‘Realising a Culture of Candour and Openness, not fear’

Response to DoH Public Consultation on the introduction of a statutory Duty of Candour in Northern Ireland

19 July 2021

About BDA

The British Dental Association (BDA) is the professional association and trade union for dentists in the UK. Our members work in all spheres of practice including general dental services, salaried primary dental care services, hospitals and universities and the armed forces, and include dental students.

This response has been compiled on behalf of BDA Northern Ireland Council which comprises representatives of all BDA NI committees and crafts of dentistry. It incorporates feedback received from members following our own consultation of the dental profession.

Introduction

As a profession, dentists accept and support the case for change towards creating a culture of openness. At the outset, we cannot condone those behaviours that fell short and were revealed by the Hyponatraemia Inquiry. Judge O'Hara was correct when he said that, 'a more comprehensive approach for learning from error is needed'. We fully accept the precept contained in the Francis Report that, openness and transparency are crucial elements of patient safety.

A statutory duty of candour on organisations, as is the case elsewhere across these islands, should be introduced in Northern Ireland. However, the vital ingredient to being open and honest with patients is not a statutory threat or sanction, but a *cultural* change, so that a *culture of candour* is embedded in all healthcare organisations, large and small.

There is a danger that the Department of Health is becoming fixated with statutory duties with/without criminal sanctions being a silver bullet to deal with a much deeper issue that does not affect all of healthcare in equal measure. While a strong case can be made in favour of a statutory duty of candour being introduced for organisations, a much wider focus is needed which looks at addressing those significant barriers that stand in the way of realising a culture of openness and culture change.

It is our view that these current policy proposals focus too narrowly, and simplistically on where the problems lie; they do not go far enough in proposing foolproof solutions to ameliorate the range of considerable barriers that have served to reinforce a culture of fear in the practise of dentistry over the course of many years.

The practise of ‘defensive dentistry’ is a very real phenomenon, and is driven by fear of retribution from what has been traditionally an under-supportive and over-zealous professional regulator in the GDC. It also stems from the threat of litigation from an increasingly litigious society.

Our membership have told us they perceive the threat of criminal sanctions attached to a Duty of Candour to be wholly counterproductive; practice owners are very concerned about the added regulatory burden they will face in having to put in place new policies/reporting procedures and training requirements, and all of the additional and presumably unremunerated time and expense this will entail following the new statutory duty being introduced; and all of this at a time when dentists are under unprecedented pressure to deal with a massive backlog of patients in the wake of the ongoing pandemic.

To be able to move forward, we need to look back, and there is a highly relevant backstory to why a culture of openness and candour has been undermined by fear and defensive practise in the context of dentistry. Responsibility cannot rest with practitioners alone; the origins of many of the faults in the system are further upstream -with governments and administrations who have added more pressure and expectation onto healthcare professionals without providing the additional resources -in time or funding -needed in return; it lies with regulators who have deployed a punitive approach against their registrants, instead of supporting them to be the best professionals they can be, resulting in losing touch with their registrants.

While our focus is on those factors which have made openness, candour and learning more onerous in a dental setting, the risk of death or serious harm occurring in a dental setting sets dentistry apart from other parts of the medical world, and hence a lack of evidence of such shameful behaviours of deceit, self-interest and cover-up as found in the O’Hara Report.

To succeed, the profession needs to be assured that their regulator, the GDC will be fully on board in this process, in applying policies and conducting its business in a manner that will enable -and empower -a more open approach among registrants without fear of reprisal. As it stands, these proposals make no mention of the dental regulator having been involved to date.

Clinical experience and professional judgement need to be valued. Dentists need to have confidence to make decisions, even if these may not always work out as planned. Clinicians must no longer feel constrained in being able to provide patients with the most appropriate care.

Organisational duty

Reference the proposed scope of the statutory *organisational* duty of candour, we strongly object to proposals that would see the 368 dental practices in Northern Ireland being subject to the same organisational duty as, say a large Health Trust.

We note that neither a regulatory impact assessment, or an economic impact assessment have yet been carried out on ascertaining the full extent of the extra regulatory burdens these proposals would place on dental practices.

Despite our earlier engagements with the workstreams, no consideration appears to have been given of the small scale of dental practices in Northern Ireland, or indeed the

considerable pressures they are under following the impact of COVID-19 in being able to continue to offer Health Service dentistry.

Regardless of the merits of these proposals in their own right, subjecting dental practices to the full rigours of an organisational duty without any proportionality or consideration of meeting obligations according to their scale -or indeed the low risk of dentistry in meeting the threshold of harm -is likely to have a detrimental impact on Health Service dentistry.
Clinical time will be reduced further at a time when General Dental Services are only able to see approximately 40% of the number of patients compared with pre-COVID; it also comes at a time when many practitioners cannot see a future in providing Health Service dentistry, with private options looking more attractive.

While the provisions about taking time out for reflective practice; staff training and other measures are all laudable, the consultation makes no mention of what extra provision will be made to compensate independent contractors for the not inconsiderable clinical time foregone to introduce and apply these measures into daily practice as directed by the guidance -which in itself has not yet been devised. These represent significant gaps that must be addressed if practitioners can be expected to support this process.

Asks:

- **Regulatory and Economic Impact Assessments should be undertaken, with a particular focus on small business dental practices.**
- **Any corresponding increase in non-clinical workload to introduce new policies, and to routinely service these must be compensated for.**
- **General Dental Practitioners do not benefit from Crown indemnity provision at present, unlike their general medical colleagues. We would urge Department of Health to reconsider this position in light of the proposals being brought forward to subject all health care workers to statutory duty of candour obligations on a similar basis.**

Dental professionals
Already, dental professionals have a professional duty of candour under the standards of their GDC registration. Dental professionals understand the privileged position in which they work and provide care for their patients. The responsibility to tell patients that something has gone wrong has always been part of a dental professional's life. The profession has always endeavoured to be open, transparent and candid.
Indeed, the introduction of a professional duty of candour to most professionals will be merely the repackaging of a normal professional responsibility that existed previously.

The reality is that 'human factors' mean mistakes do happen, no matter how conscientious and well-trained a professional is. **What is needed most is a development towards a 'no-blame' culture so that proper learning can ensue when things do go wrong.**

"Mistakes happen. We are all human. We should be able to speak about these mistakes without the fear of retribution so that our peers can learn from what has happened. Peer review is one of the most beneficial & educational processes we have after graduating in what can be a very isolating and challenging career path in general practice".

Challenges we face

A dominant culture of fear within dentistry
Within the practise of dentistry, there is a long history of the General Dental Council taking a punitive approach towards registrants. Every registrant fears legal retribution. That legacy is a significant factor that stands in the way of realising a true learning culture. There is a key role for regulators in helping the profession develop a much-needed learning culture, and they must be brought into this process. Fear of professional and system regulators and threat of complaints is creating a culture of fear starting at undergraduate dental student level. It will take a huge amount of effort to reverse this tide. If the element of fear and punitive reprisal can be removed, then openness will flourish.

Time and administrative burden/realities
The time and resource pressures faced by dentists is another key variable that should be considered. Ensuring sufficient time and resources in the working lives of professionals, rather than placing what may be perceived to be 'additional' requirements is an essential practical consideration in making continuous learning around patient safety a reality.

"At a trust or hospital level there are admin teams to sort all this and human resources to make sure all staff are kept up to date with all this. At practice level, I spend one full clinical session a week just doing management of the practice, and countless hours at home outside of work. I really have no appetite to add a lot more to my pile of paperwork"

Dental practitioners, in the main, operate in small general dental practices, where the practice owner will be both the organisation and the individual – this cannot be considered to be equal to a large Health Trust employing over 10,000 people. It is simply ridiculous to treat these two organisations in the same way.

Dental practices are often smaller by comparison to other organisations and work closely together so communication can be easier and more open. Dental practices are unique, and do need a system which is proportionate, reasonable, and suitable for them.

Dentistry is low risk
It is unlikely that serious harm or death will occur in dental practices, compared with other healthcare settings where the risk is indeed much higher. On that basis, there is a stronger argument in favour of a proportionate approach to be applied to dentistry.

Further clarification is needed on how the threshold for harm, including psychological harm is likely to apply in a dental setting.

Compliance
We simply must avoid a repeat of the process in which dental practices became subject to inspection by RQIA, coming under the definition of 'independent hospitals', with annual inspections despite being considered as highly compliant, and low risk. In addition, we point to the Departments ongoing inability to find sufficient legislative time to rectify the issue of moving away from wholly unnecessary annual inspections.

There is a severe lack of confidence from within the dental profession that monitoring for compliance of this duty will be done proportionately, appropriately, without bias and not

punitively. The relationship between practices and RQIA has been made more difficult by the disproportionate manner in which DoH have insisted on an annual inspection regime, despite the risk not justifying this.

If dental practices are subjected to the same rigours associated with organisational compliance as Health Trusts, this relationship will be put under further strain which will be deeply unhelpful.

Our members tell us they feel policy-makers and politicians who have a responsibility in overseeing health services should also be made subject to candour themselves. Practitioners must not be the scapegoat for a system that is severely under-resourced, under stress, where much needed reforms have not taken place, and where practical steps are not taken to address pressures that have exacerbated over many years.

Supporting professionals

Setting out what is required of professionals and organisations from a duty of candour is one thing; it's no less important to ensure adequate support mechanisms are there to enable staff and organisations to learn from error and improve their practise. All the literature around this issue confirms that legislation will not on its own bring about a change of behaviour or culture. Experience and professional judgement need to be valued, and dentists given the confidence to make decisions, even if these may not always work out as planned.

"While I support the need for professionals in health care to be open and honest, there needs to be adequate support for those professionals removing the fear of criminal liability".

"I have noticed a huge change in my younger colleagues' approach to dental practice towards 'defensive dentistry'. This does not give the clinician an opportunity to treat the patient in the appropriate way".

Peer review and support may diminish if people are afraid of speaking out about their mistakes, this is how people learn and peer review is an incredibly valuable tool and actually goes towards creating that supportive and open culture.

Practitioner Wellbeing

Alongside a duty of candour, we need to put in place the necessary supports to look after practitioner wellbeing. There is a clear need for a service akin to *Practitioner Health* in England/Scotland to be put in place in Northern Ireland in order to support doctors and dentists in difficulty.

We know that when doctors and dentists are experiencing difficulty and/or have underlying personality disorders or mental health issues, there is little space in Northern Ireland for them to ask for early intervention and safe signposting to help, resulting in them presenting late and with complex issues.

This unhealthy culture has to be changed, where a duty of candour is not necessarily at a stage where there has been patient harm, but where the potential is for error, and the clinician with insight has somewhere to go to ask for help without the need for Occupational Health, employing bodies or the regulatory bodies to be informed.

The Practitioner Health service to doctors and dentists in England, and all health care workers in Scotland gives this discreet space for clinicians to enter support and therapeutic

services at an early stage. We do not have this type of service in Northern Ireland, which needs to be established with some degree of urgency.

Openness vs fear

We believe the introduction of a statutory duty of candour on health organisations in Northern Ireland could be an important step in promoting openness and honesty when dealing with patients and families at a corporate/organisational level. This would complement the extensive work already done in recent years at a professional level when it comes to admitting errors and communication with patients and families.

As the representative organisation of a proud profession that prides itself in continuous learning, professionalism, integrity and a desire to patient-centred care, we can never condone or explain away those actions which fell short, that served to compound the grief for families over the course of many years. We too are motivated by ensuring a repeat of such episodes can never happen again.

While we fully support the desired outcome of ensuring that staff will be open and honest to patients and families about their errors, imposing a legal duty with fear of criminal sanctions on individual professionals is untested anywhere else in the world, and we fear would be wholly counterproductive. These issues are multi-factorial, and its why the current proposals of imposing criminal sanctions on individual health care workers in isolation, and without simultaneously dealing with the negative pressures of a litigious society and industry that has built up to actively target healthcare professionals, is where the proposals currently fall short.

"We need to have a culture of open and honest communication. However, I fail to see how the threat of criminal charges will encourage this? If anything, I suspect this will do the exact opposite".

Defensive dentistry
The Duty may have the opposite effect of moving away from openness and candour, by perpetuating a fear based on blame and claim culture. Many dentists operate under fear of legal retribution. The threat of criminal sanctions, may result in the practice of 'defensive dentistry'– which hampers learning, is not in the best interest of the patient, critical decision making, and leads to more referrals to specialists.

"A relatively new term, defensive dentistry marks an apparently, potentially serious threat to the way in which we think about and deliver treatment to our patients. It denotes the practise of providing dentistry which presents as few risks as possible to the practitioner from a patient complaining, or more seriously taking up a legal case as a result of an action or omission by the practitioner".

Coming across very strongly from our member responses is the need to move to an open and no-blame culture, but that the threat of criminal sanctions is perceived overwhelmingly as being counterintuitive to achieving that aim. The higher thresholds of harm and failure to disclose that triggers such criminal sanctions does not change this fact.

Practitioners tell us they believe more support is needed for practitioners. They need confidence to make the right decisions even if the end result is not as planned. In the practise of dentistry, many treatments do not have a 100% guaranteed success rate.

"I strongly believe that an open culture of no blame is what we need. But this cannot happen if there is a threat of criminal sanction. This is not the way it works in the rest of the UK or in the ROI or anywhere else for that matter."

"Young dentists already practice defensive dentistry due to the fear of the GDC. This is not always in the best interest of the patient. If this duty of candour is brought in with criminal sanctions, this will only get worse and the profession and the public will suffer as a result. I truly believe this could be one of the worst things to happen to the dental profession".

Another prevalent view within the dental profession related to criminal sanctions, relates to the belief that the new duty could leave practitioners more exposed and vulnerable to litigation than is already the case at present. While these policy proposals make some reference to this issue, in respect of the rise in litigation within dentistry, it is our view there are insufficient safeguards in current proposals to reassure an understandably nervous profession that they will be suitably protected when things do go wrong, and they seek to exercise full candour. If these extra protections are not provided for, the practise of defensive dentistry will simply exacerbate.

"The overly litigious system in the UK creates a fear among professionals which runs in opposition to the duty of candour, and surely if this was addressed first the duty of candour would follow on organically".

Furthermore, it should not be the intention of the duty of candour to promote a culture of fear; however, the perception caused by disregarding existing professional obligations, imposing the threat of criminal sanctions, and applying a position of distrust to professionals would only serve to setback the culture-shift which we all want to see.

Summary

- We are opposed to criminal sanctions being imposed on individuals for fear of this being counter-productive
- Defensive dentistry is practised out of fear from the professional regulator, and from the threat of litigation. Dentists need assurances on both fronts to help move from a culture of fear, to a culture of openness, candour and learning.
- A collaborative piece of work that looks at addressing fear in a dental setting, and how we can move further down the road to full openness and candour is long overdue. The General Dental Council (GDC) as the professional regulator has an important role to play in this work locally, and should publicly commit itself to supporting this process to flourish in Northern Ireland. RQIA as systems regulator, and DoH and HSCB should also subscribe to these principles in how they oversee dentistry, in partnership with the profession's representatives. With adequate supports in place, and if meaningful progress was made, then any fundamental opposition against a duty of candour with criminal sanctions would melt away.
- Regulatory and Economic Impact assessments must be carried out to ascertain impact on dental practices as small businesses from being subject to an organisational duty. Wholly disproportionate to expect a small dental practice to provide same level of administrative requirements as a large Health Trust
- Any additional time or expense, including reduced clinical time incurred with implementing these new policy procedures must be compensated for

- Dentistry must be recognised as low-risk for likelihood of harm threshold being met, and dealt with proportionately
- Concerns around how compliance inspection process will be undertaken need to be listened to, including absence of candour and consultation on the part of DoH with the dental profession previously on regulatory issues
- Professionals need to be supported. This must include supporting practitioner wellbeing, and putting in place a Practitioner Health service for doctors and dentists in Northern Ireland