

South Eastern Health & Social Care Trust - Response to Department of Health Consultation on the introduction of a statutory Duty of Candour and Being Open Framework in Northern Ireland – August 2021

1.0 Introduction

The South Eastern Health & Social Care Trust (hereafter referred to as the Trust) is committed to working with the Department of Health (hereafter referred to as the Department) and its Hyponatraemia Programme in implementing the recommendations contained in the Report of the Inquiry into Hyponatraemia-Related Deaths. The Trust's sympathies are with the bereaved families of the children who died from hyponatraemia.

As an Acute and Community Hospitals Trust that provides integrated health and social services to the population of Ards and North Down, Down and Lisburn Council areas serving a resident population of 364,000 (source: Northern Ireland Statistics and Research Agency (NISRA) 2020 Mid-Year Population Estimates), and as an organisation employing approximately 12,000 staff across a range of professional staff groupings, the Trust welcomes the opportunity to respond to the consultation on the introduction of a statutory Duty of Candour and Being Open Framework in Northern Ireland and contribute the views of both the organisation's staff and Trust Board.

2.0 Background

Since the consultation launch by the Health Minister on the 12 April 2021 the Trust has encouraged all staff, across all professions, to engage in the consultation process and to make their views known directly to the Department.

The Trust has also engaged directly with the Duty of Candour Workstream with staff, including members of the Trust Board, and IHRD Recommendations Implementation Group, attending the consultation online engagement and feedback sessions held in the months of April and June 2021.

The Trust wishes to thank the Minister and the Chair of the Duty of Candour Workstream, Quintin Oliver, for the granting of an extension by which to submit its response from 2 August 2021 to 31 August 2021¹. As Health & Social Care Trusts are not typically expected to formally respond to Departmental Consultations this additional time has allowed the Trust to provide a more considered response than what might have been possible within the original consultation timeframe.

3.0 The Trust Response

In completing this organisational response the Trust has taken a two strand approach putting forward:

1. A corporate response in relation to the consultation proposals.

¹ The Health Minister wrote to Arm's Length Body (ALB) Chairs on the 23 June 2021 encouraging ALB organisations to submit a corporate response.

2. An organisational staff response: this provides a summary of feedback from Trust staff across a range of directorates and professions in relation to the consultation proposals.

4.0 Corporate Response

The Trust believes that openness and honesty with service users must be at the heart of every healthcare organisation and everyone working for them.

4.1 Consultation Definitions

In respect of the proposed definitions, the distinction between the concept of openness as a culture within the service, and candour as a statutory duty to provide information specific to the organisation, is helpful.

However, the term candour is not used in routine communication and may not be widely understood in the public sphere. It may be preferable to consider use of the term 'duty of openness' as had previously been considered.

4.2 Policy Proposals for the Statutory Organisational Duty of Candour for Northern Ireland

The Trust agrees that the introduction of Statutory Organisational Duty of Candour will increase openness and accountability within Northern Ireland's Health and Social Care services. Furthermore, the introduction of an Organisational Statutory Duty would align Northern Ireland with other jurisdictions within the United Kingdom, and would therefore be welcome.

The Trust agrees with the proposed scope of the proposal. A statutory organisational Duty of candour should apply to every healthcare organisation.

The Trust notes that routine requirements for organisations will be included in accompanying guidance to be issued by the Department, and the proposed structure is laid out in the Being Open Framework. The Trust reiterates that it is committed to working with the Department, and for its senior leadership to 'lead by example in modelling the way for an open, honest and just culture', where staff feel supported in an environment where openness and learning can flourish. The Trust will welcome the opportunity to co-produce the policies and procedures that will enable the exercising of organisational and individual responsibilities.

It is helpful to provide a definition for harm thresholds for when things go wrong. However, there are limitations to the proposed definitions and thresholds which will require further refinement and will need to be accounted for in any accompanying guidance to legislation. This will be necessary in order that organisations and individuals apply definitions, thresholds and procedures in a consistent manner.

The Trust agrees in principle with the requirements for fulfilling the Statutory Procedure when the threshold has been met and a 'notifiable incident has occurred'. The Trust notes that further development of guidance is required in order that organisations can ensure compliance, and the Trust would welcome the opportunity to work with Department in developing these.

The Trust agrees that apologies should be provided as part of the Duty of Candour procedure. Consideration will need to be given to ensure that a legislated apology does not become formulaic and insincere for either service users or staff members.

The Trust agrees with the proposals for support and protection for staff in order that they can fulfil the statutory Duty of Candour. Consideration should also be given to having input from relevant professional regulatory bodies which are outside of the organisation to support staff to fulfil the statutory duty of candour through training, advice and guidance.

The Trust agrees with the proposed criminal sanctions for breach of a statutory organisational Duty of candour. It is accepted that the impact associated with fines would likely encourage organisations to adhere to the Duty of Candour notification procedure. However, it is vital that fines issued to an Organisation for an obstruction offence / failure to notify do not impact on financial resources for delivery of services or staffing.

4.3 Policy Proposals for the Statutory Individual Duty of Candour for Northern Ireland

The Trust does not support a separate Statutory Individual Duty of Candour as there are existing organisational and professional body policy and procedures that facilitate safeguards.

The Trust believes a Statutory Individual Duty of Candour with criminal sanction would be detrimental and would potentially hinder the proposals outlined in the Being Open Framework.

An Individual duty of candour with criminal sanction is in contrast to a 'no blame' culture that acknowledges mistakes, enables learning, outcomes and actions to safeguard against such incidents reoccurring. The Trust believes that health and social care must lead and develop a culture where a duty of openness is fostered and encouraged.

Where the introduction of a Statutory Organisational Duty of Candour would achieve alignment with the rest of the UK, the introduction of an Individual Statutory Duty with criminal sanction would make Northern Ireland different from any other jurisdiction. It is of note that this proposal was considered after the Francis report and was not adopted by legislators in England.

A statutory duty of candour with criminal sanction at an individual level duplicates the standards and requirements currently in place by professional and regulatory bodies² with regards to staff conduct and fitness to practice. These standards in conjunction with existing organisational Human Resources and disciplinary policy and procedures place adequate focus on individual accountability. The Department may also give consideration to implementing 'Freedom to speak up' guidance as initiated in England.

² GMC / NMC Openness and Honesty When Things Go Wrong: the Professional Duty of Candour (2015)

If a potential criminal act has occurred, referral under existing law should be made to the Criminal Justice Agency and the matter processed through the criminal justice system as appropriate.

The imposition of criminal sanctions for individuals has the potential to result in unintended consequences including increasing workforce pressures and negatively impacting on staff morale. Furthermore, the recent global pandemic has highlighted the challenge of recruiting, motivating and retaining healthcare staff in a very competitive environment both within the UK and internationally. The proposed introduction of an individual duty of candour with criminal sanctions has the potential to make this challenge significantly greater in Northern Ireland than anywhere else in the world making other jurisdictions more attractive as countries of employment for health care staff.

4.4 The policy framework for Being Open guidance

The Trust supports the principles and proposals in respect of the Being Open framework. The framework has the potential to accelerate cultural change within Health and Social Care (HSC) and increase routine openness and candour. The setting out of expectations for service users, staff members and organisations is also welcome.

As an organisation, the Trust has an integrated governance framework which incorporates openness and candour, and accountability within operational services is underpinned by the Trust values and behaviours. These are incorporated within the Trust's Corporate Plan and People Plan which are cascaded to all departments and levels.

The Being Open Framework will define the ethos within the professional role and code of conduct and practice of all professionals working in HSC roles. Resources will need to be made available to staff and managers to provide support when issues are raised with regards to work load and / or systemic features, in order that these concerns are addressed.

The Trust would be grateful for the opportunity to support the Department in the further development of the framework.

5.0 Organisational Staff Response

The Trust Board recognises the huge significance of the Duty of Candour proposals and the need for the Department to hear from a wide cross section of HSC employees. Therefore, to facilitate that and enhance the richness of the Trust corporate response an engagement and feedback exercise was undertaken.

5.1 Methodology

Given the length of the consultation document (102 pages with 55 question sections) coupled with the challenging timescale to complete the return, an effort to summarise the main points of the consultation was made in the form of a template, with a caveat that it may be necessary to refer to the full consultation document should additional information be required on a particular point.

To complete the organisational response to the consultation, returns were then sought from each Trust directorate. The Trust also garnered the views of senior



medical and nursing staff in separate feedback sessions. These returns were then thematically collated to add to the overall Trust Board response to the consultation document.

5.2 Limitations

In working to complete this response, the Trust must acknowledge that the challenging timescale in which to canvass staff and seek feedback means that the depth of consultation has by necessity been limited even with the granting of an extension.

Pandemic pressures, including increased workloads, and staff fatigue, have also limited levels of engagement and feedback, as has the length and depth of the consultation documentation which requires considerable time resource both to read and respond.

5.3 Consultation Definitions

There is general agreement that the definitions of 'openness' and 'candour' are satisfactory.

5.4 Policy Proposals for the Statutory Organisational Duty of Candour for Northern Ireland

There was general agreement that the scope of the policy proposals and which organisations the proposals would apply to were satisfactory, however there were concerns raised as to how a Duty of Candour would apply in practice to smaller healthcare providers / organisations.

There was general agreement that the routine requirements were satisfactory, and recognition that organisations and individuals should act in a way to support an open and honest culture. However there was also comment that openness and candour should be a way for working and not something that needs to be a statutory requirement.

There was general agreement that the proposed definitions were not satisfactory and require further clarification and definition. There were particular concerns regarding the potential subjectivity of psychological harm, and that definitions are consistent with current Serious Adverse Incident (SAI) guidelines.

Further clarification as to what is deemed 'reasonable support' when things go wrong was requested, and further clarity as how this links in with existing HSCB procedures.

There was general agreement regarding when and how an apology should be offered by an organisation. Some respondents did query whether an apology should be a legislative requirement, and that it would be necessary for the public to understand that an apology is not an admission of liability.

There was agreement that support for staff is necessary, and that staff need to feel safe to speak out, to have psychological safety and adequate support and training to adhere to the Duty of Candour. Furthermore, this needs to be linked to Collective Leadership and Restorative Just Culture.

It was commented that what is classed as relevant training is vague and staff require further clarity as to what that support looks like.

There was no opposition to a statutory organisational duty of candour with criminal sanction, however there were queries as to what this will achieve, given organisational culture is a more powerful factor.

5.5 Policy Proposals Statutory Individual Duty of Candour for Northern Ireland

There was significant consensus that any criminal sanction should be organisational, not individual. There was also agreement that if a staff member is involved in certain actions then there is enough in existing law to take the required action. Organisational policy and procedure facilitates safeguards and provides oversight in conjunction with the relevant regulatory bodies. If a potential criminal act has occurred existing criminal statute should apply. Any additional criminal element is unnecessary and distressing for staff.

There was general agreement that sufficient recourse to appropriate sanctions already exist through professional regulators. For example, individual staff can be removed from their professional register for behaviour which breaches the requirements of the code of conduct which will prevent an individual from practicing.

Overall it is noted that there is no evidence that criminal sanctions for staff in respect of duty of candour will have a positive impact on staff behaviour or openness. On the contrary, the imposition of such sanctions will undoubtedly increase pressures in securing a workforce in Northern Ireland HSC organisations and will negatively impact on staff morale and retention, particularly if Northern Ireland is unaligned with other jurisdictions in the UK.

Clarification regarding serial non-compliance is required. The risk and fear is someone coming behind to judge especially if that individual is not a specialist.

5.6 The policy framework for Being Open guidance

There was general agreement that the policy framework is helpful and that cultural change needs to be facilitated, however there were comments that organisations will require further detail and clarity regarding how the framework will work in practice, and how it will fit in with existing Trust governance frameworks and HSC strategies. Furthermore, greater detail in regard to support for staff and service users is required, as is detail regarding resourcing.