Northern Ireland
Public Services
Ombudsman

Submission to the consultation on the introduction of a statutory Duty of Candour in Northern Ireland.

August 2021

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1.0 Introduction and Background

1.1 Introduction

1.1.1 This paper sets out the Ombudsman's views on the Department of Health's policy proposals to enact a statutory Duty of Candour in Northern Ireland. The Ombudsman recognises the importance of this issue and has given careful consideration to the proposals put forward by the Duty of Candour Workstream.

1.1.2 The former Ombudsman fully endorsed Mr Justice O'Hara's recommendations in relation to the introduction of a statutory Duty of Candour in Northern Ireland. Mr Justice O'Hara, as a result of the Inquiry into Hyponatraemia-Related Deaths (IHRD), recommended the introduction of a statutory Duty of Candour at both an organisational and individual level. Central to this recommendation was the proposal that criminal liability should attach to both organisations and individuals for breach of these duties. This paper details the jurisdiction of the Northern Ireland Public Services Ombudsman and outlines the current Ombudsman's views on the Workstream's proposals for implementation of the Duty of Candour in Northern Ireland.

1.2 Jurisdiction of the Northern Ireland Public Services Ombudsman

1.2.1 The Northern Ireland Public Services Ombudsman (the Ombudsman) was established by the Public Services Ombudsman Act (NI) 2016 (the 2016 Act). The role of the Ombudsman is to independently and impartially investigate complaints brought by members of the public about public services in Northern Ireland. The Ombudsman also has the power to conduct investigations without a complaint often referred to as 'own initiative investigations' under section 8 of the 2016 Act. The Ombudsman's investigation service is free to members of the public and plays an important role in both providing access to justice and redress for individuals as well as supporting improvement and learning in public services.

1.2.2 The purpose of the Ombudsman as provided for by section 1(2) of the 2016 Act is to investigate complaints of alleged maladministration by listed authorities. Schedule 3 to the 2016 Act identifies the relevant listed authorities and includes government departments and their agencies, district councils, education bodies including schools, universities and colleges of further and higher education, the Northern Ireland Housing Executive and housing associations as well as organisations involved in the delivery of health and social care. In relation to the health and social care sector, the Ombudsman's jurisdiction is wide including all six health and social care trusts, the Regulation & Quality Improvement Authority (RQIA), the Northern Ireland

Medical & Dental Training Agency (NIMDTA), the Patient Client Council, the HSC Board and the Public Health Agency, the Business Services Organisation (BSO), general health care providers such as GP's and independent providers of health and social care such as care homes and domiciliary care providers.

1.2.3 Any person who claims to have sustained an injustice (person aggrieved) may complain to the Ombudsman about maladministration. Complaints about professional judgement in health and social care are also within the Ombudsman's remit. Where a person aggrieved has died or is unable for any reason to act for themselves in bringing a complaint, the 2016 Act permits an MLA or member of that person's family or other suitable person to act on their behalf. Public bodies may also refer a complaint to the Ombudsman where it has been unable to resolve the complaint. This has occurred in two cases involving separate health and social care trusts.

Healthcare complaints remain the largest area of complaint to the Ombudsman's office. In 2018-19, 310 complaints were received relating to the delivery of health and social care and this increased by 22% to 377 in 2019-20. Overall, 36% of complaints to the office in 2019-20 and 34% in 2020-2021 related to the delivery of health and social care services. A high percentage of the complaints received in this area are progressed to further investigation and it is notable that across both years, over 70% of all complaints determined and reported on at further investigation, related to health and social care. As is evident from the above statistics complaints about health and social care form a large part of the work undertaken by NIPSO who have developed considerable knowledge and expertise in this area.

2.0 Organisational Duty of Candour

2.1 Introduction of an Organisational Duty of Candour

2.1.1 Mr Justice O'Hara recommended the introduction of a statutory organisational Duty of Candour in Northern Ireland. The Ombudsman fully endorses the proposed organisational Duty of Candour and is of the view that it will play an important role in encouraging health and social care providers to act in an open and honest manner when mistakes are made.

2.1.2 One of the key themes which emerged from Mr Justice O'Hara's inquiry into the Hyponatremia-Related Deaths was a lack of honesty and openness with the families involved where it was suspected or believed that death or serious injury had been caused to a patient by an act or omission of a health care organisation or its staff.[1] In the course of investigating health and social care complaints, the Ombudsman's Office sometimes encounters a lack of

[1] IHRDNI Report, para 8.101, pg.73, accessed at Vol3-08-Current.pdf (ihrdni.org)

openness. The culture may be defensive rather than open, particularly in relation to the investigation and disclosure of information pertaining to serious and adverse incidents. The Ombudsman is of the view that it is appropriate to impose a statutory Duty of Candour on healthcare organisations and that as Mr Justice O'Hara recommended this may assist in building a culture of greater openness and transparency. The introduction of a statutory duty will also act to reassure the public in terms of accountability.

2.1.3 Additionally, the introduction of an organisational Duty of Candour will bring Northern Ireland into line with the rest of the United Kingdom. An organisational Duty of Candour for health and social care providers was introduced in England in 2014.[2] A similar organisational duty came into force in Scotland in 2018[3] and Wales is currently legislating for an organisational duty which is expected to come into force in 2023.[4]

2.2 Scope of the Organisational Duty

2.2.1 Mr Justice O'Hara was of the opinion that the statutory organisational Duty of Candour should apply to every healthcare organisation. The Ombudsman agrees with Mr Justice O'Hara and supports the wide scope of the statutory organisational duty which has been proposed by the Workstream. The organisational duty will be most effective and send a stronger message about accountability if it applies to every healthcare organisation. The organisational Duty of Candour seeks to achieve a broad culture change and this will be best achieved by a wide, far-reaching scope.

2.3 Criminal Sanctions for Breach of the Organisational Duty

2.3.1 The Ombudsman is in agreement with the proposal that criminal liability should arise in the event of breaches of the organisational duty. It is of central importance that the messaging around organisational criminal liability is correct and it should be reinforced that organisations are not being held liable for their mistakes but for a failure to be open and honest when a mistake has been made.

2.3.2 In relation to the level of sanction, it is proposed that the maximum penalty for a breach should be a Level 5 fine (£5000) on summary conviction. The Ombudsman recognises that this takes account of the current financial difficulties facing health and social care, however, the Ombudsman takes the view that the maximum level of the penalty should not be so restricted and therefore the penalty applied in any case is left open to the jurisdiction of the Court and this would allow the Court to send out a strong message to

[2] The Health & Social Care Act 2008 (Regulated Activities) Regulations 2014, s.20
[3] Health (Tobacco, Nicotine etc and Care) (Scotland) Act 2016, Part 2
[4] The Health and Social Care (Quality and Engagement) (Wales) Act: summary [HTML] | GOV.WALES

organisations about their obligation to be open when the facts of the case would indicate the need for a higher penalty. The courts are experienced in determining the appropriate level of penalty and a higher maximum penalty would enable the courts to determine the level of penalty on a case-by-case basis taking account of the full range of factors which have a bearing on penalty.

3.0 Individual Duty of Candour

3.1 Introduction of an Individual Duty of Candour

3.1.1 In addition to an organisational Duty of Candour, Mr Justice O'Hara recommended a statutory individual Duty of Candour. Sir Robert Francis also recommended the introduction of an individual duty in England as part of his 2013 report on the Mid Staffordshire NHS Foundation Public Inquiry.

3.1.2 The Ombudsman has given consideration to the introduction of a statutory individual Duty of Candour in Northern Ireland. She is in agreement with Mr Justice O'Hara's well-reasoned argument that the individual ethical duties placed on practitioners by their professional organisations do not go far enough. Based on the experience of her Office investigating complaints, the Ombudsman has found that, despite ethical duties placed on healthcare professionals by relevant Codes of Conduct, individuals can remain reluctant to give full and honest answers to questions reasonably asked by a patient or their family where death or serious harm has occurred. The Ombudsman has reflected on Mr Justice O'Hara's findings in relation to the lack of honesty demonstrated in the course of his inquiry and instances were personal reputation came before patient safety.

3.1.3 The Ombudsman's Office has encountered a number of serious instances of individual healthcare professionals acting without candour. In one notable case, Trust staff were found to have removed failings from an original SAI report concerning the death of a child in hospital before the report was shared with the child's parents. In another case which involved a death in hospital, pages were removed from a Nursing Plan of Care booklet before a copy was provided to the deceased patient's family.

3.1.4 The Ombudsman and her team have further heard from the professional bodies in relation to their views and opinions regarding a possible individual Duty of Candour.

3.1.5 On balance from the experience of the Ombudsman's office, the written support from the Ombudsman's predecessor and the clear reasons expressed by Mr Justice O'Hara the Ombudsman supports the introduction of an individual Duty of Candour. The introduction of such an individual statutory Duty of Candour would send out a very strong message to both healthcare

professionals and the public in relation to the openness and transparency that is expected following an incident.

3.2 Scope of the Individual Duty

3.2.1 The Ombudsman agrees with Mr Justice O'Hara's recommendation that the individual Duty of Candour should have a wide scope and that it should apply to all individuals working in healthcare organisations in Northern Ireland. A wide scope is preferable as it sends out the correct message in relation to accountability and will act to increase public confidence in accountability mechanisms. It will also prevent a situation whereby different duties apply dependent on the nature of the healthcare organisation which could lead to confusion on the part of health care workers and frustration for members of the public. A wide scope will ensure consistency and maximise potential for learning.

3.3 Criminal Liability for Breach of the Individual Duty

3.3.1 Mr Justice O'Hara was firm in his recommendation that breaches of the individual Duty of Candour should attract criminal liability. The Ombudsman acknowledges that this recommendation has attracted much debate and that concerns have been raised by health and social care professionals and their professional bodies. The Ombudsman also notes that the Workstream was unable to reach a unified policy position in this area.

3.3.2 A number of arguments have been put forward against criminal liability. It has been suggested that individual criminal sanctions in this field would be overly harsh and would result in Northern Ireland adopting a unique policy approach which similar jurisdictions have opted against. Whilst it is accurate to say that Northern Ireland would be adopting a unique approach in relation to the Duty of Candour, the concept of individual criminal liability does exist in other comparable areas of law. For example, individuals can be held criminally liable for breaches of the GDPR legislation which came into force in the UK in May 2018.[5]

3.3.3 Criminal liability has also been opposed on the basis that it could lead to a culture of blame and defensive medicine due to fear of litigation. In the course of her investigations the Ombudsman finds that, more often than not, complainants are seeking answers and honest explanations regarding what went wrong and how (if at all) the health service may have failed them or their loved one. Complainants are also very focused on the need for learning and improvement when things have gone wrong. The impact of an individual statutory duty with criminal liability is not yet known but it is possible that

[5] See Data Protection Act 2018: Section 144, 148 & 170-173

litigation might actually reduce rather than increase if individual healthcare professionals are routinely encouraged to act in a transparent and open manner in the aftermath of mistakes in an organisation that has put appropriate arrangements in place to enable them to do so and provides appropriate support.

3.3.4 It has also been suggested that the prospect of criminal liability might impact negatively on staff morale and result in difficulties for recruitment and retention. The Ombudsman considers that this could be combated by correct communication and messaging around the nature of criminal liability. It will be extremely important to communicate that the intention is not to criminalise mistakes in health and social care but rather to sanction individuals who have acted dishonestly and without candour in the aftermath of mistakes.

3.3.5 Criminal liability in this area has the potential to increase public trust and confidence in the health and social care system. It is worth noting that 75% of respondents to the Workstream's public opinion survey were supportive of criminal liability for health professionals who withhold, alter, cover up or provide false information in relation to serious harm or death.

The criminal burden of proof would also operate to ensure that criminal liability would only arise in the most serious of circumstances where a high evidential threshold has been met.

3.3.6 The Ombudsman has given careful consideration to this matter and has concluded that the individual statutory Duty of Candour should be underpinned by criminal liability. Criminal liability is merited given the potential significance of a breach of the individual duty and to send a strong message on the expectation of society for those who work in health and social care to be open. There is a strong argument that patient safety demands, at a minimum, the same level of protection as personal data. The Ombudsman considers that the importance of appropriate training and support for staff to enable them to fulfil the individual Duty of Candour cannot be overstated. The Workstream's proposal to make it a statutory requirement for organisations to provide all employees with adequate support and protection for staff is appropriate. The Ombudsman agrees that the individual duty cannot exist without the correct organisational supports and protections being in place.[6]

3.4 Criminal Liability: the 3 policy approaches

3.4.1 Three potential policy approaches have been put forward by the Workstream in relation to implementation of the statutory individual Duty of Candour. The first approach mirrors Mr Justice O'Hara's recommendations and would result in the introduction of an individual statutory Duty of Candour breach which

[6] Duty of Candour & Being Open – Policy Proposals for Consultation, para 3.27

would attract criminal liability. The second approach would introduce an individual statutory Duty of Candour with no criminal sanctions for a breach. The third approach would introduce an individual statutory Duty of Candour without criminal sanction for breach however separate criminal offences would be created; these offences would introduce criminal liability for health and social care staff who wilfully, intentionally or maliciously supress or conceal information, distort or alter information and destroy information.

3.4.2 The Ombudsman has given consideration to each of the three policy approaches put forward by the Workstream. She disagrees with the second approach as an individual Duty of Candour without criminal sanctions for breach goes against the spirit of Mr Justice O'Hara's well-reasoned and carefully considered recommendations. Whilst the first approach would implement the recommendations as envisaged by Mr Justice O'Hara, the third policy approach also makes it clear that criminal liability will only attach in very specific and clearly defined circumstances. The Ombudsman supports the introduction of either the first or third approach. The first has the additional merit of being fully cognisant with the recommendation as set out by Mr Justice O'Hara but the Ombudsman recognises this could also be achieved by a more defined criminal offence.

4.0 Being Open Framework

4.1 The Ombudsman agrees with the mechanisms which have been set out as a means of facilitating cultural change in the 'Being Open Framework'. These mechanisms are particularly useful as they elaborate on the measures which organisations need to put in place to ensure that staff are adequately supported and enabled to proactively exercise candour.

5.0 Conclusion

5.1 The Ombudsman welcomes the opportunity to comment on the Department of Health's proposals to enact a statutory Duty of Candour in Northern Ireland. This paper has outlined the Ombudsman's jurisdiction and highlighted the fact that healthcare complaints remain the largest area of complaint to her office.

5.2 The Ombudsman fully supports the introduction of a statutory organisational Duty of Candour underpinned by criminal liability. She also fully supports the introduction of a statutory individual Duty of Candour and believes that the individual duty should also be underpinned by criminal liability. The Ombudsman recognises that the prospect of individual criminal liability has generated opposition amongst some health and social care professionals. She has carefully considered the arguments on both sides and has come to the conclusion that individual criminal liability is warranted to send a clear message about what is expected of those who work in health and social care.

Where individuals are not open about acts and omissions that may have resulted in death or serious injury there is the potential for mistakes to be repeated and significant avoidable harm to occur. It is clear that a proportionate approach to the enforcement of the individual duty would ensure that only the most serious and flagrant breaches would be considered for enforcement action, but that appropriate investigation and accountability mechanisms can help to bring significant organisational learning and improvement. The Ombudsman feels that the removal of individual criminal liability would go against the spirit of Mr Justice O'Hara's well-reasoned recommendations. However, she does recognise that it is of vital importance that all healthcare staff receive the appropriate training and support to enable them to fulfil their obligations under the individual Duty of Candour.

5.3 Having considered the three policy approaches put forward by the Workstream the Ombudsman prefers the first approach as most fully reflecting the position of Mr Justice O'Hara but recognises the third approach, which would provide for a more defined criminal offence, could also deliver on the spirit of Mr Justice O'Hara's recommendation. The Ombudsman is of the view that the clarity of this approach could play an important role in reinforcing the fact that these proposals do not intend to criminalise the mistakes of healthcare professionals.

5.4 The Duty of Candour and the issue of criminal sanction has attracted much debate and the Ombudsman recognises that Northern Ireland would be taking a unique policy approach if it were to enact the above proposals. Reflecting on Mr Justice O'Hara's recommendations and the experience of her Office in the field of health and social care complaints, the Ombudsman believes, that on balance, this unique approach is the correct one.

MARGARET KELLY

Northern Ireland Public Services Ombudsman **27 August 2021**