

## **NMC response to the Welsh Government's consultation on the Statutory Guidance and Regulations required to implement the Duty of Candour**

### **About us**

1. We are the UK's independent, statutory regulator of nursing and midwifery professions. We regulate around 771,445 nursing and midwifery professionals, including over 38,900 nurses and midwives in Wales. Our purpose is to promote and uphold the highest professional standards in order to protect the public and inspire confidence in the professions and our vision is safe, effective and kind nursing and midwifery that improves everyone's health and wellbeing.

### **Summary**

2. We welcome the opportunity to respond to the Welsh Government's consultation on the Statutory Guidance and Regulations required to implement the duty of candour for NHS organisations.
3. The duty of candour is at the heart of professionalism and patient safety. As well as being embedded within our professional Code and standards and Code, it is also at the heart of our own fitness to practise strategy. We also recently updated our joint guidance with the GMC on the professional duty of candour,<sup>1</sup> which provides more information about how meet the principles set out in our Code and standards.
4. While the professional duty of candour already exists for professionals on our register, organisations play a central role in enabling professionals to fulfil their duty by creating a culture which encourages being open and honest.
5. We strongly support the introduction of the statutory organisational duty of candour for NHS bodies in Wales, which we believe will complement the professional duty by helping to embed a wider culture of openness and learning. Introducing the statutory duty will also bring regulations in Wales more closely in line with England and Scotland, which as a four-country regulator, we support. We welcome the introduction of the supporting Statutory Guidance and Regulations, which we agree are both necessary and useful tools for ensuring the effective implementation of the organisational duty.
6. We welcome the Welsh Government's intention to introduce a statutory duty for independent health and care providers in 2024, which will bring parity between NHS and non-NHS settings. However, there is a risk that the staggered approach

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<sup>1</sup> [NMC and GMC Guidance on the professional duty of candour \(2022\)](#)

towards implementation has the potential to create confusion for professionals who work across multiple settings about what is expected of them.

7. We would like to take this opportunity to emphasise as the regulator of nurses and midwives in the UK (and nursing associates in England) that the NMC Code and all our standards and guidance apply to every professional registered with us regardless of the setting they work in. This applies to our regulatory expectations around the professional duty of candour.
8. Below we have responded to the questions from the consultation that are relevant to us and which we have further comment on.

**Question 4: Do you agree that setting the threshold for triggering the duty of candour at moderate harm, severe harm or death reaches the right balance between informing Service Users and not overburdening NHS providers?**

9. We agree with the proposed threshold for triggering the duty of candour in principle, which we understand is in line with thresholds set for existing duties in England and Scotland and in Wales under the Putting Things Right arrangements.
10. The statutory duty was introduced in England and Scotland in 2014 and 2018 respectively, which means that there is likely to be a rich evidence base to help determine the appropriate threshold. We believe it will be particularly important for Welsh Government to consider existing evidence from these jurisdictions to understand whether existing thresholds are in fact achieving the right balance between informing Service Users and not overburdening NHS providers.

**Question 7: Is the relationship between the professional duty of candour that many health professionals are subject to and the statutory duty of candour clear?**

11. The duty of candour is embedded within our Code and professional standards, which make explicit that being open and honest is a core element of professional practice for nurses, midwives and nursing associates. Our joint guidance with the GMC on the professional duty of candour underpins our Code and makes clear that all health and care professionals have a responsibility to be open and honest with patients when something goes wrong or causes, or has the potential to cause, harm or distress.
12. However, we know that health and care professionals can, at times encounter barriers which prevent them from being open and candid. This includes engrained cultural behaviours, where individuals may fear that speaking out could lead to reprisal and blame, or they may feel that nothing will change.
13. Organisations play a central part in eradicating these barriers by fostering a working culture of openness and honesty and a willingness to learn lessons when things go wrong. The statutory and professional duty are therefore mutually reinforcing, and we agree that the statutory duty will complement the existing professional duty by promoting a system-wide culture of candour, where individuals are encouraged and supported to speak out.

14. Though complementary, it is important to recognise that the professional duty extends beyond just being open and honest with people who use services, patients or their advocate, carer or family. As detailed in our guidance, health and care professionals also have a responsibility to be open with their colleagues, employers and regulators. They also have a responsibility to encourage colleagues to be open and honest, and to take part in investigations and reviews when requested.
15. While we believe that the draft guidance makes this distinction clear, we suggest that understanding could be improved by encouraging all registrants to familiarise themselves with information issued by their professional regulator and / or professional body and that of their employer organisation. This will help ensure that professionals receive tailored and detailed information about exactly what the professional *and* statutory duty means for their profession and will help support them to continue to meet standards and requirements expected of them. Similarly, the statutory guidance could highlight the NMC and GMC's separate case studies on how the professional duty applies in practice for respective registrants.
16. As per our guidance, to implement the organisational duty effectively, organisations have a responsibility to make sure that staff understand the duty and that they are appropriately trained. They also have a responsibility to support individuals to report adverse incidents. We believe that the guidance could be amended to make these obligations clearer.

**Question 12: Is the guidance clear when harm to Service Users that occurs whilst waiting for diagnostics and treatment triggers the duty of candour?**

**Question 13: What further clarification do you consider would be helpful for NHS bodies and Service users with regards to harm sustained whilst waiting for diagnostics and treatment?**

17. We agree with the Welsh Government's assessment of potential harm arising while waiting for diagnostics and treatment. We would encourage registrants to apologise where harm results from administrative errors such as those described in the guidance. However, we are concerned that triggering the duty in this context could represent a significant deviation from the common understanding of when the duty applies. It will also create inconsistencies with how the duty is enforced in other jurisdictions in the UK.
18. Guidance provided must therefore be explicit as to the circumstances in which the duty would occur so that professionals have a clear understanding of their responsibilities and how to manage these situations. While we do not have any comments on the draft guidance provided, we suggest that the views of professionals and representative professional and public bodies will be particularly important to identify whether further clarification or support is required. We would welcome the opportunity to work with the Welsh Government to develop further guidance if helpful.

**Question 22: Do you agree that "in person" notification is appropriate and proportionate when informing a Service User or their representative that the duty of candour has been triggered?**

**Question 23: Do you agree that it is appropriate and proportionate that the NHS Body has the choice of which form of “in person” notification is most appropriate, taking into account these factors above?**

19. In line with our Code and standards, we believe that notifications about when the duty has been triggered should always be person-centred. This means that decisions should always be led by the needs of the person who uses the service or where appropriate their advocate, carer or family, and provided in a way which takes into account their personal circumstances, background, language and communication needs. Professionals should also take into consideration any conditions or disabilities which may require adjustments.
20. While we agree that ‘in person’ notifications will often be appropriate and proportionate, there may be circumstances which require a range of verbal and non-verbal communication methods to be used, which means that notifications by telephone would be inappropriate. There may also be situations where written communication is preferred or required, depending on the language and support needs of the person being notified, or local policies.
21. It is crucial that information is provided in a way that the individual wants or needs, and in a way that they understand. We therefore strongly agree that NHS bodies should have discretion to determine which form of notification is most appropriate, taking into account the personal circumstances of people who use services and any known preferred method of communication.
22. We also agree that in person notifications should be followed by a written notification, to aid understanding and to provide a formal record of what has been discussed. This aligns with our own guidance on the duty of candour, which advises registrants to ‘record the details of your apology in the patient’s clinical record’ and that ‘a verbal apology may need to be followed up by a written apology, depending on the patient’s wishes and on your workplace policy’.
23. We agree that the factors listed to help determine the form of notification are appropriate and that they will help ensure notifications are delivered in a person-centred way. However, in line with our own guidance on the duty of candour, it is also important that information is provided at a time where individuals are best able to understand and retain the information. We therefore suggest that the timing of the notification should also be included as a factor to consider.

**Question 24: Does the guidance on how to make a meaningful apology set out at section 7e and Annex E of the Guidance provide sufficient information and advice to ensure a personal, meaningful apology is conveyed?**

24. We agree that providing a personal, meaningful apology is a crucial aspect to the duty of candour. Not only will people who use services and / or their advocates, carers or families expect this, but it is also the right thing to do.
25. Our joint guidance on the duty of candour provides further detail about what to consider when apologising. This includes advice on the method, delivery and timing of the apology itself, as well information about record keeping and follow-up

actions. We believe that the Annexe on how to apologise aligns with and complements our guidance, by providing a broad framework of points to consider.

26. We know that a significant barrier to apologising can be the perception that it is an admission of blame or liability. We therefore welcome the distinction made in the draft guidance and Annexe, which will be important for encouraging professionals to be open and to apologise when things go wrong. This also aligns with our own guidance on candour, which makes explicitly clear that an apology does not equate to legal liability. However, the distinction between an apology and legal liability may not always be clear for those receiving the apology. It is important that appropriate training is in place to support professionals with managing this distinction.

**Question 28: What type of training do you think would be required by NHS staff in addition to the current NHS training in order for the Duty of Candour to be successful?**

27. As the regulator for all nurses and midwives in Wales, regardless of whom they are employed by or the role and setting they are working in, we expect all our registrants to abide by our Code and standards as part of their day-to-day professional practice. This includes abiding by the professional duty of candour as set out in section 14 of the Code, section 1.3 of the Future Nurse Standards of proficiency for registered nurses and section 1.19 of the Standards of proficiency for midwives.
28. In addition, the Code requires all NMC registrants to maintain the knowledge and skills required for safe and effective practice, and to take part in appropriate and regular learning and professional development activities that aim to maintain and develop competence and improve performance. This would include ensuring that knowledge of the requirements of the professional duty of candour and responsibilities under it is kept up to date. We recently updated our joint guidance on the professional duty of candour and although this did not set out any new requirements for professionals, there would be an expectation on our part that all registrants, including NHS employees, are aware of the refreshed guidance and have undergone appropriate activities to ensure that their knowledge of the guidance is up to date.
29. Leaders play an essential part in fostering a culture of openness and learning. If things go wrong, professionals need to feel confident and supported to raise concerns without fear of reprisal. We believe that training for senior leaders and managers on how to create an open and learning culture when things go wrong will therefore be particularly important for embedding this duty.

**Question 33: Do you think changing the Putting Things Right (PTR) rules like this will cause problems? For example, do you think it would be better to not tell the person what has happened if it is in their best interest?**

30. In some instances, patients may not want to know the details of what has gone wrong. However, we believe that patients should always be provided with the option to understand what went wrong should they wish. Patients will also want to

know what will be done to prevent the harm from recurring and harming someone else.

31. Our guidance on the duty of candour addresses this issue as follows:

‘Patients will normally want to know more about what has gone wrong. But you should give them the option not to be given every detail. If the patient does not want more information, you should try to find out why. If after discussion, they don’t change their mind, you should respect their wishes as far as possible, having explained the potential consequences. You must record the fact that the patient does not want this information and make it clear to them that they can change their mind and have more information at any time.’

32. We therefore welcome the changes made to the PTR rules, which we believe align more closely with the principles underpinning the duty of candour and our own guidance.

**Question 37: What are your views on how the proposals in this consultation might impact:**

- **on people with protected characteristics as defined under the Equality Act 2010;**
- **on health disparities; or**
- **on vulnerable groups in our society.**

33. We are pleased to see that the Welsh Government has conducted an initial equality impact assessment. While the initial assessment identified that the proposals are unlikely to have a detrimental impact on any particular group, we encourage the Welsh Government to keep this assessment under review. This should be informed by work with stakeholders with relevant expertise to ensure this assessment is informed by a range of diverse views. We also suggest that the Welsh Government may like to consider both the potential impacts on people who use services, but also professionals working in the health and care system.

34. In general, we hope that these and any proposals that are rooted in a culture of openness and learning will contribute to interrupting patterns of entrenched health inequalities for people using health and care services. This is especially important in light of the Welsh Government’s recently published Anti-racist Wales Action Plan.<sup>2</sup> This acknowledges that ensuring services are delivered in an accessible, culturally sensitive way for all and reducing health inequalities must be the priority for everyone within the health and care sector.

35. We welcome clear and explicit responsibilities for professionals to discuss options and risks around care provision. This may reduce health inequalities for all groups but in particular may help tackle diagnostic overshadowing within care provision for people with learning disabilities. Equally, clear duties to share information when things have gone wrong could contribute towards important sector-wide learning which may influence the reduction of inequalities such as maternal health

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<sup>2</sup> [Welsh Government, Antic-racist Wales Action Plan 2022](#)

disparities for women and people from different ethnic minority groups, again as referenced in the Anti-racist Action Plan.

**Question 38: We would like to know your views on the effects that the Duty of Candour proposals would have on the Welsh language, specifically on opportunities for people to use Welsh and on treating the Welsh language no less favourably than English.**

**For example, what effects do you think there would be? How could positive effects be increased, or negative effects be mitigated?**

36. In line with the Welsh Standards Regulations, organisations should be sensitive to the requirements of Welsh language speakers. While we do not have any specific comments on the effects of the proposals on the Welsh Language, NHS bodies will need to ensure that arrangements are put in place so that all ongoing communication is in Welsh. Our Code, standards and joint guidance are all available in Welsh.
37. We thank you once again for the opportunity to comment on your new Framework and we would welcome further conversations with you if helpful.
38. If you have any further questions, please contact our Policy Team at [policy@nmc-uk.org](mailto:policy@nmc-uk.org).