

Mr Mathieson
The Quality Unit
Scottish Government
GER St Andrew's House
Regent Road
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17 December 2014

Dear Mr Mathieson

Proposals to introduce a statutory duty of candour for health and social care services

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. The association is dedicated to campaigning for improvements in the law to enable injured people to gain full access to justice, and promote their interests in all relevant political issues. Our members comprise principally of practitioners who specialise in personal injury litigation and whose interests are predominantly on behalf of injured claimants. APIL currently has over 4,000 members in the UK and abroad who represent hundreds of thousands of injured people a year.

APIL welcomes the proposals to introduce a statutory duty of candour on organisations providing health and social care. We are pleased that the proposed statutory duty will be wide reaching, covering health and care services provided by NHS Boards, Local Authorities, all organisations providing services regulated by the Care Inspectorate, independent hospitals, independent hospices, General Practices, community pharmacies, dental practices and optometry practices. A statutory duty of candour would encourage an open and transparent culture across those health and social care providers.

APIL believes that the majority of those injured as a result of medical accidents frequently want nothing more than an explanation of what went wrong and why. They also want to know that lessons have been learned. The proposed statutory duty of candour would help to achieve this, as it would require the organisation to ensure that the relevant person is notified of what has happened, including a step by step account of the facts, including as little or as much information as the person has expressed their wish for.

Disclosable events

The threshold for disclosable events is welcomed. Requiring the disclosure of an unintended or unexpected event that occurred or was suspected to have occurred that resulted in death, injury or prolonged physical or psychological harm being experienced by a user of health and/or social care services is a proportionate threshold, provided that it is interpreted broadly so that “injury” extends to at least some moderate harm. This strikes the balance between providing the patient with an apology if something has happened to them, without requiring the doctors to divulge every “near miss”. Telling the patient about every slight incident, even if there was no harm, may result in adverse effects, causing patients to lose confidence in their health care providers. This is not to say that near misses and slight incidents should not be taken seriously and addressed to ensure that they do not occur again, but this is a separate issue to the duty of candour.

The purpose of the new statutory duty is to increase openness between the service provider and user. This can be achieved without the need to cause unnecessary worry to the patient; and without overloading health and social care professionals with an unmanageable administrative burden. If the duty is not overbearing, health and social care professionals are likely to embrace a new culture of openness. This would hopefully lead to more openness and transparency as a whole, and not just in the situations specified in the consultation.

An organisational duty

Whilst APIL welcomes the steps towards improving openness and transparency, we believe that the obligation of candour should apply to the individual, and not on the organisation or employer. We believe that an individual duty would be simpler and much less bureaucratic, thus increasing the likelihood that the duty will be complied with. Arguably, there is already an organisational duty of candour when the NHS complaints procedure is followed correctly. The reality, though, is that this is often ignored. Sometimes this is because the Complaints Officer is not provided with a candid explanation from the medical professional that he/she can convey in the complaints response. An individual duty on the professional would hopefully improve the existing processes and allow the patient to receive a more satisfying explanation of what went wrong.

Monitoring

It is important that all providers of health and social care comply with the statutory duty of candour to an equal standard. We understand the benefits of building on existing regulatory mechanisms, but it is important that the monitoring requirements are broadly the same to

ensure that the duty is being complied with to the same standard. Health and social care providers – both private and NHS – should be under the same obligation.

The Apologies (Scotland) Bill

Following consultation in 2012, Margaret Mitchell MSP has the right to introduce the Apologies (Scotland) Bill into the Scottish Parliament at any time. This Bill provides that any apology given would be inadmissible as evidence for the purpose of certain legal proceedings. APIL has previously expressed concern about the Bill, stating that the Bill is unnecessary, is laid out in uncertain terms and is also a potential barrier to access to justice. It is absurd to believe that the court will make a ruling based on an apology, as there must always be substantial evidence for a personal injury case to succeed. A blanket rule that all apologies are inadmissible would be unnecessary, and also greatly unsuitable. There are occasions where an apology is an important piece of evidence. We believe that there should be openness and transparency in the healthcare system, and the approach to improving the culture of candour proposed by the statutory duty is much preferred to that set out in the Apologies Bill.

We hope that our comments prove useful to you. If you have any queries regarding our response, please contact alice.warren@apil.org.uk.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Alice Warren', with a stylized, cursive script.

Alice Warren

Legal Policy Officer

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