Health and Care Professions Council – 27 March 2013

Duty of Candour

Executive summary and recommendations

Introduction
Recommendation 181 of the Report of the Mid Staffordshire NHS Foundation Trust Public Inquiry (the Francis Report) states that "A statutory obligation should be imposed to observe a duty of candour."

This paper examines the possible steps that the Health and Care Professions Council (HCPC) could take towards introducing a 'duty of candour' without the need for legislation.

Decision
Council to discuss and instruct the Executive on how to proceed.

Background information
Report of the Mid Staffordshire NHS Foundation Trust Public Inquiry.

Resource implications
None.

Financial implications
None.

Appendices
None.

Date of paper
18 March 2013

Duty of Candour

1. Introduction

1.1 This paper examines the possible steps that the Health and Care Professions Council (HCPC) could take towards introducing a 'duty of candour' without the need for legislation.

1.2 Recommendation 181 of the Report of the Mid Staffordshire NHS Foundation Trust Public Inquiry (the **Francis Report**) states that:

A statutory obligation should be imposed to observe a duty of candour:

- *On healthcare providers who believe or suspect that treatment or care provided by it to a patient has caused death or serious injury to a patient to inform that patient or other duly authorised person as soon as is practicable of that fact and thereafter to provide such information and explanation as the patient reasonably may request;*
- *On registered medical practitioners and registered nurses and other registered professionals who believe or suspect that treatment or care provided to a patient by or on behalf of any healthcare provider by which they are employed has caused death or serious injury to the patient to report their belief or suspicion to their employer as soon as is reasonably practicable.*

The provision of information in compliance with this requirement should not of itself be evidence or an admission of any civil or criminal liability, but non-compliance with the statutory duty should entitle the patient to a remedy.

2. Obligations

2.1 From the perspective of professional regulation such a duty would impose two obligations.

2.2 The **first obligation** is a 'whistleblowing' obligation to report untoward incidents caused by others. Whilst there may be some cultural reluctance to 'turning in' a professional colleague, an obligation of this kind is already part of HCPC Standards of Conduct, Performance and Ethics which provide that:

1 You must act in the best interests of service users.

You are personally responsible for making sure that you promote and protect the best interests of your service users...

You must protect service users if you believe that any situation puts them in danger. This includes the conduct, performance or health of a colleague. The safety of service users must come before any personal or professional loyalties at all times. As soon as you become aware of a situation that puts a service user in danger, you should discuss the matter with a senior colleague or another appropriate person.

2.3 The **second obligation** would be to inform a patient or their representative of the adverse outcomes of care provided to that patient and, as the final paragraph of the recommendation indicates, imposing an obligation to provide information of that nature may expose the health professional concerned to legal liability.

3. Apologies and liability

3.1 This is a complex area of law and efforts have been made for many years to persuade health professionals that discussing healthcare outcomes and, where appropriate, expressing sympathy or providing an apology do not necessarily amount to an admission of liability.

3.2 In England and Wales that has been acknowledged in law, by section 2 of the Compensation Act 2006 which provides that:

An apology, an offer of treatment or other redress, shall not of itself amount to an admission of negligence or breach of statutory duty.

3.3 Obviously, that section only extends to apologies and redress, and would not protect a person who gave a frank explanation of an error and how it occurred. It is also worth noting that this provision does not extend to Scotland or Northern Ireland. In effect, the Francis Report is addressed to the Health Secretary in his capacity as the minister responsible for the English NHS and therefore does not take account of any differences in law in the other UK jurisdictions.

3.4 The defence organisations (such as the Medical Defence Union) take the view that, in health care, admitting that something went wrong does not necessarily amount to an admission of liability, as the fact that the outcome of treatment was not as expected or predicted does not always mean that the treatment was negligent. Proving negligence requires more; establishing that a duty of care was breached and that the harm suffered by the patient was a direct consequence of that breach.

3.5 This is a rather academic viewpoint and there can be little doubt that, in reality, the threat of litigation and/or disciplinary action will have a significant 'chilling' effect on the willingness of clinicians to be open and honest with patients about adverse incidents. However, that said, both the General Medical Council (GMC) and the Nursing and Midwifery Council (NMC) do already have relevant provisions in their respective codes.

3.6 The GMC's Good Medical Practice provides:

If a patient under your care has suffered harm or distress, you must act immediately to put matters right, if that is possible. You should offer an apology and explain fully and promptly to the patient what has happened, and the likely short-term and long-term effects.

3.7 Similarly, the NMC Code of Conduct provides:

You must act immediately to put matters right if someone in your care has suffered harm for any reason. You must explain fully and promptly to the person affected what has happened and the likely effects.

4. HCPC

4.1 In terms of the HCPC taking matters forward, the Standards of Conduct, Performance and Ethics currently contain no provision similar to those in the GMC and NMC codes. Including such a provision in these Standards would be a helpful first step.

4.2 Imposing such an obligation does not and cannot address the issue of immunity from civil or criminal liability – that is matter which would require primary legislation. However, the HCPC could send a clear message as to the implications in terms of regulatory proceedings, by making clear that compliance with any new 'duty of explanation and redress' would be a relevant factor in determining whether fitness to practise is impaired. This could be achieved by appropriate statements in policy documents such as the Standard of Acceptance, the Indicative Sanctions Policy and relevant Practice Notes.