

HEALTH (TOBACCO, NICOTINE ETC. AND CARE) (SCOTLAND) ACT 2016

EXPLANATORY NOTES

THE ACT – OVERVIEW

Part 1 – Tobacco, Nicotine Vapour Products and Smoking

Chapter 3 – Smoking Outside Hospitals

Section 20 – Smoking outside hospitals

60. [Section 20](#) of the Act amends Part 1 of the Smoking, Health and Social Care (Scotland) Act 2005 (“the 2005 Act”).

Section 20(2)

61. [Section 20\(2\)](#) inserts new sections 4A, 4B, 4C and 4D into the 2010 Act. The new sections contain powers for the Scottish Ministers to designate no-smoking areas around certain buildings on certain NHS hospital grounds and provide for related duties, offences and penalties. Each new section is considered in turn below.

Section 4A: Offence of permitting others to smoke outside hospital building

62. Subsection (1) makes it an offence for a person who has management and control of a no-smoking area to knowingly permit smoking there.
63. Subsection (2) provides that a person knowingly permits smoking if the person should have known that someone was smoking in the no-smoking area.
64. Subsection (3) provides that it is a defence for an accused to show that the accused (or an employee or agent of the accused) took all reasonable precautions and exercised all due diligence to avoid committing the offence, or that there were no lawful and reasonably practicable means by which the accused could have prevented the smoking in the no-smoking area. The onus is, however, on the accused to prove this.
65. Subsection (4) provides that a person who commits the offence under this section is liable on summary conviction to a fine not exceeding level 4 on the standard scale (currently £2,500).

Section 4B: Offence of smoking outside hospital building

66. Subsection (1) makes it an offence for a person to smoke within the no-smoking area outside a hospital building.
67. Subsection (2) provides that it is a defence if the accused can prove that the accused did not know, and could not reasonably be expected to have known, that the area in which the accused was smoking was a no-smoking area. This might arise in instances where,

for example, no-smoking signs had been removed or had failed to be displayed. The onus is, however, on the accused to prove this.

68. Subsection (3) provides that a person who commits the offence of smoking in a no-smoking area is liable on summary conviction to a fine not exceeding level 3 on the standard scale (currently £1,000).

Section 4C: Display of warning notices in hospital buildings and on hospital grounds

69. Subsection (1) places a duty on Health Boards to prominently display signs at every entrance to the hospital grounds.
70. Subsection (2) requires the person in management and control of each building on a hospital ground to prominently display signs at the entrance to each building. Subsection (5) makes it an offence for a person to fail to comply with this requirement. It also makes it an offence to fail to comply with requirements which may be set out in regulations made under subsection (4).
71. Subsection (3) provides that a sign must state that it is an offence to smoke in the no-smoking area outside a hospital building or knowingly permit smoking there.
72. Subsection (4) gives the Scottish Ministers a power to make regulations which may provide further detail as to the manner of display, form and content of the no-smoking signs.
73. Subsection (5) provides that a person who commits an offence of failing to display signage at the entrance to hospital buildings in compliance with this section is liable to a fine not exceeding level 3 on the standard scale (currently £1,000).

Section 4D: Meaning of “no-smoking area outside a hospital building” and related expressions

74. Subsection (1) defines the meaning of “no-smoking area outside a hospital building”. It is an area lying immediately outside the hospital building. It is bounded by a perimeter of a specified distance from the building. However, the area is limited to being within, and thereby cannot fall outside of, hospital grounds. Subsection (2) gives a power to the Scottish Ministers to make regulations prescribing the specified distance. The regulations can also make further provision about determining the perimeter around a building, for example they could make detailed provision on how to determine the starting point outside a building from which the specified distance is to be measured.
75. Subsection (3) defines “hospital”, “hospital building” and “hospital grounds” for the purposes of this section. A hospital means a health service hospital as defined in section 108(1) of the National Health Service (Scotland) Act 1978. A hospital building is simply a building on hospital grounds. Hospital grounds covers land in the vicinity of a hospital which is associated with it.
76. Subsection (4) allows the Scottish Ministers to make regulations which can—
- (a) exclude certain hospitals altogether from the ban on smoking outside hospitals,
 - (b) include certain land within the meaning of hospital grounds e.g. land which might not necessarily be in the vicinity of, or associated with, a hospital, so that it can be caught by a no-smoking area,
 - (c) exclude certain land from the meaning of hospital grounds e.g. land which despite being in the vicinity of, and associated with, a hospital, is not to be caught by a no-smoking area,

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- (d) make further provision to elaborate on the meaning of “hospital grounds” e.g. criteria could be set out for determining whether land is to be regarded as associated with a hospital or not,
 - (e) provide that certain buildings on hospital grounds are not to be regarded as hospital buildings for the purposes of the ban on smoking outside hospitals, and thereby, remove these buildings from having a perimeter applied from them, and
 - (f) provide that certain land within a no-smoking area is to be exempt from that area so that it is not an offence to smoke there or permit others to do so.
77. Subsection (5) allows regulations made under subsection (4) by the Scottish Ministers to make provision modifying the application of section 4C so that, for example, signage requirements can be adjusted, as appropriate, to take account of exceptions and other provision made by those regulations.

Section 20(3) to (8) of the Act

78. **Section 20(3)** of the Act amends section 5(1) (proceeding for offences under sections 1 to 3) of the 2005 Act to include the offences contained in new sections 4A, 4B and 4C(5) within section 5; and section 20(4) amends the title of section 5 to reflect this change. This links the start of the time limit for summary proceedings to the point at which the Crown is passed sufficient evidence on the offence to justify bringing a prosecution. This will prevent any lengthy or extended hearing processes consequential to the issuing of a fixed penalty notice under Part 1 of the 2010 Act resulting in a subsequent prosecution for that offence being time barred.
79. **Section 20(5)** amends section 6(2) (fixed penalties) of the 2005 Act to include the offences contained in new sections 4A, 4B and 4C(5) within section 6(2). This means that only an individual (or, put another way, a “natural person”) can be issued with a fixed penalty notice in relation to these offences i.e. fixed penalty notices cannot be issued to bodies corporate etc. who may be accused of committing these offences.
80. **Section 20(6)** amends section 7 (powers to enter and require identification) of the 2005 Act to apply it appropriately in relation to the offences contained in new sections 4A, 4B and 4C(5). It provides an authorised officer of a local authority, for the area in which the hospitals falls, with powers to enter and search hospital grounds and to require identification (name and address) from an accused or a person with information about the offences.
81. **Section 20(7)** amends section 40 (regulations or orders) of the 2005 Act so that regulations made under new section 4D(2)(a) and (4)(a) are subject to the affirmative procedure.
82. **Section 20(8)** amends, and renames, schedule 1 (fixed penalty for offences under sections 1, 2 and 3) to the 2005 Act to account for the new offences in sections 4A, 4B and 4C(5) for which fixed penalty notices may be issued.

Part 2 – Duty of Candour

83. **Part 2** of the Act introduces a duty of candour in health and social care settings.
84. **Part 2** of the Act creates a legal requirement for health and social care organisations to inform people (and their families) when they have been harmed (either physically or psychologically) as a result of the care or treatment they have received. There will also be requirements for organisations to prepare and publish reports in relation to the duty of candour.

Duty of candour procedure

Section 21 – Incident which activates duty of candour procedure

85. **Section 21** describes incidents which give rise to the duty of candour procedure. The responsible person (defined in section 25) is required to follow the duty of candour procedure where the person has provided someone with a health service, a care service, or a social work service, and in the course of providing that service an unintended or unexpected incident has occurred which has resulted in certain outcomes. The outcomes need to relate to the incident rather than being attributable to the person's illness or condition. The decision as to whether the outcome relates to the incident is to be made by a registered health professional who was not involved in the incident itself.
86. The outcomes are set out in subsection (4) and cover a range of physical and psychological effects as well as death.
87. Subsection (5) provides the Scottish Ministers with the power to make regulations to amend the list of outcomes in subsection (4). Under section 32(2), any such regulations would be subject to the affirmative procedure.

Section 22 – Duty of candour procedure

88. The duty of candour procedure, which covers actions to be taken by responsible persons, will be set out in regulations made using the power in subsection (1). Those regulations will be subject to negative procedure. Responsible persons are defined in section 25(1) and include Health Boards (both territorial and Special Health Boards), the Common Services Agency (which operates under the name of NHS National Services Scotland), independent health care services, local authorities and other providers of care services and social work services. Generally, individuals providing health, care or social work services are not included in the "responsible person" definition. However, for care services, individuals providing a service who make arrangements with others to assist with the provision of the service, are included in the definition of "responsible person".
89. Subsection (2) gives detail as to what the regulations may, in particular, make provision about. This includes taking actions to meet with and apologise to the "relevant person" (see paragraph 92 below) and provide support to them, as well as asking the "relevant person" whether they would like to receive an account of the incident or information about further steps taken. Subsection (2) also includes detail on recording and monitoring incidents and providing training and support to those carrying out the duty of candour procedure.
90. Subsection (3) gives a definition of 'relevant person' for the purposes of the section and the duty of candour procedure, which is the person who has received the health service, care service, or social work service, or a person acting on behalf of that person where that person has died or lacks capacity, or for other reasons cannot make decisions about the service provided to them.

Section 23 – Apologies

91. **Section 23** defines 'apology' in relation to the duty of candour provisions and subsection (2) provides that any apology or other steps taken which are in accordance with the duty of candour procedure set out in regulations made under section 22 cannot be taken by itself to be an admission of negligence or a breach of a statutory duty. This means that there is not to be taken to be a link between giving an apology (or otherwise following the duty of candour procedure) in relation to an incident and acknowledgment of any wrong-doing. This does not prevent individuals affected from taking further action in relation to an incident.

Section 24 – Reporting and monitoring

92. Responsible persons who provide health services, care services or social work services in a financial year are required to prepare and publish reports. These reports are not to identify individuals. The reports must include the following information (but responsible persons can also include other information if they wish)—
- details about the incidents that have occurred,
 - information on the organisation’s compliance with the duty of candour procedure,
 - information about policies and procedures and whether there have been changes to these policies and procedures resulting from incidents that have occurred.
93. In order to assist with monitoring the extent to which the duty of candour procedure has been followed, there is a power for certain bodies to require responsible persons to provide them with information. These same bodies are to be notified when the annual reports are published. The particular bodies with the power to require information (and who are to be notified) vary depending on the responsible person. So, for example, Health Boards are linked to the Scottish Ministers, independent health service providers are linked to Healthcare Improvement Scotland, while providers of care services or social work services are linked to Social Care and Social Work Improvement Scotland (SCSWIS, which operates under the name of the Care Inspectorate).

Interpretation

Section 25 – Interpretation of Part 2

94. **Section 25(1)** defines certain terms used in Part 2.
95. “Care service” is defined by reference to section 47(1) of the Public Services Reform (Scotland) Act 2010 (“the PSR Act”) and covers the following: support services, care home services, school care accommodation services, nurse agencies, child care agencies, secure accommodation services, offender accommodation services, adoption services, fostering services, adult placement services, day care of children and housing support services. Each of those services is further defined in Schedule 12 to the PSR Act.
96. “Health service” is defined to cover services under the national health service continued under section 1 of the National Health Service (Scotland) Act 1978 and also independent health care services. Independent health care services are independent hospitals, private psychiatric hospitals, independent clinics, independent medical agencies and independent ambulance services (section 10F(1) of the 1978 Act).
97. “Social work service” is defined by reference to section 48 of the PSR Act. Section 48 defines such services by reference to local authority social work services functions (whether the services are provided by the local authority or by other persons that the local authority has entered into an arrangement with). Social work services functions are then listed in schedule 13 to the PSR Act which lists a range of statutory functions.
98. “Registered health professional” is defined by reference to section 60(2) of the Health Act 1999. Section 60(2) covers professions regulated under various enactments and also professions that might be regulated in the future by an Order in Council made using the powers in section 60. Those professions are: doctors, dentists, professions complementary to dentistry, optometrists, dispensing opticians, osteopaths, chiropractors, pharmacists, pharmacy technicians, nurses, midwives, arts therapists, biomedical scientists, chiropodists, podiatrists, dietitians, hearing aid dispensers, occupational therapists, operating department practitioners, orthoptists, paramedics, physiotherapists, practitioner psychologists, prosthetists, orthotists, radiographers, speech and language therapists.

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99. “Provide” is defined for a health service, a care service, or a social work service as meaning to carry on or manage such a service. The term “provide” in relation to such services is already defined in other legislation in a similar way (see, for example, section 105 of the PSR Act). The definition makes clear that the term operates in the same way here.
100. Subsection (2) provides the Scottish Ministers with the power to make regulations to amend the definition of “responsible person” in subsection (1). Under section 32(2), any such regulations would be subject to the affirmative procedure.