Browne Jacobson

The Care Quality Commission (CQC) prosecutes an NHS Trust for the first time for breach of the Duty of Candour

In September 2020, for the first time the CQC successfully prosecuted an NHS Trust for breaching the Duty of Candour. It is important for all NHS organisations to take heed of this prosecution and review the approach that is being taken in your organisation to candour.

12 October 2020

In September 2020, for the first time the Care Quality Commission (CQC) successfully prosecuted an NHS Trust for breaching the Duty of Candour. The CQC has issued fines and warnings for similar breaches in the past, but this is the first time it has taken a Trust to court since the statutory Duty of Candour was implemented in 2014.

It is important for all NHS organisations to take heed of this prosecution and review the approach that is being taken in your organisation to candour. Trusts must go beyond compliance with the strict requirements of the statutory duty and embed a culture of candour across the whole organisation.

Statutory Duty of Candour – the legalities

The statutory Duty of Candour was implemented by Regulation 20 of The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014.

Under Regulation 20, the statutory sanctions come into play when there has been a “notifiable safety incident” which then triggers the statutory Duty of Candour. A notifiable safety incident is: any unintended or unexpected incident that could result in, or appears to have resulted in—

1. The death of the service user; or
2. Severe harm, moderate harm or prolonged psychological harm to the service user.

The service user (or other relevant person lawfully acting on their behalf) must be given notification of such an incident as soon as is reasonably practicable after the Trust becomes aware of it. The notification must:

1. Be given in person;
2. Provide a true account of the facts known about the incident at that time;
3. Explain what further investigation will take place;
4. Be recorded in writing; and
5. Include an apology i.e. an expression of sorrow or regret. It is important to remember that an apology does not automatically equal an admission of liability. This should be a straightforward apology essentially saying “we are sorry for what has happened”. It is not an admission that you have caused the incident to happen.

This initial notification must be followed up with a written notification containing all of the information given at the notification meeting, details of any proposed investigation into the incident and an apology. The results of any investigation must be provided to the service user or relevant person in a timely way. The Trust must keep a copy of all correspondence.

The Duty of Candour is policed by the Care Quality Commission (CQC), which is the lead monitor for compliance. This monitoring is undertaken by inspection (and therefore compliance with Duty of Candour could have an effect on a hospital’s inspection rating). The

CQC does have the power to bring a criminal prosecution against the organisation if it identifies that the Duty of Candour is breached. The fine imposed may be up to £2,500. A prosecution can cause significant reputational damage for Trusts and attract further scrutiny from the CQC.

It is worth noting that whilst doctors and nurses will not be personally liable in terms of criminal sanctions, where the CQC identifies a breach of the Statutory Duty of Candour it can also bring a prosecution against an individual Director or Senior Manager at the Trust in exceptional cases.

The Culture of Candour

In addition to the Statutory Duty of Candour, Trusts also have a general duty of candour which requires Trusts to act in an open and transparent way with people who use their services. This general duty has no statutory sanctions attached. It is important to note the distinction between the statutory Duty of Candour and the general duty to be open and transparent, but they are inextricably linked. Trusts should not get too hung up on the legalities here and instead seek to embed a “culture of candour” within your organisation.

CQC Prosecution

The CQC has recently taken a Trust to court for breach of the statutory Duty of Candour for the first time. The prosecution related to the handling of the death of 91 year old Elsie Woodfield at Derriford Hospital, which is part of University Hospitals Plymouth NHS Trust. Ms Woodfield’s oesophagus was perforated during an endoscopy. The court heard that the Trust's incident report did not conclude her death was a Serious Incident and so her family were not adequately informed about the death at that time. After a complaint was filed by Ms Woodfield's daughter, the Trust emailed her a statement but the court heard that this "failed to provide an account of all the facts" and Ms Woodfield's daughter had to "piece things together" and was left with many unanswered questions.

The magistrate in this case fined the Trust £1,600 and ordered the Trust to pay legal costs of £10,845.43 and a victim surcharge of £160. The fine was reduced to reflect the Trust’s guilty plea. The case was widely reported in the media. It was reported that the magistrate commented in open court that the fine was not sufficient to cover the distress caused to Ms Woodfield’s family.

Although the prosecution related to the breach of the statutory Duty of Candour, the magistrate referred throughout to the Trust’s general duty to be open and transparent. The court was concerned with whether the Trust had acted openly and transparently and not just with whether they had complied with the technical requirements of the statutory Duty of Candour.

This case acts as a timely reminder to all NHS Trusts about the importance of embedding a culture of candour. If we can assist you with reviewing your Duty of Candour Policy or procedures or with your programme of learning to support a culture of Candour please do not hesitate to contact us.

Co-authored by Nicola Evans and Ed Pollard.

Contact

Nicola Evans

Partner

Nicola.Evans@brownejacobson.com

+44 (0)330 045 2962

Related expertise

Commissioner and integrated care systems

Health and life sciences