European and External Affairs Committee

"EUR(3)-03-09 : (Paper 3) : 24 February 2009"

Inquiry into Patients' Rights in Cross-Border Healthcare

The British Medical Association (BMA) is an independent trade union and voluntary professional association which represents doctors from all branches of medicine all over the UK. It has a total membership of over 139,000. The BMA has closely followed developments around cross-border mobility for the past five years. We have submitted a response to the European Commission's recent proposal for a Directive on the application of patients' rights in cross-border healthcare. We have also responded to the subsequent House of Lords Sub-Committee G inquiry and the Scottish Government's consultation on the proposal.

BMA Cymru Wales welcomes the opportunity to give evidence to the National Assembly for Wales' European and External Affairs Committee Inquiry into Patients' Rights in Cross-Border Healthcare. The points and recommendations raised in this paper represent those of the BMA as a whole, representing Doctors across the UK. It is intended that it will provide a sufficient basis on which to enable the Committee to take evidence in relation to the implications of the Directive for Wales.

Despite matters relating to the European Union being a reserved field for the UK Government to negotiate; the EU Directive will have direct implications for healthcare provision in Wales - which is a devolved responsibility and varies markedly across the United Kingdom.

Executive summary

The BMA welcomes the publication of the European Commission proposal and agrees with the principle of cross-border patient mobility;

The proposal must not have a detrimental impact on the current arrangements relating to the ability of patients to receive healthcare in their respective Member State or across the internal devolved regions of the UK;

The BMA calls on the European Commission to ensure that the proposal does not impose an unnecessary administrative burden upon healthcare systems or clinicians and that it emphasises the importance of quality and safety in all healthcare provision;

It is important that non-discriminatory national rules for the provision of healthcare, such as the gatekeeper role of GPs, are respected;

The BMA calls on Member States to ensure that patients are not prevented from exercising their rights to cross border treatment due to financial constraints and that equality of access is guaranteed;

BMA has concerns over the lack of clarification on continuity of care and the linked issue of language and translation provision;

The proposal presents opportunities to improve access to information on the quality of healthcare across the EU and on the types of treatment offered;

The sharing of patient data, the use of e-Health and systems of compensation and redress need to be examined further to ensure it carries the trust of patients.

Necessity of legal clarification of patients' rights

The BMA welcomes the publication of the European Commission proposal for a directive on the application of patients' rights in cross-border healthcare. Following the adoption of the Services Directive and the recent rulings of the European Court of Justice on cross-border patient mobility, the BMA believes that legal clarification of the position of EU patients is vital. The present legal uncertainty surrounding the issue of patient mobility has resulted in unequal access to care abroad with only those patients willing and able to undertake legal action exercising their rights.

In general if treatment is available patients should be treated as close to home as possible. National healthcare systems should be designed and organised in a way which ensures that all patients have access to high-quality care close to home and without undue delay. However, the BMA agrees that in circumstances when this is not possible, that patients should have the option to travel to another EU Member State for treatment which is paid for by their home healthcare system.

It follows that a balance must be achieved between legal certainty and the need for Member States to retain responsibility for healthcare. In this respect, the BMA welcomes the principle of greater choice for patients and believes that the proposal is a significant step forward but any changes must not jeopardise treatment for home-based users.

Objectives of EU action

The BMA calls for any new Directive to respect the principle of subsidiarity and to recognise and respect the fact that EU healthcare systems differ considerably across the 27 Member States. The new rules should clarify existing patient rights under EU law but should not impose any unnecessary administrative burdens or financial costs which would ultimately be detrimental to the provision of safe, high-quality healthcare for all. At all times, patient safety and the provision of high-quality clinical care should be the overriding priorities of any new legislation.

To this end, the BMA welcomes the emphasis on quality and safety which is inherent throughout the proposal. However, we remain concerned that, as with hospital care, the definition of quality and safety varies markedly from one Member State to another, and that the lack of comparable EU data on safety and quality makes it difficult to enable patients to make informed decisions.

In a modern healthcare system with an increased emphasis on patient safety, it is essential to demonstrate that both Member States and healthcare authorities have fulfilled the appropriate safeguard criteria. The BMA welcomes the establishment of guidelines which would facilitate the implementation of a common set of quality and safety principles and would welcome the participation of healthcare professionals in the writing of these guidelines. The BMA would encourage the introduction of a set of minimum quality standards for healthcare in Europe, overseen by the European Commission, in order to ensure the highest possible level of healthcare across the continent.

National conditions for the receipt of care

The BMA believes that it is essential to respect non-discriminatory national rules and processes which are used to effectively plan healthcare in the various Member States. GPs are best placed to provide information regarding the healthcare choices available to patients - we therefore believe that GPs are best placed to provide prior consent.

The gatekeeper system of healthcare in the United Kingdom is not only an issue of subsidiary, it is fundamental to the functioning of the National Health Service across the four UK nations.

We therefore support the fact that the proposals safeguard the gatekeeper function of GPs in the UK and respect a Member State's right to define its own national basket of care. However, the BMA believes that it should be mandatory for patients to obtain prior consent before receiving hospital treatment and consideration should be given to pressing the UK Government to include a derogation on prior consent in its negotiating position in relation to this dossier.

We believe that the proposals offer a unique opportunity to raise general standards of healthcare across the European Union. The BMA further supports the provision in the proposal which allows Member States to remain free to establish a list of available treatments that will or will not be provided under their own health care arrangements.

Levels of reimbursement

The BMA has concerns regarding the possibility that healthcare may be more expensive abroad and that the patient would be expected to pay the difference in cost. Whilst we agree with the principle that the level of reimbursement should be no more than the cost of treatment in the home healthcare system, we believe that this co-payment may have a negative impact on equality of access. Thus the BMA calls on Member States to ensure that patients are not prevented from exercising their rights to cross border treatment due to financial constraints. Member States will have to establish extremely clear rules for systems of reimbursement if this new directive is not to provoke a new spate of cases taken to the European Court of Justice.

Practical impact of the proposals

BMA is concerned that the differences in healthcare policy and healthcare provision throughout the UK will be exacerbated as a result of the proposals. Much needs to be done at a UK and at a devolved national level to determine patient rights before the UK will be in a position to implement the directive.

In Wales, and across the UK, the ability of NHS-funded patients to secure treatment abroad has implications for equity. Effectively, patients placed lower down a waiting list for reasons of clinical priority but who are willing to be treated abroad might not only receive treatment quicker than those higher up the list who prefer to be treated in the UK, but - depending on reimbursement arrangements - might even delay the treatment of UK patients. The BMA calls on the UK authorities to ensure that no patient is put at a disadvantage from the new proposals by having their treatment delayed in such a way. This new directive must not compromise standards of care for people who choose to stay in their home country, or who are unable to travel abroad for treatment.

A further aspect of equity is that, under current NHS arrangements, patients in one part of the UK are not free to seek treatment, as a matter of right, in another part where waiting times are shorter. Yet they would be able to seek such treatment in another Member State. This can be viewed not only as an anomaly, but also as inequitable to those who might consider treatment elsewhere in the UK but who are denied that option by UK rules, and who for whatever reason will not contemplate seeking treatment abroad. The BMA believes that the introduction of an inter-state mechanism allowing for cross-border healthcare may also provide a template for the resolution of the issue at intra-state level. The definition for the threshold of undue delay should be based on clinical judgement otherwise there is a danger that it may have unforeseen consequences for national service providers - namely by encouraging providers to schedule care at the lowest end of the threshold to save money. The definition of what is considered undue delay has considerable implications for healthcare between Wales and other UK regions.

A concern for the BMA is the lack of clarification regarding continuity of care. Effective communication between clinicians and healthcare systems in both the referring and receiving countries must be ensured. Continuity of care should be ensured by a unified system of handover between clinicians as language problems and different decision making procedures may impact on patient safety. The BMA has particular concerns over the cross-border treatment of certain illnesses such as mental health and chronic physical disability where the importance of the clinical relationship and knowledge built up over the course of several consultations cannot be overestimated. Patients must be aware of such concerns and these must be taken into consideration when opting for cross-border treatment.

Further clarity is needed on the provision of language support to patients receiving treatment in a foreign country. It seems an unfair

burden to expect the receiving country to provide services such as interpretation and the translation of medical notes. However, patient safety considerations mean that the language issue should be urgently addressed and the BMA calls for further work to be undertaken on this issue.

The BMA further questions the impact of the proposals on the NHS Healthcare Travel Cost Scheme which provides financial support for certain low income patients to travel to hospital. As qualifying patients would be eligible for this if they were treated in the UK, it would be discriminatory to refuse the reimbursement if they travelled outside of the UK for treatment. This may have a potentially destabilising affect on the finances of the NHS and needs to be examined in further detail.

Equality of access

The BMA remains concerned that the proposal must not be allowed to erode the fundamental values of universality, accessibility and equality that underlie healthcare. Healthcare provision should be equal for all EU citizens regardless of whether they have the ability to travel abroad for treatment. Patient mobility must not just be for the wealthy and educated: equality of access must be guaranteed.

The BMA believes that equal access to care abroad may be compromised by the need for a patient to pay up-front for care received abroad before seeking reimbursement. The proposals must avoid restricting cross border care to the wealthiest NHS patients.

It is essential that Member States introduce an equitable system which provides full reimbursement with a minimum of delay. An extension of the EU Late Payments Directive, which is currently under review, may be one method of ensuring swift reimbursement but other financial mechanisms must also be explored.

In the interest of providing clear and transparent information, the BMA suggests that national healthcare systems provide easily accessible and understandable information on the contents of its national basket of care and on the cost of each treatment. Whilst this already exists in many Member States, the BMA believes that the compilation of a list of treatments and corresponding costs may provide domestic benefits in the UK by informing patients of the actual cost of their publicly funded treatment.

The BMA welcomes the proposal to establish national contact points which will provide information about the process for accessing cross-border healthcare. The BMA is pleased that this added administrative burden will not fall on medical professionals, particularly family doctors, who should not be expected to organise cross border treatment. In addition to providing information on process, redress and financial considerations, we also wish the national contact points to provide information on more practical considerations such as the differing cultures of care that exist across the EU Member States. When choosing to undergo treatment in a member state other than his/her own, patients must be fully aware of different cultures and traditions of care which may impact upon their decision to access such care abroad.

The BMA believes that there may be a role for the European Commission or another independent European organisation to provide information on cross-border care. If every member state is expected to provide in-depth information on the healthcare systems of 26 other countries, the administrative burden will be heavy, particularly for smaller Member States. A single Internet portal could provide this information leaving national contact points to provide more detailed answers in response to an individual patient's queries. Such a portal could also be used to encourage Member States to provide a comparable data set on the availability of treatment and on the quality of care and treatment outcomes. The portal must allow for regional variations within a member state and will provide a useful tool in highlighting regional disparities.

Cooperation between Member States

The BMA believes that there needs to be a mechanism for sharing patient data between clinicians in both the patients' home country and the country where they receive treatment. Clinicians in both countries must be able to communicate effectively and to exchange medical records in the language of the patient's country of origin. Whilst high level recommendations are in place for cross border interoperable systems the practicalities of delivering interoperable systems needs much more detailed consideration. Many issues, which have presented a challenge for individual countries, could be magnified when applied to this scale. Questions remain such as how will the language barriers, differences in structuring and recording information be managed? Whilst SNOMED may assist, there will still be parts of the record in free text. There are also information governance and data quality issues which need further exploration. It is very unlikely that e-Health systems will be fully interoperable by the time that this proposal is implemented across the EU.

The BMA welcomes the clarification that healthcare providers must fulfil the regulatory requirements in the practicing country rather than in their country of origin. However we argue that this makes it even more essential that Member States are able to share their respective regulatory data and should be able to verify the eligibility of professionals to practice. This could be in the form of a certificate confirming an individual's good standing and fitness to practice. We would also call for the concept of regulatory redress to be added to the proposal. Whilst the proposal clarifies the system for financial redress in the event of healthcare-related harm, the BMA believes that the concept of regulatory redress should also be added.

Further, the BMA calls on Member States to implement a comprehensive system of redress and compensation for patients who suffer unexpected or avoidable harm as a result of cross-border healthcare. As well as providing redress for patients, this system should allow for a mechanism by which the home member state has recourse for claiming compensation for the cost of rectifying clinical mistakes made by the country of treatment.

Directive 2006/123/EC

2 C-158/96 "Kohll"; C-120/95 "Decker"; C-368/98 "Vanbraekel"; C-157/99 "Smits & Peerbooms"; C-372/04 "Watts"

3 http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_083704

4Directive 2000/35/EC