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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.

Yes, as set out in the definition by Sir Robert Francis it both makes sense as a legal construct and a virtue for organisations plus individual staff to apply.

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.

n/a

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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.

Broadly in principle I agree with the scope. I believe this needs careful consideration in all areas and should have a lengthy and rigorous examination of all the potential pitfalls. Non patient facing organisations and roles will need very careful consideration. For example what about administration staff that have no direct patient care role. Should they be liable if they happened to type a letter that later was found to contain information that was not shared with the patient or patients family in an open and honest fashion. My concern would be that without careful consideration that this would deter non-patient facing organisations from functioning and also non patient facing staff from choosing to work within the HSC.

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.

See above for comments.

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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.

Yes I believe both organisations and individuals should be open and honest in their interactions with patients.

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.

n/a

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.

No

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.

I have significant concerns that self-harm has not been covered here. Self-harm can be an act made with mental capacity and also can be a mechanism to cope with intense psychological anguish. If clinicians and organisations had to apologise to patients for this act in this circumstance it would remove the patient's personal autonomy.

I am also concerned about psychological harm and am wondering who will be determining that this has occurred. If this is to be psychiatrists with another additional role then it would have significant resource implications.

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.

No

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 should not be automatically triggered they would devalue them being meaningful and personalised.

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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.

"When an adverse outcome occurs that is not resulting from an error an apology should not be triggered. Apologies should not be automatically triggered they would devalue them being meaningful and personalised."

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.

Apologies should not replace frank conversations about the complexities of care and treatment when the least worst option must be chosen which results in the least harm.

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.

Yes however I support only the organisational duty and not individual 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.

n/a

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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.

Yes however this will require significant resource within an organisation likely requiring a dedicated team. Resource implications are clearly significant in an already very stretched system and I am concerned it may remove resources from direct patient care.

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.

n/a

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.

No

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.

I believe criminal sanctions are unnecessary. These are not present in Wales or Scotland. Individual employees of the HSC will be given extra responsibilities as the trust will be fined. Blame will be attributed to the individual within the organisation which moves away from the open learning culture that trusts are trying to move towards. Individuals I believe are likely to respond by avoiding reporting of errors due to the risk of criminal sanctions.

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.

No

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.

I believe this is already covered by professional obligations and employment regulations as part of our terms of employment. It would be better to look at the current processes and improve those existing systems rather than jump to the above.

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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?

n/a

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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.

This is unnecessary and a duplication of existing systems. Currently my own practice is overseen by the GMC via appraisal and revalidation. I also undertake professional development via a peer group which is overseen by the Royal College of Psychiatrists that links into my appraisal and revalidation. I appreciate that these systems failed in the situations reviewed by Justice O'Hara however creating a completely new process on top of existing processes I do not feel is the answer. Candour is part of my duties as a doctor and existing systems should be looked at resourced and strengthened to reflect the failings not create a new process. The organisational aspect of this process proposed would be appropriate but not the individual statutory duty; I feel its introduction is unnecessary.

Northern Ireland is already experiencing a staffing crisis and introduction of yet another process or system that provokes fear and anxiety I feel will add further to this. Speaking in relation to medical staff only I have seen many colleagues leave for many different reasons. Local pay issues come up in these personal discussions when comparing Northern Ireland and England (consultants in England are paid on average 30% more compared to those in Northern Ireland) but also overseas opportunities such as New Zealand, Australia and Canada. Recent pensions tax issues that have been widely reported and left some with huge tax bills due to the issues with taper and completing extra work. These issues were resolved in England, Scotland and Wales with no detriment to the doctors subject to this taper issue. Northern Ireland has been the only jurisdiction with no support from the HSC or employers leaving them to personally pay the huge tax bill.

I feel introduction of the individual proposals will further serve to push people to seek employment elsewhere and will greatly harm any recruitment or retention to Northern Ireland. Why would someone choose to work here if they are already devalued due to lower local pay, no support with pension tax issues and then on top of that the potential for individual criminal liability in relation to duty of candour. I sadly have to say that personally would consider seriously my ongoing commitment to remain in Northern Ireland carefully should statutory individual liability become legislation.

Alternative Policy Proposals (paragraphs 4.23 – 4.35)

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

I find neither of these proposals acceptable as I do not believe a statutory individual duty of candour is a proportionate response with or without criminal sanctions. Please see my previous responses for the reasons behind my argument.

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.

As previously discussed look in detail at the existing professional review systems that are present and rigorously improve upon them rather than creating a new process or system as a response.

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.

As previously discussed it is my view that statutory individual duty of candour should not come to pass and therefore it should have no scope.

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.

As previously discussed it is my view that statutory individual duty of candour should not come to pass and therefore there should be no requirements.

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.

n/a

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.

As previously discussed it is my view that statutory individual duty of candour should not come to pass and therefore there should be no requirements which would result in the need for a discussion about exclusions.

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.

n/a

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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.

Yes, they appear to provide great key principles and a conceptual framework for everyone to work towards excelling to deliver.

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.

n/a

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 these seem to be well thought out and the type of delivery of service that any of us aspire to see within the HSC for our patients but also our families.

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.

n/a

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, again I feel these are well thought through and will support feedback, reflection and great cultural evolution within the HSC.

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.

n/a

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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 again well thought through and provides the HSC organisation with appropriate guidance in relation to developing processes and promoting an appropriate culture.

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.

n/a

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.

Yes

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.

n/a

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

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.

n/a

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

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.

n/a

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, agree with the majority but see below.

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.

As previously: When an adverse outcome occurs that is not resulting from an error an apology should not be triggered. Apologies should not be automatically triggered they would devalue them being meaningful and personalised.

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.

n/a

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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.

No, agree with the majority but see below.

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.

As previously: When an adverse outcome occurs that is not resulting from an error an apology should not be triggered. Apologies should not be automatically triggered they would devalue them being meaningful and personalised.

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.

n/a

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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?

Not that I can propose at this stage.

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?

Listen to everyone's voice and engage widely. I have many colleagues who had no clue this consultation even existed and I do not believe it has been promoted widely or assertively enough given the significant implications it may have. I would expect consultation events following the closure date of this consultation. Many more people need to be consulted on this ongoing before anything comes into legislation.