Introducing the Statutory Duty of Candour

A response from Care England

1. Introduction

1.1 Care England is the leading representative body for independent care services in England. Our membership includes organisations of varying types and sizes; among them single care homes, small local groups, national providers and charitable organisations and associations. Between them, they provide a variety of services for older people and those with long-term conditions, learning disabilities or mental health problems.

1.2 We welcome the opportunity to comment on the proposals to introduce a duty of candour. We would like it to be noted that we are fully supportive of the general thrust of the regulations. The Duty of Candour proposals have been largely welcomed by Care England care home members. We welcome the policy intention to promote a culture of openness and support for people seeking answers when they have been harmed by the actions of a provider. We do however have some concerns regarding implementation and would also expect the DH to invest in supporting providers to undertake any changes needed to meet the requirements of this new duty.

2 Process

2.1 We welcome the fact that adult social care providers will be dealing with the self-same incidents they already have to notify under Regulations 16 and 18 of the Care Quality Commission (Registration) Regulations 2009. Indeed, the wording in Reg. 1 – (4)(a)(ii)-(v) and (4)(b) – of these draft regulations on candour is similar to that in Reg.18(2) (a) and (b) of the 2009 regulations and, of course, guidance is given under Outcome 20 of Essential Standards – so there should not really be a problem of identification.

2.2 However the situation will be different for those social care registered providers who are contracted by the NHS to provide healthcare. This is not an uncommon situation particularly where a number of residents in a home will be funded by the NHS for continuing healthcare. In these cases, the home will provide both social care, funded by the local authority, and healthcare funded by the NHS. In effect the home has two masters and unfortunately two separate contracts and monitoring arrangements. If the home has residents funded by various local authorities and CCGs then the contracting and monitoring systems the home must meet become even more complex. What these new Duty of Candour proposals need to avoid is adding to this administrative burden by requiring the home to submit to two separate *and different* reporting mechanisms.

2.3 Regulation 5 of the draft regulations seems to be an attempt to answer this issue. It says, *'Where a service is both a health care service and a social care service, paragraph (3) is to apply'*. We are unsure as to what exactly that means. Presuming it relates to actual activity, then a care home might have one resident funded by a CCG and 30 funded by local

authorities, yet the reporting mechanism for health applies – and does it apply to all residents or only those funded by the NHS? However it is difficult to see how this might work in practice as a care home will always remain as a social care registered service and must follow the standards of reporting to CQC required for that service. Clarity is required.

2.4 The current NHS standard contract, that applies to care homes caring for people under continuing healthcare, requires reporting to local risk management systems, using NPSA definitions. The contract also sets out the reporting timescales ie 10 days as opposed to these draft regulations which say 'as soon as practicable' and gives detailed processes for implementation including what happens around non reporting. Finally the provider must report when it has had communications on this issue with patients to the commissioner – again not something referred to in the draft regulations.

2.5 Whilst the RIA does debate this issue in more detail it does note that, '*Where the terms of the NHS Contract only apply to part of a provider's activity, it is not clear how the duty of candour requirement might be implemented, and whether the provider would face any additional costs to roll out the duty of* the *new proposals candour to all service users under the new proposals.'* We would ask therefore when will it be made clear and who will make it clear. As previously mentioned this will be the normal arrangement - there will be few providers where the service provided is entirely covered by the NHS standard contract.

3 <u>The regulations</u>

3.1 The guidance says that this applies to organizations and not individuals however the draft regulations defines registered person to whom all this applies as the service provider <u>or</u> registered manager. Regulation 6 says *'a person guilty of an offence*….' as opposed to an organization. This needs to be clarified.

4 <u>Litigation</u>

4.1 We have two further major overarching concerns: (a) a possible compromise of the privilege enjoyed by individuals against self-incrimination; and (b) the related exposure of provider organisations to litigation, both criminal and civil. Despite some reassurance from the conclusions in the Impact Assessment (Paras. 5-7, 60-64 and 70-72), our concerns are not completely allayed. The fear of litigation on open reporting may remain. The position is perhaps more complex than even the Impact Assessment allows – see, for example, the Francis Report, Vol. 3, pp 1482-1484.

4.2 We would caution against over optimism about current provider candour (TLAP report Para 13) – we expect general compliance with a duty to notify, but are unsure how well established it is to apologise to service users and/or their families, especially in writing. The TLAP document also tends to dismiss the fear regarding litigation but this is not specifically based on any evidence. We do not feel the fear should be ignored.

4.3 According to the website of the Medical Protection Agency: "By being open, you do not have to admit guilt or liability, blame others, or speculate. In the UK, the Compensation Act 2006 makes clear that an apology is not equivalent to an admission of liability." Nevertheless, providers may need some support to help them feel confident when apologising.

5 Guidance for providers

5.1 Providers need to be made aware of their new duties under these regulations and that by notifying CQC of relevant incidents they are also prompting questions about their compliance with the duty of candour. They need to be confident about being open and apologetic and we believe the DH should be publishing legal guidance (in plain English) on the vulnerability of providers and their staff as a result of open disclosure?

5.2 Providers may need guidance as to the definition of harm and what they need to do in the event of a near miss.

5.3 The DH should also be asking insurers to comment on the possible effects on premiums (going further than the usual position that premiums are set on the basis of claims experience) and their willingness to carry the risks associated with candour – how would a home that claims under the public liability clause be treated subsequently?

5.3 Care England will be pleased to work with TLAP to provide advice on creating a culture of openness within provider organisations.

6 Costs

6.1 It is difficult to be clear regarding costs until more detail is known with respect to the points raised above and also until we understand how CQC monitor this duty and in particular determine that a breach has occurred.

6.2 The RIA notes that CQC would bear increased costs of monitoring providers and enforcing the duty. This is misleading to the extent that CQC will be costing all its regulation activity by sector and ensuring there is a 100% recovery from providers of these costs. Ultimately therefore increased costs will be for the provider to bear.

6 Commissioners

6.1 We regret that the Duty of Candour applies only to providers. Commissioning decisions impact directly on individuals and could cause harm. We are noticing more cost reviews on individual packages of care for people with learning disabilities for example, which will result in some services having to be withdrawn from the person, but commissioners explicitly saying that families should not be informed that such reviews are being undertaken. What candour here?

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