



DEPARTMENT OF HEALTH CONSULTATION ON 'DUTY OF CANDOUR':

AvMA's INITIAL RESPONSE

AvMA believe that the Government's decision to opt for a mere 'contractual' duty of candour and refusal to listen to evidence and arguments for a more meaningful duty backed up in statutory regulations is a terrible mistake and would result in a missed opportunity to make the biggest advance in patients rights and patient safety since the NHS began. AvMA is urging all political parties to support an amendment to the Health and Social Care Bill which would require such a real Duty of Candour. In doing so AvMA has the full support of National Voices (the umbrella group for over 200 patients' charities) and the National Association of LINKS Members, amongst others. The amendment has been introduced by cross bench peer Baroness Masham of Ilton, and already has the support of Liberal Democrat and Labour peers.

- On a positive note, there now seems to be consensus that something really serious needs to be done to guarantee that patients and families are dealt with openly and honestly when things go wrong. The well intentioned words in the NHS Constitution; various guidance and the health professionals' codes of practice are not enough. Organisations need to be placed under a meaningful 'duty' or 'requirement'. That much we can all be grateful for.
- However, the Government heard loud and clear in its Listening Exercise on the Health & Social Care Bill, mostly from patients' groups but from other experts as well, that what was needed was a statutory "Duty of Candour" reflected in this Bill – not the so-called "contractual" duty of candour which they recently announced and are consulting on the detail of. This is paying lip service to the notion of a genuine 'duty of candour' and has been soundly rejected by the leading voices on this topic – notably, Action against Medical Accidents ("AvMA" – the charity which has championed the cause of patient safety and justice for nearly 30 years); National Voices (the umbrella group for over 200 patients' charities); and the National Association of LINKs Members.
- Failure to commit to a more meaningful measure in this Bill – one which would be worthy of the title "Duty of Candour" – will not only fail to have the desired effect, it is a snub and an insult to patients and patients' groups, and other experts. There is little if anything in the Bill which is genuinely drawn directly from the priorities and wishes of patients. A commitment to a statutory "duty of candour" certainly would be. This is an opportunity to show that patients really are being listened to.
- We believe a "contractual" duty is woefully insufficient on its own, and why a statutory, enforceable duty is required. Note: we are not against the standard clause in providers' contracts which is proposed, it is simply that that measure on its own can not have the desired effect and, as we will discuss, is riddled with practical difficulties.

- Essentially, this is a question of just how seriously the Government takes its commitment to “require” openness with patients when things go wrong and cause harm. If this is really an essential and fundamental principle which we want any provider of NHS care to live up to, it is reasonable to expect to find it where all other essential core standards are – in the registration requirements with the Care Quality Commission. These are reflected in the statutory CQC regulations, making it a statutorily enforceable requirement for any provider to meet these standards.
- Not only is a requirement to be open with patients not reflected in the CQC regulations at present, but quite bizarrely the regulations do make it a statutory requirement to report incidents which cause harm (anonymously) to the CQC. This sends out completely the wrong message about how important being open with patients is taken. The Government’s current proposals do nothing to address this.
- In addition to this, AvMA and others point out that the Government’s proposals of a mere contractual duty on its own simply cannot have the desired effect. It is worth nothing that the Government itself admits in its consultation document, that

“We are not certain of the precise mechanism that will be added to contracts”.

The primary elements of the proposed contractual duty seem to be a standard clause in providers’ contracts, and a requirement to make an annual declaration that the clause is being complied with. If that is not a “tick box” exercise, one wonders what is.

- If the Government agrees that the requirement to be open really is fundamental and essential, why on earth would a different approach be taken to this essential requirement with it being left to the commissioning process? Commissioners simply aren’t equipped to regulate issues of this kind. If one accepts the argument that this is the appropriate way to proceed, then all of the core standards currently in the CQC regulations could simply be dealt with in the standard contract for providers.
- Another key weakness in the Government’s proposal is that “providers’ contracts’ only relate to NHS contracts with trusts, PCTs and private/voluntary providers of NHS services. This would not include primary care practitioners such as GPs. The Government admits in its consultation document that they are subject to different arrangements, and the duty could only be brought in in negotiation with their representing organisations. Very significantly, the BMA General Practitioner Committee have already stated that they will not sign up to a ‘duty of candour’. This is not something which should be negotiable. A duty is a duty. The Government’s proposed contractual duty of candour would be weak even where it did apply, but simply would not cover where so much NHS care is undertaken – in primary care.
- It is not just patients and patients’ groups who advocate a statutory duty of candour. AvMA present an impressive list of leading clinicians and organisations who support it. Just recently, at the Mid Staffordshire Public Inquiry, Sir Liam Donaldson, the ex-Chief Medical Officer for England and internationally renowned champion for patient safety reiterated his long held belief in a statutory duty of candour when asked directly. He said:

“I have always personally agreed that there should be a statutory duty of candour. I have favoured it because I am of the view that professionals should be encouraged to take responsibility when they have done something wrong, rather than withhold instances of harm”

- As recently as June of this year, MPs on the Commons Health Select Committee looking at “Complaints and Litigation” recommended that a duty of candour be included in the licensing arrangements with the Care Quality Commission (precisely what AvMA and others are arguing for).

- The Government say in its current consultation document that it wished to avoid a “bureaucratic” or “tick box” arrangement. However, its proposal amounts to just that. The Care Quality Commission’s Registration Regulations and the CQC’s regulation of the care requirements within them is clearly the appropriate place to place a duty of candour. To imply that somehow the CQC could not cope with regulating this is simply not credible. It would suggest they are incapable of regulating all the other core requirements in its regulations. A good start would simply be to check that organisations are complying by examining the reports of incidents sent to them under the existing requirement. This would not be onerous.
- No doubt the CQC is under a lot of pressure and has a natural desire to argue that it needs additional resources. It may not welcome an additional requirement in its registration regulations with enthusiasm. However, it is its job to regulate matters which are essential in healthcare. If the CQC were unable to regulate a ‘duty of candour’ it is not credible to suggest that commissioners could.

AvMA

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