

PE2176/A: Introduce penalties for failing to comply with Mental Welfare Commission recommendations related to duty of candour

Scottish Government written submission, 14 August 2025

Does the Scottish Government consider the specific ask of the petition to be practical or achievable?

The Scottish Mental Health Law Review (SMHLR), published in 2022, made several recommendations regarding strengthening the powers and responsibilities of the Mental Welfare Commission (MWC) in legislation, including the following recommendations:

- The legislation should include a level of accountability directly to the Scottish Parliament. This would include 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 MWC should have the power to initiate legal proceedings to protect the human rights of any person or group covered by mental health and capacity law.

In our response to the SMHLR, we acknowledged that we should aim to strengthen accountability and scrutiny in the mental health system. This should take place in the context of a wider reform to mental health law and will be in the long-term.

With regards to legislative change, we are taking a staged approach to mental health law reform, beginning with the modernisation of adults with incapacity legislation.

With regards to duty of candour, provisions within the Health (Tobacco, Nicotine etc. and Care) (Scotland) Act 2016 set out how Health Boards and health professionals should respond to an unintended or unexpected incident. These provisions do not impose sanctions or penalties for failing to carry out duties under the legislation.

The Scottish Government previously considered whether the legislation should be amended to include sanctions or penalties against organisations who fail to comply with the law and came to the conclusion that there are a number of pieces of legislation that are already in place which would hold organisations to account, if it was deemed necessary. We are therefore not minded to amend the Regulations or the overarching legislation to include sanctions or penalties.

Health professionals will also be subject to professional standards relating to their own profession, and can be subjected to an investigation and disciplinary action from their own regulatory body should they be found to be in breach of their obligations.

What, if any, action the Scottish Government is currently taking to address the issues raised by this petition, and is any further action being considered that will achieve the ask of this petition?

The Mental Welfare Commission (MWC) plays an important role in external assurance of Mental Health inpatient settings through its visits which focus on compliance with the Mental Health (Care and Treatment) (Scotland) Act 2003.

The MWC has a duty to visit people who are receiving care under mental health and incapacity legislation. The purpose of these visits is to hear directly from the person receiving care and treatment whether they feel their rights are being respected.

If they find that people's rights are not being respected the MWC currently have a duty to provide advice to the relevant health board and to alert relevant bodies, including Scottish Ministers and Healthcare Improvement Scotland.

Where issues are identified by the MWC, NHS Boards should prioritise these, reporting feedback and recommendations through their existing escalation and clinical governance structures. Clear actions and timelines should be agreed for all recommendations and delivery should be monitored by the leadership of the Board.

However, there are limits to the MWC's scope and powers. While they visit individuals and provide recommendations to boards, they do not carry out inspections or audits of services and they do not have powers to enforce their recommendations. That is why the Scottish Government will consider strengthening powers and responsibilities of the MWC in the context of a wider long-term reform to mental health law.

In respect of the health professionals, there is already a rigorous process in place to ensure staff are transparent and can be subjected to an investigation and disciplinary action from their own regulatory body should they be found to be in breach of their duties and obligations.

Mental Health and Incapacity Law Unit