



ENABLE Scotland

Leading the way in learning disability

Consultation on Proposals to Introduce a Statutory Duty of Candour for Health and Social Care Services

ENABLE Scotland Response
January 2015

About ENABLE:

ENABLE Scotland is the largest voluntary organisation in Scotland of and for children and adults who have learning disabilities and their families. We have a strong voluntary network with around 5000 members in 44 local branches and via individual membership.

Around a third of our members have a learning disability. ENABLE Scotland campaigns to improve the lives of people who have learning disabilities and their families and carers. ENABLE Scotland provides social care services to more than 2,000 people across Scotland who have learning disabilities or mental health problems.

In Summary:

ENABLE Scotland is pleased to see the Scottish Government taking forward actions to reflect the learning from the Winterbourne scandal by bringing forward proposals to protect the dignity and rights of vulnerable adults, including those who have learning disabilities.

We therefore welcome the proposed introduction of a statutory duty of candour on organisations providing health and social care. We advocate that the proposed statutory should apply across the spectrum of health and social care provision.

However, in order to best achieve its intended consequences, ENABLE Scotland would emphasise that this proposed new duty and associated requirements must fit properly with existing landscape of regulation without creating duplication or unintended gaps.

We are pleased to be able to offer comment at this initial stage, and are keen to be involved in ongoing dialogues around the development of this new duty.

**Annex B
CONSULTATION QUESTIONNAIRE**

Question 1:

Do you agree that the arrangements that should be in place to support an organisational duty of candour should be outlined in legislation?

Yes No

ENABLE Scotland welcomes the proposed introduction of a statutory duty of candour on organisations providing health and social care. We advocate that the proposed duty should apply across the spectrum of health and social care provision.

ENABLE Scotland believe that is right that any patient harmed by the provision of a health or social care service is informed of the fact and an appropriate remedy offered, regardless of whether a complaint has been made or a question asked about it.

ENABLE Scotland would emphasise that the offence should cover all health and social care settings; this would include the health and social care settings provided by the third/voluntary sector. We would therefore suggest that those health and social care settings listed at paragraph [5.1] should extend beyond organisations providing services regulated by the care inspectorate.

ENABLE Scotland would suggest that, in light of the proposal to include children within the scope of the new duty, it is worthwhile considering whether the provisions of the proposed new statutory duty should extend to education settings. Recent reports on the alleged misuse of seclusion and restraint in a specialist school setting in Scotland ¹ demonstrate the need for transparency and accountability in regards to harm that has occurred in education settings.

Question 2:

Do you agree that the organisational duty of candour encompass the requirement that adequate provision be in place to ensure that staff have the support, knowledge and skill required ?

Yes No

ENABLE Scotland would emphasise that detailed guidance would be required in order to ensure consistency in approach. ENABLE Scotland would suggest that the development of an appropriate national training tool

¹ <http://disabilitynewsservice.com/2014/11/second-council-failed-act-special-school-abuse-allegations/>

would aid implementation of this duty.

Question 3a: Do you agree with the requirement for organisations to publically report on disclosures that have taken place?

Yes No

ENABLE Scotland supports Scottish Government's recognition at [2.7] that the proposed new duty needs to reflect and align with existing statutory reporting requirements. We would note that in order for reports to be accessible to the public, the public must know where they can find the reports, and they must be produced in an accessible format. Whilst broadly in favour of the proposed requirement to report publicly, we do have some comment on the mechanisms for this reporting.

The consultation document suggests that a separate stand-alone report on disclosures under this new duty will be required. ENABLE Scotland would enquire as to the necessity for public reports beyond reports that would already be made by social care providers to the Care Inspectorate; anything to be contained in the proposed public reports as 'disclosable incidents' would already be reportable to the care inspectorate as 'reportable incidents'.

We would therefore suggest that under existing reporting requirements there could be a section for recording duty of candour requirements to check that the event has also been disclosed to the relevant person and reasonable support has been put in place.

Otherwise we would be concerned that this will create unnecessary administrative duplication.

Question 3b: Do you agree with the proposed requirements to ensure that people harmed are informed ?

Yes No

However, we do have some further comment.

ENABLE Scotland would recommend that the 'relevant person' referred to in section [6] as the recipient of the disclosure of harm should be clearly defined. The individual who has suffered harm will, in most instances, be the recipient of information about the incident and the apology. But consideration will need to be given to who is the relevant person where the person harmed lacks mental capacity or is under 16 or is not competent to make a decision in relation to their care and treatment.

A definition of 'relevant person' would be essential to determine if that encompasses parents for the under 16s and guardians/ attorneys for people under Adults with Incapacity (Scotland) Act. For the adults who are not subject to an order under Adults with Incapacity (Scotland) Act, but who would be unable to fully understand the process surrounding an incident, consideration needs to be given to who would provide that assistance.

The proposed requirements to ensure that people harmed are informed should also contain a requirement of accessible communications. ENABLE Scotland emphasise that when informing a person with a learning disability of harm that has occurred, disclosures must always be appropriate and accessible.

Any written communication (formal apology, confirmation of actions taken, summary of face-to-face meetings) provided to the person who has been harmed must be provided in an accessible format appropriate to the individual's needs. For example if the person has a learning disability, written information should always be provided in Easy Read. This would also apply where the person harmed is a child and their parent has a learning disability.

When informing children and young people of harm that has occurred, this should always take place in the presence of an appropriate adult, usually the parent or carer. Disclosure to children and young people should be undertaken by a member of staff who is experienced in working with children and who has the necessary communication skills. This is particularly important when communicating with children and young people with no or limited verbal communication skills who may require to be communicated with using different methods e.g. BSL, Makaton, Talking Mats.

Article 12 of the UNCRC emphasises that children have the right to express their views and have their opinions taken into account when adults are making decisions that affect them. This principle should be carefully adhered to in situations where a disclosure is being made.

On the requirement on an organisation to provide an apology at [6.7], ENABLE Scotland's practice would always be to apologise where appropriate, but we would suggest that introducing a formal duty to apologise raises some issues.

Firstly, insurers in some circumstances will advise against the issuance of an apology in case this amounts to an admission of liability. Secondly, we would argue that the requirement to apologise diminishes the value of any apology to individuals and family members.

We would suggest therefore that it must be made clear that an apology, offer of treatment or other redress, shall not of itself amount to an admission of negligence or breach of statutory duty. An apology under this duty should not be viewed as the same as an admission of legal liability.

Question 3c: Do you agree with the proposed requirements to ensure that people are appropriately supported ?

Yes No

ENABLE Scotland would highlight that "Reasonable support" at [6.3] should be defined, though not exhaustively, within detailed guidance – the type of support offered should be tailored to the individual's or family's needs and could include advocacy, counselling, legal advice, support from a third sector organisation or other agency/individual as appropriate. A child or young person may require specialist support from a play therapist, youth counsellor, psychologist or other trained professional; they may also require additional support for learning at school if the incident has impacted on their education in some way.

ENABLE Scotland would again suggest that a national training tool should accompany guidance, ensuring consistency in approach to staff training across health and social care settings.

Further, we recommend that further consideration be given to liability for the provision of ongoing appropriate support. Please see our response to [Q.5] below for further detail on this point.

Question 4:

What do you think is an appropriate frequency for such reporting ?

Quarterly Bi-Annually Annually Other (outline below)

As per our response to Question [3a], it is our understanding that 'disclosable events' would already be immediately reportable to the regulator under existing reporting requirements. ENABLE Scotland would seek further clarity on what is to be achieved by this additional reporting element and what this would look like in practice.

We would suggest that under existing reporting requirements to record and report an event to the relevant Inspectorate, when an incident takes place there could be a section for duty of candour to check that the event has been disclosed to the relevant person and reasonable support has been put in place. These would be immediately reportable and then it would be for the regulator to compile these statistics for regular reporting.

In any case, it will be important to make the information public as quickly as

possible in the interests of transparency. ENABLE Scotland would suggest therefore that quarterly public reports could be compiled by the regulator, using specific data from regulated organisations' immediate incident reports.

Question 5:

What staffing and resources that would be required to support effective arrangements for the disclose of instances of harm?

At [2.8] Scottish Government recognises that disclosure of harm requires advanced communication skills. The proposed duty of candour will create a clear training need. ENABLE Scotland would again emphasise that a national training resource would help relieve some of the pressure on resources in this respect.

ENABLE Scotland would emphasise in relation to the 'public reporting' requirement this could impact of staffing and resources if not implemented in a way which avoids duplication. We have made suggestions as to how to avoid to duplication in our responses to questions [3a] and [4].

In general, we would like to highlight the need for consideration as to where the financial burden of additional, and potentially, ongoing support as a result of a disclosure for an individual.

There is a recognised inherent risk in the provision of social care. ENABLE Scotland would suggest that the financial burden aligned to that risk does not lie solely with the provider but must also apply to the commissioner of social care services.

For example, ENABLE Scotland would already in practice put in place support for people who had been harmed. It should be noted that the provision of this reasonable support has associated additional costs. Would the expectation be that this is the responsibility of the support provider? Or would the responsibility lie with the commissioner to reassess the support required by the individual in order to meet changing circumstances.

Question 6a:

Do you agree with the disclosable events that are proposed ?

Yes No

ENABLE Scotland agree with the basic principle at [9.9] as a starting point for developing the definition of 'disclosable events'. As it stands there appears to be a relatively high threshold for 'disclosable events'. Scottish Government may well wish to look to align this with incidents that would

currently be reportable to the regulator.

ENABLE Scotland would be keen to work with Scottish Government in the development of this definition.

Question 6b: Will the disclosable events that are proposed be clearly applicable and identifiable in all care settings ?

Yes No

As it stands the disclosable events in chapter [3] would not necessarily be clearly applicable and identifiable in all care settings. ENABLE Scotland would emphasise that it is essential that the disclosable events be clearly applicable and identifiable in all care settings to all staff. ENABLE Scotland would emphasise that to achieve this detailed guidance and a national training tool will be essential.

ENABLE Scotland would be keen to work with Scottish Government in the development of this definition.

Question 6c:

What definition should be used for 'disclosable events' in the context of children's social care?

The definition should cover any unintended or unexpected event that occurred or was suspected to have occurred that resulted in death, injury or prolonged physical or psychological harm or that has had an adverse impact on the child's physical, psychological or cognitive development.

The definition should explicitly take account of children's rights as enshrined in the UNCRC. These rights would include:

- Article 3 – any decisions taken must be in the best interests of the child
- Article 6 – the child has the right to life, survival and healthy development
- Article 12 – respect for the views of the child
- Article 19 – protection from harm and mistreatment of any kind
- Article 23 – right of disabled children to special care and support
- Article 24 – right to receive good quality healthcare.

Question 7

What are the main issues that need to be addressed to support effective mechanisms to determine if an instance of disclosable harm has occurred ?

ENABLE Scotland emphasise that clear guidance must be issued and suggest that this is accompanied by a national training tool. This would

ensure consistency in approach to implementing procedures necessary to support an organisational duty of candour.

Complementing as it does the existing suite of policy and legislation such as the Adult Support and Protection (Scotland) Act 2007, the Children (Scotland) Act 1995, Protection of Vulnerable Groups (Scotland) Act 2007, and the Children and Young People Act (Scotland) 2014, and the Child Protection Guidance, the proposal has the potential to add a further layer of complexity to decision making around instances of harm and protecting vulnerable adults and children.

There may be opportunity to mirror the mechanisms currently in place adult and child protection.

A national training tool would also aid uniformity in the determination of instances of disclosable harm.

Question 8:

How do you think the organisational duty of candour should be monitored ?

ENABLE Scotland suggest that a regulatory body would have responsibility to oversee organisations. This should be within the existing monitoring, regulation and scrutiny mechanisms that are already in place e.g. for ENABLE Scotland and other social care providers this would be the Care Inspectorate.

Question 9:

What should the consequences be if it is discovered that a disclosable event has not been disclosed to the relevant person ?

ENABLE Scotland agree that consequences must be in place for failure to disclose an event to the relevant person.

ENABLE Scotland suggest regulators would use their existing regulatory powers, for example, Care Inspectorate reflecting in grades awarded.

ENABLE Scotland also emphasise that consequences should exist for the failure to disclose a disclosable event to the regulator.

End of Questionnaire