Centre for Mental Health and Incapacity Law, Rights and Policy
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Consultation on Proposals to Introduce a Statutory Duty of Candour for Health and Social Care Services

The Centre for Mental Health and Incapacity Law, Rights and Policy welcomes the Scottish Government's proposal for a statutory duty of candour for health and social care services subject to the comments made below. The Centre works to promote excellence in mental health and incapacity law, rights and policy and considers that the proposed duty of candour will have implications for those with mental disorder and/or incapacity and the protection of their human rights.

The provision of health and social care services evidently has implications for the human rights of those receiving such care services. For those with mental ill health and/or incapacity issues it is particularly vital that the provision of health and social care services respects and protects the rights of individuals who can often be the most vulnerable members of society. Moreover, this vulnerability is likely to be heightened as individuals with mental disorder and/or incapacity maybe in a unique position amongst those receiving health and social care services in that they can potentially be subjected to non-consensual care and treatment under the Mental Health (Care and Treatment) (Scotland) Act 2003 or the Adults with Incapacity (Scotland) Act 2000.

In Scotland, devolved legislation and its implementation and interpretation must be compatible with the rights identified in the European Convention on Human Rights (ECHR)[1]. These must be taken into account if a statutory duty of candour for health and social care services is established as follows:

1. The sharing of personal medical and other data falls within the ambit of the right to privacy in Article 8(1) ECHR (the right to private and family life)[2]. Any interference with this right must be justified under Article 8(2)[3]. However, an individual's Article 8(1) right allows them to choose who they share information with unless this can, again, be justified under Article 8(2). In disclosing information regarding instances of harm, to the individuals concerned and for the purposes of reporting, it is important that the right to private life for all parties involved is respected. The retention and disclosure of personal information must be legitimate and proportionate to ensure Article 8 compliance. Consideration

[1] Ss2,3 and 6 Human Rights Act 1998 and ss29(2)(d) 57 Scotland Act 1998.

[2] Reinforced by Article 13, Council of Europe Recommendation R(2004)10, Article 22 CRPD and Principle 6 MI Principles.

[3] *MS v Sweden (*20837/92) (1999) 28 EHRR 313; *Z v Finland* (22009/93) (1998) 25 EHRR 371.

should therefore be given as to the manner of the public disclosures of instances of harm.

2. Article 2 ECHR (the right to life) imposes an obligation on states to safeguard the lives of those within its jurisdiction and a procedural obligation to investigate deaths. Regarding health care, Article 2 has been found to require states to 'make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients' lives' and 'an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable…'[4] This requirement would most likely apply in all areas where health and social care are being provided.

   A statutory duty of candour would go some way to assisting in complying with Article 2 requirements by enabling those affected to be informed of the circumstances of a death, which is proposed as a 'disclosable event' in the consultation document.

3. Article 3 ECHR (prohibition of torture, inhuman or degrading treatment or punishment) places on states an obligation to investigate allegations of ill-treatment.[5] Insofar as individuals receiving compulsory treatment in detention are concerned, it is for the state to provide an explanation if the individual is found to be injured at the time of their release.[6] A duty of candour would go some way to assisting to such investigations and would contribute to the transparency and promptness which they require.

4. It should also be noted that Article 14 ECHR[7] requires that other ECHR rights are protected and respected on an equal basis for all and without discrimination.

In addition, the UK has also ratified the United Nations Convention on the Rights of Persons with Disabilities (CRPD). The rights identified in the CRPD, which applies to persons with physical and mental disabilities, can be seen as reinforcing those in the ECHR, namely Articles 12 (equal treatment before the law (exercise of legal capacity), 15 (freedom from torture, cruel or inhuman or degrading treatment or punishment) and 17 (integrity of the person). Although the CRPD does not form part of domestic law it still provides for binding obligations on the Scottish Parliament. The enactment of devolved legislation in Scotland and actions of the Scottish Ministers can be prevented by the Secretary of State if they contravene the UK's

[4] *Calvelli and Ciglio v Italy* (32967/96) (unreported) (17 January 2002) para.49

[5] *Labita v Italy* (26772/95) (2008) 46 EHRR 50 para.131

[6] *Aksoy v Turkey* (21987/93) (1997) 23 EHRR 553 para.61

[7] See also Article 5 CRPD.

international obligations, including those under international human rights treaties[8]. Moreover, Article 25 CRPD requires that state parties shall:

> "Require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care".[9]

The duty of candour represents an ethical standard which should be extended to all individuals, including those with mental disability. This requires consideration of the special requirements that people with mental disorder may have in relation to being informed of and supported through disclosures of harm.

General Observations

In light of the above comments, we make the following observations:

- To ensure certainty for organisations and individuals an organisational duty of candour should be specified in detail. It must be sufficiently flexible to cover the wide range of circumstances in health and social care settings.
- For those experiencing mental ill health or incapacity, disclosing an episode of harm may be particularly distressing. Thus, the importance of staff having the specific knowledge and skills necessary to disclose to those with mental illness and/or incapacity is vital.
- In the interests of transparency and accountability, the requirement for organisations to publically report on disclosures would be welcome. However, consideration should be given to the right to privacy for all individuals involved.
- The consultation states that disclosable events 'would be defined as (an) unintended or unexpected event that occurred or was suspected to have occurred that resulted in death, injury or prolonged physical or psychological harm being experienced by a user of health and/or social care services.' It is further stated that '(p)rolonged pain and prolonged psychological harm also needs to be taken into account when framing definitions (e.g. prolongation for a continuous period of 28 days).'

  The need for the event to have resulted in prolonged harm is noted. It is worth considering exactly how 'prolonged harm' can be satisfactorily measured? If the threshold for the duty to disclose is set too high this will render the duty ineffective. As noted, it may be difficult to ascertain the actual impact of harm on those with mental illness, particularly psychological harm. In some situations it may be difficult to distinguish between, for example, distress caused by mental

[8] ss35 and 58 Scotland Act 1998.

[9] CRPD Article 25(d)

illness and distress caused by a harmful event although the fact that an individual suffers from mental illness or incapacity should, of course, not be used as justification for denial of the existence of harm.

- It is also submitted that there may be events which do not result in discernible harm but which are not carried out according to procedure. How would it be determined that harm has or has not occurred in such situations? Additionally, harm may only arise once the person is informed that they have been involved in an episode of harm.
- It is necessary for the definition of 'harm' to be sufficiently broad to encompass a wide range of circumstances and individuals. For those suffering from mental disorder or mental ill health occurrences of psychological harm may be less discernable owing to that person's existing disorder.
- In respect of care home settings/secure settings for those with mental disorders there is already a duty to report deaths and injuries to the Care Inspectorate. A duty of candour would extend this to informing the individual receiving the care or treatment. There is also the issue of how to inform someone who lacks capacity that they have been harmed. This may require further specific safeguards.

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