



## HEALTH AND SOCIAL CARE BILL 2011

### Joint Briefing for the House of Lords Committee

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

**Aim:** Establish a 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, or could have caused harm.

**What we want peers to do:**

**We urge all peers to support the following amendment put down by Baroness Masham.**

#### **Amendment put down by Baroness Masham:**

“After clause 2

Insert the following new Clause—

“The Secretary of State’s duty to ensure transparency

After section 1A of the National Health Service Act 2006 insert—

“1B Duty to ensure transparency

The Secretary of State must act with a view to securing—

(a) that any persons providing health services should provide, within as short a period as possible, full information to patients, their carers or representative about any incident or omission in or affecting their care which may have caused harm, or may in the future cause harm,

(b) that regulations are introduced to enable the Care Quality Commission to take action against a registered person or body who fail to disclose details of such incidents as set out in those regulations.”

## **Justification:**

There is currently no statutory requirement for providers of NHS services to tell a patient (or carer or representative) when something has gone wrong during their care and treatment. Whilst a host of compulsory standards are set out in statutory regulations, this issue is left to guidance and a non-binding requirement to 'have regard to' the principle of openness in the NHS Constitution.

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

Organisations concerned with patient safety have campaigned for a statutory Duty of Candour to rectify this situation.

The government has agreed 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 do not believe this is adequate. It would not include all NHS providers (only those with standard contracts) and would not create access to the sanctions which the CQC has at its disposal.

## **Background:**

Many responses to the NHS Future Forum's 'listening exercise' on the Health & Social Care Bill, most notably from patients' groups including Action against Medical Accidents ('AvMA' – the charity for patient safety and justice), the National Association of LINKs Members (NALM), and National Voices (the coalition of patient, service user and carer organisations), called for the introduction of a statutory 'Duty of Candour'.

This followed years of campaigning by AvMA, other patients' groups and patient safety activists, including Sir Liam Donaldson (the ex chief medical officer) for such a statutory duty.

The government, in its response to the NHS Future Forum, agreed on the need for a duty of candour, but said: "This will be enacted through contractual mechanisms and therefore does not require amendments to the Bill."

In its subsequent report on complaints and litigation the House of Commons Health Select Committee recognised the force of the arguments for a statutory duty. It recommended that:

- a) "service agreements between NHS commissioners and their providers should include a contractual duty of candour to the commissioner", and
- b) "a duty of candour to patients from providers should also be part of the terms of authorisation from Monitor, and of licence by the Care Quality Commission".<sup>1</sup>

The latter recommendation would give the duty of candour the statutory clout it needs. The licence (registration) terms of the CQC are established in secondary legislation (regulations), to which this would be a minor change.

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<sup>1</sup> House of Commons Health Select Committee Sixth Report of Session 2010-11: Complaints and Litigation, HMSO, July 2011

In its response to the select committee the Government rejected the second recommendation precisely because it would be a statutory change:

“Making a Duty of Candour to patients part of the terms of authorisation for providers would represent a further statutory duty. For this reason, the Government does not currently intend to introduce a statutory duty of candour into the CQC registration requirements.”<sup>2</sup>

On 10 October 2011, pre-empting the Bill's Second Reading in the House of Lords, the Government launched a consultation on how its proposed *contractual* duty should be implemented. The consultation does not allow for consideration as to whether the duty should have a different status.<sup>3</sup>

### **Contractual and/or statutory Duty?**

AvMa, NALM and National Voices are not opposed to constructive changes to the NHS standard contract. But, in line with the Commons select committee, 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. GPs, dentists, pharmacists and any private healthcare providers without a standard contract would not be covered<sup>4</sup>;
- the Government admits it is unclear about how a “contractual” duty would work in practice<sup>5</sup>;
- 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:

- restricting the duty of candour to the contracting process diminishes its importance and impact, and is inconsistent with how any other genuine “must do” is regulated;
- it is offensive to patients, and undermines the principle of candour, that there is a statutory requirement in the CQC’s registration regulations for providers to report patient safety incidents to the CQC but *no statutory* requirement to report them to the patients affected;

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<sup>2</sup> Government Response to the House of Commons Health Select Committee Sixth Report of Session 2010-11: Complaints and Litigation, HMSO, September 2011

<sup>3</sup> Implementing a ‘Duty of Candour’; a new contractual requirement on providers. Proposals for consultation, DH 2011

<sup>4</sup> *ibid*

<sup>5</sup> *ibid*

- inclusion in the CQC registration regime would cover *all* providers of NHS services (not just those with a particular form of contract), including dentists and, in due course, GPs
- 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 a range of statutory (not contractual) enforcement powers up to and including the suspension of registration.

## **General argument**

The Government appears to consider that it is in itself a matter of principle not to create a new statutory requirement.

We believe that the true principle that is 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 does not exist under current arrangements. A contractual arrangement does not create that right -- it only creates an arrangement between institutions.

Like the other rights in the NHS Constitution, the right to know when things have gone wrong should be enshrined in legislation.

The statutory route, as discussed above, is also the only comprehensive and properly enforceable route to achieve the right.

There may be concern that giving the CQC another requirement to enforce may seem 'bureaucratic', or that the CQC may not be equipped to take it on. We reject both arguments.

The CQC already has the ability to act on a range of qualitative requirements in its registration regulations. There is even an existing requirement to report incidents which cause harm to the CQC. A related duty to share all information about such incidents with the patient or their family would be a modest change.

The CQC can decide how much work is necessary to monitor compliance. A good start would be to build on the current mechanisms by asking each reporter of a patient safety incident to declare and provide evidence that they have had the appropriate explanatory discussion with the patient (and/or family or carer).

If the CQC was in fact unable to deal with the duty of candour requirement, it suggests that it is incapable of regulating other requirements set out in the existing regulations. T

## **Conclusion:**

We believe an amendment to create a right for patients to know when things have gone wrong with their care and treatment, by creating a statutory duty of candour, is fully justified, would improve healthcare, put the patient at the centre of health services and could gain the support of the House. At the very least, it would be extremely useful to draw Minister further to explain and justify their continuing resistance.

We urge you to support this amendment in committee.

## 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)** 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](mailto:don.redding@nationalvoices.org.uk)

Peter Walsh  
Chief Executive, AvMA  
Tel: 020 8688 9555 / 07952 396967  
e-mail: [chiefexec@avma.org.uk](mailto:chiefexec@avma.org.uk)

Malcolm Alexander  
Chair, NALM  
020 8809 6551  
[NALM2008@aol.com](mailto:NALM2008@aol.com)