Inquiry into Hyponatraemia Related Deaths (IHRD) Implementation Programme

Frequently asked questions (FAQ's)

Being open and a Duty of Candour for Health and Social Care

Title of document	Frequently asked questions (FAQ's): Being open and a Duty of Candour for Health and Social Care
Author(s)	Department of Health
Date of document	June 2020
Draft or Final version	Final - Version 4.0

Frequently asked questions (FAQ's)

Being open and a Duty of Candour for Health and Social Care

The Department of Health is currently taking forward proposals to establish a Being Open culture and a Statutory Duty of Candour for Health and Social Care in Northern Ireland. To support information sharing and understanding, a set of Frequently Asked Questions (FAQ's) has been developed which are outlined below. These will be added to as the work progresses.

A Duty of Candour Workstream and Being Open sub-group have been established to take this work forward. Further details regarding the Workstream and sub-group membership and brief may be found here.

Contents

Section 1 - Aim of the Hyponatraemia Implementation Programme

Q1. Who is responsible for taking this work forward?

A1. The Department of Health. An implementation programme has been established to take forward the recommendations arising from the Inquiry into Hyponatraemia Related Deaths and this includes a Duty of Candour. A Workstream has been established to develop detailed proposals/options to address the recommendations about the Statutory Duty of Candour. The Workstream and its Being Open sub-group are responsible for developing the guidance and support needed for organisations and staff to create a culture of openness in advance of proposals for a Statutory Duty. Guidance and support will also be available for service users, carers and their families. Further information on the Hyponatraemia Implementation Programme may be found here.

Q2. What is the Duty of Candour Workstream trying to achieve?

A2. A Duty of Candour Workstream and Being Open sub-group have been established to take forward a Duty of Candour. The aim of both groups is to introduce a culture change within Health and Social Care which ensures that being open and honest becomes the norm and that staff and patients can and do speak up when things go wrong. To do this, it has been recommended that:

- A Statutory Duty of Candour is implemented; and
- Guidance is developed and support is provided for staff.

Q3. What is the background to this work?

A3. The introduction of a Statutory Duty of Candour for organisations and staff was a key recommendation made by Justice John O'Hara in January 2018. Justice O'Hara led an Inquiry into the tragic and avoidable deaths of five children as a result of Hyponatraemia. O'Hara found that there had been a repeated lack of openness and honesty by Health and Social Care with the families involved and that reputation and avoidance of blame were placed above honesty and duty. He recommended a Statutory Duty of Candour, to encourage consistency in openness and to avoid any confusion about what everyone should expect.

This work will build on the Francis Inquiry Report (2013) into the failings in care at Mid Staffordshire NHS Foundation Trust between 2005 and 2009 and the Donaldson report, Right Time Right Place (2014), into the quality and safety of

care in Northern Ireland. Both reports made recommendations around increased openness throughout the health and social care system and led to a pledge by the Minister for Health in 2015 to introduce an organisational Duty of Candour at that stage.

Section 2 - Being open and the Statutory Duty of Candour

Q4. What does Candour mean?

A4. Candour means openness and honesty. We want to develop a culture where being open and honest is the norm across Health and Social Care. We want to use openness to allow people and organisations to learn and improve and to move away from fear and blame. The "Statutory Duty of Candour" will support this culture and will also include specific requirements for organisations and individuals to be open and honest when things go wrong.

Q5. How will staff be supported to be open?

A5. Justice O'Hara recommended that "support and protection should be given to those who properly fulfil their Duty of Candour". We are looking at a range of options to provide support to staff on a day to day basis and when things go wrong. This has been a key element that has been explored in our involvement with staff and their suggestions include:

- the creation of a "no-blame" culture which ensures that mistakes are investigated in a just and fair way;
- buy in from leadership and management, in order to ensure adequate support for staff to confidently exercise the Duty of Candour;
- clear regional guidance, including legal advice, accompanied by processes and procedures for individual organisations;
- adequate resources and time to comply with the Duty of Candour, including comprehensive and extensive training, both for existing staff as well as undergraduate and post-graduate trainees;
- open, honest and compassionate communication; and
- service user and carer involvement.

It is clear that Health and Social Care Organisations have a key role in this and all of their core policies and procedures should reflect the principles of being open. This should be a clear commitment and it should come from the top. Staff must be given training and guidance, as well as space and resources, to interact with one another and with service users in an open manner. Staff should be able to provide feedback and learn when something has not gone as well as expected and this learning should be shared.

We will continue to work with staff to find out the best way to support them.

Q6. How will service users and carers be supported?

A6. Organisations must provide guidance to service users, carers and their families in relation to openness when accessing Health and Social Care services. This will include when something goes wrong and guidance will be developed to outline what they can expect, how they will be involved and how to access support. Organisations must also respond to feedback and complaints from service users, carers and their families.

Service users and carers have been involved to co-develop the guidance and find out the best way to support them. Further involvement is planned.

Q7. The report calls for a Statutory Duty of Candour. What does that mean?

A7. A Statutory Duty of Candour would create a legal responsibility to be open and honest and set out specific requirements when things go wrong.

Creating a law doesn't change the culture, but it can set out how people have to behave and it sends a very clear message that being open is a key priority for everyone.

Our aim is that people will embrace openness in everything they do and that the Statutory Duty is there to support that.

Q8. When would the Duty of Candour apply?

A8. While openness and honesty should happen on a day to day basis, there will be specific requirements of the Statutory Duty of Candour, which will apply when something has gone wrong, resulting in harm or death. Organisations must be open about what has happened and have clear systems in place for involving the service user, carer and families as well as recording, reporting and investigating such incidents. Staff will have a responsibility to follow these systems.

Q9. Will individual Health and Social Care staff be subject to criminal sanctions for failure to comply?

A9. Potentially, yes, and the Workstream are currently developing options for implementation.

Justice O'Hara recommended that failure to comply with the duty, or stopping

someone else from carrying out their duty, would be a criminal offence and this would apply to organisations and individuals.

However, the organisational Duty of Candour comes first. If organisations fail to provide a system in which staff are supported to be open and honest, then it is the organisation that is at fault not the individual. Individuals will fulfil their duty within the organisational system.

If an individual has been given all of the necessary guidance and training to be open and works within a supportive, learning culture where there is no fear of blame, and they still choose to amend records, withhold information or lie, then they should be held accountable for their choice.

We are currently considering if and when a criminal offence would apply.

Q10. Won't the criminal liability mean we are criminalising mistakes?

A10. No.

The criminal liability relates to a breach of the Duty of Candour or preventing another person from performing their duty. This is not about penalising organisations or people for making mistakes. It is about whether or not organisations or individuals are open and honest about the mistake. It is saying that if you make a mistake and then choose to lie about it, amend records or withhold information then you are not fulfilling your duty to be open and honest.

Q11. What will the threshold be for prosecution and what will the penalties be?

A11. This has not been decided yet.

However, criminal sanctions require evidence that is "beyond reasonable doubt" about both the act and the intention. That means being able to prove that the organisation or individual did break the law AND that they MEANT to do it. These are strong protections for the organisations or individuals concerned.

Justice O'Hara recommended that the power to prosecute should apply "in cases of serial non-compliance or serious and wilful deception". This means that prosecution for any breach of the duty will only target the most serious cases.

We will be giving this area more detailed consideration as work progresses.

Q12. Will there be any exemptions for Health and Social Care workers if they feel the exercise of candour might worsen a patient/client's wellbeing?

A12. This has not been decided yet but it is likely.

We have been carrying out research and listening to feedback which has indicated that there may be circumstances in which other professional obligations such as the duty to consider a patient's capacity to make a decision, a patient's right to confidentiality, safeguarding issues, as well as legal issues like privilege and self-incrimination, may affect a professional's ability to be open and honest in all circumstances.

We are looking at these issues to make sure that the Duty of Candour does not have unintended negative consequences for service users or staff and that staff have clear guidance on competing obligations and the importance of professional judgement.

Q13. What happens in other parts of the United Kingdom?

A13. Both England and Scotland have a statutory organisational Duty of Candour in place.

In England, a statutory organisational Duty of Candour was introduced for National Health Service (NHS) providers in November 2014, and extended to all other social care providers from 1 April 2015. The duty requires that registered persons must act in an open and honest way with patients, or someone acting on their behalf, when a "notifiable safety incident" has occurred.

In Scotland, legislation was introduced in 2016 to implement a Statutory Duty of Candour similar to that operating in England. This organisational duty applies to organisations providing health services, care services and social work services in Scotland. Certain incidents activate the Duty of Candour procedure, including: incidents involving death; severe harm; harm which is not severe harm but leads to certain outcomes; and a person requiring treatment to prevent death, or an injury which could cause "severe harm" or "harm".

Q14. Why is the proposal for Northern Ireland different than England and Scotland?

A14. Justice O'Hara looked at what had happened in England and he wanted to go further.

He wanted to make a genuine change to the **entire** system, not just when things go wrong. His recommendations are a real opportunity to create a cultural change, where:

- staff and service users are open and supported every day;
- everyone can be honest about what they could do better;
- this learning is shared openly; and
- service users and carers are given help to access information, support and services within this system.

That's why he made recommendations about not just organisations, but staff, being open and honest *in all their dealings* and that they should be supported and protected to be able to do that.

O'Hara wanted there to be a strong deterrent for those who might not fulfil their duty to be open and honest. He found that there had been a repeated lack of openness and honesty with the families involved and that reputation and avoidance of blame were placed above honesty and duty. He said that "all that is required is that people be told honestly what has happened and a legally enforceable Duty of Candour for individuals will not threaten those whose conduct is appropriate".

Q15. Is this already covered by clinical professional codes of conduct?

A15. No.

Justice O'Hara wanted everyone – organisations and individuals to be open and honest. Organisations themselves have no professional regulation, nor do the non-clinical managers or staff etc working for them.

Although professional health and social care regulators already include a Duty of Candour within professional codes of conduct, Justice O'Hara felt that this was not a strong enough deterrent. Evidence from families also showed that it had not been enough to make people be open and honest with them.

It is important to note that Professional Regulators are not there to punish past misdemeanours or behaviours. Instead, they assess whether the person's current professional performance is impaired.

A Statutory Duty of Candour creates an additional, legal, obligation for organisations and their staff to be open and honest with patients and the public

when things go wrong, and criminal liability would attach to breach of this obligation.

The introduction of a Statutory Duty of Candour would not limit the ability of professional regulators to continue to take regulatory action in appropriate circumstances.

Q16. Is this just an added level of bureaucracy that will take time away from treating patients?

A16. No.

The Department aims to implement the recommendations in a way that ensures a consistently open culture, where learning is encouraged, patient care is improved and bureaucracy is reduced. We do not want this to be a tick box, paper exercise.

We recognise that staff feel under pressure working in a complex system but we want to use this opportunity to simplify and clarify, rather than add complexity, and we will carefully consider any resource implications.

Q17. Will this make Northern Ireland a less attractive place to work?

A17. No. We have an opportunity to do the opposite.

Creating an open culture where staff are supported to be open and honest, where the focus is on learning and not on blame, where service users are valued and listened to and where the entire organisation from the top down is committed to a safe and supportive environment should make Northern Ireland and Health and Social Care a more attractive place to work.

Section 3 - Involvement and engagement

Q18. Is this already a done deal?

A18. No. We are committed to co-producing this work with the people who deliver the services and the people who use services so that everyone has the chance to have their say.

A wealth of evidence and research has been gathered to inform the Workstream and sub-group. We have also undertaken a wide programme of involvement to identify the barriers and ways to overcome these with staff, service users and carers, independent health and care providers, the social care sector, GP's etc. All this information is being considered by the Workstream and sub-group and a series of options for public consultation are being developed.

Q19. Do all the recommendations have to be implemented?

A.19 No

The Department aims to implement the recommendations in a way that ensures a consistently open culture, where learning is encouraged, and improves patient care.

We are also committed to co-producing this work with the people who deliver the services and the people who use services so that everyone has the chance to have their say. It is also important that we consider the impact on Health and Social Care organisations and their staff and make sure there aren't unintended consequences. This may require an approach that complies with the spirit, rather than the letter, of the recommendations.

To ensure this work is effective, it is vital that any interested parties and key stakeholders engage with the Workstream in order to ensure that all relevant evidence is taken into account when developing policy proposals for implementation of the recommendations.

Q20. What does Co-production mean?

A20. Health and Social Care organisations are required by law to actively and meaningfully involve service users, carers and the public in Health and Social Care services. This is known as Personal and Public Involvement, or PPI and means that Health and Social Care organisations have a legal duty to involve and consult

with service users, carers and the public when developing and considering proposals to change the way that care is provided.

Co-production builds on this legal requirement by creating genuine partnership working. It recognises that the people who use services are as important as the people who run services. It means different people and groups working together, having their say and creating shared solutions.

Q21. Who will be involved?

A21. Anyone who has something to say.

The involvement of a wide range of stakeholders is key to the successful implementation of a Duty of Candour.

The Workstream and sub-group members consist of a wide range of Health and Social Care staff, the Third sector and service user and carer members, supported by Departmental staff. This co-production approach enables partnership working between people to consider the recommendations and co-design options for how the work should be taken forward.

We have developed an Involvement Plan to ensure that everyone who wants to can be involved in the work. This includes people who use Health and Social Care services, their families and those who care for them, staff delivering services, other organisations providing Health and Social Care services such as the community and voluntary sector or independent health and care providers, and professional regulatory bodies. Different approaches will be used to ensure that everyone is meaningfully involved.

Q22. What involvement has been undertaken to date?

A22. We held a series of involvement workshops during May and June 2019 to consider what a Being Open Duty of Candour means for Health and Social Care. These workshops were held for Health and Social Care staff, service users and carers, and the Third sector. The sessions aimed to:

- Increase awareness of the Inquiry into Hyponatraemia Related Deaths recommendations about Being Open and the Duty of Candour for Health and Social Care;
- Explore the core components of a “Being Open” organisation;
- Consider the challenges of a Duty of Candour at both an organisation and

individual level and what support they will require; and

- Identify next steps to continue and support involvement for stakeholders.

Further involvement events were undertaken in late 2019 with identified sectors to consider the same questions outlined above.

This is just the first step. We will continue to involve service users, carers, staff and others to ensure that a wide range of stakeholders are given the opportunity to input into the work at all stages.

Q23. Will there be more opportunities to get involved?

A23. Yes. The involvement of a wide range of stakeholders is key to the successful implementation of this work.

We regularly review our involvement plan to consider who we have engaged and involved to date, who needs to have a say going forward and what we need to do to make sure they can get involved. This is an on-going process so there will be more opportunities to get involved and have your say. You can find more information here or register your details here (external link opens in a new window / tab) to get involved.

Q24. What will we do with the information we collect?

A24. The information we get from listening to stakeholders is used to inform and shape our work.

All information provided at events is gathered and analysed and a report on the findings is then considered by the Workstream and subgroup.

Feedback from stakeholders is a key part of the information we are gathering to support our work, and we have also:

- **Commissioned research** to help improve our understanding of how candour operates in other jurisdictions, as well as the legal and human rights issues that are relevant to a Statutory Duty of Candour; and

- Put out a public **call for evidence** to ensure the Workstream takes into account all research and information available.

Information on all of the above is published on the Department of Health website at: https://www.health-ni.gov.uk/articles/ihrd-get-involved-duty-candour where

everyone can access it.
Q25. How can I get involved?
A25. If you would like to get involved in the programme of work, find out further information here or register your details here(external link opens in a new window / tab).
Q26. How can I keep up-to-date?
A26. The Department of Health website is up-dated regularly to share evidence and information which has been considered by the Workstream and sub-group. All this information may be found at https://www.health-ni.gov.uk/articles/ihrd-get-involved-duty-candour .

Section 4 - Work so far

Q27. What has the Duty of Candour Workstream done so far?

A27. The Workstream and sub-group want to learn from what has happened elsewhere and to listen to what stakeholders have to say. This will support their understanding in relation to the issues and that is what the work so far has focused on.

Following the commencement of the Inquiry into Hyponatraemia Related Deaths Implementation Programme in June 2018, we have been considering relevant information, including specially commissioned research, to identify policy options to implementing the Candour.

In February 2019, we published our research and asked for any additional research or information from stakeholders. 13 submissions were received and have been considered by both groups. Any organisational responses have also been published on the Department of Health website here.

We held nine involvement workshops during May and June 2019 to ask key stakeholders "What does a Duty of Candour mean for Health and Social Care?" These workshops included:

- six workshops across all five Health and Social Care Trust areas with over 400 staff from a range of grades and disciplines;
- two workshops with service users at Patient and Client Council Membership Events; and
- a workshop with the Third sector convened by Northern Ireland Council for Voluntary Action (NICVA).

Further workshops were held in late 2019 to engage with further stakeholders including service users and carers, independent health and care providers, the private healthcare sector and the social care sector. The feedback from the workshops has been analysed and published on the Department of Health website here.

The Chairs of both groups have also been meeting with a wide range of stakeholders, including Health and Social Care Trusts, organisations and professional bodies.

A series of options for consideration on how to take this work forward are being developed. A working group of service users and carers has been set up to

develop guidance as part of the framework for openness.

Section 5 - Next steps

Q28. What are the next steps?

A28. The Department is preparing policy options to implement the recommendations, taking account of all the research, evidence and feedback from stakeholders. The next stage will be public consultation, followed by the legislative process.

We will continue to involve key stakeholders in line with the Involvement Plan.

Q29. How long will it take?

A29. Following public consultation, draft legislation will need to be prepared. The introduction of a Statutory Duty of Candour will require Ministerial and Executive approval prior to introduction to the Assembly for scrutiny. It is likely to take a number of years to come into effect.

However, creating a culture of openness does not need to wait for legislation and the Being Open group has been working on guidance, training and support that can be implemented ahead of the legislation.

Q30. Why does it take so much time?

A30. This is a major piece of work with implications for everyone who uses or works in the Health and Social Care system.

This means engaging with all stakeholders including patients, families and members of the general public and giving everyone the chance to have their say. It is also important that we consider the impact on Health and Social Care organisations and their staff and make sure there aren't unintended consequences.

Q31. Will there be updates on progress?

A31. Regular updates are available here, where you will also find more information on the programme as a whole.

Updates will also be emailed to those registering their interest at the Department of Health, Hyponatraemia Implementation Programme website here.