemnity arrangements are vital

A pandemic situation requires healthcare professionals to practice in different ways, in different settings and for some it requires them to enter practice early or return from retirement. Clarity over indemnity arrangements for clinical negligence claims is therefore essential in order to support healthcare professionals to work flexibly and do the best for their patients, while also ensuring that there is clarity as to how patients can seek compensation if they have been harmed.

The UK Government, working with the Scottish Government and other devolved administrations, quickly identified at the start of the pandemic that there was a need to ensure clear indemnity arrangements were in place.

This was addressed by Section 11 of The Coronavirus Act 2020 which provides the Secretary of State for Health and Social Care with powers to provide indemnity for clinical negligence liabilities arising from NHS activities carried out for the purposes of dealing with, or in consequence of, the coronavirus outbreak, where there is no existing indemnity arrangement in place.

This was particularly important during this pandemic in relation to NHS services commissioned from non-NHS providers where healthcare professionals and others from the independent sector have been working as part of the Coronavirus response and where no existing state indemnity arrangements were in place. It was also particularly important in Scotland and Northern Ireland given there is not a state-backed indemnity scheme for general practice.

**Recommendation:** We recommend that the inquiry acknowledges that clarity over indemnity arrangements for clinical negligence claims is therefore essential, and that the way in which this addressed during this Covid-19 pandemic is recognised ahead of future pandemics.

## Mental wellbeing of the profession

The duration and severity of the Covid-19 pandemic has had a huge impact on an already stretched workforce. While most healthcare workers will be used to dealing with illness and death, many have been dealing with extremely high numbers of critically ill and dying patients, made more challenging by restrictions on family visits.

An October 2020 MPS survey of 1251 doctors showed that 1 in 4 doctors had witnessed the death of a patient with no family member present. More than 1 in 10 (11%) had lost a colleague due to Covid-19 at that point.

Other healthcare workers have been unable to deliver essential care for non Covid-19 patients, which has the potential to cause moral injury - psychological distress caused by actions which violate your moral or ethical code – and mental health disorders. In addition, support and facilities management staff have also been under significant pressure to keep healthcare services functioning.

While we do not yet know the real long-term mental health legacy of the pandemic, the available evidence suggests that it will be substantial. A [study](#) by Professor Neil Greenberg's of staff working in critical care during the pandemic, shows they report more than twice the rate of PTSD found in military veterans who have recently experienced combat.

However, the concern is that when the crisis is over, some of the local services may not be continued and longer-term treatment for conditions, including but not limited to PTSD, will not be prioritised.

In May 2021, we coordinated a joint letter to the Secretary of the State for Health and Social Care, which we also sent to Cabinet Secretary for Health and Social Care, suggesting that we take inspiration from the service offered to veteran's developing a specialist physician-led mental health services for NHS staff whose work has caused or exacerbated mental health difficulties. This called followed the study of Prof. Neil Greenberg's of staff working in critical care during the pandemic.

The NHS has been at the frontline of our nation's battle against this virus and staff have risked their health in performing their duties with great dedication. This is analogous to the way that military personnel perform when they put their health on the line when the nation requires them to do so.

Establishing a dedicated, rapid access, occupationally focused service for healthcare workers feels, morally, like the right thing to do, just as establishing specific veterans' mental health services is morally right.

There are both social and financial imperatives. If appropriate support is not offered, we may lose staff from the workforce temporarily, placing even more pressure on stretched resources, or even permanently. In a recent British Medical Association [survey](#) thousands of exhausted doctors said they are considering leaving the NHS in the next year, as many continue to battle mental wellbeing conditions without adequate respite from the demands of the pandemic.

Many are in a desperate situation, and this is not something that can wait. This is a pressing issue which we feel has a rapid and clear solution.

At the start of the pandemic, MPS extended its free counselling service for members to all of those who are experiencing work-related stress. Other organisations have also acted to support healthcare professionals. This does not however replace the need for a system wide approach to supporting healthcare professionals following the enormous pressures they have faced.

**Recommendation:** We recommend the implementation of a strategy that support doctors' mental wellbeing in order to avoid huge numbers either leaving the profession or suffering in silence with psychological injuries. This should include specialist support for those struggling with PTSD, alongside measures to ensure the system has capacity, and research into the impact of the pandemic on doctors' mental wellbeing.

## About MPS

Medical Protection is part of MPS, the world's leading protection organisation for doctors, dentists and healthcare professionals with more than 300,000 members around the world.

Our in-house experts assist with the wide range of legal and ethical problems that arise from professional practice. This can include clinical negligence claims, complaints, medical and dental council inquiries, legal and ethical dilemmas, disciplinary procedures, inquests and fatal accident inquiries.

MPS is not an insurance company. We are a mutual non-for-profit organisation and the benefits of membership of MPS are discretionary as set out in the Memorandum of Articles of Association.

## Contact

We would be very happy to provide evidence to the inquiry. Should you require further information about any aspects of our submission, please do not hesitate to contact Patricia Canedo, Policy and Public Affairs Manager, [patricia.canedo@medicalprotection.org](mailto:patricia.canedo@medicalprotection.org).



The Medical Protection Society Limited  
Level 19, The Shard  
32 London Bridge Street  
London SE1 9SG  
United Kingdom

Tel: +44 (0)20 7399 1300  
Fax: +44 (0)20 7399 1301

[medicalprotection.org](http://medicalprotection.org)

The Medical Protection Society Limited (MPS) is a company limited by guarantee registered in England with company number 36142 at 33 Cavendish Square, London, W1G 0PS. MPS is not an insurance company. All the benefits of membership of MPS are discretionary as set out in the Memorandum and Articles of Association. MPS is a registered trademark and 'Medical Protection' is a trading name of MPS.