

# Candour and criminal defence:

## a problem for providers and managers in the health and social care sectors

Care providers are more likely than ever to be held criminally responsible following deaths as prosecutors have got to grips with new offences which concentrate on organisational criminal responsibility. This coincides with unprecedented levels of regulatory oversight and the introduction of compulsory self-reporting of serious incidents to the Care Quality Commission (CQC) and service users. Care providers must meet these regulatory obligations without undermining the right of the organisation and management in criminal investigations and prosecutions.

### Duty of candour

The statutory regime governing notification of incidents has been overhauled to accommodate the role of the CQC. Regulations require organisations and individuals to report all deaths, serious incidents, and allegations of abuse and neglect to the regulator. The Health and Social Care Act 2008 (regulated Activities) Regulations 2014 introduced a 'duty of candour' requiring providers to inform resident's or their families as soon as reasonably practicable.

These obligations are understandable, and have not been specifically drafted with a view to exposing care providers to the risk of criminal investigation. However, the duty to notify sits uneasily with long established rights under the criminal law including the right of silence and the privilege against self-incrimination.

There is a danger that a premature or poorly drafted notification may include admissions of criminal liability and great care must be taken in how they are worded.

### Internal investigations and interviews

Most organisations will wish to understand for themselves what caused or contributed to any serious incident so as to learn from it and take action to ensure it isn't repeated. If

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a criminal investigation occurs statements made in internal interviews can be seized by the police and badly written statements may inadvertently incriminate home owners or managers or may omit material which may exonerate them. If a lawyer is involved in this process then in certain circumstances their work may be the subject of the organisation's legal privilege which protects it against disclosure to any third party, including law enforcement or a regulator.

If a care provider knows that the police or the CQC are already conducting a criminal investigation it is highly advisable to tell them that the organisation wishes to interview witnesses in case they object. The investigators will usually wish to get first accounts from the most important witnesses. If they find out from the organisation's own staff that they have been interviewing employees it may create suspicion of a cover up.

### Investigations and interviews by law enforcement

Most organisations will wish to cooperate with criminal investigators but there is nothing uncooperative in examining the requests made to check that they are lawful, relevant and proportionate.

The police have wide powers to gather evidence including voluntary requests and the use of production orders requiring disclosure of evidence. After making an arrest the police have extensive powers of seizure leaving the organisation with little control over what is taken and how that may affect its operations.

Frequently, law enforcement will start with a long list of material (including

confidential records) it seeks from a care provider on a voluntary basis. There may be real legal difficulty with compliance with such requests and it may be necessary to challenge them.

The police will interview people either as witnesses or as suspects. If they are witnesses it is voluntary although some agencies (eg Health and Safety Executive) have compulsory powers to interview witnesses but the questions and answers in compulsory interviews cannot be used against the individual if they are charged except in very limited circumstances. It is very important that the status of interviewees is clearly established as those interviewed as suspects have greater rights including right to legal representation and the right to silence. If the organisation itself is under suspicion the question arises as to who should attend an interview under caution on behalf of the organisation. It is essential that it is not someone within the management who may themselves be a suspect due to the risk of questions being asked about their own conduct as well as that of the organisation. The solution is to nominate somebody who had no role in the incident or to provide a written statement.

In the scrutiny following a resident's death care homes can be forced to act as both investigators and suspects. Navigating this process requires a delicate balance between being candid where possible and guarded where necessary. It is not a failure of openness to keep the relevant persons informed of any failures that are identified, however serious they may be, whilst still seeking to ensure that safeguards in criminal law are maintained. ct