

Title/Subject: Implementation of Duty of Candour
Meeting: Integration Joint Board
Date: 2 February 2018
Submitted By: Chief Social Work Officer
Action: For Decision

1. INTRODUCTION

- 1.1 This report advises the Board of the basis and key matters relating to the implementation of Duty of Candour provisions in the Health (Tobacco, Nicotine etc. and Care) (Scotland) Bill which were given Royal Assent on 6 April 2016. A target implementation date of 1 April 2018 has been agreed.

2. RECOMMENDATIONS

The Integration Joint Board is asked to:

- 2.1. note the implications of Duty of Candour
- 2.2. agree that implementation of Duty of Candour will be monitored and reviewed by the Clinical and Care Governance Group with updates coming back to the IJB in due course.

3. BACKGROUND

- 3.1. The Health (Tobacco, Nicotine etc. and Care) (Scotland) Act 2016 received Royal Assent on 1 April 2016 and introduced a new organisational Duty of Candour on health, care and social work services. This duty will apply to almost ten thousand organisations. The implementation date for the Duty of Candour to come into effect is 1 April 2018.
- 3.2. The overall purpose of the new duty is to ensure that organisations are open, honest and supportive when there is an unexpected or unintended incident resulting in death or harm, as defined in the Act. This duty requires organisations to follow a Duty of Candour procedure which will include notifying the person affected, apologising and offering a meeting to give an account of what happened. The procedure will also require the organisation to review each incident and offer support to those affected (people who deliver and receive care). The details of this procedure will be set out in Regulations which will be published prior to 1 April 2018.

- 3.3. The purpose of the new Duty of Candour provisions is to support the implementation of consistent responses across health and social care providers when there has been an unexpected event or incident that has resulted in death or harm that is not related to the course of the condition for which the person is receiving care. The principles of candour already inform the approach that is taken in many organisations.
- 3.4. The professional duty currently applies to many health and social care professionals across Scotland as this is a part of the requirements of their practice by their professional regulators.
- 3.5. Some professional regulatory bodies already require registrants to have a Duty of Candour. The General Medical Council (GMC) and Nursing and Midwifery Council (NMC) have issued specific additional guidance on Duty of Candour. Research evidence collated by the Professional Standards Authority and observations from national visits to NHS Boards would suggest that there are several factors that contribute to unacceptable variation in organisational approach to candour. The statutory duty on organisations would help to establish a robust and consistent approach to candour across health and social care, complementing professional duties already in existence.
- 3.6. The Act requires the responsible person to report annually on the implementation of the Duty of Candour procedure. This report is to include information on the number and nature of incidents in which the duty was invoked and any changes to policies and procedures that resulted from the incidents. This will capture the learning and improvement actions arising from the review of unintended incidents or events resulting in death or harm.
- 3.7. Evidence and experience suggests that organisations that embrace transparency and candour regarding harm incidents can evidence improvements in the learning culture within their organisation as a result this greater openness.
- 3.8. Annual reports will be reviewed to consider progress with implementation of the Duty of Candour procedure. Reports outlining how the duty has been applied by organisations will be considered by Scottish Government, Healthcare Improvement Scotland and the Care Inspectorate as part of their existing arrangements for reviewing the quality of health and social care delivery in Scotland.

4. CONSIDERATIONS

- 4.1. The responsibility for Duty of Candour activation will depend on local decision-making that takes account of the sequence of events relating to the incident that is regarded as unintended or unexpected and results in one of the outcomes outlined in the Act.
- 4.2. Organisations involved with the provision of care impacting upon the outcomes for an individual will need to have mechanism to consider the specific ways in which

they will liaise and discharge their individual responsibilities in respect of the Duty of Candour procedure. Guidance will include reference to common scenarios and best practice in this area.

- 4.3. Depending on where and when the incident that resulted in death or harm took place, it is for the services within the Health and Social Care Partnership to decide whether the NHS Board or Local Authority is the responsible person and will activate the Duty of Candour procedure.
- 4.4. The Duty of Candour procedure will not be activated for near misses. This is because no death or harm (as defined by the Act) will have occurred and so the statutory nature of the procedure cannot apply. Some organisations already have established processes to review near misses. The Duty of Candour procedure should not stop organisations from reviewing near misses as part of an established learning system within their organisation.
- 4.5. Section 23 of the Act defines “apology” in relation to the Duty of Candour provisions and subsection (2) provides that any apology or other steps taken which are in accordance with the Duty of Candour procedure set out in regulations made under section 22 cannot be taken to be an admission of negligence or a breach of a statutory duty. This means that there is not to be taken to be a link between giving an apology (or otherwise following the Duty of Candour procedure) in relation to an incident and acknowledgment of any wrong-doing. This does not prevent individuals affected from taking further action in relation to an incident.
- 4.6. Section 3 of the Apologies (Scotland) Act 2016 provides that an apology is a statement (which could be written or oral) made either by the person who is apologising (whether a natural person, or a legal person such as a company), or by someone else on their behalf (e.g. a spokesperson or agent). The core element is an indication that the person is sorry about, or regrets, an act, omission or outcome. Where the statement includes an undertaking to look at the circumstances with a view to preventing a recurrence that qualifies as part of the apology itself. The definition of apology for the purpose of the Act does not include statements of fact or admissions of fault. In any statement that includes both an apology and a statement of fact and/or admission of fault, only the apology is inadmissible as evidence of liability.
- 4.7. Guidance will include information to support organisations consider how best to communicate apologies as part of the Duty of Candour procedure. The Act states at Section 23 that “an apology or other step taken in accordance with the Duty of Candour procedure under section 22 does not of itself amount to an admission of negligence or breach of a statutory duty”.

5. CONCLUSIONS

- 5.1. Consultation with relevant organisations, agencies and groups was undertaken by the Scottish Government.
- 5.2. This report provides an overview of the background, implications and intentions of Duty of Candour.
- 5.3. Although Duty of Candour already informs the approach taken in many organisations, the professional duty now extends and applies to many health and social care professionals across Scotland and now forms part of the requirements of their practice by their professional regulators.
- 5.4. When the toolkit and e-learning modules are available, training and roll out across the workforce will be taken forward. The plan will be considered and supported via existing groups and monitoring arrangements. It is recommended that the Clinical and Care Governance Group will be the lead group for implementation planning, monitoring and review.
- 5.5. Annual reports outlining how the duty has been applied by organisations will be considered by Scottish Government, Healthcare Improvement Scotland and the Care Inspectorate as part of their existing arrangements for reviewing the quality of health and social care delivery in Scotland.

Resource Implications

An implementation toolkit and guidance is due to be published and intended to reflect the need for Duty of Candour procedures to be implemented in accordance with best practice; emphasising local learning systems and how these inform continuous improvement. The Duty of Candour procedure is not related to organisational conduct or capability arrangements in any way.

Resources have been allocated already by NHS Education for Scotland and the Scottish Social Services Council to support training and awareness. Using and targeting existing resources will also be an important element of implementation support planning for the Duty of Candour.

Implementation will be supported via existing Workforce Development mechanisms, plans will be developed to inform staff and services of the new duty when the toolkit and e-modules are available. Implementation will be monitored and supported via the Clinical and Care Governance Group.

Government have assured organisations that guidance, training materials and workforce tools will be issued early 2018. Once in receipt of these, an appropriately staffed task group will update procedures, brief staff and disseminate training. This will be underway before the legislation implementation date of 1st April 2018.

There is a need to check if any funds have been provided via settlement.

Impact on IJB Outcomes and Priorities

This report does not impact on IJB Outcomes and Priorities

Legal & Risk Implications

Legal

Duty of Candour is very specific and only applies where there has been an unexpected or unintended consequence that causes harm or death to an individual (as defined by the Act) that is not as a consequence of the condition for which they are being treated.

Risk

If organisations have not applied the Duty of Candour procedure when it appears they could or should have then this will be reviewed through the range of existing mechanisms for reviewing and supporting improvements in the quality of care. The Act outlines at Section 24(6) that a notice may be served to require the organisation to provide information about any matter relating to their implementation of the Duty of Candour procedure. Healthcare Improvement Scotland, Care Inspectorate and the Scottish Government are currently considering recommendations from the Monitoring and Reporting Sub-Group.

Consultation

Consultation has not been necessary

Equalities Assessment

There are no equalities issues arising from the implementation of Duty of Candour.

Approved for Submission by: Chief Social Work Officer

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Date: 19 Jan. 18

List of Background Papers: n/a