Health (Tobacco, Nicotine etc. and Care)(Scotland) Bill

The Medical Protection Society Limited

About MPS

1. The Medical Protection Society (MPS) is the world’s leading protection organisation for doctors, dentists and healthcare professionals. We protect and support the professional interests of more than 300,000 members around the world. Our benefits include access to indemnity, expert advice and peace of mind.

2. MPS is not an insurance company, but a mutual (not-for-profit) organisation which exists to serve and protect its members and to safeguard their professional reputation, interests and integrity. All the benefits of membership of MPS are discretionary as set out in the Memorandum and Articles of Association.

3. Our in-house experts assist with the wide range of legal and ethical problems that arise from professional practice. This includes clinical negligence claims, complaints, medical and dental council inquiries, legal and ethical dilemmas, disciplinary procedures, inquests and fatal accident inquiries.

4. Our philosophy is to support safe practice in medicine and dentistry by helping to avert problems in the first place. We do this by promoting risk management through our workshops, E-learning, clinical risk assessments, publications, conferences, lectures and presentations.

Opening remarks

5. MPS welcomes the opportunity to provide evidence to the Health and Sport Committee, in relation to Part 2 (Duty of candour procedure) and Part 3 (Ill-treatment and wilful neglect) of the Health (Tobacco, Nicotine etc. and Care) (Scotland) Bill. MPS makes no comment on Part 1 of the Bill, and the Committee’s call for views on Nicotine Vapour Products (NVPs) and smoking in hospital grounds.

6. The Committee will be aware that earlier this year MPS responded to the Scottish Government’s consultations on the proposals for a statutory duty of candour and a new criminal offence of ill-treatment and wilful neglect.

7. In respect of the statutory duty of candour, MPS fundamentally supports a culture of openness in healthcare. Safeguarding the public and improving patient care must be a priority; however adding additional legislation to the healthcare profession is not always the best way of achieving this.

8. In MPS’s experience, a reliance on legislation and regulation risks creating defensive behaviours, where self-preservation becomes a dominant influence, instead of a focus on the best interests of the
patient. MPS strongly believes that a change in culture would be far more effective at promoting openness, professionalism and accountability amongst those working in healthcare. Focusing on legislation and regulation as the key methods of driving behavioural change may undermine this.

9. MPS remains of the view that this new statutory duty is not the most effective way of embedding openness in healthcare. Equally, it is recognised that the policy decision has now been made, and so MPS stands ready to play its part, working with the Scottish Government, to ensure the duty of candour regulations are properly communicated to the profession – and that professionals have clarity about precisely what that duty entails.

10. In respect of a new criminal offence of ill-treatment and wilful neglect, MPS does not believe that sufficient justification has been made for the proposed new offence. Where someone is the victim of alleged neglect, the law currently, rightly, provides for both investigations and sanctions where necessary. There is legislation covering these matters in relation to incapacitated patients or children\(^1\). Patients with capacity have the option of criminal and/or civil proceedings if they are the victim of alleged neglect.

11. MPS has experience of the confusion that can be caused when primary legislation does not set out the scope of criminal offences in sufficient detail. It is with this in mind that we raise our concerns that the term “ill-treatment” is not defined in either the Bill or the explanatory guidance.

12. A robust, clear definition should be provided, and MPS encourages the Scottish Government to look at this issue as a priority.

**Specific comments on Part 2 (Duty of candour procedure)**

**S 21 – Incident which activates the duty of candour procedure**

13. Section 21 (2) (b) provides that “a registered health professional” is responsible for offering a “reasonable opinion”. MPS does not think that an adequate definition has been given as to who that would be in practical terms. Further definition and clarity is needed to ensure that an appropriately qualified person is making the assessment of whether the duty of candour requirement is engaged.

14. In such instances, any decision would need to be taken swiftly and the emphasis would be on an unintended or unexpected incident and a significant outcome, as listed in s 21 (4) (c ) (i)-(v).

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\(^1\) Adults with Incapacity (Scotland) Act 200; Mental Health (Care and Treatment) (Scotland) Act 2003; Children (Scotland) Act 1995; Adoption and Children (Scotland) Act 2007; Protection of Vulnerable Groups (Scotland) Act 2007; Children and Young People (Scotland) Act 2014; Health and Safety at Work Act 1947.
15. Appropriate training will be required for individuals who are tasked with providing an opinion under the provision of s 21. MPS would like to see more detail on this point, and would welcome the opportunity to play a role in shaping exactly what that training model would look like.

16. MPS supports the provisions of s 21 (b) (ii), where it outlines that only an outcome unrelated to the person’s illness or underlying condition would be included in the application of the duty of candour.

17. Concern remains that common side effects, and common complications of treatment, could be captured by the duty of candour. Clarification is needed on this point.

S 22 - Duty of candour procedure

18. Section 22 (3) (b) should be amended. As currently drafted it would cause conflict between a doctor’s professional duty of confidentiality. Disclosure of confidential patient information to a “person acting on behalf of that person”, where a patient has died, is unlikely to be appropriate for a doctor. This issue is already dealt with in paragraph 71 of the General Medical Council’s (GMC) Confidentiality guidance.\(^2\)

S 23 – Apologies

19. MPS strongly supports s 23 covering the provision of an apology, and that an apology taken in accordance with the duty of candour is not itself an admission of negligence or a breach of statutory duty.

20. MPS supports a position of open communication, encouraging appropriate apologies where things have gone wrong. We provide regular high quality training and education to members to support this culture in medical practice.

S 24 – Reporting and monitoring

21. As the Bill currently stands, s 24 could result in an individual rural GP practice having to produce an annual report on its engagement with the duty of candour. This has the potential to significantly impact that practises’ available resources.

22. This potentially burdensome scenario needs addressing. This can be done via a clearer definition of a “responsible person.”

Specific comments on Part 3

(III-treatment and wilful neglect)

S 26 – Care worker offence

\(^2\) General Medical Council – Confidentiality (2009), paragraph 71, page 28.
23. The explanatory notes for s 26 indicate that some ancillary staff will be excluded from the reach of this Bill. While MPS does not believe this new, additional criminal offence is necessary, if the Scottish Government is minded to proceed, there is no readily apparent reason why only certain individuals coming into contact with patients can be held to account in this way.

S 29 – Power to order offence to be remedied or publicised

24. MPS does not feel the need for specific legislation around “publicity orders’ has been justified. We feel this is a strong example of our underlying concern about this new, additional criminal offence - adding to a culture of fear in the healthcare profession.

Concluding remarks

25. In this submission we have outlined some of our concerns about both a statutory duty of candour, and the new, additional criminal offence of ill-treatment and wilful neglect.

26. However, there is equally a recognition that policy decisions have been made on both of these issues. With experience of the development of the statutory duty of candour in England, and accompanying guidance, as well as the offence of ill-treatment and wilful neglect, MPS stands ready to work with the Scottish Government on both of these issues. It is essential that un-intended consequences are avoided wherever possible. It is also important that healthcare professionals are supported, and have clarity about what new duties mean for their professional practise.

27. MPS wants to play its part in this by working constructively with the Scottish Government and other government and healthcare agencies, to support healthcare professionals, so they can do what the entered the profession to do – care for patients.

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