Consultation on Proposals for an Offence of Wilful Neglect or Ill-treatment in Health and Social Care Settings

BMA SCOTLAND RESPONSE

Overview

The British Medical Association is a registered trade union and professional association representing doctors from all branches of medicine. The BMA has a total membership of around 140,000 representing 70% of all practising doctors in the UK. In Scotland, the BMA represents around 16,000 doctors.

While the BMA supports the broad principles of person-centred and safe care which lie behind the proposals set out in the consultation on establishing a criminal offence for ill-treatment or wilful neglect of those receiving care or treatment in health and social care settings, we have some serious concerns about the rationale for the specific proposals, the hurdles to implementation, and the balance of benefit against the costs and unintended consequences/risks.

We are also very thoughtful about the range and scope of any new offence, and how it relates to the current discussions about a duty of candour, or to existing process around professional regulation. We are not aware of any evidence that the wide range of existing criminal, civil and professional sanctions have proved to be inadequate in Scotland to deal with serious failings in health care delivery.

There is a lack of clarity about the expected benefit of the proposals – in particular, what problem they would directly resolve, and about what the potential risks and unintended consequences are. These include negative impacts on, for example the creation of disincentives for informal/voluntary carers to become involved and for doctors to make clinical judgements based on the wider benefits of the whole population. Both of these examples would drive up levels of unnecessary treatment and costs.

While the consultation document makes it clear that the proposed offence is not intended to cover instances of genuine error or accident, the circumstances in which criminal prosecution would take place and how available evidence would be assessed in order to make that decision is unclear. We would welcome assurances that a criminal conviction would not be imposed on someone accused of wilful neglect because of issues outwith their control, for example a unit is so understaffed that an individual is unable to provide adequate cover. If the Scottish Government decides to go ahead with introducing this offence, there must be very clear guidelines in place outlining the circumstances in which prosecution would follow. There must be appropriate safeguards in place which protect effective clinical management and decisions about the best use of resources in the interests of all patients.

The development of a culture where open and transparent reporting is the norm requires employers to establish clear, no-blame, incident reporting systems from which to learn and improve, and we will be providing comment on the Scottish Government's consultation on introducing a statutory Duty of Candour on organisations. The threat or over-use of criminal prosecution seems likely to deter the development of such a culture, and to deter information sharing at the 'near miss' level. Clear guidelines over the grounds for

prosecution would need to be set out to ensure that medical professionals were not deterred from reporting cases of neglect.

Introducing this offence may create conflict with existing regulatory processes. There would be a risk that potential criminal activities could be investigated before the actions of professional regulators. Regulatory actions for doctors provide greater protection for the public in that they are taken under the balance of probabilities standard of proof whereas in the criminal context, the court will have to prove *beyond reasonable doubt* that all the elements of the offence of wilful negligence are present. This, obviously, is a much higher standard of proof, and a finding of impaired fitness to practise that results in erasure from the register will effectively end that healthcare professional's career.

Attached below are comments on the specific questions asked in this consultation, and we look forward to continuing to contribute to this process. We look forward to hearing how the other recommendations from the Francis report will also be implemented.

Question 1: **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?**

One difficulty in supporting this proposal is the implication that there is a widespread problem of ill-treatment and wilful neglect in Scotland which requires greater legal protection. From a medical perspective this is not the case. Doctors can already be subject to multiple investigations relating to a single incident, and adding a criminal offence would not provide any additional protection for patients. We are however not in a position to comment whether the regulatory and professional requirements in place for social care are equivalent to the stringent ones in place for doctors. We would like to see a cost v benefit analysis of the proposals for each sector of the formal health and adult social care workforce, alongside an assessment of the relationship any such new process would have to the existing regulatory frameworks already in place for each profession/sector of the private and public formal workforce.

The list of those who would be covered by these proposals listed on page 5 and outlined in Annex A is not consistent and needs to be aligned.

Question 2: **Do you agree with our proposal that the offence should not cover informal arrangements, for example, one family member (generally termed unpaid carer, or carer) caring for another?**

Many individuals receive exceptional and exemplary care provided by family and friends and it is a crucial element of the health and well-being of patients. If the offence of wilful neglect were extended to informal arrangements, we recognise that it could jeopardise the existing willingness and compassion society offers to so many who are in need. A benefit/risk analysis of the introduction of the offence into the informal care environment should be conducted, alongside an assessment of the existing mechanisms in place to tackle the issue of harm being inflicted on vulnerable people by unpaid carers.

However, if this offence is imposed on all staff, employed carers and volunteers across health and social care, it would be perverse to exclude the offence from covering informal arrangements where neglect can equally take place. The Scottish Government estimates that there are more than 650,000 unpaid carers living in Scotland, and has proposed legislation to strengthen and extend the rights of carers. We welcome this move and

consider it is appropriate to improve the way in which carers are supported in their caring responsibilities. We are particularly interested to read the conclusions drawn by the Scottish Government in response to its consultation on legislation to support carers and young carers across Scotland which is referenced in these proposals:
http://www.scotland.gov.uk/Publications/2014/01/4757

Question 3: **Should the new offence cover social care services for children, and if so, which services should it cover?**

The Berwick report recommended that an offence of wilful neglect or ill-treatment should be introduced in relation to adults with full capacity, and we agree that if this offence is introduced this should include children who are patients in any NHS care setting, both primary and secondary care, as well as community services and NHS funded care provided in independently run facilities.

In terms of whether the new offence should include social care services provided for children, the range of social care services for children is different to those delivered for adults. While we do not think the offence is necessary for non-healthcare settings, such as schools, which are already covered by an extensive legislative and regulatory framework, we would nonetheless welcome clarification on whether equivalent criminal proceedings are in place within social care services provided for children.

Question 4: Should the offence apply to people who are providing care or treatment on a voluntary basis on behalf of a voluntary organisation, whether on a paid or unpaid basis?

If someone is providing care and treatment on a voluntary basis on behalf of a voluntary organisation, paid or unpaid, they should be subject to the same level of scrutiny and meet the required standards. However we recognise the same risk as noted under question 2, namely that if unpaid volunteers potentially face the risk of criminal prosecution this may be a considerable deterrent to those who fulfil a vital and valued role. We must therefore again question whether the introduction of this offence is appropriate in Scotland, and like our answer to Question 2, request that the evidence of a proper risk/benefit assessment is considered before a final decision is made on this issue.

Question 5: **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?**

As noted above, there needs to be clarification on the circumstances that might lead to a criminal prosecution under this new offence. For example a decision on how to allocate resources or triage patients could potentially be perceived and therefore challenged by patients and their relatives as wilful neglect. Health professionals and doctors in particular make difficult judgments and decisions on a daily basis, yet the proposals in this consultation do not address how unpopular professional decisions would be interpreted. A balance must be struck between accountability, preventing the wilful neglect of patients, and protecting professionals from unfair and unnecessary litigation. Doctors are held to account if they neglect patients in their care, and we should avoid creating a culture of litigation in the NHS in Scotland. We believe that if this offence is introduced, it should be applied only when an alleged crime is so severe that it should merit a criminal sanction over and above any action taken by a regulator. The Cabinet Secretary had previously declared that the charge of wilful neglect would be used in the most extreme cases only, and clarification on this point would

assure clinicians that genuine unintended errors/mistakes would not be subject to prosecution.

We are concerned about the impact any such new office would have on the clinical decision making of doctors in particular. We rely on doctors to make treatment decision for individuals based not only on the individual specific presenting symptoms, but on a more holistic assessment of their needs, the potential quality of life improvements which would result from treatment, and on the much wider assessment of whole population prioritisation. Any instrument which incentivises doctors to err on the side of caution to protect themselves by over prescribing or over treating will not be in the best interests of the patient, wider population or in the quest to achieve a sustainable healthcare system for the future, within a finite resource.

Consideration could be given to enhancing access to the Ombudsman service and also putting in place measures to accelerate the complaints process.

Question 6: **Do you agree with our proposal that the offence should apply to organisations as well as individuals?**

We agree that if an offence of wilful neglect is introduced then it should apply to organisations as well as individuals. Corporate responsibility is at the heart of fostering an environment in which care is prioritised. However there is no mention in the consultation of management responsibility and its possible role in creating organisational and fiscal constraints which may significantly contribute to system failure. The proposals need greater clarification on where the responsibility for an adverse situation would start and finish. If an offence is detected it is not clear without worked examples which individuals may be identified as responsible, for example the care worker, the shift manager, the general manager, the ward sister, the medical registrar, the consultant or the GP who visits a home on a weekly basis?

Question 7: **How, and in what circumstances, do you think the offence should apply to organisations?**

As noted above, if there is a possibility that an organisation could be involved in criminal procedures this may deter a culture of openness and transparency and create a blame culture.

It is also difficult to understand the circumstances in which it will be possible to prove to a criminal level of satisfaction that an organisation had an intent to neglect patients. There needs to be greater clarity on how wilful neglect would be proven at an organisational level.

Question 8: 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?

If this offence is introduced, the recommendations on penalties for individuals and organisations should reflect existing penalties for similar offences.

Question 9: **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.**

We have no comment on this.

BMA Scotland
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