

Consultation on proposals for an offence of wilful neglect or ill-treatment in health and social care settings

Healthcare Improvement Scotland response

December 2014

Introduction

Healthcare Improvement Scotland is the national healthcare improvement organisation for Scotland. We have a vital role in supporting healthcare providers to deliver safer, more effective and more person-centred care and to achieve Scotland's 2020 vision for health and social care.

Our key priorities are to work together with healthcare providers and the people of Scotland to:

- empower people to have an informed voice that maximises their impact in managing their own care and shaping how services are designed and delivered
- reliably spread and support implementation of best practice to improve healthcare, and
- comprehensively assess the quality and safety of healthcare.

Throughout everything we do, we value people, make best use of our resources and work effectively as one organisation.

Key points

As an organization, we are fully committed to improving care for every person, every time. We are therefore supportive of the policy intention behind the proposed legislation – that no measure of deliberate neglect or mistreatment is acceptable and that the criminal law should reflect this.

We also note the reasoning that the legislation and associated sanctions may have a deterrent effect (although it is not possible to quantify this). We feel it is important to consider, however, any possible unintended consequences in relation to current efforts to establish a culture of openness, transparency and learning, as demonstrated by the Duty of Candour which is currently out for consultation, and which reflects Healthcare Improvement Scotland's work to support the reporting of and learning from adverse events. It is also important to consider the wider response to any incidents of willful neglect or mistreatment, in terms of individual and organizational learning and service improvement.

In considering both of the above aspects together ie recognition and action in relation to the criminal act of deliberately causing harm and the essential nature of openness to learning, we draw on Don Berwick's *A promise to learn- a commitment to act*. Berwick sets out that 'enforcement' and criminal sanction is necessary but rare and we share his concern that '*unintended errors must be handled very differently from severe misconduct*'. Many of our comments are therefore attempting to seek clarity on what willful neglect is, how it should be distinguished from system-related harm and how learning systems and professionalism are key to minimising both.

With the move towards integration of adult health and social care, we are also supportive of proposals that cover both care settings.

We note the reference in the consultation document to the Quality Strategy aims of delivering safe, effective and person-centred care. We feel there is also scope for the legislation to reflect the NHS values as set out in the 2020 Workforce Vision:

- care and compassion
- dignity and respect
- openness, honesty and responsibility
- quality and teamwork

Our detailed responses on the questions set out in the consultation document are provided below.



Questionnaire responses

Do you agree with our proposal that the new offence should cover all formal health and adult social care settings, both in the private and public sectors? Please explain your views.

Yes No

We are broadly content with the proposals, subject to greater clarity on how these would be implemented in practice. This may be provided through guidance, definitions and case studies. This point is expanded upon in the answers below.

We also believe that the focus should not begin and end with the prosecution process and that it should be set in a broader context of prevention and improvement. The Business and Regulatory Impact Assessment suggests that the legislation may have a deterrent effect but there was perhaps scope in the consultation document for greater analysis of the intended outcomes of the legislation. It is important that the impact of this legislation is carefully considered and that efforts are made to reduce any potentially negative impact on moving towards a more open and honest culture as supported by the proposed Duty of Candour. It would be unfortunate if this legislation is counterproductive to fostering a positive safety culture where adverse events are disclosed and reviewed regularly to promote learning and system improvements.

Do you agree with our proposal that the offence should not cover informal arrangements, for example, one family member caring for another?

Yes No

We would agree that these are best covered by existing legislation.

Should the new offence cover social care services for children, and if so which services should it cover? Please list any children's services that you think should be excluded from the scope the offence and explain your view.

Yes No

(not answered)

Should the offence apply to people who are providing care or treatment on a voluntary basis on behalf of a voluntary organisation?

Yes No

The offence should apply as voluntary organisations have the same responsibilities to individuals and duty of care as those employing staff. All services commissioned by health boards and local authorities should be expected to meet the same standards and commissioners should be satisfied of this.

However we caveat this response with the need to recognise that ways of working with volunteers may differ from paid staff. Arrangements for monitoring, supervision and feedback, for example, may be less prescriptive. The onus is therefore on the organisation to have appropriate governance and performance arrangements in place to safeguard against potential issues as far as can be reasonably expected.

Do you agree with our proposal that the new offence should concentrate on the act of wilfully neglecting, or ill-treating an individual rather than any harm suffered as a result of that behaviour?

Yes No

We agree that the offence should be in relation to committing the act rather than the outcome, and note the case set out in the consultation document against setting a threshold of harm.

Consideration will need to be given, however, as to how to determine whether actions were wilful or constitute ill-treatment, as opposed to unintentional harm which may arise as a result of a lack of, for example, training or appropriate resources. This concept is difficult to determine.

The NPSA has developed the Incident Decision Tree to help NHS managers determine a fair and consistent course of action toward staff involved in patient safety incidents. Such a mechanism may help to reduce fears of a 'blame culture' in relation to reporting adverse events and the potential risk that introducing the offence of wilful neglect may impede progress towards an open, safe, learning culture which the proposed Duty of Candour seeks to promote.

Do you agree with our proposal that the offence should apply to organisations as well as individuals?

Yes No

How, and in what circumstances, do you think the offence should apply to organisations?

Yes No

We agree that the offence should apply to organisations, however believe that the requirements on organisations in relation to safeguarding patients and service users need to be clarified. This can fall into two areas: safeguards against individuals (e.g. disclosure checks, supervision, responses to feedback and whistleblowing) and organisational responsibility to ensure safe, high quality care (e.g. risk assessment, training, provision of appropriate equipment).

Clarification of what is expected of organisations would support consideration of whether an organisation can demonstrate that it has taken all steps that can reasonably be expected. It should be clear whether failure to take such specific action can be classed as wilful neglect as well as any deliberate action taken.

Do you agree that the penalties for this offence should be the same as those for the offences in section 315 of the Mental Health (Care and Treatment) (Scotland) Act 2003 and section 83 of the Adults with Incapacity (Scotland) Act 2000?

Yes No

We agree that a consistent approach should be taken to all instances of abuse of positions with a duty of care. We note, however, the consultation document which states that there is little evidence on which to base an estimate of the potential number of additional cases, that there have been very few prosecutions under the Mental Health Act and none under the Adults with Incapacity Act.

It is also important to maintain a balance between legislation that will drive compliance and that which might lever positive change. It is hard to determine how the proposed penalties would result in positive change and service improvement. Focusing blame on individuals will not consider or address any systemic or organisational issues that can be improved.

Should the courts have any additional penalty options in respect of organisations? If so, please provide details of any other penalty options that you think would be appropriate.

Yes No

This is an area which requires much consideration and clarification. As noted in the response to the previous question, it is important to place any organisational penalties in the broader context of prevention and service improvement rather than simply retribution. Penalties as well as opportunities for learning and improvement support would depend on the type of organisation involved (NHS, registered service etc).

It is also unclear as to the stage at which an instance of wilful neglect or ill-treatment formally becomes treated as an offence. As noted previously, it will be important to determine how this will be differentiated from unintentional harm. How this is determined, and by whom, will need to be clarified.

What issues or opportunities do the proposed changes raise for people with protected characteristics (age; disability; gender reassignment; race; religion or belief; sex; pregnancy and maternity; and sexual orientation) and what action could be taken to mitigate the impact of any negative issues?

We anticipate that the proposed changes may benefit people across the range of protected characteristics and it is difficult to foresee any adverse impact. However, it may be useful to seek views of organisations or groups representing people with protected characteristics to obtain their views directly in order to inform the impact assessment.

It is important however, to recognise that people affected by any offence (patients, service users, carers and families) will be vulnerable, and this may impact more on people with particular protected characteristics more than others – for example, people with learning disabilities or dementia . It is important that people affected are supported to participate in the process (for example through access to advocacy, the Patient Advice and Support Service, Victim Support etc) and to understand their rights and responsibilities. Clear and accessible information for patients/service users and their carers is essential.
