



THE LAW SOCIETY
of SCOTLAND
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Consultation Response

Scottish Government: Consultation on Proposals to Introduce a Statutory Duty of Candour for Health and Social Care Services

**The Law Society of Scotland's response
January 2015**

Introduction

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes. To help us do this, we use our various Society committees which are made up of solicitors and non-solicitors to ensure we benefit from knowledge and expertise from both within and out with the solicitor profession.

The Health and Medical Law Sub Committee of the Law Society of Scotland, welcomes the opportunity to consider the Scottish Government's consultation, Proposals to Introduce a Statutory Duty of Candour for Health and Social Care Services. The committee has the following comments to put forward:

General comments

We recognise and welcome the policy objectives and positive intentions of this proposal. There appears to be two themes contained within this consultation- transparency and information sharing and support.

We understand that transparency has taken on a particular significance following the Mid Staffordshire NHS Foundation Trust Public Inquiry¹. It is also acknowledged that there can be a lack of faith that legal remedies for injured patients will be successful. Issues of time and expense may also play a part in a patient feeling aggrieved. People may often be reluctant to raise concerns simply because they don't know how to or because they fear that it will have a negative impact on their relationship with the healthcare professional.²

Informing patients about every slight incident, even if there was no harm, may have quite the opposite intended effect and cause patients to lose confidence in hospital and care staff. A balance has to be struck between providing the patient with an apology if something

¹ *Robert Francis Inquiry report into Mid-Staffordshire NHS Foundation Trust*. London:Department of Health 2011.

² Mulcahy, I., (2003) *Disputing Doctors: The Socio- Legal dynamic of Complaints About Medical Care*. Open University: Maidenhead at p 64-66

has happened to them, without requiring the doctors to divulge every 'near miss'. Whilst we support the need for vigilance, we believe that this should also be proportionate.

Existing Obligations

We note that the duty of candour already exists as an ethical obligation imposed by governing bodies of the various individual healthcare professionals. For example in October 2014, a Joint statement from 8 Chief Executives of statutory regulators of healthcare professionals³ set out the following:

- tell the patient (or, where appropriate, the patient's advocate, carer or family) when something has gone wrong;
- apologise to the patient (or, where appropriate, the patient's advocate, carer or family);
- offer an appropriate remedy or support to put matters right (if possible); and
- explain fully to the patient (or, where appropriate, the patient's advocate, carer or family) the short and long term effects of what has happened.

The current proposal covers the same areas but with no legal sanction. It is therefore unclear what this will add to existing policy and guidance.

The Role of an Apology, Explanation and Support

Most professional healthcare organisations now incorporate some or all of the above elements into their good practice. An apology can be delivered in many ways and is not easily conducive to formula. It relies upon interpretation, emotion and often spontaneity of the parties; both giving and receiving the apology. Such things are difficult to capture and perhaps even more so if this then becomes a requirement. The Compensation Act 2006 gave this a statutory footing in section 2 which provides that 'an apology, an offer of treatment or other redress shall not, of itself amount to an admission of negligence or breach or statutory duty.' As a consequence, there is the possibility that the proposals result in duplication of process and remedy. Many NHS boards already have such

³ Joint statement from the Chief Executives of statutory regulators of healthcare Professionals (2014). Available from: http://www.gmc-uk.org/Joint_statement_on_the_professional_duty_of_candour_FINAL.pdf_58140142.pdf [Accessed 12 January 2015]

procedures in place whereby an apology can be made without admission of fault, so would such proposal merely be providing a duplication of processes which already exist- what does it propose to add to these processes?

Disclosable Events

We recognise that there may be institutional and cultural difficulties inherent in this. As with many professions, there is a powerful hierarchical structure in place, in healthcare, which may lead to ostracisation, especially if the colleague is more junior to the colleague that they are reporting. Conversely, defensive over-reporting by doctors of minor issues may also be a challenge. We acknowledge that statutory provision is in place which aims to protect employees from dismissal and victimization⁴ however, the Mid-Staffordshire Hospital inquiry⁵, highlighted that healthcare professionals with concerns were discouraged from raising them.

We question how regulations will define a requirement for genuine open communication and how to ensure that any such duty has more value than becoming a 'box ticking' exercise.

Consistency of Approach

The Consultation has highlighted existing problems towards a consistency in approach.⁶ Whilst we recognise the value of a consistent approach, given the breadth of provisions contained within the frame of health and social care, this will be challenging for organisations to enforce. We envisage that there may also be issues pertaining to interpretation and application especially where the regulations rely on subjective assessments. Compliance may therefore be resource intensive and difficult to monitor.

⁴ The Public Interest Disclosure Act 1998

⁵ *Robert Francis Inquiry report into Mid-Staffordshire NHS Foundation Trust*. London: Department of Health 2011.

⁶ Scottish Government (2014) 'Consultation on proposal to Introduce a Statutory Duty of Candour for Health and Social Care Services. Available from: <http://www.scotland.gov.uk/Resource/0046/00460832.pdf> [Accessed January 10 2015] at pp8 and 9.

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