

31 August

Health and Care Professions Council response to the Department of Health (Northern Ireland) consultation on Draft Policy Proposals on Duty of Candour & Being Open

1. About us

We welcome the opportunity to respond to this consultation.

The Health and Care Professions Council (HCPC) is a UK-wide statutory regulator of healthcare and psychological professions governed by the Health Professions Order 2001. We regulate the members of 15 professions. We maintain a register of professionals, set standards for entry to our register, approve education and training programmes for registration and deal with concerns where a professional may not be fit to practise. Our role is to protect the public.

2. Response to the consultation

2.1 We have provided responses to the consultation questions where relevant to our role as a professional regulator.

Terminology (paragraphs 2.25 – 2.27)

Question 1: Do you agree with the terminology and definitions adopted by the Workstream in respect of “openness” and “candour”?

Yes, we agree with the definitions used as these broadly align with our own terminology.

The HCPC’s own terminology relating to candour is found in Standard 8 of our Standards of Conduct, Performance and Ethics. The standard is called ‘Be open when things go wrong’ and states that registrants must “be open and honest when something has gone wrong with the care, treatment or other services that you provide by:

- informing service users or, where appropriate, their carers, that something has gone wrong;
- apologising;
- taking action to put matters right if possible; and
- making sure that service users or, where appropriate, their carers, receive a full and prompt explanation of what has happened and any likely effects.”

Standard 9 is entitled “Be honest and trustworthy” and includes Standard 9.1 “You must make sure that your conduct justifies the public’s trust and confidence in you and your profession.”

Please note that we have responded to those questions relevant to our expertise and the scope of our work as a healthcare professional regulator and expertise. We have not responded to questions outside our scope or expertise, which includes a number of questions relating to the detail of the approach to organisations.

Statutory Organisational Duty of Candour (Section 3)

Question 3. Do you agree with the proposed scope of the statutory organisational Duty of Candour? If yes, please provide any additional information.

The HCPC regulates 15 different health and care professions. As explained in our response to Question 1, our Standard 9 requires our registrants to “be honest and trustworthy” and our Standard 8 requires our registrants to “be open and honest when something has gone wrong with the care, treatment or other services that you provide by:

- informing service users or, where appropriate, their carers, that something has gone wrong;
- apologising;
- taking action to put matters right if possible; and
- making sure that service users or, where appropriate, their carers, receive a full and prompt explanation of what has happened and any likely effects.”

Our Standard 7 also requires registrants to report concerns about safety. We very much welcome the opportunity to respond to this consultation, and very much appreciate the time that the team in the Department of Health have taken to discuss the proposals with us.

Candour is a critical part of safe and effective professional practice and we welcome moves to strengthen the framework around candour through an organisational duty. Being open and honest when things go wrong is vital to ensuring a culture that learns from mistakes to prevent things going wrong in future. It is also a critical part of supporting families and patients who have been harmed by mistakes. Our deepest sympathies are with the families of those who tragically lost their lives to hyponatraemia.

While we do not regulate organisations, registrants’ employing organisations play an incredibly important role in creating a culture that enables health and care professionals to meet our professional standards. We would expect registrants to follow policies set by their employers and follow the law at all times.

An organisational duty of candour would support the development of an open and honest culture, which is critical for improving outcomes for patients and service users. We believe that an organisational duty of candour, combined with the relevant professional standards that are promoted and enforced by a regulator, provide a strong statutory and regulatory framework to support the right culture and behaviours.

In addition, work to support culture change in organisations requires effective leadership, and to support the embedding of the 'Being Open' guidance and the right culture we would suggest, in addition, that consideration be given to introducing 'Duty of Candour Guardians' nationally and within employers, to drive real change.

We cover this below.

Routine Requirements (paragraphs 3.10 – 3.11)

Question 5. Do you agree with the routine requirements of the statutory organisational Duty of Candour?

We agree with the routine requirements. The HCPC's Standards also require routine openness and candour, not only when things go wrong.

Apologies (paragraphs 3.24 – 3.26)

Question 11. Do you agree with the proposed legislative requirement to provide an apology as part of the Duty of Candour procedure?

Yes. An apology is a key element of the HCPC's own standards relating to openness. For an apology to be genuine, it should come from the right person/people and make clear that they are sorry for what has happened. The HCPC has issued guidance to registrants about the importance of apologising and making clear that, as far as the HCPC is concerned, an apology is not an admission of guilt.¹

Question 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.

As at Question 11

Support and protection for staff (paragraphs 3.27 – 3.28)

Question 15. Do you agree with the proposals for support for staff under the statutory organisational Duty of Candour?

Yes.

The HCPC agrees with the proposals for support for staff, which broadly aligns to our own approach.

¹ For more information, see our Sanctions Policy here: <https://www.hcpc-uk.org/globalassets/resources/policy/sanctions-policy.pdf?v=637117389410000000> as well as a 2019 blog here: <https://www.hcpc-uk.org/news-and-events/blog/2019/standards-in-practice-being-open-when-things-go-wrong/>

The HCPC's approach to regulation has seen greater emphasis on upstream activity by focusing on promoting professionalism and preventing and reducing harm². We believe that interventions of this kind are most likely to foster long-term systemic changes which will positively impact patient and service user safety.

Reporting and monitoring (paragraphs 3.29 – 3.32)

17. Do you agree with the proposed reporting and monitoring requirements under the statutory Organizational Duty of Candour?

Yes. The HCPC supports accurate reporting which can help foster a learning culture.

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.

The HCPC views candour as an essential part of ensuring service user safety and believes that preserving public trust in the health and care systems is vital for public health. We know that candour is especially important when things go wrong and that learning and improving is impossible without a culture of candour. The HCPC also acknowledges that candour can bring comfort to families which have experienced loss and that this is no less important than those benefits relating to safety.

We are of course mindful of the families who continue to live with the loss of children to hyponatraemia and whose pain was compounded by the lack of candour they experienced. Where the HCPC does not support an individual duty, it is not because we believe that candour is unimportant or that health and care professionals should not be accountable. The HCPC's focus is on the safety of service users and patients but we do not believe that service users or patients are best served by the proposals for an individual duty for the following 4 reasons:

1. The presence of existing relevant HCPC standards and significant sanctions attached to their breach (including the ability to 'strike-off' a registrant thus preventing them practising and preventing future harm);
2. The potential for our ability to effectively deploy those sanctions to be impeded by criminal investigations, which could delay our fitness to practise processes.
3. Unclear connection between the proposal and increased protection for patients and service users;
4. The HCPC's approach to regulation which aims to support registrants and employers, to build open and supportive cultures in workplaces, which help to prevent problems before they occur and encourages and open, honest and

² The HCPC's Professionalism and Prevention Framework can be accessed here: <https://www.hcpc-uk.org/globalassets/meetings-attachments3/education-and-training-committee/2020/8.12.11.2020/enc-03---professionalism-and-prevention-framework.pdf>

learning culture, which can provide better protection to patients and service users.³

The consultation highlighted Justice O'Hara's view that existing oversight mechanisms had not been sufficient to ensure candour takes place.

The HCPC (and other regulators) are continually evolving the way we regulate to ensure we are protecting the public and adapting to the increasingly complex needs of the UK's health and care systems. The HCPC welcomes more engagement on these issues and agrees that these processes can always be strengthened further. However, we believe that these changes should be driven by other means, including continued strengthening of health and care regulators through their existing oversight mechanisms and/or changes to the legislation governing health and care regulation to empower regulators to better protect the public. Planned regulatory reforms have the potential to significantly strengthen professional regulators' legal frameworks.⁴

Candour is already an important part of the HCPC's standards including Standard 7 (report concerns about safety) Standard 8 (be open when things go wrong) and standard 9 (be honest and trustworthy).⁵ Where a registrant would be likely to be prosecuted under the proposal (i.e. when investigation has found evidence of deliberate and intentional breach of the Duty) this type of breach would be likely to constitute a serious case under the HCPC's Fitness to Practise procedures. While each FTP case is unique, the HCPC's Sanctions Policy suggests that a striking off order may be appropriate where a registrant is accused of serious dishonesty (for example, putting false information in a service user's record) and that other more lenient sanctions would not be appropriate in these cases.⁶ The seriousness of these sanctions demonstrate the importance the HCPC places on honesty and shows service users the concrete steps the HCPC will take to uphold public safety.

Given the existing strength of the sanctions in place, the HCPC believes that the consultation document does not clearly evidence how the proposal in 4.13-4.22 will increase patient and service user safety.

The HCPC has adopted a Professionalism and Prevention Framework which focuses on upstream regulation to address problems before they occur and will be growing this function over coming months and years. Although this work is embryonic, the HCPC has already seen very positive results in workplaces which have introduced a just culture and the HCPC would advocate this approach instead

³ For more about the HCPC's Professionalism and Prevention Framework, see here: <https://www.hcpc-uk.org/globalassets/meetings-attachments3/council-meeting/2020/06.-03.12.2020/enc-07---professionalism-and-prevention-framework.pdf>

⁴ <https://www.gov.uk/government/publications/health-and-care-bill-factsheets/health-and-care-bill-professional-regulation>

⁵ The HCPC's Standards of Conduct, Performance and Ethics can be found here: <https://www.hcpc-uk.org/standards/standards-of-conduct-performance-and-ethics/>

⁶ Please see paras 56-58 and 130 of the HCPC's Sanctions Policy which can be found here: <https://www.hcpc-uk.org/globalassets/resources/policy/sanctions-policy.pdf?v=637117389410000000>

of more punitive and statutory measures. The HCPC's approach to regulation is also informed by research which finds that adopting a punitive approach to health and care regulation could make candour less likely while also reinforcing unhealthy workplace practices.⁷

As expanded on in our comments on the Framework, the HCPC is also concerned that creating new statutory duties (including criminal liability) could create confusion for service users and employers and create a parallel rather than complimentary path alongside the work of regulators.

We believe that proposals which increase the support for staff, help create a culture of openness in organisations and reinforce high standards of conduct and professionalism will have a positive impact on service user safety.

Question 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.

We would suggest that an organisational duty of candour, combined with the relevant professional standards that are promoted and enforced by a regulator, provide a strong statutory and regulatory framework to support the right culture and behaviours.

In relation to cultural change as well as our own promotion of professional standards, as set out above, we would suggest could be supported through leadership to support the embedding of the 'Being Open' guidance. We would suggest that consideration be given to introducing 'Duty of Candour Guardians' nationally and within employers, to drive real change.

'Duty of Candour Guardians' could be modelled on existing 'Freedom To Speak Up' Guardians. The guardian approach has been used with success in England with both a national guardian and individual guardians in NHS Trusts.

We believe that interventions of this kind, which help to create an environment which fosters candour, are more likely to achieve candour than the creation of a new duty for healthcare workers. This model would also serve to reinforce the organisational duty which has been proposed here and to help prevent mistakes before they happen.

We would be very happy to discuss this or any aspect of our response further with you.

⁷ For one example of this research, see the PSA's Report *Telling patients the truth when something goes wrong*, here: https://www.professionalstandards.org.uk/docs/default-source/publications/research-paper/telling-patients-the-truth-when-something-goes-wrong---how-have-professional-regulators-encouraged-professionals-to-be-candid-to-patients.pdf?sfvrsn=100f7520_6

Scope (paragraphs 4.36 – 4.38)

Question 27. What is your preferred policy approach in respect of the scope of the statutory individual Duty of Candour?

The HCPC would not support a statutory individual duty.

Routine Requirements & Requirements When Care Goes Wrong (paragraphs 4.39 – 4.43)

Question 28. Do you agree with the proposals in relation to the requirements under the statutory individual Duty of Candour?

While the proposed requirements broadly align with the obligations of HCPC registrants must already meet, the HCPC does not support the statutory individual duty for reasons provided above.

Exemptions (4.44)

Question 30. Do you have any comments to make on the case for exemptions from the requirements under the statutory individual Duty of Candour?

Candour's links with confidentiality mean that determining where exemptions should apply will be difficult and highly reliant on the context of the situation. This is a further factor suggesting that creating this duty for professionals in primary legislation would not be likely to be the most effective approach.

Additional Feedback

Question 31. Is there any additional feedback that you wish to provide in respect of the policy proposals for the statutory individual Duty of Candour?

The HCPC welcomes the opportunity to give feedback on these proposals. The trustworthiness of health and care professionals is fundamental to ensuring quality care for service users. We are absolutely committed to playing our part in protecting patient safety through robust and effective professional regulation and would like to offer our support for activity the NI government will be taking to promote a culture of openness and candour. Our professional liaison team would be pleased to work with you to promote Standards and high-quality professional practice.

We would be very happy to discuss any aspect of our response with you and would like to register our thanks, once again, to the team for taking the time to discuss these proposals with us.

Being Open Framework (Section 5)

Policy Proposals (paragraphs 5.1 – 5.8)

Question 32. Do you agree with the policy proposals in respect of the Being Open Framework?

Yes. HCPC registrants would already be expected to act in accordance with the Being Open Framework. Standard 3.4 of our Standards of Conduct, Performance and Ethics states that registrants must keep up to date with and follow the law, our guidance and other requirements relevant to their practice.

The HCPC's standards require registrants to be open and honest when things go wrong but also to give service users and carers the information they want or need, in a way they can understand at all points during their care.

Level 1 – Service Users and Carers (paragraphs 5.9 – 5.11)

Question 34. Do you agree with the policy proposals at Level 1 of the Being Open Framework for Service Users and Carers?

Yes. This aligns with the HCPC's existing standards for registrants.

Level 1 – Staff (paragraphs 5.12 – 5.13)

Question 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. While the HCPC only regulates health and care professionals (and not employers or institutions) we emphasise the important role employers play in ensuring that registrants can meet their HCPC standards.

The HCPC provides resources for employers via our Employer Hub which assists employers to create an enabling environment for registrants to meet their HCPC standards.

We have also developed materials aimed at assisting registrants to improve their practice through reflection as well as other pieces of information to provide guidance on how they can meet their HCPC standards.

Level 2 – Staff (paragraphs 5.20 – 5.21)

Question 42. Do you agree with the policy proposals at Level 2 of the Being Open Framework for Staff?

Yes. The proposals broadly align with the HCPC's standards for registrants. This includes the obligation for registrants to report when they have concerns about service user safety.

Level 3 – Staff (paragraphs 5.30 – 5.31)

Question 48. Do you agree with the policy proposals at Level 3 of the Being Open Framework for Staff?

Yes. This aligns with the HCPC's existing standards for registrants.

Additional Feedback

Question 52. Is there any additional feedback that you wish to provide in respect of the policy proposals for the Being Open Framework?

Paragraph 5.25 states "Where staff fail to exercise their individual Duty of Candour routinely within these requirements, it would be expected that this would be dealt with through normal line management performance management processes."

While the HCPC appreciates that internal processes can run concurrently with external processes, we believe that more emphasis should be placed on the role of health and care regulators. Where a registrant has routinely failed to meet their duty of candour, it is highly likely that they have not met their HCPC Standards of conduct, performance and ethics. This should be raised with the HCPC as soon as possible for a possible Fitness to Practise process to begin.

Where a registrant has not met their HCPC standards but is undergoing an internal process or additional training, this does not invalidate the need to raise a concern with the HCPC but is something the HCPC will take into consideration when assessing the concern.

Consultation & Impact Screening (Section 6)

Question 53. Do you have any feedback or data which may be relevant to the potential impact of the policy proposals within this consultation exercise, in particular in relation to the following areas:

- **Equality;**
- **Human Rights;**
- **Rural Needs;**
- **Regulatory; and**
- **Economic Impact?**

We believe that the current proposals may negatively impact the ability of regulators to regulate in a timely and efficient way. Included in this concern is the chance that the proposals create a parallel rather than complimentary mechanism for dealing with concerns about a professional's candour.

We are also concerned that employers, service users and other professionals may interpret these proposals as suggesting that serious failures of candour should be dealt with outside of the remit of health and care regulators. We believe that this could create a risk where serious issues are not referred to the HCPC in good time

and that the HCPC may not be able to take immediate steps necessary to protect service users.

Question 55. Do you have any feedback or suggestions on how best to engage and involve stakeholders on the development and implementation of this policy going forward?

We are grateful for the opportunity to take part in this detailed consultation. We would welcome any discussions on these proposals and look forward to engaging further.