

Alzheimer Scotland

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

Introduction

Alzheimer Scotland is Scotland's leading dementia voluntary organisation. We work to improve the lives of everyone affected by dementia through our campaigning work nationally and locally and through facilitating the involvement of people living with dementia in getting their views and experiences heard. We provide specialist and personalised services to people living with dementia, their families and carers in over 60 locations and offer information and support through our 24 hour freephone Dementia Helpline, our website (www.alzscot.org) and our wide range of publications. Alzheimer Scotland welcomes the opportunity to contribute to the consultation on the proposals for an offence of wilful neglect or ill-treatment.

General Comments

Alzheimer Scotland notes that within the proposals, that there is no definition, framework and/or reference to guidance around what constitutes 'wilful neglect or ill-treatment'. We further note that the provisions within section 315 of the Mental Health (Care and Treatment) (Scotland) Act 2003 and section 83 the Adults with Incapacity (Scotland) Act 2000 are similarly open-ended and allow for broad interpretation of when an offence has taken place. We are concerned that the inclusion of the word 'wilful' without a clear definition is particularly unhelpful.

Therefore, we believe the Scottish Government must clarify within the legislation or through statutory guidance the circumstances under which this offence may apply. This should recognise that mistreatment and neglect may take a number of forms including physical, mental, emotional and financial.

Areas in which the offence should apply

Alzheimer Scotland broadly agrees with the Scottish Government's proposals set out in the consultation document whereby the new offence will be applicable in all health and social care settings, across the public, third and independent sectors. We further believe that the new offence must include services outwith the scope of local authority, health board and, in future, health and social care partnerships commissioning and delivery, for example, those services commissioned by self-funding individuals. This should also include services both within and outwith the scope of regulation by the Care Inspectorate and Healthcare Improvement Scotland.

Alzheimer Scotland supports the view that it would not be appropriate for this proposed offence to apply in cases where an informal caregiver arrangement exists. However, we agree that the contractual, professional practice of trained and regulated professionals demands the highest level of quality care and conduct.

The proposals as set out within the consultation document do, however, require further clarification in relation to paragraph 14 which states that it would not be appropriate:

“for the offence to cover the types of care situation where there is no legal obligation or contract in place.”

And that:

“If ... a cared-for person is neglected or mistreated by the unpaid carer, then the existing offences in statute would apply.”

The Scottish Government should demonstrate which existing offences to which this refers and in addition, set out why these are not sufficient in themselves as a framework under which health and social professionals practice. It is imperative that cases of neglect and wilful mistreatment, particularly in instances where an individual lacks capacity, are investigated and taken forward to completion to ensure the safety of a person who uses services. As noted above, ill-treatment and neglect can take a number of forms and it is crucial that statute allows for recourse to be taken in any and all instances.

In addition, we note with concern the reasoning in paragraph 14, which states that an offence on non-formal caring roles would be inappropriate since:

“Care is being provided in a person’s home, not a health or social care setting”

We do not believe that this should be a consideration in the Scottish Government’s final decision on which organisations and individuals should be subject to this proposed offence; as noted in paragraph 10, ‘adult care settings’ will include care at home, supported accommodations and other support services. An individual receiving care and support services should receive the highest standards of care and support and be treated with dignity and respect, irrespective of where this is delivered.

Alzheimer Scotland agrees with the Scottish Government that only those with a formal contract should be subject to the proposed offence. We support the proposed offence covering the delivery of health and social care services by individuals on behalf of a voluntary organisation however irrespective of whether or not the individual is formally contracted. In such cases, the organisation concerned must be held responsible for the neglect or ill-treatment as we believe that responsibility for a volunteers conduct and for the care of the person using a service remains with the organisation itself.

Conduct-based or outcomes based offence

Alzheimer Scotland agrees with the Scottish Government that the proposed offences, in line with the offences of the Mental Health (Care and Treatment) (Scotland) Act 2003 or the Adults with Incapacity (Scotland) 2000, should be based on the conduct of the individual and not the outcome.

Whilst we fully agree that the offence itself must be predicated on the conduct of the individual or organisation, Alzheimer Scotland takes the view that there must be a level of

distinction in cases where the level of harm is more serious, as in instances where death occurs as a result of neglect or ill-treatment.

Organisational vs. individual application

Alzheimer Scotland agrees that this offence should have scope to be applied to organisations as well as individuals, believing that the culture and management within services is inextricably linked to the quality of the care delivered. As there is a considerable range of services covered by this proposal and as the circumstances in each case will be markedly different, each case must be evaluated and considered in its own right to determine the appropriate action that should be undertaken. However, we believe that following list, although not exhaustive, are instances where the organisation must be held liable under this offence, if they are found to have failed to:

- Ensure sufficient resources (E.g. equipment) to ensure that safe practice and care were in place;
- Adequately manage staff in relation to staff recruitment, induction, training and supervision; and/or
- Implement good practice in relation to meeting health or social care needs and record keeping.

Alzheimer Scotland recognises that there are instances where individuals may act in a negligent and wilfully harmful manner which directly contravenes the approach and culture of a service provider. We believe that in such cases, where the provider demonstrates that this incident is isolated and that measures have been taken to avoid a repeat of such an instance, it may be appropriate for the individual to solely be liable.

However, we realise that within some settings, the approach and management of a service may foster a culture of bad practice and negligence. In this instance, or in instances where a service has multiple occurrences of wilful neglect or ill-treatment, we believe it would be appropriate that both the organisation and the individual should be liable under the legislation.

Penalties and Enforcement

Alzheimer Scotland believes that the regulatory regime in Scotland must reflect the seriousness of such an offence and that if this law is to be effective, there must be adequate resources made available to enforce it. We note that the consultation document acknowledges that:

There have been very few prosecutions under the Mental Health (Care and Treatment) (Scotland) Act 2003 and none under the Adults with Incapacity (Scotland) Act 2000.

Taking this into consideration, along with the acknowledgement that there are existing offences in statute that can be applied (as proposed for unpaid carers), Alzheimer Scotland

believes that the efficacy of existing legislation must be reviewed to determine if the legislation as proposed will be effective or is necessary.

If it is determined that similar legislation is to be introduced across all health and social care services, there must be a strong drive by the Scottish Government, health boards, local authorities and regulatory bodies including, professional bodies, the Care Inspectorate, Health Improvement Scotland and the Mental Welfare Commission, as well as police and courts, to ensure that both existing and proposed legislation are fully enforced, taking appropriate action where individuals and/or organisations are found to have been wilfully negligent towards, or have ill-treated, an individual. Regulatory bodies must be able to take stronger action against services and individuals where there is endemic and sustained risk to people who use services. This could include revoking registration of services and life-long restriction on working with vulnerable people.

Whilst we agree that the offences should be consistent across the different pieces of statute, in cases of organisational culpability, the available punitive measures currently available are not sufficient; a fine will not, in isolation, improve a service or an organisational ethos.

As indicated above, we believe that non-regulated services should be included within the scope of these proposals. It would therefore be appropriate that, as proposed within the Scottish Government's review of the National Care Standards, that:

One option could be that the commissioner of a service – such as the Health and Social Care Partnership – becomes responsible for holding the service to account.

Alzheimer Scotland welcomed this proposal in its response to the Scottish Government and believes that this would be an application which would be useful.

Services must be held to account through additional means to the statutory penalties set out within the proposals, as they are unlikely in themselves to prevent negligent practices from occurring. In line with the progression of health and social care integration, the commissioning of services by Health and Social Care Partnerships (HSCPs) could be used to hold services to account. The Boards and Strategic Planning groups of HSCPs must be empowered when approaching service provision and delivery within their respective localities and regions to take action to prevent organisations with repeated instances of wilful neglect and/or ill-treatment from delivering services within a locality.

However, Alzheimer Scotland notes that additional measures, as suggested within this consultation response, do not require additional legislation, with existing statute allowing for these actions to be taken.

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