

Duty of Candour Workstream & Being Open Sub Group consultation on Duty of Candour & Being Open policy proposals

Introduction

The British Association of Social Workers Northern Ireland (BASW NI) is part of BASW, the largest professional body for social workers in the UK. BASW has 21,000 members employed in frontline, management, academic and research positions in all care settings.

BASW NI welcomes the opportunity to respond to the consultation on the Duty of Candour and Being Open policy proposals developed by the Inquiry into Hyponatraemia-Related Deaths Programme Duty of Candour Workstream and Being Open Sub-Group.

Being Open Framework

Core to the social work role, no matter what service a practitioner is employed in, is safeguarding service users and improving their life opportunities. This is the case whether a social worker supports children and families, older people, people with a learning disability or a physical disability, individuals seeking asylum, or people with a mental health problem.

While high quality social work practice is key to achieving this aim, so too is ensuring the organisational, legal and policy contexts social workers operate in are focused on keeping people safe. It is, however, a reality that well trained, committed staff can make mistakes, and it is vital that social workers are open when things go wrong. BASW NI therefore fully supports the Workstream's proposals for a policy framework to promote openness and candour and endorses the "three-level" approach.

Among the most basic of the recommendations made is to create opportunities "for staff to reflect on their work routinely in their teams". Research¹ conducted by BASW NI in partnership with the Northern Ireland Social Care Council (Social Care Council) the Irish Association of Social Workers and Coru, Ireland's multi-profession health regulator, found that for 71% of Northern Ireland social workers, "using reflective practice" contributed to their sense of professional social work identity. Feedback from BASW NI members indicates, however, that social workers are seldom afforded sufficient time in their working week to engage in reflective practice, with time in team meetings being used for managerial aspects of work.

Consultation with BASW NI members also highlighted that currently, many social workers do not feel safe enough to raise issues regarding inadequate staffing and high levels of vacancies through line management structures. These factors place

¹ *Shaping Social Workers' Identity: An all-Ireland Study* (2020)

https://www.basw.co.uk/system/files/resources/shaping_social_workers_identity_-_an_all-ireland_study.pdf

significant pressure on social workers across HSC services and BASW NI Members have raised serious concerns about the impact of unmanageable caseloads on the quality of practice. The vacancy rate in HSC social work services is currently 7.3%².

It is therefore welcome that the level 1 proposals for the *Being Open Framework* would require that “staff can expect to be managed by senior staff who themselves exhibit openness and candour, within an organisation that supports, encourages and models these behaviours on a daily basis”. It is fundamentally important that when issues are raised by staff, including concerns about staffing levels, that resources are made available for managers, supported by leadership, to address the concerns. Implementing a policy to promote openness will only succeed if staff are assured that their concerns will be addressed. A failure to act on the issues raised by staff will likely hinder the effectiveness of the proposals to promote openness.

Although BASW NI’s remit does not extend to representing the interests of social care workers, well-resourced social care provision is vital to the delivery of high-quality social work services. The scope of the Workstream’s proposals will, in line with Justice O’Hara’s recommendation, apply to staff working for every healthcare organisation. It is therefore vital, given no professional body represents the interests of social care workers, the Workstream undertakes meaningful engagement with the social care workforce as part of this consultation process.

Ensuring social workers are open with service users when something goes wrong is a requirement of the *BASW Code of Ethics for Social Work*³. The Code is binding on all social workers who are BASW members in all roles, sectors and settings in the UK. It requires that social workers “work in a way that is honest, reliable and open, clearly explaining their roles, interventions and decisions and not seeking to deceive or manipulate people who use their services, their colleagues or employers.” The code also requires that “Social workers should be prepared to account for and justify their judgements and actions to people who use services, to employers and the general public.”

In light of the standards BASW requires its own members to adhere to, the Association supports the definition of candour included in the consultation document as specified by Sir Robert Francis, Chair of the Mid Staffordshire Inquiry (2013). The duty as defined requires:

“The volunteering of all relevant information to persons who have or may have been harmed by the provision of services whether or not the information has been requested or whether or not a complaint about that provision has been made”.

It is also a requirement of the Northern Ireland Social Care Council (Social Care Council) *Code of Conduct and Practice*⁴, under which social workers in Northern

² Northern Ireland health and social care (HSC) workforce vacancies March 2021 <https://www.health-ni.gov.uk/publications/northern-ireland-health-and-social-care-hsc-workforce-vacancies-march-2021>

³ <https://www.basw.co.uk/system/files/resources/Code%20of%20Ethics%20Aug18.pdf>

⁴ <https://staging.niscc.info/app/uploads/2020/09/standards-of-conduct-and-practice-for-social-workers-2019.pdf>

Ireland operate, that they are candid when errors are made. The code requires practitioners to be “*open and honest with people if things go wrong, including providing a full and prompt explanation to your employer of what has happened*”. Failure to live up to this standard can ultimately result in a social worker being removed from the Northern Ireland Social Care Council register—deeming them unable to practice.

It is the view of BASW NI that social workers, as required by the Social Care Council *Code of Conduct and Practice*, already work under a *de facto* individual duty of candour. Breach of this duty carries with it a severe penalty in the form of a potential loss of livelihood.

Statutory Organisational Duty of Candour

BASW NI, as is the case for many other professional bodies, supports and represents members that are stretched in capacity, often carrying excessive workloads while receiving insufficient support from managers and senior staff, who themselves are also often stretched in capacity. Where organisational failings lead to staff becoming overburdened, there is an elevated risk that something goes wrong and mistakes are more likely to be made.

Serious Case Reviews into the killings of Dylan Tiffin-Brown⁵ and Evelyn-Rose Muggleton⁶, children under the remit of Northamptonshire council, highlighted drift and delay fuelled by staff turnover and poor oversight. Both children were killed by men with histories of violence.

An Ofsted investigation⁷ conducted shortly after the children’s deaths identified “significant shortfalls in social work capacity across the service, resulting in unmanageable caseloads and high volumes of unallocated and unassessed work”. The report indicated social work caseloads in the Local Authority’s first response teams were too high, “with many social workers responsible for between 30 and 50 children”. As a result, social workers reported they were “‘overwhelmed’ and ‘drowning’”. Furthermore, Ofsted identified that as a consequence of unmanageable caseloads “visits to children are not sufficient, and rushed home visits lead to superficial, weak assessments, which results in delays in providing support.”

Following the Ofsted report, an independent report⁸ by the Commissioner for Children’s Services in Northamptonshire for the Secretaries of State for Education and for Housing, Communities and Local Government found:

⁵ <http://www.northamptonshirescb.org.uk/about-northamptonshire-safeguarding-children-partnership/scr/childak/>

⁶ <http://www.northamptonshirescb.org.uk/scr/childap/>

⁷ <https://files.api.ofsted.gov.uk/v1/file/50037960>

⁸ *Optimum delivery and governance arrangements: children’s services in Northamptonshire: Report for the Secretaries of State for Education and for Housing, Communities and Local Government* (May 2019)

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/847889/Northampton_commissioner_report_1.pdf

“Much of the failure within children’s services is long-standing, systemic and improvement will require a fundamental shift in the current culture which is embedded in the service and across the Council”.

The report noted historic problems in terms of communication with front-line staff and failure by successive senior managers to address longstanding problems. It highlighted mistrust of leadership by staff resulting from unfulfilled promises concerning improvements and failure by middle-managers to take responsibility for their service areas and performance.

To ensure there is learning where problems occur, it is essential that organisations reflect on the systems and procedures which led to the errors. For this reason, BASW NI is fully supportive of the Workstream’s proposal for a statutory Duty of Candour at organisational level. The Association also agrees with Justice O’Hara’s recommendation that the statutory organisational Duty of Candour should apply to every healthcare organisation.

While BASW NI agrees with the proposed requirements under the statutory organisational Duty of Candour when things go wrong, it is difficult to fully assess the proposal that organisations provide “reasonable support to the relevant person in relation to the incident” given the terms of what constitutes *reasonable support* are yet to be defined by the Department of Health. Also, while the Association supports the requirement that an apology is made to individuals who have been affected by adverse incidents, it is vital that apologies are meaningful and reflect a genuine commitment to deliver service improvements to prevent similar incidents occurring again. BASW NI is mindful of the concerns acknowledged in the consultation document that legislating for an apology could lead to a standardised or formulaic approach, which does not guarantee a genuine and sincere apology for the patient, service user, carer or family involved.

As an alternative to legislating for an apology, BASW NI recommends including a statutory requirement for a senior representative of the organisation to engage in a process of restorative justice with the individual affected, or in the case of a fatality, with members of the victim’s family. Such a process would ensure the organisation is held accountable as well as affording those affected by the incident the opportunity to be heard and to seek answers to their questions and share the human-emotional impact of the harm caused.

Furthermore, a restorative approach may help all involved to overcome the aftermath of the harm caused. Most of those affected will want to feel vindicated, a sense of justice and a reassurance that this will never happen again. Vitally it also provides an opportunity to rebuild trust between the service provider and service user, who in all likelihood, will continue to be a recipient of HSC services in the future.

The accountability and openness at the core of restorative justice makes the approach particularly appropriate given the Workstream’s assertion that the proposed duty of candour “is not about penalising organisations, or people, for making mistakes; it is about holding organisations or individuals to account for their openness and honesty about a mistake when it occurs”.

Mersey Care NHS Foundation Trust introduced a restorative justice culture in April 2016, promoting a non-punitive approach to addressing the impact of harm and wrongdoing. Analysis of the impacts of the restorative justice approach indicates “a strong downward effect on the number of suspensions and disciplinary cases. In the period from April 2014 until March 2018, the disciplinary and suspension cases for the two operational units at Mersey Care was reduced from 66 before to 37 after the introduction of restorative practice”⁹. It has also led to an increase in reporting adverse events of between 7% and 18% per year from 2014 to 2017.

Notwithstanding the view that a restorative justice approach should be central to organisations’ responses to adverse incidents, BASW NI supports the proposal for a criminal offence for the breaches of the organisational Duty of Candour detailed in paragraph 3.36 of the consultation paper. They are:

- Failure to notify the relevant person that a notifiable safety incident has occurred.
- Failure to provide the notification in line with the legislative requirements.
- Provision of a false or misleading statement to a regulator or other individual acting pursuant to the statutory Duty.
- Publication of a false or misleading public statement by an organisation about its performance.

BASW NI also agrees with the proposed obstruction offence under the statutory organisational Duty of Candour.

Although the £5,000 fine proposed as the maximum penalty for breach of the organisational duty of candour is not large when considered in the context of the multi-million-pound operating budgets of many HSC organisations, it is however important that significant financial resources are not diverted from frontline services. BASW NI also accepts the additional impacts associated with a fine—including the potential risk of reputational damage—will encourage organisations to adhere to the Duty.

As previously explained, each individual social worker’s practice must promote candour in accordance with the Social Care Council’s *Code of Conduct and Practice*, with risk of sanction for non-compliance. However, the requirement of the Social Care Council in its *Standards of Conduct and Practice for Employers*¹⁰ to “ensure that where care has or may have caused physical, emotional, financial or material harm or loss, this is reported openly and honestly to the appropriate authorities in accordance with Duty of Candour requirements”, does not carry any equivalent threat of sanction on organisations for non-compliance.

The introduction of a statutory organisational Duty of Candour is therefore needed to close a gap which does not exist at the individual level.

⁹ *Restorative Just Culture: a Study of the Practical and Economic Effects of Implementing Restorative Justice in an NHS Trust* (2018) Kaur, de Boer, Oates, Rafferty, Dekker https://www.matec-conferences.org/articles/matecconf/pdf/2019/22/matecconf_icsc_eswc2018_01007.pdf

¹⁰ <https://niscc.info/app/uploads/2021/03/standards-of-conduct-and-practice-for-employers-rqia-10.03.21.pdf>

Statutory Individual Duty of Candour

Under the primary proposal for a statutory individual Duty of Candour, criminal liability would relate to a breach of the requirements of the Duty and to obstruction of another in the performance of the Duty. The Workstream argues “the introduction of a statutory individual Duty of Candour with a criminal sanction for breach would underpin and strengthen, rather than replace, the existing oversight mechanisms such as training, performance review, disciplinary procedures and professional regulation.” However, in this instance BASW NI disagrees with the Workstream’s approach. It is the Association’s view that the statutory duty at individual level unnecessarily and unhelpfully duplicates the requirements currently present in the Social Care Council’s *Code of Conduct and Practice*.

Social workers can be removed—and have been removed—from the Social Care Council register for behaviour which violates the requirements of its *Code of Conduct and Practice*. Removal from the register prevents an individual from practicing social work, resulting in loss of livelihood. BASW NI notes the Workstream has not agreed upon proposals for a maximum penalty for breach of the statutory individual Duty. The consultation paper explains only that “comparable offences in other sectors tend be punishable summarily with a fine being the maximum penalty”.

However, BASW NI considers the risk of a fine for breaching the statutory individual Duty of Candour—even if set at a maximum level equivalent to the penalty for breach of the statutory organisational Duty of Candour—to be significantly less of a deterrent than the consequences social workers face under the existing system of professional regulation.

Considering the strength of the current regulatory framework for social work, introduction of a statutory duty of candour with criminal sanctions for breach would not be a useful mechanism to either encourage practitioners to behave in an open and candid manner, or to deter them from withholding information when errors occur.

The introduction of the statutory individual duty of candour, could, however, have the unintended negative consequence of fostering secrecy and the development of a blame culture. This would impede the objectives outlined in proposals for the *Being Open Framework* presented in the consultation.

In relation to the first alternative proposed—a *statutory individual Duty of Candour without criminal sanction attached for breach*—the Workstream explains that given there is no criminal sanction, “In the event that an individual member of staff breached these requirements, employers and professional regulators would continue to be ultimately responsible for oversight”. As this option would deliver no practical change to the regulatory framework social workers operate under, BASW NI considers it superfluous.

The second alternative is a *statutory individual Duty of Candour without criminal sanction for breach, and separate criminal offences for withholding information, destroying information, or providing false or misleading information*. Under this scenario, the Duty would lead to criminal sanctions in cases where staff are proven to have wilfully, intentionally, or maliciously:

- Suppressed or concealed information
- Distorted or otherwise altered information
- Destroyed information

Again, these are behaviours that would result in a breach of the Social Care Council *Code of Conduct and Practice* and likely, removal from the social work register. Given the proposal's potential for creating / entrenching a blame culture and considering the severity of the existing penalties provided by the social work regulatory framework, BASW NI does not consider this alternative option to be of merit.

Crucially, however, BASW NI believes the existence of a statutory individual Duty of Candour could undermine the effectiveness of a statutory organisational Duty of Candour. As detailed earlier in this response, where organisational failings exist, mistakes are more likely to be made. It is essential that organisations learn when mistakes are made to ensure they do not happen again. Where individuals stand to be punished for these mistakes, it is less likely that organisations will reflect and improve. The result will be poorer, rather than better outcomes for service users.

The consultation document highlights Justice O'Hara recommended the power to prosecute under the statutory organisational Duty of Candour should apply "in cases of serial non-compliance or serious and wilful deception". Where a single mistake is uncovered, there is significant risk that organisations will fail to recognise the mistake as part of a potential pattern, or an existing pattern that has not yet come to light. Under the current proposals, having the option of attributing blame to an individual under a statutory individual Duty of Candour will serve to reduce the likelihood of rigorous investigations being conducted at the organisational level.

This concern is presented in a scenario where at worst, organisations fail to recognise corporate failings. There is, however, the potential for staff to be intentionally singled out for blame to cover up more serious errors at organisational level. It is therefore vital that any mistake is investigated at the organisational level, with the threat of sanction under the organisational Duty of Candour applicable not only in cases of serial non-compliance, but also where organisational failings have led to single mistakes. Organisations committed to promoting the wellbeing of their services users will not oppose such a requirement and it is vital the Workstream acknowledges this in its plans.

It is BASW NI's view that the potential risks to patient and service user safety posed by inappropriately holding a member of staff liable under an individual Duty of Candour for a failing that resulted from organisational error, renders an individual duty of candour at best unnecessarily duplicative, and at worst dangerous.

Potential impacts on the social work workforce

At paragraph 4.34. of the consultation document, the Workstream recognises the introduction of any criminal offence could be perceived as harsh and create fear among staff, thus impacting morale and recruitment or retention. During BASW NI's consultation with members, concerns were raised on multiple occasions about the impact that introduction of a statutory individual Duty of Candour with criminal

sanctions could have on recruitment and retention to HSC social work services. Approximately 64% of Northern Ireland's social workers work in HSC and given the generic nature of social work education, there is significant opportunity for social workers to leave HSC and pursue roles in the voluntary, criminal and youth justice, and education sectors. Members also highlighted the introduction of a statutory Duty of Candour which affects part, but not all of the profession, would create inequality within social work.

The Department of Health is currently undertaking a Social Work Workforce Review, which recognises the pressures currently facing the social work profession. In terms of the age profile of the HSC social work workforce, 32% are aged 50 or older. The average age at normal retirement on the latest year's HSC data was 61.1 years. This indicates the potential impact of retirements over the next five to 10 years could be significant. In light of this challenge, it is vital that experienced, highly skilled social workers are not deterred from remaining in HSC roles. The introduction of a statutory individual Duty of Candour could be a significant push factor in driving staff into non-HSC roles where the Duty will not apply. Members have raised concerns that the introduction of a statutory individual Duty of Candour could also deter young people from studying social work in Northern Ireland, or from staying in the region to join the workforce following qualification.

If you would like any further information or to arrange a meeting to discuss the issues raised in this response, please contact Andy McClenaghan, BASW NI Public Affairs, Policy and Communications Lead on 07702 517560 or andy.mcclenaghan@basw.co.uk.