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Covid-19: Doctors' call for legal protection against claims of unlawful killing is rejected

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England's health and social care secretary has rejected a call to bring in emergency legislation to protect doctors from "inappropriate" legal action amid fears that the NHS will be overwhelmed by the covid-19 pandemic.

Doctors are worried not only that they will be forced to choose which patients should live and which should die but that they could be vulnerable to a criminal investigation by police.

In November the prime minister, Boris Johnson, warned that if the NHS were overwhelmed the country 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." In an official briefing on 6 January London's most senior doctors were told that the capital's hospitals were less than two weeks from being overwhelmed, and those in other parts of the UK are under similar pressure. For example, the Royal London Hospital has expanded its intensive care unit capacity from 44 to 150 beds, all of which were occupied on 19 January.

Doctors' organisations plea for emergency legislation came in a letter to the health secretary, Matt Hancock, signed by the Medical Protection Society, BMA, Doctors' Association UK, Hospital Consultants and Specialists Association, British Association of Physicians of Indian Origin, Royal College of Surgeons of Edinburgh, and Medical Defence Shield.¹

The letter pointed out, "While doctors have a range of valuable guidance they can refer to on administering and withdrawing treatment—whether it be from their employing trust or board's ethics committee or from their royal college, union, regulator or NICE [National Institute for Health and Care Excellence]—this guidance 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 how clinicians should proceed in such a difficult situation."

The organisations told Hancock they did not believe that healthcare professionals "should suffer from the moral injury and long-term psychological damage that could result from having to make decisions on how limited resources are allocated, while at the same time feel vulnerable to the risk of prosecution for unlawful killing."

They emphasised that they were not arguing for healthcare professionals to be above the law and proposed that the emergency legislation should apply

only to decisions made in good faith, in circumstances beyond their control, and in compliance with relevant guidance. It would not apply to wilful or intentional criminal harm or reckless misconduct and would be in force only temporarily, applying retrospectively from the start of the pandemic, they said.

Doctors working in the NHS are covered by state indemnity for clinical negligence, and an additional scheme has been established to include any responses to the pandemic that are not already covered. The General Medical Council has issued guidance to reassure doctors that the covid-19 context will be taken into account when considering complaints. But the groups' letter said that these moves, while positive, did not answer their concerns.

Some groups of NHS trusts have sought legal opinions from barristers with a view to drawing up protocols on how treatment decisions should be taken if resources are insufficient.

Barrister Michael Mylonas said, "In emergency departments throughout the country, doctors will have to take decisions as to who should receive ICU services. In the absence of national guidance, doctors in different hospitals, perhaps even neighbouring hospitals, may well apply different criteria and reach different decisions. This places an enormous additional burden on healthcare workers, provides no certainty about the treatment that will be available on attending hospital, and invites legal challenge."

Asked by *The BMJ* about the call for new legislation at a 10 Downing Street briefing on 18 January, Hancock said that the issue of intensive care capacity was a "very serious concern." But he added, "I am very glad to say that we are not in a position that doctors have to make these sorts of choices and very much hope that we don't get into that situation. It is not necessary at this point to change the law on this matter."

Jane Dacre, president of the Medical Protection Society, responded, "It's a pity that the health secretary believes emergency laws are currently unnecessary, given the grave concerns raised by health leaders. The commitment to keep the case for legislation under review is welcome; however, with more people in UK hospitals with covid-19 than ever before, healthcare staff need this legal protection now. Introducing the legislation now would enable doctors to focus on doing the best for their patients without fear of unfair investigations."

A spokesman for the Department of Health and Social Care for England said that existing indemnity arrangements would continue and would cover the "vast majority of liabilities."

See also Jane Dacre on BMJ Opinion: <https://blogs.bmj.com/bmj/2021/01/16/jane-dacre-doctors-must-be-protected-as-pressure-on-health-service-grows>

- 1 Medical Protection Society. UK healthcare leaders unite in call to protect doctors as pressure on health service grows. January 2021. <https://www.medicalprotection.org/uk/articles/uk-healthcare-leaders-unite-in-call-to-protect-doctors-as-pressure-on-health-service-grows>.

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