

Duty of Candour detail released: General transparency duty added - March 2014

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Introduction

We consider below yesterday's launch of a consultation on the new statutory duty of candour, which provides the long awaited detail on candour triggers under revised CQC registration requirements. We also identify a new general duty of openness and transparency in all service provision across health and social care.

Issue

Since the Francis report a year ago, patients, service users and providers across the health and social care sector have awaited the detail on the new Duty of Candour recommended by Francis. The statutory duty targets all providers of health and social care and is to be enforced by the CQC.

Key issues:

- Effective from 1 October 2014;
- Introduces a general duty of openness and transparency for all providers to service users;
- Introduces a specific duty of candour following incidents arising from service provision;
- Incident trigger level is 'moderate harm' for healthcare providers and 'significant harm' for social care providers. Where the service is both health and social care, the moderate care trigger applies;
- Sets out the detail around notification steps and documentation;
- Breach of the duty is an offence (against the registered provider), punishable by fine;
- Capable of defence if the provider can show it took all appropriate steps and exercised all due diligence in an effort to comply;
- There will be no breach of the patient/service user declines to engage.

Market perspective

This long awaited insight into the proposed regulations introducing the statutory duty of candour (the power to do so resting with the safe passage of the Care Bill through Parliament), presents one of the most significant legal changes following the 290 recommendations recommended by Robert Francis in February 2013. Whilst the sector has already made significant changes to embrace openness when things go wrong in service provision, the impact of a statutory duty of candour cannot be understated. The aspiration is that the new legal duty drives forward the cultural change around openness across health and social care.

Our view

The draft regulations carry few surprises on detail, as it was expected following the Dalton review that the harm threshold would drop to moderate harm for healthcare. It is perhaps less clear for service users that different terminology on the harm threshold is applied to health and social care, particularly when the CQC is a single regulator of both health and social care, under a single set of regulations and standards. The key to making this work must be to ensure the semantics do not get in the way of providers and service users understanding when the duty is triggered, when harm occurs.

Above this however, we recognise the equally powerful new provision in regulation 3(1), which creates a freestanding general duty on providers to deal with service users in an open and transparent way. The translation of that provision, both in practical application and knowing when it will or will not be breached (for example, is the legitimate application of an exemption under FOIA still acceptable, or will it fall foul of CQC scrutiny under the general principle being created?). In some aspects, the general duty requires as much thought for compliance, as the specific incident based duty.

How we can help

Our experience of both CQC compliance and managing incidents and learning, ensures we can support your organisation by:

- Working with you at a strategic level to consider the impact and compliance issues this presents;
- Help you prepare for this operationally and strategically, over the next 6 months;
- Take part in training and staff engagement sessions to disseminate knowledge about the impact of this new legal duty;
- Review your policy and guidance documentation to support compliance by 1 October 2014;
- Provide 24 hour assistance with incident management, to help you manage these new obligations;
- Support you in shaping and delivering a transparency agenda that satisfies your various duties in 2014.

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