

Union Street | St Helier
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Deputy Tom Coles
Chair, Regulation of Care Sub-Panel

BY EMAIL

19 September 2025

Dear Chair,

Re: Draft Regulation of Care (Jersey) Amendment Law 202–

Thank you for your letter requesting clarification on certain provisions under the draft Regulation of Care (Jersey) Amendment Law 202– (the “**draft Law**”). The Minister for the Environment has asked me to reply on his behalf to ensure that the Sub-Panel receives a timely response.

Please find the answers to the Sub-Panel’s questions, below.

1. Clarification of the rationale for the choice of words used and the approach taken in Article 38 of the draft Law (new Regulation 6(11)(a) and (b) of the Regulation of Care (Standards and Requirements) (Jersey) Regulations 2018 (the “Regulations”))?

Article 38 of the draft Law includes a new Regulation 6 under the Regulations, which incorporates a “duty of candour” into Jersey law. This represents a significant advancement for patient rights in Jersey as, for the first time, this will require all regulated care providers to inform patients and care receivers (or persons lawfully acting on their behalf, where applicable) when treatment or care goes wrong and to issue a written apology detailing the facts surrounding the event.

The duty of candour was first implemented as a statutory duty in England in November 2014 (under Regulation 20 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014), following recommendations from the Mid Staffordshire NHS Foundation Trust public inquiry, which highlighted failures in care and a lack of openness.

It is proposed to follow the approach of England introducing the duty of candour so that Jersey also has a legal framework encouraging openness in health and social care. This is designed to:

- improve patient safety by ensuring that incidents are reported, investigated, and learned from;

- advance patients' rights by recognising a patient or care receiver's right to be informed about their care, including when things go wrong;
- promote a more transparent and accountable health and care system, where providers are held responsible for the quality and safety of care; and
- build trust between health and care providers, patients and the public.

However, legislation alone will not ensure openness in Jersey's health and social care system: a supportive culture that encourages and values transparency must also be implemented. That is why it is encouraging to note that Health and Care Jersey have already started to issue duty of candour letters in some cases. It must also be clarified that these provisions have no impact on the meaningfulness of duty of candour letters that have been voluntarily provided to patients before the draft Law comes into force or those that are issued following implementation of the draft Law.

This question relates specifically to the provisions which govern the legal status of apologies, which would be required under this Regulation if approved by the Assembly. In England, apologies issued by health care providers under the requirements of the duty of candour do not amount to an admission of liability. English law provides a provision of general applicability, including for apologies issued under the duty of candour requirements, under section 2 of the Compensation Act 2006.

Jersey has no legislation governing the status of apologies, which means that an apology may be construed as an admission of liability. The rationale behind the duty of candour, as noted above, is to encourage openness and transparency. It goes further and requires all regulated services to issue apologies when things go wrong. If Jersey law remains unclear on the status of an apology given in these circumstances, then this undermines that policy rationale behind the duty of candour because services will be reluctant to provide full, genuine apologies, including all the facts of the notifiable safety incident.

Excluding apologies from being taken as an admission of liability is crucial in fostering a culture of transparency and breaking down barriers between the parties when things go wrong. This was explained by the former Member of Parliament, John Howell in advancing his Private Members Bill on this issue in the UK Parliament in 2021:

"...an apology that does not create a legal liability will often settle a dispute, rather than being seen as a way to take the accused for every penny they have. It should be the mark of a mature democratic society and of its dispute resolution system that an apology, whether made publicly or privately, can and should be allowed to be meaningful and helpful rather than simply a necessary yet tokenistic gesture. An apology can truly change atmospheres, the nature of conversations and outcomes. Used appropriately, it can help to avoid a dispute going to court. Equally, it can assist the resolution of a case by changing the approach being taken. ...apologies can often unlock disputes and lead to settlements without recourse to formal legal action. Since parties may be reluctant to do anything that may be construed as an admission of liability, apologies have to date seemingly been sparse...A culture has emerged of people and organisations not wanting to offer an apology in case it is detrimental to their legal position or deemed to be a weakness."

The proposed new Regulation 6(11)(a) and (b) has been based on the legislation which generally governs apologies in Scotland. This is set out below.

Scotland – Section 1 of the Apologies (Scotland) Act 2016 (the “Scottish Act”)

“1 Effect of apology in legal proceedings

In any legal proceedings to which this Act applies, an apology made (outside the proceedings) in connection with any matter—

(a) is not admissible as evidence of anything relevant to the determination of liability in connection with that matter, and

(b) cannot be used in any other way to the prejudice of the person by or on behalf of whom the apology was made.”

Paragraph 3 of the Explanatory Notes to the Scottish Act states as follows:

“The Act has the broader purpose of encouraging a cultural and social change in attitudes towards apologising.”

This provision has been found to be more effective than the equivalent provision in England, so much so that the UK Government has stated its intention to reform the English law based on the Scottish Act. In response to a public consultation on the subject published in February 2025, the UK Government stated:

“Section 2 of the Compensation Act expressly states that an apology shall not of itself amount to an admission of negligence or breach of statutory duty. However, the Government has decided to pursue reform by means of primary legislation, as amending the law affords the opportunity to provide additional clarity that offering an apology does not represent admitting liability in a wider range of cases, and also represents a chance to foster a legal environment that encourages genuine apologies. We agree with respondents who believed apologies to be especially beneficial in cases involving child sexual abuse, where validation and healing are very important.”

The UK Government also committed to introducing a statutory definition of an apology. This is included in the Scottish Act and in the proposed new Regulation 6.

Therefore, having considered this body of evidence, it was decided to base Regulation 6(11)(a) and (b) on the drafting of section 1 of the Scottish Act because it was noted that the UK Government was proposing to amend section 2 of the Compensation Act 2006, drawing on the features of the Scottish Act. It was further noted that recent attempts were made to reform the English law via a Private Members Bill. These initiatives were instigated because English law fails to provide sufficient legal certainty on what an apology is and how it will be treated – this means caution persists in the way that apologies are made. If regulated providers remain cautious in their approach to issuing apologies this would entirely undermine the policy rationale for implementing the duty of candour in Jersey.

2. Please can you outline how liability is determined in relation to this provision?

In relation to the new duty of candour Regulation – proposed new Regulation 6 – as a whole, it requires services to issue apologies when things go wrong. If they do not do so then they may be in breach of the Regulations, depending on the facts of the case. It is a criminal offence to breach the Regulations, with the maximum penalty being a £50,000 fine. Prosecution decisions are for the Attorney General to decide.

Regarding the impact that Regulation 6(11)(a) and (b) would have on civil liability in other areas of law, such as clinical negligence, it must be emphasised that this is regulatory legislation – it does not interfere with tort law. Should this provision be approved by the Assembly, liability in tort law would be determined by the courts in precisely the same manner as is currently the case.

If these provisions are enacted, it would only be the letter of apology issued under this Regulation that could not be used as evidence of an admission of liability. The evidence that the letter refers to, the care records that it points to, and all other relevant evidence may be used by claimants to advance a clinical negligence claim.

In fact, it is likely that there will be more evidence for a potential claimant to draw upon in future because the Regulations require services to keep detailed care records and to share those with patients and their loved ones. This will, of itself, ensure patients have improved access to information on their care or treatment.

3. Is there legal precedent for the wording of such a provision in this way, and if so, please can you provide an example?

As set out in answer to question 1, above, this provision is based on section 1 of the Scottish Act. The Scottish Act includes a specific definition of an apology. Regulation 6(10) also provides the definition of an apology. The UK Government has stated its intention to amend the equivalent English law provisions to incorporate the key features of the Scottish Act, in due course.

4. Clarification about the meaning of “negative impact” on the Jersey Care Commission under Article 13 of the draft Law, new Article 37A.

As set out in the report accompanying the draft Law, new Article 37A of the draft Law is proposed to allow the Care Commission to provide services in other jurisdictions. This would enable other small jurisdictions, such as the Isle of Man and Guernsey, which do not yet have an independent health and social care regulator, to engage the Care Commission to conduct inspections of its health and social care services. This would benefit Jersey’s relationship with these jurisdictions and assist the Island to collaborate in the delivery of health and social care across the Crown Dependencies, should such collaboration be deemed desirable.

The Care Commission holds statutory responsibilities to regulate health and social care services in Jersey. This includes conducting full inspections of services within the time-period stipulated under Regulation 80 of the Regulations. The Care Commission must deal appropriately with notifications that services must provide under Regulation 21 of the Regulations, including conducting unannounced visits to monitor matters of concern. There are other key statutory responsibilities, including responding to complaints and preparing reports if requested to do so by ministers.

In this context “negative impact” means that the Care Commission must not agree to provide services for other jurisdictions if, in doing so, it is likely to be left unable to perform those statutory functions effectively. Its primary responsibility must always be to ensure that Jersey’s regulated health and social care services are safe and effective.

5. Clarification about the use of “by the service user’s representative” rather than ‘from the service user’s representative’ under Article 41 of the draft Law, Regulation 9(8).

It is considered that the use of “by” instead of “from” in this context is effective and fulfils the policy intent which is to enable a regulated service to withhold access to personal plans and care records if there are safeguarding concerns. As this is a drafting point, clarification has been sought from the Legislative Drafting Office which has confirmed this point.

6. Clarification here about the use of “by the service user’s representative” instead of ‘from the service user’s representative’ under Article 41 of the draft Law, Regulation 9(10)?

As above, it is considered that the drafting here is effective and fulfils the policy intent of not allowing a regulated service to withhold access to personal plans or care records relating to an individual for whom the person requesting that access either holds a lasting power of attorney or has been appointed as their delegate. The Legislative Drafting Office has confirmed this point.

Should you require any further information on the above or on any other matters relating to the draft Law, please do not hesitate to contact the Minister’s office.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Jackson', written in a cursive style.

Connétable Mike Jackson
Assistant Minister for the Environment