



RESPONSE TO

Consultation on

THE DRAFT NHS CONSTITUTION

October 2008

Introduction

Action against Medical Accidents ('AvMA') is the independent charity which has been promoting patient safety and justice for people harmed by health care since 1982. AvMA has extensive experience of helping and advising thousands of patients each year who have been affected by medical accidents and of collaborative working with the Department of Health, NHS bodies, health professionals and regulators as well as fellow patients' organisations.

We have limited our response to the areas where the draft constitution has direct relevance to our mission to improving patient safety and justice for people affected by medical accidents. We have divided our response into our 'big idea' for introducing a Duty of Candour (or patients "right to openness and honesty when things go wrong") and a right for staff not to be blamed inappropriately when things go wrong, and then other comments on the draft consultation.

Our Big Idea – A 'Duty of Candour' and Avoidance of Inappropriate Blame

We are calling on the Government to use the historic opportunity which the adoption of an NHS constitution provides to introduce a 'Duty of Candour' (in the form of a "right to 'openness and honesty' when things go wrong") on NHS organisations, and those providing services on its behalf. A duty of candour (or "right to full openness and honesty when things go wrong") has been recommended by the Health Select Committee and by the Chief Medical Officer (Making Amends, 2003). Such a measure has been called for by AvMA and others for years. We believe that the introduction of a right to candour (or 'openness and honesty' when things go wrong) in the Constitution would be a hugely helpful step in addressing the 'culture of denial' which still exists in the NHS when things go wrong (Safety First, 2006). We propose that to balance this new right, that a right for staff not to be subjected to unfair or inappropriate blame when things go wrong is introduced. Together, these new rights would help significantly in developing an 'open and fair' culture conducive to improving patient safety.

Other Comments on the Draft Constitution

- 1 We welcome the proposal that all NHS Bodies and all NHS funded organisations be obliged by law to take account of the NHS Constitution. However, to be meaningful, it must be realistic for NHS bodies to face a challenge as to whether they are meeting this obligation reasonably. Legal action by judicial review or otherwise is beyond the means of the vast majority of citizens. Special attention should be paid to how non-NHS bodies providing services for the NHS could be held to account for not abiding by the constitution. Private bodies are not subject to judicial review. The NHS Complaints procedure should be able to deal with any complaint about a failure to abide by the Constitution, with an independent judgement being made by the Ombudsman if necessary. Alternatively or in addition, the Ministry of Justice should take steps to improve access to public funding ('legal aid') to enable citizens to seek judicial reviews of matters in connection with the NHS Constitution.
- 2 We recommend that further thought is given to the wording of so-called 'pledges' in certain areas. Where a pledge is being made, it may be more appropriate to state that patients and the public can 'EXPECT' the pledge to be met rather than the NHS should 'STRIVE' to meet it. The use of 'strive' implies that the pledge is unlikely to be met, whereas some of the things pledged really should be an expectation which is rarely not met. In particular, under Quality of Care and

Environment patients should be able to expect that services are provided in a clean and safe environment, and expect continuous improvement in the quality of services etc.

- 3 We recommend that under 'Complaints and Redress' it is made clear that people's rights under these headings include a right not to have their treatment or care adversely affected as a result of making a complaint or seeking redress.
- 4 Under 'Complaints and Redress' mention is made of people's right for compensation if they have been harmed by negligence. However, the Handbook describes the only route to achieving this as being through taking legal action. This seems at odds with the Government's stated intention in the NHS Redress Act. We recommend that there should be a right for patients/families to receive compensation where the NHS itself identifies there would be a liability under the law, without taking legal action. At the least, there should be a pledge to offer people fair and appropriate compensation and other redress as a result of avoidable errors, without having to take legal action. Legal action is not possible or acceptable to many people in society, and also adds (unnecessarily in some cases) to legal costs.
- 5 We believe that under 'Complaints and Redress', in order to make more meaningful the commitment to 'support' people, there should be an explicit right to independent advocacy services to help members of the public with disputes with the NHS.