



E: linda.pollock@gov.scot

Linda Pollock
Director
Healthcare Quality and Improvement Directorate

To NHS Chief Executives
Copy to NHS Duty of Candour Leads

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Dear Chief Executive,

ORGANISATIONAL DUTY OF CANDOUR PROCEDURE OBLIGATIONS ON NHS BOARDS DURING COVID-19

On 16 December 2020 we met with your Duty of Candour leads to discuss how Duty of Candour incidents and similar, such as significant adverse event reviews, could and should be dealt with at this difficult time.

We were aware at that point of the pressures that Boards were under due to Covid-19 and that these pressures have increased. We have also considered the letter of 21 December 2020 from John Connaghan, Interim Chief Executive of NHS Scotland to Board Chief Executives, setting out the Framework for Boards to prioritise their services should they need to pause resumed services or redeploy capacity to deal with the Covid-19 resurgence or manage other winter pressures.

At our meeting on Wednesday 16 December, we took away an action to produce the minutes of that discussion and prepare a paper ahead of the HIS Adverse Events Network meeting on 21 January. The minutes are attached to this letter, for information. This letter replaces the proposed paper.

There was a suggestion that you, either as individual Boards or as a group, were considering seeking your own legal advice from the Central Legal Office to understand your position surrounding this matter and that would seem to be a useful and necessary step. You will understand that Scottish Government cannot offer legal advice on these matters.

It is Scottish Government's view that the statutory obligations under the organisational Duty of Candour regulations remain in place throughout this difficult time and should continue to be upheld where possible. The duty of candour is a legal requirement placed on Boards by the Health (Tobacco, Nicotine etc. and Care) (Scotland) Act 2016, and is implemented by the Duty of Candour Procedure (Scotland) Regulations 2018. Decision making in this particular circumstance is best left to those on the ground, however, at our meeting, we had discussed whether the situation we now find ourselves in, in terms of a reduction in service capacity



due to a global pandemic, and large scale decisions to postpone certain types of treatment (e.g. elective treatment) engage the organisational duty of candour. We understand that legal advice has been provided by the Central Legal Office on this matter. Scottish Government anticipate that NHS Boards will have considered their legal obligations under the legislation as part of the response to the letter from John Connaghan which was issued in March 2020, and which asked Boards to prepare and submit mobilisation plans when preparing for Covid-19 that included large scale decisions on postponing healthcare services.

There may of course still be incidents which occur as an indirect result of pressure caused by the current wave of Covid-19 e.g. a shortage of staff during an operation results in something going wrong and there may be incidents which happen that are unrelated to the pandemic. Such incidents should continue to be reviewed to assess whether the organisational Duty of Candour applies. The organisational duty of candour guidance sets out that *'Organisations (as responsible persons) must activate the duty of candour procedure as soon as reasonably practicable after becoming aware that... an unintended or unexpected incident occurred'*. It is necessary to consider what constitutes "reasonably practicable" in the current context of the Covid-19 pandemic and the Scottish Government appreciates that the need to prioritise immediate healthcare rather than carry out your obligations under the legislation may mean that it is not "reasonably practicable" for this to begin as quickly as it would have done previously.

We are aware of some Boards who have developed processes to consider their statutory obligations in ways that take account of decisions taken as a result of the Covid-19 pandemic and we would suggest that it would be helpful if details of this work could be shared with others. This reflects the commitment that we all share to place people at the heart of health and social care services.

We are seeking to balance the necessity to not place unnecessary burdens or demands on Boards, while at the same time ensuring that patients and their families are not disadvantaged.

In terms of the annual reports to be produced for 20-21, you will wish to consider how you can reflect the impact of the Covid-19 pandemic on the provision of services and the approach taken to decision-making in respect of the organisational Duty of Candour provisions. This could include what you have done to consider statutory obligations, despite the circumstances, to ensure that a person-centred and transparent approach to effective and timely communication have informed decisions in respect of organisational duty of candour. The Scottish Government can provide questions to support consistent reporting of Covid-19 content in the 20-21 annual reports.

Alongside this, we will review and update our online guidance to reflect the content of this letter.

Yours sincerely,

Linda Pollock
Director Healthcare Quality and Improvement Directorate