

Response to Welsh Assembly Consultation on the *Health and Social Care (Quality and Engagement) (Wales) Bill*

NWSSP Legal & Risk Services, 2nd August 2019

1. NWSSP Legal & Risk Services (“L&RS”) welcomes the introduction of the *Health and Social Care (Quality and Engagement) (Wales) Bill* (“the Bill”), in particular in regard to the strengthening of the existing duty of quality on NHS bodies and the establishment of an organisational duty of candour on providers of NHS services.
2. L&RS sets out below some brief comment as to the Bill. In providing these comments, L&RS note the intention to consult with stakeholders as to the drafting of the accompanying Regulations and Guidance, and as to amendments to the *NHS (Concerns, Complaints and Redress Arrangement) (Wales) Regulations 2011*. In light of the expertise of L&RS in the area in question, we should be pleased to provide assistance and request to be a member of the working group.
3. L&RS also consider that this may be an opportune time to consider more wide-ranging amendments to certain aspects of the *NHS (Concerns, Complaints and Redress Arrangements) (Wales) Regulations 2011* which have caused practical difficulties both for complainants and Health Bodies.

Part 2 – Improvement in Health Services

4. L&RS note that the Bill will introduce a duty on both Welsh Ministers and Local Health Boards, NHS Trusts and Special Health Authorities to secure quality in health services, particularly with regard to the effectiveness and safety of health services, and the experience of individuals to whom health services are provided. Whilst the duty of quality is being reframed, it does not appear to be the intention of the Bill to create any new liability for claims that does not presently exist.

Part 3 – Duty of Candour

5. L&RS notes the introduction of an organisational Duty of Candour. The detail in terms of definitions and processes is to be set out in accompanying Regulations and Guidance. L&RS agrees that this is the sensible approach as it will be in line with the structure of the existing *NHS (Concerns, Complaints and Redress Arrangements) (Wales) Regulations 2011* and allow sufficient flexibility for processes to be amended as required.
6. As above, L&RS would welcome the opportunity to be a member of the working group consulting on the Regulations and Guidance.
7. Where the Bill refers to the processes set out in the proposed Regulations and Guidance, it will be essential for those to either be written into the *PTR Regulations (NHS (Concerns, Complaints and Redress Arrangements) (Wales) Regulations 2011)*, or to be entirely

consistent with those Regulations. The process needs to be absolutely clear in terms of how the existing duties and processes will fit in with the detail of the Duty of Candour.

8. The Duty of Candour provisions will apply to NHS bodies, defined for the purposes of the Bill as Local Health Boards, NHS Trusts, Special Health Authorities and Primary Care Providers providing health care on behalf of a Local Health Board. The impact of this, particularly in terms of Primary Care Providers, is broad and alongside the training for Health Bodies (as outlined in the Regulatory Impact Assessment) it is anticipated that additional time will need to be spent raising awareness and providing training to primary care providers. The GMPI Team at L&RS may also be required to assist GP Practices in complying with their obligations to prepare reports under Part 3(5) of the Bill. This will impact upon workload. There may also be an implication for HEIW in respect of GP and other trainees for whom it is responsible.
9. L&RS note the conditions for the proposed Duty of Candour as set out in Part 3(3) of the Bill, which will be defined further.
10. L&RS note the reference in the Explanatory Memorandum that the triggering of the Duty of Candour does not indicate that “*the NHS body has acted negligently*”, meaning that there should be no inference that legal liability exists. That principle should be made clear in the accompanying Regulations and Guidance and the processes should clarify how the Health Body’s existing duties to investigate Qualifying Liability under the *NHS (Concerns, Complaints and Redress Arrangements) (Wales) Regulations 2011* will sit alongside or form part of the new process.
11. L&RS note that the Bill defines “harm” as including “*psychological harm, and in the case of a service user who is pregnant, loss of or harm to the unborn child*”. The Explanatory Memorandum states that further guidance will be shared to ensure that providers and service users are clear as to what level of harm must be suffered before the duty of candour is triggered. In doing so, it is sensibly recommended that the working group will have regard to existing definitions of harm.
12. L&RS recommend that comment is made in the Regulations and Guidance such that nothing within them should have any impact upon the existing principles of Litigation Privilege or Legal Professional Privilege. This inevitably must be the case since justice is not a devolved area, but explicit provision may assist in avoiding uncertainty and argument.

Parts 4 and 5

13. L&RS notes but does not offer comment at this time upon the other elements of the Bill, i.e. the replacement of the Community Health Councils with a Citizen Voice Body and the provisions for appointment of Vice Chairs for NHS Trusts.