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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 Worksream 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.

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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.

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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.

Fine. 'Candour' as used in healthcare seems to have come to embody the sense that something has already gone wrong or be amiss, whereas 'openness' seems to be all-encompassing, appropriate in all circumstances.

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.

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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.

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.

Organisational Duty of Candour is reasonable as long as the required culture changes do take place.

Every clinician knows it is impossible to read the minds of patients as to what they consider to be 'complete' answers to their questions, and those goal posts can also move over time. You can be as honest, open and frank as humanly possible yet the

patient is still at liberty say it's not enough - who is to judge where the threshold really is? If Montgomery has taught us anything it is the elasticity of 'materiality'.

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.

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.

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.

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.

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.

"No.

The formulaic approach concern is real.

Most situations are going to require an apology anyway but shouldn't make it just another box to tick."

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.

Agree that an apology should not be able to be construed as an admission of liability.

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.

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 paragraph above seems to presuppose that an individual statutory duty of candour will be enforced whereas the preferable situation would be for any statutory duty to be at the organisational level, with the employees bound by their Professional Duty of Candour.

Staff will of course need to be supported in fulfilling their duty."

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.

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.

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.

No.

If this is truly to be part of an organisations culture they should just be doing it all the time and therefore not box-ticking 'how often'.

More red tape will not help, training and support more valuable use of resources

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.

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.

Where is the money going to go and who will benefit from this fining of our already cash-strapped health service? What happens if the individual cannot pay - will the health service will end up footing the bill anyway?

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.

Reasonable in theory but again, where is the money to come from/go to and how could it best be used?

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.

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Additional feedback

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?

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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.

The Professional duty of candour should suffice and anything more undermines professionalism.

Regulatory bodies have plenty of sanctions in their armoury to back this up if an individual is found wanting and referred to them by their organisation - these sanctions should be more of a chastening stick than a fine that could be paid and forgotten.

Are Dr's with these types of criminal convictions going to be allowed to practice by GMC? Will it end up being a '1 strike' or '3 strikes and you are out' type of system? If so the regulator holds the sway anyway so no need to change the status of the duty.

Who will decide?

Interesting that the workstream couldn't even agree on sanctions yet they are forging ahead with this consultation and who knows, maybe even implementation. There will undoubtedly be unintended and probably counterproductive consequences if this is introduced.

Alternative Policy Proposals (paragraphs 4.23 – 4.35)

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

Still of the view that there are enough sanctions available to encourage Candour within the profession without introducing any statutory duty

BUT,

if an individual statutory duty does end up being introduced then separating the offences of withholding/destroying/misleading from the general Duty of Candour itself would be helpful ie criminal sanctions only for deliberate acts of concealment rather than staff living in fear of criminal sanctions for inadvertent or even just perceived (by the patient) omissions.

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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.

Professional Duty of Candour is sufficient

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 workstream is probably right here - everyone in an organisation might potentially have some contact with patients and the wider public, even if just handling their notes or cleaning the corridor and so the duty should therefore extend to all HOWEVER this would likely be unmanageable and probably result in even fewer candidates being willing to put themselves forward to work in health & social care, in any role.

Surely this is a good reason to restrict the imposition of a statutory duty to the organisational level, from whence that cultural change can be filtered down to all employees rather than unequally burden the professional staff (who are already under a duty to their own regulator)."

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.

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.

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.

I can only think of one occasion when candour led to harm for a patient but those situations do arise.

Surely professional judgment in this respect should still be permissible, if justifiable in all the circumstances?

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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.

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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.

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.

Parts 1 is an admirable goal Parts 2 - 3 already happen in my experience Harder to be convinced that Parts 4 & 5 are achievable. Staff are unlikely to be supported in this idealistic way and how could candour effectively be 'monitored'?

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.

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.

This all happens already under professional guidelines, it's totally unnecessary to spell this out

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.

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.

Nobody is going to be given extra time to reflect and feedback on anything during working hours except possibly management. Everyone is too busy trying to get on with their jobs, which are already subject to strict professional guidelines covering all of the above.

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.

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.

This is just repetition and management-speak, not at all helpful to those on the ground

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.

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.

This already happens

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.

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.

The IR1 reporting system and M&M discussions at audit meetings are already dealing effectively with these kind of events

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.

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.

Ditto comment at no.47

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.

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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.

These systems are in place already

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.

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.

One is already expected to do all of this under the professional Duty of Candour.

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.

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.

To my knowledge these systems are all in place already

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.

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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?

Would be interesting to know if the economic impact referred to above is simply the cost of implementation and funding of the (likely mountains of) extra paperwork this is going to generate in order to 'be seen to be doing something'...or the real cost to the health service by way of the loss of upright staff, or potential recruits, for whom the sheer mental burden imposed by this proposal will be just one straw too many.

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?