

Duty of Candour and the Mental Welfare Commission

PE2176: Calling on the Scottish Parliament to urge the Scottish Government to introduce penalties for organisations that fail to comply with recommendations made by the Mental Welfare Commission in relation to duty of candour.

Duty of Candour

The term ‘duty of candour’ refers to a legal duty on health and social care organisations to inform those affected by unintended or unexpected incidents which appear to have caused harm or death.

The duty was legislated for in Scotland in the [Health \(Tobacco, Nicotine etc. and Care\)\(Scotland\) Act 2016](#) in response to the recommendations of several reviews and inquiries into service failings and patient safety in the UK. This included the [Francis Inquiry](#), the [Dalton Williams](#) review and the [Berwick report](#), all of which recognised the need for greater openness and transparency when things go wrong.

The duty in the 2016 Act [applies to a wide range of health and social care organisations](#) in Scotland, including NHS boards, independent hospitals and clinics, NHS independent contractors, social work services, social care providers and agencies.

The types of harm which should trigger the duty of candour procedure are set out in s21(4) of the act as:

- (a) the death of the person,
- (b) a permanent lessening of bodily, sensory, motor, physiologic or intellectual functions (including removal of the wrong limb or organ or brain damage) (“severe harm”),
- (c) harm which is not severe harm but which results in—
 - (i) an increase in the person's treatment,
 - (ii) changes to the structure of the person's body,
 - (iii) the shortening of the life expectancy of the person,
 - (iv) an impairment of the sensory, motor or intellectual functions of the person which has lasted, or is likely to last, for a continuous period of at least 28 days,

- (v) the person experiencing pain or psychological harm which has been, or is likely to be, experienced by the person for a continuous period of at least 28 days,
- (d) the person requiring treatment by a registered health professional in order to prevent—
 - (i) the death of the person, or
 - (ii) any injury to the person which, if left untreated, would lead to one or more of the outcomes mentioned in paragraph (b) or (c).

When potential incidents are identified or come to the attention of the organisation, it should appoint a registered health professional not involved in the incident to decide whether the duty of candour procedure should be followed.

When the procedure is activated, the organisation must notify the affected individual, invite them to a meeting to explain what happened, offer them a written apology and conduct a review of the circumstances which led or contributed to any incidents.

The 2016 Act requires organisations to follow the procedure as soon as practicably possible after becoming aware of eligible incidents, but there are no sanctions or penalties within the legislation for not meeting the duty.

The Mental Welfare Commission

The Mental Welfare Commission (MWC) safeguards the rights and welfare of people in Scotland who have a mental illness, learning disability, or other related conditions. It is an independent body with its powers set out in the Mental Health (Care and Treatment)(Scotland) Act 2003.

Key functions of the Commission include:

- **Visiting and Monitoring:** the Commission visits individuals receiving care to ensure their treatment is appropriate and respects their rights.
- **Investigations:** The Commission looks into complaints or concerns about care and treatment, especially where rights may have been breached.
- **Advice and Guidance:** The Commission offers advice to professionals, carers, and individuals about mental health law and best practices.

If the Commission finds that people's rights are not being respected it has a duty to provide advice to the relevant health board and to alert relevant bodies, including Scottish Ministers and Healthcare Improvement Scotland.

There is an expectation that NHS boards will respond to any recommendations but the MWC does not have statutory powers to enforce its recommendations, although it can escalate matters to Scottish Ministers.

Scottish Government Action

The [Scottish Mental Health Review](#) was commissioned by the Scottish Government and reported in 2022. It made several recommendations regarding strengthening the powers of the MWC, including:

- Legislate to give the MWC the power to make a report to Parliament if there is a serious failure by a public body, including the Scottish Government, to follow a recommendation.

The Scottish Government committed to a wider, longer-term reform of mental health law and work on this is underway.

There are no planned changes to the duty of candour legislation.

Kathleen Robson
SPICe Research
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