

Population Healthcare Division
Health and Social Care Group
Welsh Government Offices
Cathays Park
Cardiff
CF10 3NQ



13 December 2022

By email: HSCQualityandEngagement@gov.wales

Dear sir/madam,

The Health and Social Care (Quality and Engagement) (Wales) Act 2020

APIL welcomes the opportunity to respond to the Welsh Government's consultation on the statutory guidance and regulations required to implement the duty of candour in Wales. We believe that the guidance provides a comprehensive understanding of how the duty will work and that the use of flowcharts and case studies is helpful.

APIL is supportive of an open and transparent culture across all healthcare providers, where there are admissions to patients when things have gone wrong. Often, people who have been injured by medical mistakes simply want to know what went wrong and that lessons have been learned. We believe that the implementation of a statutory duty of candour in Wales will help achieve this.

While this is a step in the right direction towards an improved culture of openness and learning from mistakes, a duty of candour is not enough in isolation. Lessons can and must be learned from the introduction of the duty of candour in England and Scotland, where a statutory duty of candour has been in place since 2015 and 2018 respectively. Compliance with the duty in both jurisdictions has been sporadic at best, with an inconsistent approach across the different Trusts and Health Boards, and it is evident that the duty alone does not always lead to openness when things go wrong. Consideration must be given to addressing the wider issues behind why there is not already a culture of openness within the healthcare profession – not only the fear of litigation, but the fear of speaking out leading to job loss, and/or reputational damage. Sanctions for non-compliance with the duty of candour must also be used to their full effectiveness – something which does not currently happen in England or Scotland.

Our response consists of general comments about the proposals, particularly where we have identified concerns.

When the duty of candour is triggered

Unexpected or unintended harm

The Health and Social Care (Quality and Engagement) (Wales) Act 2020 provides that the duty of candour will apply when two conditions are met: 1) a Service User to whom health care is being or has been provided by an NHS body has suffered an adverse outcome; and 2) the provision of health care was or may have been a factor in the Service User suffering that outcome. We are concerned with the use of 'unintended harm' as this might lead people to think that the duty only applies to unintended harm. Therefore, if someone intended to cause harm, they would not need to be honest about this or provide any apologies. This should be clarified in the guidance.

More than minimal harm

The threshold of harm to which the duty of candour applies must be proportionate, striking a balance between providing the patient with an apology, without requiring the health care professional to divulge every 'near miss'. We are pleased with the proposal to implement the threshold for triggering the duty of candour at moderate harm, severe harm or death, in line with the thresholds already set in England and Scotland.

Telling patients about every slight incident may result in adverse effects on them, causing them to lose confidence in healthcare providers. However, this is not to say that slight incidents should be ignored; it is essential that these are appropriately addressed even if they do not trigger the duty of candour. The moderate harm threshold will also avoid overburdening NHS providers, hopefully leading to more openness and transparency.

We believe that the harm framework in Annex B provides useful guidance and will be helpful to identify when the duty of candour has been triggered.

Annual reporting of duty of candour

The Act states that NHS bodies are required to report annually on whether the duty has come into effect. We welcome that the duty will include the requirement to publish an annual report which assesses the organisation's performance in respect of the duty of candour; how many incidents have triggered the duty and why, as well as information about any steps taken by the body with a view to preventing similar circumstances from arising in the future.

It is important that all cases are reported and that there is consistency for lessons to be learned. We agree with the timeframes proposed and that it is reasonable that the duty of candour report should be aligned to the existing annual Putting Things Right report already in place to avoid duplication.

Broad scope

The consultation paper states that the duty of candour for independent providers is only expected to come into force around April 2024. APIL is of the view that the statutory duty of candour should be implemented broadly and apply to health and social care providers operating independently in Wales. All healthcare providers, NHS and non-NHS should be under the same duty to ensure consistency. There is no justification for any organization or individual working within the healthcare system to be excluded from the duty of candour.

Monitoring

Regulations 10 and 11 set out the requirements for oversight of the candour procedure. The proposed monitoring and oversight of the duty of candour is similar to the provisions already in place in England. This is currently not working in practice as, in many cases, there is no compliance with the duty. We believe that more has to be done in order to guarantee compliance with the duty of candour.

PTR

We agree that this opportunity should be taken to update the PTR Guidance so that it is reflective of current practice.

We note that some significant changes are proposed, in particular that an offer cannot be made where an NHS body considers the value of qualifying liability exceeds £25,000. Historically, the NHS bodies' discretion in this regard has been helpful in cases worth near to £25,000 which, if removed from the Redress scheme, would be pursued as civil claims and attract significant legal costs. We believe removing the NHS bodies' discretion in this respect is unnecessary (especially as the NHS body can seek legal advice from Legal & Risk Services if required in any event) and will lead to an increase in low value civil claims where proportionality is likely to be in issue.

We believe this opportunity should be taken to update the fixed fee framework at PTR Guidance Appendix O. The Welsh Government's consultation paper recognises that it has been some time since the PTR Guidance was last updated (it has never been updated in the 10 years since it came into force) and the PTR Guidance Appendix O stipulates that the figures within the framework are to change on an annual basis, but no review has yet been carried out. This has resulted in the fixed fee framework becoming extremely out of date. If it continues to be out of touch with inflation, then less solicitors will be able to afford to offer specialist legal advice under the Redress scheme, which means that there is less access to justice for claimants that fall within the scope of the scheme. We believe that a review of the fixed fee framework is well overdue and that there is no reason why it cannot be done now, whilst other outdated areas of the PTR Guidance are being updated.

We hope that our comments are useful to you. If you have any further queries, please do not hesitate to contact us.

Yours faithfully,



Ana Ramos

Legal Affairs Assistant

Association of Personal Injury Lawyers