Royal College of Nursing response to the Professional Standards Authority review of the impact of the Duty of Candour

Like our members, the RCN strongly supports informing patients when things have gone wrong as an essential part of an open clinical culture that respects the autonomy of the patient. Our members who work in successful organisations tell us that that such an approach is accepted as common sense good practice. We also support regulators robustly investigating allegations of dishonest concealment against registrants, as cover-up is dangerous and defeats trust and learning.

However, we do not support the regulators becoming habitually involved in enforcing the process side of the duty of candour. We consider that regulators' efforts should be focussed upon dishonesty and lack of competence. There is a risk that if duty of candour charges are added to charges around clinical error, the response to a mistake will look disproportionate and punitive upon one individual and will make practitioners even less likely to want to admit to mistakes. Our research reveals that practitioners are already fearful about regulatory processes.

We have noted with some concern that fear of adverse consequences from employers is prevalent among our members in relation to the Duty of Candour. One of our members summed it up adroitly when she commented that there is "a tension between the duty of candour and the consequences of speaking out." This can be tackled by professional regulators and system regulators working together and sharing data effectively to ensure that employers do not treat professionals adversely when they properly exercise the duty.

We also note the inherent difficulty with the Duty of Candour, in that when something goes wrong it is easier in the immediate aftermath to identify individual failings, like a wrongly administered medication, than the system failings, like short staffing, that have also contributed. We would like to see the regulators provide reassurance that this almost inevitable limitation in the nature of the outcome of a Duty of Candour exercise are taken into account in any subsequent investigation and that apologies offered and explanations given during the candour process are reviewed accordingly.

We hope that professional regulators will be supported to respect a culture that allows professionals to develop workplaces that deliver the Duty of Candour effectively. For this, healthcare staff will need to have sufficient resource and staffing, so that there is protected learning time to reflect, to share learning, to adjust systems and train accordingly. The presence or absence of such systems should be considered as a part of all fitness to practise investigations, and the blameworthiness of the individual assessed in the light of those considerations at all times, with the learning fed back to employers.

We consider that more can be done at a structural level to support healthcare staff abide by their professional duties to speak out, which can be in a state of tension with their loyalties towards an employer or their fear of damaging consequences, through greater use of 'Freedom to Speak Up Guardians.'

We also consider that the current professional duty of candour lacks clarity as the seriousness of the harm is not described in a way that assists managers and practitioners make proportionate responses, and this increases the anxiety that surrounds the topic at

present. It would be helpful if the definitions contained in the statutory organisational duty of candour were adopted for professional regulation.

Our responses to the specific questions raised are set out below.

Questions

1. **Do you think there has been a change in professionals' attitudes to candour since 2014 (the regulators' joint statement was published in 2014)? If so, how?**

Some professionals working in well managed organisations consider that there has been a duty to be upfront with patients when something has gone wrong since the introduction of clinical governance in the 1980s and see the duty of candour as a matter of common sense. As such, some RCN members question whether the 2014 changes have any discernible and practical impact to date. This is a typical response from one member:

> *'We have systems in place for this, but I am not sure DoC changed much for those providers who were already encouraging an open and transparent culture of reporting and investigation of incidents. So we are very positive and supportive about the DoC principle, but felt that we were taking that approach already so it hasn't significantly changed how we work.'*

2. **Is possible to measure the extent to which professionals are complying with the professional duty of candour? If measurement is possible, do regulators have a role in this task?**

We do think that the extent of compliance can be measured through system regulators, as they are in a position to inspect whether an organisation has complied with the organisational duty. This is more straightforward for high profile incidents which have caused harm as the information can be cross referenced with the candour information. We also note that system regulators can, through interviews with staff, test whether there is a culture of knowledge about the duty and a habit of learning and reflection, which is also very valuable.

One senior nurse commented that in her organisation, the policy is in place but there is a lack of a systematic approach to applying it, so there is sometimes a delay in notifying patients. Overall, measuring compliance seems to belong best with systems regulators who can influence employers to support their staff well.

3. **What role do professional regulators have in encouraging candour among their registrants?**

Professional regulators have a vital role in investigating and dealing fairly but firmly with instances of dishonest cover up. Registrants should expect their regulator to treat deliberate cover up as a real danger to patient safety and unacceptable.

However, we do not think that it is helpful for professional regulators to regularly add the other aspect of candour, being the process of apologising and writing to the patient and so forth, to charges when the registrant is under investigation for an error.

The piling up of other charges that would not ordinarily attract regulatory investigation is, in our view, counterproductive as it creates an atmosphere of punitive charging. It is also unfair if some registrants attract regulatory sanction for failing to comply because the clinical error happened to be theirs, when others in their organisation are equally responsible for compliance with the duty of candour process, but face no consequence.

We are concerned that several amongst our members suggested that professionals are worried by candour because they think that admitting mistakes will lead to punishment, suggesting that they do not trust their regulator and employer to deal fairly and proportionately with genuine error. We fear that regulators adding additional candour charging in situations where there is no question of cover-up, could simply add to a culture of blame rather than openness.

4. **If regulators have a role in encouraging candour, have professional regulators been successful in carrying out this task?**

We have seen a great increase in dishonesty charging by the NMC over the past few years and we consider that the NMC is treating alleged attempts to cover-up more assiduously in recent years than ever before. We have seen dishonesty charged for almost all instances where a written record is at odds with the actual history. For example, in a typical case, a nurse had filled out a MARR chart before administering medication, and then became unwell during the shift, so that the medication appeared to have been given but in reality had not. Dishonesty was charged even though there was no evidence that the nurse had tried to cover up a mistake. Whilst filling out a record beforehand is poor practice, and may deserve sanction, it is not dishonest if the intention was to complete the action. We could cite many such cases, and it is our anecdotal experience that a high proportion of such dishonesty charges are not found proven by panels.

If anything, we would ask that more care is taken in relation to charging dishonesty at the NMC so that there is actual evidence for dishonesty before it is charged, given how distressed registrants will be in the face of such a charge. We do take the view that the NMC treats cover-up allegations with great seriousness and in this way, the NMC supports that aspect of encouraging candour.

5. **Can professional regulators do more to encourage candour? If so, what?**

Our primary concern is that nurses and midwives should not find that compliance with the duty of candour leads to them facing arbitrary repercussions for exercising their duties. A clear statement by professional regulators that this will not be the case would be welcomed.

Some of our members commented about the general weight of form filling that they encounter in their daily work lives, which detracts from their ability to focus upon the direct care that they would like to give to patients. If there is additional pressure from regulators to include the process aspects of delivering the organisational duty of candour, then this could weigh upon nurses further.

6. **What barriers are there to professionals behaving candidly?**

The duty of candour as set out on this questionnaire as well as in the NMC Code and the joint guidance lacks clarity about the severity of incidents that should be reported. We have had a comment by a member as follows:

> "In my own organisation, duty of candour is enforced and managers are questioned if it is not acted upon when a patient safety issue occurs. This can be difficult for clinicians in end of life cases where care has not been as good as it should have been but has not caused or accelerated the patient's death, but being honest with family can cause further distress. There is certainly a challenge in managing these few cases."

The organisational duty of candour is better because it sets out how serious the harm has to be before the duty of candour process must be initiated. It requires the incident to be at least at the level of moderate harm and the regulation then clearly defines what this harm level means, as follows:

"moderate harm" means—

a. harm that requires a moderate increase in treatment, and

b. significant, but not permanent, harm;

"moderate increase in treatment" means an unplanned return to surgery, an unplanned re-admission, a prolonged episode of care, extra time in hospital or as an outpatient, cancelling of treatment, or transfer to another treatment area (such as intensive care);

It is our view that the NMC Code and Joint guidance suffer from a lack of specificity which then make it harder for professionals to know when they need to comply, and therefore less able to do so and even, as in our example, sets up a tension between the managers and clinicians. In the joint guidance there is even a discussion about whether near misses should be reported to patients and families, without much of a steer about when this should take place. However, there is at least a recognition in that section that reporting that things have gone wrong can be distressing for patients and their families and allows the health professionals to take this into account.

In our view, the regulators and the PSA could assist by giving clearer, less open ended guidance so that health professionals have the confidence to comply that comes from clarity about the expectation on them.

Additionally, there can be an unwelcome disparity between stated policies and the actions of employers and regulators towards individuals. Professionals must be able to trust that compliance with this duty does not lead unfairly to disciplinary action being taken.

7. **How do professionals perceive the professional duty of candour?**

Professionals are in favour of a professional duty of candour in that they recognise that openness and honesty are vital in the delivery of safe care.

8. **What materials or guidance relating to candour do professionals refer to?**

Members refer to the use of employers' policies, the NMC Code and guidance, RCN guidance and MDO and Indemnity provider guidance. Interestingly, those who responded did not refer to the regulations and guidance relating to the organisational duty of candour as set out in the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014: Regulation 20.

9. **What do you recommend could be done in your sector and/or others to better encourage candour?**

From the responses of our members, we are concerned to see quite a persistent fear that compliance with the duty of candour may lead to increased risk of a punitive response from the regulators and employers. We consider that the regulators should make it clear that their role is not punitive, that they will take a proportionate approach towards errors, will take context into account and will treat dishonest cover up, rather than mistakes and failures to deal properly with processes, severely. We are encouraged by the proposed fitness to practise strategy at the NMC, which is currently under consultation. We think that an emphasis on context, and taking account of whether there is a culture that allows for reflection and learning, will encourage better compliance with the duty of candour

Some members also questioned whether the duty could be better explained using more everyday language than a duty of candour. The role and purpose of the duty could be more clearly explained, with a particular need to focus on using it as an opportunity to learn rather than punish, and greater clarity that apologies and disclosures are not admissions of guilt, fault or liability.

In NHS Trusts there is now a system of 'Freedom to Speak Up Guardians' who support individuals who wish to speak out. The structure that such a system can provide, connecting the most senior staff with issues on the front line and protecting staff in the process, is not yet available for nurses working in General Practice nor in the independent sector. We would encourage the PSA to consider ways to support the extension of this system, and to use their influence for making it a contractual requirement for private contractors, for example.

10. **How does your organisation encourage professionals to behave candidly?**

The RCN has a guide to the Duty of Candour on its website, which points the reader towards the joint NMC and GMC guidance and to the Francis 'Freedom to Speak Up' review.