Appendix A to Opening Statement on behalf of GHG

Public Authorities and the *Duty of Candour*

1. The problem of public authorities and officials acting defensively where things have gone wrong has long been recognised. In recent times a series of inquiries have referred to the existing *duty of candour* and the need to codify the law. Provisions are already in place in the healthcare context and the bereaved Hillsborough families are currently promoting a draft law to codify and strengthen already existing common law and human rights law jurisprudence in this area.[1]

2. Institutional defensiveness and the cultures of denial are anathemas to fact-finding and accountability. They interfere with the process of learning from past errors and remedying flawed processes and policies. Cultures of denial protect corrupt and incompetent officials and sponsor impunity. Together, institutional defensiveness and denial cultures corrode public confidence in public authorities and services.

Recent Inquiries considering the duty of candour of public officials and institutions

3. *The Mid Staffs NHS Foundation Trust Public Inquiry 2013* (The *Francis Inquiry*) recommended a statutory 'duty of candour' with criminal sanction for professionals and managers who mislead the public. [2] That recommendation led directly to the 'duty of candour' imposed by *Regulation 20* of the *Health and Social Care Act 2008 (Regulated Activities) Regulations 2014* and the imposition of a similar duty into the *NHS Standard Contract 2014/2015*[3].

[1] http://www.thehillsboroughlaw.com
[2]http://webarchive.nationalarchives.gov.uk/20150407084003/http://www.midstaffspublicinquiry.com/sites/default/files/report/Executive%20summary.pdf at p75, recommendation 1.181.
[3] Appendix 5

4. The Equalities and Human Rights Commission inquiry: '*Preventing Deaths in Detention of Adults with Mental Health Conditions 2014/15*'[4], recognised the same lack of transparency and accountability and recommended that a 'duty of candour' similar to *Regulation 20* be extended to prisons, police stations and mental health institutions.

5. '*The Report of the Independent Review into Self-Inflicted Deaths in Custody of 18-24 year olds'*[5] (July 2015: The *Harris Review*) raised the same point and made a recommendation to impose an analogous 'duty of candour' to prevent what the review expressly referred to as "institutional defensiveness".

6. While *Regulation 20* was a step forward, its limitations have already been noted. Since the introduction of this codified duty in the 2014 Regulations and the NHS Standard Contract, there have been concerns raised regarding compliance. For example, in Parliamentary debates concerning the *Mazars Report* (2015) into the failings at Southern Health NHS Foundation Trust following the death of Connor Sparrowhawk, Lord Prior referred to there being "almost a tick-box approach to the duty of candour; you tick the box to say that you have done it" but no cultural shift at the Trust towards openness, transparency and accountability.[6]

The common law principle

7. The fundamental requirements placed upon public authorities in public law are well known: they must act within legal provision and principle, they must act with procedural fairness, they must act rationally, and where fundamental

[4]https://www.equalityhumanrights.com/sites/default/files/adult_deaths_in_detention_inquiry_report.pdf, at p21, recommendation 3.
[5] http://iapdeathsincustody.independent.gov.uk/wp-content/uploads/2015/07/Harris-Review-Report2.pdf at 7.14-7.17.
[6] Ref: Hansard, 3 May 2016, Col 1375: https://hansard.parliament.uk/lords/2016-05-03/debates/16050325000362/SouthernHealthNHSFoundationTrust

rights are involved they must act proportionately. In short, public authorities must act *intra vires* and fairly, both procedurally and substantively.

8. An underpinning aspect of these requirements is a duty of candour both to the court and to the public. The classic statement of the 'duty of candour' in public law proceedings was set out in: *R v Lancashire County Council, ex p Huddleston [1986] 2 All ER 941*, per Lord Donaldson MR at p945; it arises from:

> *"...the relationship between the courts and those who derive their authority from the public law, one of partnership based on a common aim, namely maintenance of the highest standards of public administration"* .

9. In *R (Quark Fishing Ltd) v SS for the FCO [2002] EWCA Civ 1409 (CA) per Laws LJ at 50*, the '*real question*' was:

> *"... whether in the evidence put forward on his behalf the Secretary of State has given a true and comprehensive account of the way the relevant decisions in the case were arrived at".*

10. This requires telling the whole truth, not just those aspects which suit the public body, *R (Wandsworth LBC) v SoS for Transport [2005] EWHC 20 (Admin), per Sullivan J at para 250*:

> *"...It is most important that officials providing Witness Statements on behalf of public bodies, in particular Government Departments, in Judicial Review proceedings, should remember that their obligation to tell the truth to the Court does not mean that the Court need only be told so much of the truth as suits the Department's case, and that inconvenient parts of the truth may be omitted from their evidence. In Court, a witness is not merely obliged to tell the truth and nothing but the truth, but also to tell the whole truth. A statement that is only partially true is as capable of being misleading as a statement that is untrue."*

11. Whereas the above cases directly relate to judicial review proceedings, the *principle* relates to public authorities providing the court with the full picture to allow for it to reach a proper conclusion. It amounts to a positive duty to assist the court in its administration of justice, unless there is some countervailing and stronger public interest. It is therefore not confined to judicial review proceedings.

12. In criminal law the public authority is a party vested with the duty to prosecute but it also has a positive duty as 'minister of justice' to protect the process and avoid a miscarriage of justice. The public interest in such a duty is equally compelling in the context of a public authority's role as an interested person or core participant before an inquest or a public inquiry which are themselves public law proceedings. The fact that they are 'interested persons' or 'core participants' rather than 'parties' is nothing to the point: the risk of the tribunal reaching a wrong conclusion or being misled is just as real.

13. In *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363, [68], the essence of this duty was distilled and expressed as a legal standard on a level with due process, albeit in the context of a promise or practice adopted by a public authority, per Laws LJ:

"68. The search for principle surely starts with the theme that is current through the legitimate expectation cases. It may be expressed thus. Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition? It is not far to seek. It is said to be grounded in fairness, and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public. In my judgment this is a legal standard which, although not found in terms in the European Convention on Human Rights, takes its place alongside such rights as fair trial, and no punishment without law. That being so there is every reason to articulate the limits of this requirement to describe what may count as good reason to depart from it as we have come to articulate the limits of other constitutional principles overtly found in the European Convention. Accordingly a public body's promise or practice as to future conduct may only be denied, and thus the standard I have expressed may only be departed from, in circumstances where to do so is the public body's legal duty, or is otherwise, to use a now familiar vocabulary, a proportionate response (of which the court is the judge, or the last judge) having regard to a legitimate aim pursued by the public body in the public interest. The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances.

69. This approach makes no distinction between procedural and substantive expectations. Nor should it. The dichotomy between procedure and substance has nothing to say about the reach of the duty of good administration".

14. In summary, the obligation on public authorities in public law proceedings generally, is to deal straightforwardly and consistently with the public, to act with transparency to further the interests of justice. It does not allow of tactical devices to avoid accountability and responsibility.

Fundamental rights law

15. A long line of cases has established that there is a duty on the state to thoroughly investigate, including through an independent and effective judicial mechanism, circumstances surrounding a death where it is alleged that the state had a responsibility. This duty is established in domestic law[7] and in Strasbourg.[8]

16. The underlying principle is a general '*right to truth*'. In *El Masri v Macedonia [2013] 57 EHRR 25*, at [1912], in the context of "extraordinary rendition", the Grand Chamber referred to the "right to truth", not only for the applicant but other such victims and the general public. The GC stated: "...an adequate response by the authorities in investigating allegations of serious human rights violations, as in the present case, may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts."

17. Similarly, in *Husayn (Abu Zubaydah) v Poland* [2014] ECHR 834 (Fourth Section), which was also a rendition case, the court said at [488]:

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[7] R *(on the application of Amin) v Secretary of State for the Home Department* [2004] 1 AC 653, at [1617] the HL traced statutory recognition of the duty on Coroners to investigate deaths in custody to determine whether any responsibility lay on the custodian to 1276.

[8] *Ireland v UK (197980) 2 EHRR 25* at [161], *Salman v Turkey [2002] 34 EHRR 17* , at [99-100], *Amin (above cited)* at [20], and R *(on the application of Middleton) v West Somerset Coroner and another [2004] 2 AC 182,* at [5]

"Where allegations of serious human rights violations are involved in the investigation, the right to the truth regarding the relevant circumstances of the case does not belong solely to the victim of the crime and his or her family but also to other victims of similar violations and the general public who have the right to know what has happened."

18. As a matter of logic those observations apply to any investigation of human rights abuses and not just to litigation between parties whether domestically or before the ECtHR.[9]

19. The '*right to truth'* carries with it obligations on the state to inform victims of the fact and circumstances of potential human rights violations and the ECtHR has acknowledged circumstances in which the failure to discharge that obligation has itself given rise to freestanding violations of fundamental rights.

20. In *Elberte v Latvia* 61243/08 ECHR 2015 the ECtHR was called upon to consider the circumstances of an applicant who was left in a state of uncertainty regarding the circumstances of the removal of tissue from her deceased husband. She had not learned of the fact of the tissue removal until two years after his death when a criminal investigation launched in Latvia into allegations of wide-scaled illegal removal of organs and tissue removal from cadavers. And she did not learn the nature and amount of the tissue removal until some five years later when she received the Government's observations in response to her case before the Court. The Court was concerned by the failure to inform the Applicant about the removal of her husband's tissue when it was carried out and the fact that she had faced a *"long period of uncertainty, anguish and distress in not knowing what organs or tissues had been removed from her husband's body, and in what manner and for what purpose this had been done"* [139]. Her rights as the closest relative had not been respected and she was faced with conflicting views on the part of the domestic authorities as to the scope of the obligations enshrined in national law which contributed to her

[9] And the chairman of the Undercover Policing Inquiry so found albeit in the separate but related context of his approach to Restriction Orders (see Chairman's Ruling, Undercover Policing Inquiry - Restriction Orders: Legal Principles and Approach Ruling May 2016 at [196])

feelings of helplessness in the face of the breach of her personal rights relating to a very sensitive aspect of her private life [140-141]. On the particular facts of the case, including the special field of organ and tissue transplantation, the failure to inform her contributed to a finding that her rights under Article 3 of the Convention had been breached.

21. In the context of Article 8 the ECtHR has recognised time and again that there may be positive obligations upon States inherent in an effective respect for private and/or family life. In determining whether such a positive obligation in fact exists, in circumstance where Article 8 is applicable, the Court has regard to the fair balance to be struck between the general interest of the community and the competing interests of the individual(s) concerned. The duty to provide information arises from the existence of a sufficient connection between the information sought and the substantive right.

22. Examples of occasions when the ECtHR has recognised the existence of a positive duty to inform under Article 8 include:

    a. *McGinley & Egan v United Kingdom* 1988 27 EHRR 1 – applicants entitled to know whether they had been exposed to radiation at Christmas Island in 1958;
    b. *Gaskin v United Kingdom* (1998) 12 EHRR 36 – applicant entitled to receive information necessary to known and to understand his childhood and early development;
    c. *Roche v United Kingdom* (2006) 42 EHRR 30 - applicant entitled to know whether he had in fact participated in tests conducted at Porton Down in the 1960s which entailed exposure to mustard and nerve gas;
    d. *Guerra and others v Italy* (1998) 26 EHRR 357 – applicants entitled to know information about the risks arising from a proximate chemical factory and how to proceed in the event that such risks materialised.
    e. *Godelli v Italy* (2012) 33783/09 – applicant entitled to non-identifying information about her birth family.

f. *KH v Slovakia* (2009) 49 EHRR 34 – applicants entitled to information concerning their health and reproductive status; and

g. *Szulc v Poland* (2013) 57 EHRR 5 – applicant entitled to know whether information relating to her private life had been stored in a secret register.

23. It is self-evident that a duty to inform under Article 8 (which is a species of the broader duty of candour for which we contend) places an obligation upon the authorities to eschew a defensive stance and to provide full and frank disclosure irrespective of the likelihood that this would in turn provoke litigation and/or criticism of state bodies.

24. Those cases establish a well-formed set of principles that have been applied in a substantial number and range of cases, such that there is now a clear and consistent line of authority setting out the very real obligations upon the state under Article 8 to inform a victim or potential victim as to the circumstances of a potential interference with that individual's rights. To the extent that the more onerous positive obligations vested in the state under Article 2 - to ensure an effective investigation - are also subject to the '*fair balance*' test identified in the Article 8 authorities, it is clear that the factors weighing in favour of disclosure are exceptionally weighty including not only the victim but the general public's interest in ensuring that the full facts are brought to light.

25. The existence of duties on state authorities to inform has also been recognised domestically. In *R (Children's Rights Alliance for England) v Secretary of State for Justice* [2013] EWCA Civ 34 the Court of Appeal was primarily concerned with a separate and distinct duty, specifically, the state's obligation not to impede access to justice and was not persuaded that there was an implicit duty upon the Secretary of State within that broader duty to actively seek out and inform individuals of their potential civil remedies against the State and/or private contractors engaged by the State. However, at [54] Laws LJ observed that

"there is a wide range of circumstances in which the state will be required both to seek and to provide information, and that such obligations may arise in the context of different Convention rights, notably articles 2, 3 and 8".

26. A domestic example of such a duty arising in the context of Article 8 arose in *MacMahon's Application* [2012] NIQB 93. Treacy J acknowledged that the failure to consult and inform a deceased's close relative about a decision to discontinue a prosecution against those arguably responsible for her partner's death in contravention of its own guidance documents engaged the right to respect for physical and psychological integrity included in Article 8. He noted the ECtHR's insistence upon rights protected by the Convention being *effective* rights [19] and held at [23]:

"*In the case of victims, in my judgment, this requires the state to desist from conduct which would, as here, significantly exacerbate the applicant's understandable feelings of distress and anguish. In my view this is incompatible with the positive obligation inherent an effective respect for private and family life and accordingly I find that Article 8 has been breached."*

27. It is therefore clear that both domestic law and Strasbourg requires frankness, transparency and positive involvement from public authorities in assisting investigations into their own activities and possible wrongdoing, as an element of adherence to the rule of law itself.

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