

The Quality Unit
Scottish Government
GER St Andrew's House
Regent Road
Edinburgh
EH1 3DG

13 January 2015

Dear Sir or Madam

Proposal to Introduce a Statutory Duty of Candour for Health and Social Services

I refer to the Scottish Government's consultation on the above subject and am pleased to respond on behalf of the UK Information Commissioner. The Commissioner's interest in the subject primarily is a consequence of his role as regulator of the Data Protection Act 1998 (DPA) throughout the UK. Consequently, this submission will be confined to those areas where there is potential for privacy impact or that bear upon the rights of data subjects (individuals to whom the information relates), and, as such, the formal consultation questions will not be addressed.

The DPA provides individuals with a number of rights, including the right to access information relating to them (known as the right of subject access). The duty of candour would require organisations providing health and social care to tell people if an incident has taken place in the course of their care or treatment which has caused physical or psychological harm. This proposed duty therefore appears to enhance transparency for the individual in care, and should be welcomed accordingly.

The right to access personal information under the DPA is a qualified right and a number of exemptions exist which can restrict disclosure. In general, these apply to information which, if disclosed, may cause a degree and form of prejudice (for example, to the investigation of a crime or to the rights of a third party). Importantly, the Data Protection (Subject Access Modification) (Health) Order 2000 exempts the release of information which would be likely to cause serious harm to the physical or mental health or condition of the data subject or any other person. This exemption can only be applied by a health professional or



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after consultation with the most appropriate health professional with responsibility for the individual. As it may be argued in some cases that the release of information under the duty of candour could cause further psychological harm to the individual beyond that experienced as a result of the incident, consideration should be given to partially exempting organisations from the duty under these very limited circumstances, requiring disclosure instead to be made to a nominated representative of the affected individual.

Reference is made in the consultation document to events that result in the death of the patient or service user. It is unclear as to whom disclosure would be made under these circumstances and this should be clarified. As the individual is deceased, the DPA would no longer apply but, for information, the Access to Health Records Act 1990 gives the right of access to the patient's personal representative and to any person who may have a claim arising out of the patient's death.

As indicated previously, exemptions from subject access rights under the DPA include where disclosure may prejudice a crime or impact on the rights of a third party. The application of similar exemptions from the duty of candour may be appropriate. However, we would wish to stress that the DPA does not prevent the disclosure of identifiable information relating to third parties but instead provides a framework within which it can take place. Key to this is the need to process information fairly and within the reasonable expectations of the people involved. Staff within the health and social care sector must be advised that this duty may cause elements of their personal information (for example, their role within an incident) being divulged either implicitly or explicitly to patients and service users. Importantly, the DPA should never be used as a barrier to disclosure where there is public interest in disclosure taking place.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Ken Macdonald', written in a cursive style.

Ken Macdonald
Assistant Commissioner (Scotland & Northern Ireland)