THE LAW SOCIETY OF NORTHERN IRELAND

Department of Health

Consultation

DUTY OF CANDOUR & BEING OPEN – POLICY PROPOSALS

Response of the Law Society of Northern Ireland

August 2021

96 Victoria Street
Belfast BT1 3GN
Tel: 02890 23 1614
Fax: 02890 232606
Email: enquiry@lawsoc-ni.org
Website: www.lawsoc-ni.org

ABOUT THE LAW SOCIETY

The Law Society of Northern Ireland (the Society) is a professional body established by Royal Charter and invested with statutory functions primarily under the Solicitors (Northern Ireland) Order 1976 as amended. The functions of the Society are to regulate responsibly and in the public interest the solicitor's profession in Northern Ireland and to represent solicitors' interests.

The Society represents over 2,800 solicitors working in approximately 470 firms, based in 65 geographical locations throughout Northern Ireland and practitioners working in the public sector and in business. Members of the Society thus represent private clients, Government and third sector organisations. This makes the Society well placed to comment on policy and law reform proposals across a range of topics.

Since its establishment, the Society has played a positive and proactive role in helping to shape the legal system in Northern Ireland. In a devolved context, in which responsibility for the development of justice policy and law reform takes place at a local level, this role is as important as ever.

August 2021

RESPONSE

This Call for Evidence offers an opportunity for the Society provide views on whether the policy proposals developed by the Duty of Candour Workstream as part of Inquiry into Hyponatraemia-Related Deaths Programme, will be sufficient to implement the relevant recommendations arising from the Hyponatraemia Inquiry (The Inquiry) Report published in 2018. The findings of the Inquiry were that the deaths of five children had been avoidable and that the culture in the health service at the time, the arrangements to ensure the quality of services and the behaviour of individuals all contributed to the unnecessary deaths of those children.

The Inquiry Report identified failings across ten themes and made 96 recommendations, the key one being the introduction of a Statutory Duty of Candour. Such a duty has already been introduced in E&W and Scotland. The Society notes that the proposal for such a duty in this jurisdiction goes further than in neighbouring jurisdictions. The proposal is that every health care organisation as well as every worker within them will be bound by the Duty of Candour. At the conclusion of the Inquiry individuals avoided sanctions due to current practices in this jurisdiction and lack of a Duty of Candour – no arrests were made and no police investigations carried out. Under Mental Health legislation in this jurisdiction a very different outcome would have occurred as there is provision to prosecute such actions. The Society notes the very different approach and outcomes as a result of allegations against staff at Muckamore Abbey Nursing Home, all of which were dealt with under Mental Health legislation with criminal sanctions. Should a Duty of Candour be introduced in Northern Ireland then in future a different outcome will not occur following an inquiry in the medical sphere of wrong doing.

The proposed Duty of Candour will contain a statutory requirement which will apply in relation to unintended or unexpected incidents in the provision of health and social care that has or may result in unexpected/unexplained death of a service user; or moderate, serious or prolonged psychological harm to the service user. The Society questions if the definition will be broad enough to cover misdiagnosis or will such a failure remain a professional conduct matter?

Another concern is the definition of harm. The Society feels that patients undergoing medical treatment should not be subject to *any* harm. The Society sees a potential danger that if no duty exists in the criminal sphere to report harm which falls below the proposed

legislative threshold, then opportunities may be missed where a medical practitioner commits harm via continued malpractice but is not reported earlier and such a circumstance leads to more serious consequences for patients. Thus, eventually there is serious harm to the patient as a cumulative result of the continued harm as the situation progressed. The proposed definition of harm is possibly set too high. There is no natural culture of whistle blowing in the medical profession currently and with a perception that insurers may advise a position of no admission, some patients could be placed in harm for some time before the threshold is reached.

The Society notes with interest that 75% of respondents to the Workstreams survey agreed that it should be a criminal offence for an individual to withhold or alter information, cover up events or provide false information. Such provision is catered for in the Mental Health Order. It is evident that there is strong support for more openness and honesty in such circumstances. A Duty of Candour should arise in a situation where information is omitted from medical notes and records as it is likely that further clinical decisions will be based on the content of those notes. The Society would not oppose such an approach and feel that it is appropriate as the purpose of a statutory duty of candour is to ensure public accountability for the delivery of open and honest health and social care, which was so obviously lacking in the hyponatraemia cases.

The scope of the duty as recommended by Mr Justice O'Hara, should be applicable to every healthcare organisation. As such this is not just Trusts employees, but also RQIA regulated establishments and agencies, community pharmacies, GP practices, Department of Health, HSCB, BSO, RQIA, PHA, NIGALA, Blood Transfusion Service and others. The Society agree with the proposed scope as it would be inequitable to impose such a duty on a small number of organisations or services. However, it should be pointed out that there are a number of charities which may be caught in such an arrangement and this may have implications for them. This needs to be properly explored by the Department and charities who may be impacted and guidance will be required.

The Society supports the view that criminal sanctions for breach of the proposed Duty of Candour should focus on holding an organisation or individual to account for their openness and honesty about a mistake when it has occurred. The Inquiry specifically recommended that the power to prosecute should apply in "cases of serial non-compliance or serious and wilful deception". The Society questions how many cases would amount to

'serial non-compliance'? This needs to be defined to give effect to meaningful legislation in this area.

Thus, it is clear that criminal prosecution will only be pursued in the most serious of cases, and will of course be dependant on Trusts referring cases to the PSNI. This recommendation may not be palatable to medics, however the fact that it will only be implemented in the most serious of incidents should offer confidence that it will be a position of last resort, and undoubtedly only after protracted regulatory intervention by the body responsible for the professional in question. The Society would welcome the Director of the Public Prosecution Service issuing guidance to Prosecutors and the public once the legislation is enacted to advise on the scope of the legislation and how the PPS will apply the Prosecution test for same. It would be hoped that medical and related health practitioners' concerns may be placated by such guidance.

The requirement to be 'openly honest' is welcomed by the Society which includes unintended and unexpected incidents occurring during the provision of health and social care to a patient or service user. The threshold of harm to be met before the matter will constitute a notifiable incident and trigger the Duty of Candour is something that the Society has some concerns about, as outlined above. Moderate harm is included which mirrors the approach taken by our neighbouring jurisdictions. The Society feels that clear guidance and training will have to be made available to avoid confusion or avoidable incidents of investigations being triggered unnecessarily.

If a Duty of Candour is introduced in Northern Ireland, the Society feels that training of new doctors, nurses and others in the health care system will have to be changed to incorporate the new statutory duties so that everyone in the system is aware of their responsibilities as this will be a major cultural change.

An issue which is of concern for the Society, may be regarded as an unintended consequence. In the scenario where a medical or health care practitioner has been found liable for a breach of criminal law in failing to perform a duty of candour, then their insurance provider, and ultimately the Health Trust that employs them, may not indemnify them in respect of civil proceedings brought by affected patients or their relatives. This would result in innocent patients or their relatives potentially being unable to pursue a civil remedy for compensation. Steps must be taken to ensure that there is no negative impact on patients/relatives having access to civil remedies as a result of this new legislation.

On the whole the Society's view is that a breach of the criminal law must apply to everyone without exception, as no-one is above the law. That is a fair and reasonable approach to this very sensitive issue and would achieve what the Inquiry recommended. The Society would like to point out that culpability for acts of omission is something that the criminal law does not allow for currently, save for neglect under the Mental Health legislation. Any new statutory duty must be observant of the latter legislation and not introduce a conflict. It is imperative that new legislation must eliminate loopholes as there is an opportunity to provide a meaningful safety net for vulnerable people such as children, elderly and those with mental health problems who enter the health care system. Of particular concern is the care of the elderly who enter the care home system. It is hoped that a duty of candour will result in an improved system for them, and this would be welcomed by their relatives.

Finally, the Society does not believe that encouragement to medical professionals and employees on the merits of being open and honest will naturally allow candour to flourish without a specific duty being introduced by statute. It is evident that such a culture does not naturally exist at any level. The Inquiry, which focused on one small area of medical practice, clearly shows that candour is not part of the culture and additional steps must be taken to ensure openness and transparency.

CONCLUSION

The Society welcomes the opportunity to submit a response in respect of the Department of Health's Consultation on Duty of Candour & Being Open – Policy Proposals.

We trust our contribution is constructive and we are happy to meet with the Department to discuss any of the issues raised in our response.

We would like to be kept informed of any subsequent proposals formed as a result of this consultation and also any changes to the overall policy direction of the topic under discussion along with a stated rationale.