Department of Health

Improving patient safety and openness

The role of the NHS Litigation Authority in incentivising the duty of candour

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Improving patient safety and openness

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Executive summary

Hard Truths stated that the Government would consult on proposals that NHS Trusts and Foundation Trusts should reimburse part or all of the NHS Litigation Authority's (NHSLA) compensation costs when they have not been open about a safety incident which subsequently becomes a claim for clinical negligence.

The Government has now introduced a statutory duty of candour for all health and care organisations registered with CQC, requiring openness when things go wrong.

Hard Truths proposed that where a Trust or Foundation Trust has breached the statutory duty of candour about a patient safety incident which results in a claim, the NHSLA could have the discretion to reduce or remove that Trust's indemnity cover for that claim. The NHSLA would continue to make any compensation payments due to the patient.

The government believes that such an approach could provide a further incentive for organisations to develop a culture of candour, transparency and honesty.

This consultation document sets out proposals for how this could be taken forward.

Chapter 1 - Introduction

1. Since the publication of the *Hard Truths* there has been an unprecedented drive to ensure that the NHS is the most open and transparent health system in the world on key measures of patient safety and patient experience.

2. The Government has placed a new legal duty on all organisations to ensure that when something goes wrong, patients and their relatives are told about it promptly. Known as the 'duty of candour', it is intended to counteract the legalistic and defensive culture that was found at Mid Staffordshire NHS Foundation Trust, fostering instead a culture in which organisations acknowledge mistakes and learn from them. Professional regulators, such as the General Medical Council (GMC) and the Nursing and Midwifery Council (NMC) strengthening the same responsibilities on individual health professionals so that action can be taken when they are not candid about errors with their patients.

3. The statutory duty of candour is a requirement for registration with the Care Quality Commission. It came into force for NHS bodies in November and will apply to all providers of health and adult social care services registered with CQC from April. Early indications are that NHS bodies are keen to embrace candour and to ensure they are open with patients about their care and treatment, including when things have gone wrong with treatment. This is encouraging.

4. The Government is keen to explore other avenues that could support openness across the NHS. *Hard Truths* stated that we would consult on proposals that organisations should reimburse part or all of the NHS Litigation Authority's (NHSLA) compensation costs when they have not been open about a safety incident which subsequently becomes a claim for clinical negligence. It was proposed that where a Trust or Foundation Trust has breached the statutory duty of candour about a patient safety incident which results in a claim, the NHSLA could have the discretion to reduce that Trust's indemnity cover for that claim. The NHSLA would continue to make any compensation payments due to the patient, but part of this cost would be met by the Trust.

5. Any surplus that was generated by the NHSLA as a result of withholding a compensation payment would not be retained by the NHSLA, but would be returned to the Department of Health. The government believes that such an approach could provide a further incentive for organisations to develop a culture of candour, transparency and honesty. This consultation document sets out proposals for how this could be taken forward.

Chapter 2 – The Dalton-Williams Review

5. Sir David Dalton and Professor Sir Norman Williams were asked to consider the role of the NHSLA in relation to candour as part of their review of how to build a duty of candour, published in March 2014. They recommended that:

   'the focus of any sanctions on organisations found to be in breach of the duty of candour should have impact on the provider's reputation. The various options for involving the NHS Litigation Authority, including but not limited to reimbursement, should be explored in consultation. National organisations (including the NHS Litigation Authority, the Care Quality Commission and NHS England) should set out how they will:

   - *share intelligence about breaches of the duty of candour;*
   - *incentivise candid behaviour by organisations through co-ordinated action;*
   - *including commentary within published reports on the findings for individual care organisations;*
   - *ensure proportionate enforcement action is taken by commissioners and the Care Quality Commission in the event of breach;*
   - *and levy any financial sanctions on organisations that fail to be candid.*

   In consulting on incentives relating to reimbursement of litigation costs, the Government should take account of the advantages and disadvantages outlined in this report, and work to ensure that future incentives form part of a coherent framework. These measures should be subject to an appraisal of how they have affected the behaviour of decision-makers in provider organisations.'

6. The focus of this consultation document is on how financial sanctions could be imposed on organisations that are not candid. It sets out, and seeks views on, a number of options for how the work of the NHSLA can support candour and openness in NHS Trusts and Foundation Trusts.

Chapter 3 – The role of the NHS Litigation Authority

7. The NHSLA is a not-for-profit Special Health Authority that provides indemnity cover for legal claims against the NHS, supports learning from claims and provides other legal and professional services for its members.

8. Its key roles are:

Managing claims

- It manages claims against the NHS and independent sector providers of NHS care on behalf of its members;
- It settles justified claims fairly and quickly; and
- It defends unjustified claims robustly, helping to protect NHS resources.

Resolving disputes and claims

- It helps the NHS to resolve disputes and claims fairly and cost effectively;
- It resolves around 99% of claims out of court to keep legal costs low.

Helping the NHS to manage risk and reduce claims

- It uses price for its indemnity cover to incentivise safer care by charging less to organisations which have fewer, less costly claims;
- It shares learning from claims and offers support to help improve safety in the NHS and reduce claims;
- It provides a National Clinical Assessment Service (NCAS) which support the NHS and practitioners with performance concerns.

9. The NHSLA provides indemnity cover, through risk pooling schemes, to the NHS and providers of NHS care in England (with the exception of primary care) on a pay as you go basis. Health care professionals are supportive of openness, transparency and candour, but there is a perception that the threat of litigation is a barrier which can prevent health professionals and organisations being candid.

10. In order to support healthcare professionals overcome this barrier, the NHSLA actively encourages openness, transparency and candour. It encourages members of the NHSLA schemes to apologise and give an explanation to patients when things go wrong. The NHSLA will not withdraw indemnity because organisations say sorry and give an explanation - this is morally and ethically the right thing to do for patients and the NHS. The “Saying Sorry” guidance produced by the NHSLA sets out these principles and has been widely publicised in the NHS.

Chapter 4 - Sharing intelligence about breaches of the duty of candour

11. When a patient safety incident occurs, the organisation providing care should investigate and ensure that it is open, transparent and candid with the patient, their family and carers. This is backed by the statutory duty of candour which came into force for NHS Trusts and Foundation Trusts as a requirement for registration with the Care Quality Commission (CQC) in November 2014.

12. We do not believe that the NHSLA should routinely investigate whether an NHS Trust or NHS Foundation Trust has been candid whenever it receives a claim relating to an incident of poor care. Instead the NHSLA could, upon receipt of a claim, request that the Trust provide confirmation that it was candid with the patient (or the person lawfully acting on their behalf) at the time of the incident (or thereafter in the event that harm becomes known after the event) in line with the statutory duty of candour. Such confirmation could be given by the Chief Executive or Medical Director or a nominee.

13. The receipt of a claim by the NHSLA is a clear indication that a patient was not happy with the care that they received and may have been harmed by that care. It is not automatically the case that a provider has failed to meet the statutory duty of candour in these circumstances – but it is an indicator to the NHSLA that a failing has occurred and is a prompt to ask further questions.

14. If the Trust or Foundation Trust did not confirm within a reasonable time that it had met the duty of candour, the NHSLA could notify the CQC. The CQC could then choose to investigate whether the Trust was complying with the statutory duty of candour in this case and could consider whether there are grounds for taking regulatory action.

15. In addition, the NHSLA could publish a summary of the information it has received on whether organisations have been candid in relation to claims received.

16. There are a number of advantages in sharing information about candour and claims in this way. It ensures that information is shared across national bodies and will provide an additional source of information for the CQC in assessing compliance with the statutory duty of candour. It will also provide a consistent approach to breaches of candour where a claim is brought because the CQC would in all cases be the body responsible for taking action where a provider had not been open about failings in care.

Consultation question 1

- **Do you agree that the NHSLA should share information with the CQC when its members do not provide evidence that they have discharged their statutory duty of candour by being open with patients about the matters that result in a claim?**

Chapter 5 –Levying financial sanctions against an organisation that fails to be candid

17. Members of the NHSLA's schemes which have fewer, less costly claims pay less for their indemnity cover. In this way the NHSLA incentivises organisations to reduce harm and promote patient safety.

18. In addition to rewarding providers that take active steps to improve safety through a reduction in the premium they pay to the NHSLA, providers that have a greater number of costly claims arising from negligent care will pay more for their indemnity cover. The NHSLA provides all of its members with detailed information about their claims together with learning and support to assist the NHS to reduce claims.

19. Exploring whether the NHSLA scheme can be used to provide an additional incentive for candour is the main purpose of this consultation document. This would involve a financial sanction on organisations that are not able to confirm they have been candid in relation to an incident that results in a claim for compensation.

20. The proposal for the NHSLA scheme to act as an incentive needs to be considered within the context of existing sanctions which can be taken against providers who are not candid. These include enforcement action by the CQC and by professional regulatory bodies in cases where individuals are found to have breached their professional duty of candour. The proposal for the NHSLA to impose financial sanctions for a breach of the duty of candour could change the relationship between the NHSLA and providers. In addition any reimbursement arrangements might impact on Trusts' participation in the NHSLA's clinical negligence scheme. The arrangements could not apply to Trusts who were not members of the clinical scheme, potentially leaving a gap. However, our intention is to embed a culture of candour in the NHS with greater pace than has been achieved to date and this is why we feel a further incentive via the NHSLA may be necessary.

Consultation question 2

- **Do you agree that NHSLA members should meet some or all of the costs arising from a compensation claim if they cannot confirm that they have discharged their statutory duty of candour in relation to that claim?**

21. The following section sets out a number of options for levying reimbursement through the NHSLA in cases where the organisation has breached its statutory duty of candour to patients about a notifiable patient safety incident that results in a claim for compensation.

22. The statutory duty of candour places a number of requirements on NHS bodies to inform patients or a person acting on their behalf. The duty of candour offence would apply in instances where a notifiable patient safety incident has occurred and the provider does not notify the relevant person. The elements of this notification are that:
    - It should be given in person by a representative of the health service body;
    - It should provide an account of all the facts the health service body knows about the incident at the time of the notification;

- It should advise the relevant person what further enquiries the health service body believes are appropriate;
- It includes an apology, and
- It is recorded in writing by the health service body.

23. There are other requirements to the statutory duty of candour which do not constitute a part of the offence - such as following up the initial notification with written notification. It is our view that the reimbursement proposals should only apply to those parts of the duty of candour which are an offence – that is to the initial notification to a patient or their representative and the content of the notification.

Consultation question 3

- **Do you agree that any reimbursement arrangements should cover the same areas that have an offence attached in the statutory duty of candour – that is to the initial verbal notification and the content of such a notification?**

24. It is important to note that the level of damages payable for clinical negligence vary depending on the patient and their injuries. For example, claims involving elderly patients who have shorter life expectancy and fewer dependents, may not incur loss of earnings (as they are generally retired), and will generally receive lower amounts of compensation in the event of negligent care. By contrast, a claim involving a brain damaged baby who needs 24/7 care for the rest of their life will result in a claim of significant value.

Chapter 6 – How might reimbursement work in cases where organisations fail to discharge the statutory duty of candour?

25. This chapter sets out four options for how a possible reimbursement system could operate in cases that result in a compensation payment where organisations have not been candid about failings in care. We would welcome your views on these options.

Please note that these proposals would only apply to members of the NHSLA Clinical Negligence Scheme for Trusts (CNST) and therefore would only apply in England.

Option 1 - Fixed amount up to the value of damages payable

The NHSLA could charge a fixed amount, up to £10,000 for example, or lower if the value of the damages payable under the claim is less than £10,000, in the event that an organisation cannot confirm that it met its statutory duty of candour to patients. Where no damages are payable in relation to a claim, for example, when an organisation has not been negligent but neither has it been candid, there would be no financial penalty on the organisation. For claims which are less than £10,000, the NHSLA would charge to the Trust the total damages payable up to £10,000.

Advantages

The advantages of this approach are that the amount charged to the organisation is clear and calculated in a straightforward way. The NHSLA is only seeking recovery of monies actually paid for negligent care and not seeking to recover monies from an organisation in the absence of negligence (even if the organisation has not been candid).

Disadvantages

The drawbacks of this approach are that the fine will only be levied in the case of a successful claim for negligence. If a claim is not successful, no charge will be made even if the organisation has not been candid. The process is likely to be slow. Reimbursement cannot be levied until the claim is settled. This will inevitably lead to a gap between the incident and the reimbursement of around four years (there is an average delay of three years between the incident date and the claim being notified to the NHSLA, and it typically takes around 16 months for a claim to be resolved by the parties once it has been made). Therefore, the organisation may feel it is being penalised for historic issues.

Option 2 - Fixed amount irrespective of level of damages payable

In this option, the NHSLA would charge a fixed amount for each breach of the duty of candour irrespective of the level of damages payable. This amount could be charged regardless of whether a claim was successful. So, for example, the NHSLA could charge £10,000 for every claim where the organisation was not able to confirm that it had complied with the statutory breach of candour.

Advantages

This approach would have the advantage of clarity around the amount that would be payable by the organisation in the event of a breach of the duty of candour. In addition, there would be a consistent level of reimbursement irrespective of whether the negligence is proven and the level of damages of payable. Such a proposal would also be easier to administer and would not require settlement of a claim before reimbursement could be made making the delay between incident and payment just over three years rather than more than four years.

Disadvantages

However, there are a number of disadvantages to this approach. The penalty would be charged at a flat rate and would not necessarily reflect the severity of the breach of the duty of candour. In addition, the reimbursement would be payable whether or not negligence was established and could expand the Litigation Authority's remit; as it would have to make an assessment of whether the threshold of the duty of candour applied regardless of whether the provider had been negligent.

Option 3 - Fixed amount but increasing based on number of breaches

In this option the NHSLA could charge an increasing amount based on the number of breaches of the statutory duty of candour by an organisation. This could be done on a sliding scale. For example, one breach in a financial year could result in a penalty of £10,000, the second breach a further £15,000, the third breach £20,000, and the fourth breach £25,000 and so on.

Advantages

This approach would have the advantage of targeting persistent breaches of the statutory duty of candour by ratcheting up the penalty charged for each subsequent failure to be candid that resulted in a claim. As with the previous option the amount payable would be the same irrespective of the level of damages paid or even if the claim was unsuccessful. The reimbursement could also be charged prior to settlement of the claim making the delay between an incident on average just over three years.

Disadvantages

However, this approach shares some of the disadvantages of the previous option. The penalty paid through reimbursement would not reflect the severity of the breach of the duty of candour, it would simply be a flat amount per failure to be candid. It would also be payable whether or not negligence is established. This could expand the NHSLA's remit as it would have to make an assessment of whether the threshold of the duty of candour applied regardless of whether the provider had been negligent.

Option 4 - Adjustment to yearly indemnity contributions

The fourth option takes a different approach. Rather than charging an organisation for each specific breach of the statutory duty of candour, the NHS Litigation Authority could assess the number of past breaches of the statutory duty of candour for each member in

each financial year and adjust the future contribution payable by that member for their indemnity cover to reflect the number of breaches. This approach would recognise the role of openness and candour in the provision of safe care, and would have the effect of increasing the contributions of organisations where there was evidence that they have breached the statutory duty of candour. An alternative but similar approach would be to add a fixed amount to the organisation's contribution to the scheme in response to each failure to meet the duty of candour. So for example, a single failure to meet the statutory duty of candour could result in an increase of £10,000 in the organisation's contribution to the NHSLA for the following year.

Advantages

There are a number of advantages to this approach. First, it would allow the NHSLA to take a more sophisticated view of risk based on the organisation's failure to be candid alongside its claims history – the adjustment based on a failure to meet the statutory duty of candour would be considered alongside the number of claims made against the organisation. This approach would also be easier to administer, since any adjustment to a Trust's contribution would take place at the time that those contributions are annually reassessed.

Disadvantages

However, the fact that any adjustment to contributions related to candour would take place at the same time as adjustments for other factors could obscure the payment that an organisation was making as a result of its failure to be candid. This would run counter to the aim of incentivising openness. The approach also shares some of the disadvantages of the other options. The adjustment to the organisation's contribution would occur whether or not negligence was established, although it could only be applied in cases where a claim was made and was known to the NHSLA. It also assumes that candour is a risk factor in whether a claim is brought, which is not always clear.

Consultation questions 4 and 5

- **Which of the four options outlined above is your preferred approach, and why?**
- **Do you have any other ideas on how candour about service failings could be incentivised through the NHSLA?**

Equality impact

26. The general equality duty that is set out in the Equality Act 2010 requires public authorities, in the exercise of their functions, to have due regard to the need to:

    - Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act.
    - Advance equality of opportunity between people who share a protected characteristic and those who do not.
    - Foster good relations between people who share a protected characteristic and those who do not.

27. The general equality duty does not specify how public authorities should analyse the effect of their existing and new policies and practices on equality, but doing so is an important part of complying with the general equality duty.

28. We do not envisage that these proposals will have an impact on individuals sharing the other protected characteristics under the Equality Act 2010. However, if you do have any concerns that the regulations may have an impact on people sharing protected characteristics, we would welcome your comments.

Consultation question 6

- **Do you have any concerns about the impact of the proposals on people sharing protected characteristics as listed in the Equality Act 2010? (The protected characteristics are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.)**

Responding to the consultation

We would welcome your comments by Friday 27th March 2015.

To respond to this consultation, you can:

Answer the questions online, a

Email your responses to mark.bennett@dh.gsi.gov.uk

Post your responses to:

Improving patient safety and openness - consultation

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Consultation questions

- **Q1 - Do you agree that the NHSLA should share information with the CQC when its members do not provide evidence that they have discharged their statutory duty of candour by being open with patients about the matters that result in a claim?**

- **Q2 - Do you agree that NHSLA members should meet some or all of the costs arising from a compensation claim if they cannot confirm that they have discharged their statutory duty of candour in relation to that claim?**

- **Q3 - Do you agree that any reimbursement arrangements should cover the same areas that have an offence attached in the statutory duty of candour – that is to the initial verbal notification and the content of such a notification?**

- **Q4 - Which of the four options outlined is your preferred approach, and why?**

- **Q5 - Do you have any other ideas on how candour about service failings could be incentivised through the NHSLA?**

- **Q6 - Do you have any concerns about the impact of the proposals on people sharing protected characteristics as listed in the Equality Act 2010? (The protected characteristics are age, disability, gender reassignment, marriage and civil**

partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.)