

DUTY OF CANDOUR & BEING OPEN – DRAFT POLICY PROPOSALS FOR CONSULTATION

Summary

In January 2018, Justice John O’Hara published his report on the Inquiry into Hyponatraemia-Related Deaths (IHRD). His first recommendation was that a statutory Duty of Candour should be enacted in Northern Ireland and that it should apply to Healthcare Organisations and everyone working for them. Justice O’Hara also recommended that criminal liability should attach to breach of this duty and to obstruction of another in the performance of this duty. He made further recommendations about the guidance, support and protection that should be provided for staff in order to create a more open culture.

In response, the Department of Health (DoH) established an Implementation Programme to take forward the recommendations arising from the Inquiry and the Duty of Candour Workstream, and its Being Open subgroup, have been responsible for developing the proposal options to address the recommendations on candour.

Through a co-production process, the Workstream and Subgroup have developed policy options for the statutory Duty of Candour and the policy framework for Being Open guidance, taking account of: research commissioned and evidence submitted; feedback from staff and service users; and input from other key stakeholders.

The DoH is now seeking your views on the following proposals developed by the Workstream and Subgroup:

- a. Policy options for the statutory organisational Duty of Candour; and
- b. Policy options for the statutory individual Duty of Candour; and
- c. The policy framework for Being Open guidance.

A detailed summary of these proposals is available [here](#) on the DoH website.

Ways to respond

The consultation opened on 12 April 2021 and will close on 2 August 2021. Stakeholders can respond by completing this questionnaire, or by submitting their own written response, to the policy proposals to:

E-mail: IHRD.implementation@health-ni.gov.uk

Written: IHRD Implementation
Department of Health
Room D1
Castle Buildings
Stormont Estate, BELFAST
BT4 3SQ

In addition, an online questionnaire is available on the Citizen Space website [here](#), which allows stakeholders the opportunity to respond to the consultation questions online.

If, for any reason, you are unable to access the electronic versions of the documents you can request a paper copy by e-mailing IHRD.implementation@health-ni.gov.uk or by writing to the address below. The consultation documents, including the questionnaire, may also be requested in an alternative format by also contacting this address.

Terminology (paragraphs 2.25 – 2.27)

1. Do you agree with the terminology and definitions adopted by the Workstream in respect of “openness” and “candour”? If yes, please provide any additional information and / or insights.

Yes; however, constraints and limitations in the definition must be positively identified and addressed to ensure the level of candour and openness required cannot be withheld or hidden.

2. If not, do you suggest a preferred terminology that should be used to describe this policy and the statutory duty? Please provide evidence to support any alternative proposal.

Statutory Organisational Duty of Candour (Section 3)

Scope (paragraph 3.8 – 3.9)

3. Do you agree with the proposed scope of the statutory organisational Duty of Candour? If yes, please provide any additional information.

I believe that there RQIA must also be subject to this duty and their findings must be publicly available in order to inform patient/client decision.

4. If not, do you have a preferred approach for the scope of the statutory organisational Duty of Candour? For example, should the scope be limited to regulated organisations that directly provide health and social care services? Please provide evidence to support any alternative proposal.

Routine Requirements (paragraphs 3.10 – 3.11)

5. Do you agree with the routine requirements of the statutory organisational Duty of Candour? If yes, please provide any additional information.

"There must be a further impetus to ensure that all such candour is timely. If such candour is not timely, further consideration must be give to the ""withholding"" of information which should have been declared earlier. Much like the ""withholding of evidence"" used in the courts.

Timely openness and candour can save lives!"

6. If not, do you have a preferred approach for the routine requirements of the statutory organisational Duty of Candour? Please provide evidence to support any alternative proposal.

Requirements – When Care Goes Wrong (paragraphs 3.12 – 3.18)

7. Do you agree with the proposed definition for the significant harm threshold for the Duty of Candour procedure? If yes, please provide any additional information.

"This should also apply to the following your of incident:

The unexpected or unexplained death of the service user, where the death relates directly to incident or provision of services which have caused the exacerbation of or increased complication of the natural course of the service user's illness or underlying condition;"

8. If not, do you have a preferred definition for the significant harm threshold for the Duty of Candour procedure? Please provide evidence to support any alternative proposal.

Statutory Duty of Candour Procedure (paragraphs 3.19 – 3.23)

9. Do you agree with the proposed requirements under the statutory organisational Duty of Candour when things go wrong? If yes, please provide any additional information or insights.

There is no link from Serious Adverse Incidents to the tour of incident which requires organisational candour. How will the public be assured that candour and openness will be applied too all incidents where harm had occurred?

10. If not, do you have a preferred approach for the requirements under the statutory organisational Duty of Candour when things go wrong? Please provide evidence to support any alternative proposal.

All incidents (not just serious harm) must be treated openly and honestly and provide the relevant person with the information required to take further action or to request a deeper investigation to reach satisfaction.

Apologies (paragraphs 3.24 – 3.26)

11. Do you agree with the proposed legislative requirement to provide an apology as part of the Duty of Candour procedure? If yes, please provide any additional information or insights.

No.

12. If not, do you have a preferred policy approach in respect of apologies in circumstances where the threshold for the Duty of Candour procedure has been met? Please provide any evidence to support any alternative proposal.

An apology is often seen as an acceptance of guilt. I suggest that any apology must be delivered only following a full investigation, and even then, only where culpability had been proven.

13. Do you agree with the proposals in respect of apologies under the statutory organisational Duty of Candour? If yes, please provide any additional information or insights.

No

14. If not, do you have a preferred approach for the proposals in respect of apologies under the statutory organisational Duty of Candour? Please provide evidence to support any alternative proposal.

An apology is often seen as an acceptance of guilt. I suggest that any apology must be delivered only following a full investigation, and even then, only where culpability had been proven.

Support and protection for staff (paragraphs 3.27 – 3.28)

15. Do you agree with the proposals for support for staff under the statutory organisational Duty of Candour? If yes, please provide any additional information or insights.

The proposals above are rather limited.

I suggest that any/all such support MUST be the same for both clinicians and medical staff i.e. the same for both doctors and nurses.

Further consideration must be given to the application of the duty of candour to consultants (doctors, surgeons, etc). Although this duty is being applied to staff, Consultants must not be excluded in any way from this duty and must be given the same support as the 'staff' doctors and nurses.

16. If not, do you have a preferred approach for the support for staff under the statutory organisational Duty of Candour? Please provide evidence to support any alternative proposal.

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Further consideration must be given to the application of the duty of candour to consultants (doctors, surgeons, etc). Although this duty is being applied to staff, Consultants must not be excluded in any way from this duty and must be given the same support as the 'staff' doctors and nurses.

Reporting and monitoring (paragraphs 3.29 – 3.32)

17. Do you agree with the proposed reporting and monitoring requirements under the statutory organisational Duty of Candour? If yes, please provide any additional information.

No. The reports must be independently validated to ensure there is no "cover up" or deliberate reduction of severity of incidents to take them outside the threshold for Candour.

It should be considered that a number of lesser incidents, when combined, constitute an incident which falls under the duty of candour provisions.

18. If not, do you have a preferred approach for the reporting and monitoring requirements under the statutory organisational Duty of Candour? Please provide evidence to support any alternative proposal.

A complete review of the handling of all incidents should be undertaken to ensure an appropriate escalation path for their management and reporting.

Criminal sanctions for breach (paragraphs 3.33 – 3.40)

19. Do you agree with the proposed criminal sanctions for breach of the statutory organisational Duty of Candour? If yes, please provide any additional information.

Further explanation of timely notification must be included and carry sanctions where such timely notification has not been carried out.

20. If not, do you have a preferred approach for the criminal sanctions for breach of the statutory organisational Duty of Candour? Please provide evidence to support any alternative proposal.

Further explanation of timely notification must be included and carry sanctions where such timely notification has not been carried out.

Obstruction offence (paragraphs 3.41 – 3.42)

21. Do you agree with the proposed obstruction offence under the statutory organisational Duty of Candour? If yes, please provide any additional information.

Yes; however, consideration should be given to organisational obstruction and appropriate organisational-level fines imposed.

22. If not, do you have a preferred approach for the obstruction offence under the statutory organisational Duty of Candour? Please provide evidence to support any alternative proposal.

Consider the following types of obstruction:

1. Individual
2. Team/group
3. Organisational
4. Direct
5. Indirect

Additional feedback



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23. Is there any additional evidence, or observations that you wish to provide in respect of the policy proposals for the statutory organisational Duty of Candour?

Although the Duty of Candour is about openness and honesty, it must be made clear what actions are to be taken where individual/group/corporate liability is identified, or where unsatisfactory practices are in use.

Furthermore, if this duty is only applicable to staff, then consultants must not be allowed to do any work alone i.e. without the presence of someone bound by this duty.

Statutory Individual Duty of Candour (Section 4)

Policy Proposal – Statutory Individual Duty of Candour with criminal sanction for breach (paragraphs 4.13 – 4.22)

24. Please provide comments on the policy proposal for the statutory individual Duty of Candour.

Introduction of such a policy would be destructive to morale and trust.

Where someone has been open and honest, the organisation must support them unless/until it is proven that harm had been caused by a deliberate act i.e. the organisation must accept vicarious liability where it is not a deliberate act and address their training/education plans.

Alternative Policy Proposals (paragraphs 4.23 – 4.35)

25. Please provide comments on the alternative policy proposals for the statutory individual Duty of Candour.

Mistakes must be addressed as a matter of continuous improvement in the provision of quality services; however, where such mistakes are deemed criminal in nature, prosecution for such acts should be considered to be outside the scope of the Duty of Candour.

The Duty of Candour should be there to help people declare genuine mistakes and get the support necessary to ensure such mistakes do not reoccur.

26. If you do not agree with any of the three high-level policy proposals, do you have a preferred alternative policy approach for implementation of the recommendations relating to the statutory individual Duty of Candour? Please provide evidence to support an alternative proposal.

Implementing an individual policy is merely clearing the organisation of any liability before an invitation can be carried out.

Since the organisation sets the recruitment and training requirements for the various posts, this would merely be an abrogation of responsibility by the organisation.

Scope (paragraphs 4.36 – 4.38)

27. What is your preferred policy approach in respect of the scope of the statutory individual Duty of Candour? Please outline the reasons for your preference, and provide evidence to support your reasoning.

The term employee must be defined i.e. does it include any/all persons/organisations under contract to the Healthcare organisation whether inside IR35 or outside and whether operation under and umbrella company or not?

I suggest that this duty of candour should apply to any and all persons involved in any way in the provision of healthcare services, not just direct employees.

Routine Requirements & Requirements When Care Goes Wrong (paragraphs 4.39 – 4.43)

28. Do you agree with the proposals in relation to the requirements under the statutory individual Duty of Candour? If yes, please provide reasons for your agreement.

No.

This allows the organisation to ""mark it's own homework"".

All such declarations under duty of candour (since they are about'harm' to individuals should be handled by an independent organisation which is not dependent on the various healthcare organisations for funding.

29. If not, do you have a preferred approach for the requirements under the statutory individual Duty of Candour? Please provide evidence to support any alternative proposal.

All such declarations under duty of candour (since they are about'harm' to individuals should be handled by an independent organisation which is not dependent on the various healthcare organisations for funding.

Exemptions (4.44)

30. Do you have any comments to make on the case for exemptions from the requirements under the statutory individual Duty of Candour? Please provide evidence to support your position.

Additional Feedback

31. Is there any additional feedback that you wish to provide in respect of the policy proposals for the statutory individual Duty of Candour? If so, please provide evidence to support alternative proposals, if possible.

This policy proposal feels limited and should include legal consultation across the various business sectors to ensure legal parity.

All findings regarding this Duty of Candour policy should be reflected in the Policy of Candour for Nursing Staff to ensure all employees are treated the same and have the same support.

Being Open Framework (Section 5)

Policy Proposals (paragraphs 5.1 – 5.8)

32. Do you agree with the policy proposals in respect of the Being Open Framework? If yes, please outline your reasoning.

Yes; however, should it be linked to criminal investigations, the impact of such openness must be made clear to the individual. It should also be noted that it is highly unlikely that an individual will make a declaration under the duty of Candour if it is likely to result in criminal proceedings.

33. If not, do you have a preferred policy approach in respect of openness and candour in health and social care? Please provide evidence to support alternative policy proposals.

The organisation must exercise "vicarious liability" in all cases and let criminal actions be played it in the courts against the individual where appropriate. This is already in use with other organisations.

Level 1 – Service Users and Carers (paragraphs 5.9 – 5.11)

34. Do you agree with the policy proposals at Level 1 of the Being Open Framework for Service Users and Carers? If yes, please outline your reasoning.

Yes.

It demonstrates the openness of the organisation and such openness and further HSC support can be evidenced by the service user.

35. If not, do you have a preferred policy approach in respect of Level 1 of the Being Open Framework for Service Users and Carers? Please provide evidence to support alternative policy proposals.

Level 1 – Staff (paragraphs 5.12 – 5.13)

36. Do you agree with the policy proposals at Level 1 of the Being Open Framework for Staff? If yes, please outline your reasoning.

Yes. Service Users should be told what to expect and whenever a deviation occurs, why that deviation happened and what the revised approach is.

37. If not, do you have a preferred policy approach in respect of Level 1 of the Being Open Framework for Staff? Please provide evidence to support alternative policy proposals.

Level 1 – Organisations (paragraphs 5.14 – 5.15)

38. Do you agree with the policy proposals at Level 1 of the Being Open Framework for Organisations? If yes, please outline your reasoning.

Yes; however, training should not be a one-off but should be refreshed every 2 to 3 years.

39. If not, do you have a preferred policy approach in respect of Level 1 of the Being Open Framework for Organisations? Please provide evidence to support alternative policy proposals.

Level 2 – Service Users and Carers (paragraphs 5.18 – 5.19)

40. Do you agree with the policy proposals at Level 2 of the Being Open Framework for Service Users and Carers? If yes, please outline your reasoning.

Mostly; however, to whom is the HSC liable when it does not carry out it's duty of candour. Where is the accountability for failure?

41. If not, do you have a preferred policy approach in respect of Level 2 of the Being Open Framework for Service Users and Carers? Please provide evidence to support alternative policy proposals.

Level 2 – Staff (paragraphs 5.20 – 5.21)

42. Do you agree with the policy proposals at Level 2 of the Being Open Framework for Staff? If yes, please outline your reasoning.

Yes

The measures appear fair; however, I would like further clarification.

43. If not, do you have a preferred policy approach in respect of Level 2 of the Being Open Framework for Staff? Please provide evidence to support alternative policy proposals.

Level 2 – Organisations (paragraphs 5.22 – 5.23)

44. Do you agree with the policy proposals at Level 2 of the Being Open Framework for Organisations? If yes, please outline your reasoning.

Yes; however, the reporting structure must include external validation of findings to ensure transparency and ensure the creation of a trusted/trusting environment.

45. If not, do you have a preferred policy approach in respect of Level 2 of the Being Open Framework for Organisations? Please provide evidence to support alternative policy proposals.

Level 3 – Service Users and Carers (paragraphs 5.26 – 5.29)

46. Do you agree with the policy proposals at Level 3 of the Being Open Framework for Service Users and Carers? If yes, please outline your reasoning.

No. Such policies to select the most appropriate person often use a simple drop-down list to select the person. This does not mean that are the most appropriate, merely the next one on the list e.g. selection of Nominated Person in the event of loss of capacity.

47. If not, do you have a preferred policy approach in respect of Level 3 of the Being Open Framework for Service Users and Carers? Please provide evidence to support alternative policy proposals.

Level 3 – Staff (paragraphs 5.30 – 5.31)

48. Do you agree with the policy proposals at Level 3 of the Being Open Framework for Staff? If yes, please outline your reasoning.

Yes

49. If not, do you have a preferred policy approach in respect of Level 3 of the Being Open Framework for Staff? Please provide evidence to support alternative policy proposals.

Level 3 – Organisations (paragraphs 5.32 – 5.33)

50. Do you agree with the policy proposals at Level 3 of the Being Open Framework for Organisations? If yes, please outline your reasoning.

Yes; however, further information is required on how the following will be handled:

1. Immediate actions
2. Sorry term actions
3. Long term actions
4. Incident closure criteria

51. If not, do you have a preferred policy approach in respect of Level 3 of the Being Open Framework for Organisations? Please provide evidence to support alternative policy proposals.

Additional Feedback

52. Is there any additional feedback that you wish to provide in respect of the policy proposals for the Being Open Framework? If so, please provide evidence to support alternative proposals, if possible.

Further consultation is required at subsequent steps.

In addition, I suggest that any proposals for amendment be published with clear valid reasons for accepting/rejection.

Consultation & Impact Screening (Section 6)

53. Do you have any feedback about the possible ways we could measure whether or not this policy is useful?

Create SMART objectives and measure accordingly. Where areas of weakness are identified (through individual or trend analysis) they should be investigated as an internally identified incident.

Engage with external process specialists to review and suggest improvements to and standardisation of processes/practices across the various specialisms. Review exceptions regularly and keep processes 'live' and open to continuous improvement. Although this is already in place in most organisations, it is not given enough priority.



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54. Do you have any feedback or suggestions about how we can engage and involve stakeholders to develop this policy and put it in place?