



HEALTH AND SOCIAL CARE BILL 2011

Joint Briefing for the House of Lords Report Stage

AMENDMENT NUMBER 17 ON MARSHALLED LIST:

**BARONESS MASHAM OF ILTON LORD HARRIS OF HARINGEY
BARONESS WHEELER BARONESS TYLER OF ENFIELD**

A Statutory Duty of Candour for the NHS (Duty to ensure transparency)

Aim: Establish a statutory Duty of Candour so that any provider of NHS services must inform a patient (or their family, if they die or lack capacity) when something has gone wrong with their care or treatment that has led to harm.

Issue: There is currently no statutory obligation for healthcare providers to be open with patients when they have been harmed and the Government's plans do not address this

Call: We urge all peers to support the following amendment.

After Clause 6

Insert the following new Clause—

“The Secretary of State’s duty to ensure openness and transparency with patients when things go wrong

(1) After section 1D of the National Health Service Act 2006 insert—

“1E Duty of Candour when things go wrong

(1) The Secretary of State must act with a view to securing that any organisation registered with the Care Quality Commission to provide healthcare is required to take all reasonable steps to ensure that a patient or, in the event of death or incapacity, their next of kin, are fully informed about incidents which occur as a consequence of providing the regulated healthcare to that patient where the incident has resulted in—

(a) any injury to a patient which, in the reasonable opinion of a health care professional, has resulted in—

(i) an impairment of the sensory, motor or intellectual functions of the patient which is not likely to be temporary,

(ii) changes to the structure of a patient's body,

(iii) the patient experiencing prolonged pain or prolonged psychological harm, or

(iv) the significant shortening of the life expectancy of the patient; or

(b) any injury to a patient which, in the reasonable opinion of a health care professional, requires treatment by that, or another, health care professional in order to prevent—

(i) the death of the patient, or

(ii) an injury to the patient which, if left untreated, would lead to one or more of the outcomes mentioned in paragraph (a)".

Justification:

There is currently no statutory requirement for organisations that provide NHS services to tell a patient (or carer or representative) when something has gone wrong during their care and treatment that causes harm.

This issue is left to guidance and a non-binding requirement in the NHS Constitution to 'have regard to' the principle of openness.

This has allowed cases to occur where NHS organisations have withheld such information from patients, delayed its release or, worse, actively covered it up.

The government has agreed with patient safety campaigners that a Duty of Candour is required. But its preferred route is a *contractual* duty – built into the standard contracts between commissioners and *some* providers of NHS services.

Patients' organisations and others do not believe this is adequate. It would not include all NHS providers – for example, GPs, dentists and pharmacists do not have these contracts -- and it would not create access to the sanctions which the CQC has at its disposal.

Under the Government's proposal, the duty would only apply to incidents which had already been reported to the official systems, thus being next to useless in helping prevent actual cover-ups.

Baroness Masham's amendment would require the Secretary of State to create a statutory, enforceable Duty of Candour by amending the registration regulations of the CQC. All healthcare providers must comply with these to be registered and licensed.

Contractual and/or statutory Duty?

AvMA, NALM and National Voices are not opposed to constructive changes to the NHS standard contract. But we continue to argue that a contractual duty alone will not be effective, for the following reasons:

- the contractual duty would *only* apply to providers with an NHS contract -- so GPs, dentists, pharmacists and any private healthcare providers without a standard contract would not be covered¹;
- the Government admits it is unclear how a “contractual” duty would work in practice²;
- the Government is consulting how commissioners should act when a provider is found to have failed to be ‘open’ – it is not clear that they will have the leverage or the right range of remedial measures to enforce candour;
- commissioners are yet to prove they have the strength to take on powerful providers on behalf of patients;
- the government’s consultation itself suggests that ‘a serious breach would include notification being sent to the Regulators’, thereby undermining its argument that it is not appropriate to enforce candour through the statutory regulatory regime;

We argue in favour of a statutory duty because:

- inclusion in the CQC registration regime will cover *all* providers of NHS services including dentists and, in due course, GPs;
- organisations seeking registration would have to demonstrate they “take all reasonable steps” to ensure openness with patients: for example, having policies and procedures in place, including training and support of staff in ‘being open’;
- it is offensive to patients, and undermines the principle of candour, that there is a statutory requirement for providers to report patient safety incidents to the CQC -- but *no statutory* requirement to report them to the patients affected;
- it is the proper role of the CQC, as agreed by Parliament, to be the regulator of health and social care quality, promoting the interests of patients, and using statutory (not contractual) enforcement powers up to and including the suspension of registration;
- restricting the duty of candour to the contracting process diminishes its importance and impact. Every other “must do” is regulated through the “Essential Standards of Quality and Safety” in the CQC regulations;
- creating a statutory duty would bring England up to speed with Wales, which has already built this in to its “Putting Things Right” legislation, and other countries around the world including France, Sweden, some states in the USA and Canada.

Conclusion

The Government appears to consider that it is a matter of principle not to create a new statutory requirement. It has refused to listen to further argument on the issue, and excluded the statutory duty as a possibility from its own public consultation. We believe that the true principle at stake is the right of patients and their families and carers to know what has gone wrong with their care and treatment. This right is not protected under current arrangements. The proposed contractual duty on its own is woefully inadequate. We urge all peers to vote for this amendment in when it comes up at Report stage.

¹ Implementing a 'Duty of Candour'; a new contractual requirement on providers. DH 2011

² *ibid*

About our organisations

National Voices is the coalition of health and social care charities working to strengthen the voice of patients. Our broad membership, rooted in people's experience, represents millions of people, and covers a diverse range of health conditions and communities.

Action against Medical Accidents ('AvMA') is the national charity for patient safety and justice, and is a member of National Voices. AvMA provides specialist advice and support to people affected by medical accidents and works with all stakeholders to improve patient safety and justice for patients when things do go wrong.

The National Association of LINKs Members (NALM)

NALM is an independent national network of LINKs and LINKs members committed to putting service users and carers at the centre of health and social care services in every part of the country.

For further information:

Don Redding
Director of Policy, National Voices
07786 542615
don.redding@nationalvoices.org.uk

Peter Walsh
Chief Executive, Action against Medical Accidents (AvMA)
Tel: 020 8688 9555 / 07952 396967
e-mail: chiefexec@avma.org.uk

Malcolm Alexander
Chair, National Association of LINKs Members (NALM)
020 8809 6551
NALM2008@aol.com