

Group Briefing

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Open disclosure in the healthcare sector: progress, but is it enough?

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New laws which took effect on 22 September 2018 set out a process to be followed, and protections to be enjoyed, by health services providers who choose to disclose patient safety incidents to patients and their families.

The HSE has been operating an “open disclosure” policy since 2013 but as the Scally Report on the CervicalCheck Screening Programme confirmed, the practice of open disclosure in Ireland is haphazard. It is unlikely that the new laws will significantly change this as they do not impose a statutory duty on health services providers to tell patients when something has gone wrong during their treatment or care – the process prescribed by the new laws is voluntary.

Nevertheless, now for the first time, there is a statutory framework setting out a process which can be followed by both public and private health services providers who choose to disclose information or make an apology to a patient or their family where an incident occurs which causes harm to a patient or which could have caused harm, or where an incident is prevented from happening i.e. “a near miss”.

WHY SHOULD A HEALTH SERVICES PROVIDER MAKE AN OPEN DISCLOSURE?

If a health services provider *correctly*

follows the procedures in the legislation, the information that it gives and any apology that it makes in an open disclosure process cannot be used against it in court or by a regulatory body and it cannot invalidate its insurance policy.

Open disclosure is encouraged (if not required) in various guides on ethical duties of medical professionals and other health workers and it accords with international consensus on the expectations of health services providers.

Disclosure often helps to avoid potential disputes or at least to resolve them at an early stage and can improve the patient/service provider relationship.

At a more general level, a wider implementation of open disclosure should foster greater transparency in the health system and increase public confidence in health services providers.

WHAT ARE THE BENEFITS FOR PATIENTS?

Research shows that most patients and their families want to know when something goes wrong with their

This document contains a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.

treatment and to receive an apology. The open disclosure process facilitates this and may reduce the need for litigation as a method of obtaining an explanation or apology. Importantly it also means that patients' health needs can be identified and addressed as soon as disclosure takes place.

ANALYSIS

If health services providers embrace the new laws, they should benefit, both from a legal and a reputational perspective.

In addition, a wider practice of open disclosure will benefit patients. However, patients who still feel that litigation is appropriate even after

an open disclosure process will not necessarily be in a stronger position than before as they will not be able to rely on the information given or an apology already offered in the disclosure process. This means that a health services provider can admit that an incident occurred, explain what happened and apologise but then proceed to fight the case in court. This would likely affect the integrity of any apology given and it remains to be seen how this will actually play out in practice.

Unfortunately, many people may also be disappointed that disclosure remains voluntary. At present the Oireachtas (Irish parliament) is in the process of

reviewing draft legislation which would introduce mandatory disclosure, but only of *serious* patient safety incidents. Unless that draft legislation (the Patient Safety Bill 2018) is amended, neither it nor the laws introduced in September will go far enough to implement the recommendations in the Scally Report that there should be a statutory duty of candour on both individual healthcare professionals and on the organisations for which they work.

Overall the new laws can be seen as progress but patients are likely to question whether this approach to disclosure can really be regarded as meaningful or "*open*".

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