

DUTY OF CANDOUR – POST FRANCIS REPORT BRIEFING

Robert Francis QC's report on Mid Staffs makes a set of recommendations concerning Openness, transparency and candour, which is a central theme of his report. It includes specifically a recommendation for a statutory Duty of Candour with patients / families when harm has been caused or is suspected to have been caused, to be "policed" by the Care Quality Commission (CQC).

Ministers opposed an amendment to the Health & Social Care Bill designed specifically to create this. Earl Howe said that this would be re-visited when the Mid Staffs report was published. The Government argued that the 'contractual duty' it is introducing via the NHS standard contract was sufficient. It pushed ahead with the contractual duty in spite of knowing that Francis was likely to recommend a statutory duty and in spite of representations from leading patients organisations and others that this was what was needed, and that anything else was just 'paying lip service' to the issue.

In its consultation on the contractual duty (concluded January 2012) the Department of Health specifically excluded consideration of the statutory duty of candour and has never consulted on the merits of the statutory as opposed to contractual duty. It said: "*This consultation does not re-open debate about the most appropriate mechanism for requiring openness and the decision to impose a contractual requirement is set.*" In its response to the consultation (December 2012) the Department of Health did however say: "*If the Inquiry finds that a statutory duty is preferable to a contractual one and we are convinced by the arguments made, we will respond accordingly.*"

Robert Francis QC carefully considered evidence on this topic submitted from a wide range of witnesses including many from the Department of Health and came to the firm and unequivocal conclusion that the Government's 'contractual' duty is "not sufficient", that the statutory Duty of Candour was essential, and that it should be the responsibility of the CQC to enforce it with healthcare organisations.

Leading patients charities including the patient safety charity Action against Medical Accidents (AvMA), National Voices (the national umbrella group for health charities), The Patients Association, and National Association of LiNKS Members have all publicly described the proposed 'contractual duty' on its own as 'paying lip service' to the concept and insist that nothing less than the statutory Duty of Candour is sufficient. Most recently Healthwatch England – the new patients' watchdog created by the Government as part of its reforms, has formally added its weight to the call for Francis's recommendation for a statutory duty of candour to be accepted and implemented.

Robert Francis QC also recommends that it should be made a criminal offence for health professionals or directors of healthcare organisations to provide misleading information to patients/relatives about incidents or make dishonest statements to regulators or commissioners. However logical and desirable this may be, **this recommendation should be treated separately from the central**

recommendation of a statutory as opposed to merely a 'contractual' Duty of

Candour. The statutory duty can be achieved relatively quickly and easily by amending the CQC regulations (secondary legislation) and has already been the subject of considerable debate. It should be implemented without further delay. Creating a new criminal offence is a longer and more complicated process requiring careful planning.

The Department of Health will make much of its current plans for a contractual Duty of Candour. The key weaknesses with this (on its own) as opposed to the statutory Duty recommended by Francis are:

- The contractual duty does not apply to GPs and other primary care practitioners – they would be covered by the CQC regulations/ statutory duty
- The contractual duty would not apply to the private sector (apart from care commissioned by the NHS) – the CQC regulations/ statutory duty would cover all healthcare organisations who have to register with CQC
- The contractual duty would be policed by Clinical Commissioning Groups who have no desire to police it and, not being regulators, are ill equipped to do so
- Using the contractual route only would be inconsistent with how 'Essential Standards of Quality and Safety' are regulated and mean that the Duty of Candour was given lesser status
- The only sanction available under the contractual route is monetary/contractual
- The contractual duty would only apply to incidents already reported through risk management systems and so would not outlaw total cover-ups and may create a perverse incentive not to report at all
- Using the contractual duty alone would mean that healthcare organisations were statutorily required to report incidents to the national reporting system without having a statutory duty to inform patients – an anomaly Francis criticises
- The contractual duty on its own can not enjoy public confidence having been found by Francis to be insufficient and leading patients organisations seeing it as paying lip service.