Consultation Response

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

January 2015

Overview

MPS represents more than 290,000 medical professionals across the United Kingdom and around the world; we have extensive experience in supporting healthcare professionals with legal and ethical issues arising from their professional practice.

We have previously opposed similar proposals in England and Wales for the introduction of new criminal sanctions against healthcare professionals for wilful neglect or ill-treatment, and we are opposed to the proposals that the Scottish Government have brought forward in this consultation.

Instead of focusing on the creation of additional penalties for healthcare professionals the Scottish Government should be looking at improving the provision of the support that can bring about genuine and lasting change.

Clinical teams should be supported and encouraged to discuss near misses and patient incidents, as this will ensure that a continuous focus remains on improving and strengthening patient safety. To create such an open learning environment, the Scottish Government's focus should be on the development of mentoring, training and leadership programmes.

If a healthcare professional's behaviour is unacceptable they should face the consequences of their actions and the current regulatory, disciplinary and criminal framework is effective at achieving this.

There are additional criminal sanctions available to prosecute individuals who ill-treat or wilfully neglect children and adults without capacity. However, if those sanctions are to be extended to cover adults with capacity, then the need for them has to be clearly articulated.

Many elements of the proposals for a new offence lack justification, and we find some of the arguments in favour of such an offence to be inconsistent.

Specifically, we are concerned that the proposals:

- contain no threshold for level of harm
- will impede an open, transparent learning culture which is vital to improving patient safety

- will add to the current climate of fear amongst healthcare professionals
- offer little evidence on the need for a greater deterrent, greater accountability, or on examples of the proposed "exceptional circumstances" requiring greater punishments
- could potentially lead to unnecessary criminal allegations arising from civil proceedings
- may criminalise the appropriate and reasonable exercise of clinical judgment and decisions concerning the allocation of resources

If the Scottish Government proceeds with these plans it should introduce additional safeguards. The offence for both individuals and organisations should require a stated threshold of harm for the offence to apply – this could exist within any definition of wilful neglect. It should also require that a duty of care be owed to the individual, and that there has been a breach of that duty that is both 'gross' and without 'reasonable excuse'.

We address each of these concerns in our general comments below, and then provide answers to the consultation questions.

General Comments

Justification for new sanctions

When proposing new criminal laws, the Scottish Government must articulate the purpose of the new laws and the needs they address. The Scottish Government should demonstrate that the proposals offer a proportionate response to the need, and that the new laws are properly framed to address that need and fulfil that purpose.

We do not think that this has been adequately achieved for the proposed new offence of ill-treatment or wilful neglect. The stated position of the Scottish Government is that there is currently a gap in legislation, which it considers would be closed with a new criminal offence of wilful neglect or ill-treatment.[1] When existing criminal law does not automatically cover certain undesirable behaviours, we do not believe there is an automatic need to change the law and

[1] The Scottish Government, Consultation on Proposals for an Offence of Wilful Neglect or Ill-treatment in Health and Social Care settings (October 2014), Annex B pg.16

criminalise those behaviours. Any changes need to be carefully balanced against the negative impact the legislation may have.

Deterrence

If the purpose of the new sanctions is to deter wilful neglect or ill-treatment, then the Scottish Government must articulate why the extensive existing sanctions already available are insufficient.

Currently, if a healthcare worker is found to have ill-treated or wilfully neglected a patient they would be subject to a series of processes, all of which would have serious consequences. These include: professional regulatory proceedings, with the potential for erasure from the relevant register and an end to their career; disciplinary proceedings by their employer with the potential for termination of employment. These are strong sanctions and provide powerful influences on the behaviour of healthcare professionals.

Healthcare professionals are already heavily regulated. However, the consultation paper makes no reference to the existing professional regulators or disciplinary proceedings and the influence they have.

If the policy objective were deterrence alone, then it is likely that professional regulation and disciplinary proceedings, and the associated threat to an individual's livelihood, would be sufficient to discourage wilful neglect or mistreatment.

Penalties

Part of the intention behind this policy is to provide greater scope to punish those who deliberately and wilfully neglect patients. Thankfully, this is exceptionally rare. When it happens, healthcare professionals should rightly be held to account through criminal proceedings and punishment – both of which currently occur.

There are already sanctions in criminal law relating to the behaviour of professionals in certain circumstances. These are designed to cover particular and exceptional circumstances. For example, sanctions for ill-treatment or neglect of children, and ill-treatment of adults who lack capacity or those subject to the Mental Health (Care and Treatment) (Scotland) Act 2003 provide additional protection for particularly vulnerable groups.

However, the proposals for wilful neglect and ill-treatment are not justified by any particular and/or exceptional circumstances. MPS has already considered this matter with regard to similar

proposals in England and Wales, and believe the recommendations of the National Advisory Group on the Safety of Patients in England also have significant relevance to the proposals of the Scottish Government. Those recommendations identified that only in extreme circumstances should the offence should apply, defining these as when *'egregious acts or omissions…cause death or serious harm'.*

The current proposals do not contain a harm threshold so the proposed offence will serve only to create a parallel process to professional regulatory and disciplinary proceedings. This is disproportionate, since its adds yet another avenue for healthcare professionals to be pursued for the same incident.

If new sanctions are to be created they should aim to deal with exceptional circumstances and ought to be restricted to situations where death or serious harm has been caused, and, where there is a breach of a duty of care which is gross and without reasonable excuse.

The apparent justification for creating additional punishments is based on the behaviour of an individual being 'wilful' and therefore suitable for punishment beyond what is available in regulatory or disciplinary proceedings. There are two principle problems with this justification. Firstly, it is not clear that any definition of 'wilful' will not include behaviour which is an accepted part of clinical practice and the exercise of clinical judgment. For example, when a triaging decision is taken in an accident and emergency department about which patient to prioritise. Secondly, it is not clear why, if the justification for additional punishments is that the behaviour is wilful, that the proposed offence is restricted to formal care settings. If it is ill-treatment or neglect that is wilful then it should apply as widely as possible and only be restricted by a duty of care.

Organisational culture and support for professionals

The Francis report made clear that it is the senior management level in a Trust which will generally determine whether instances of neglect of patients can occur in their organisation.[2] This responsibility falls to senior management and board level in the Scottish Health and Special Boards. Given an appropriate working environment, where there is support provided to healthcare professionals rather than a culture of scrutiny and criticism, wilful neglect would be exceptionally rare.

We think that the new sanctions could result in healthcare professionals becoming fearful of the way their conduct may be later criticised. As a consequence there may be less openness and

[2] The Mid Staffordshire NHS Foundation Trust Public Inquiry – Robert Francis QC, 2013.

willingness to admit errors. This is in direct contravention to the desire for an open and accountable health service.

There is also a clear conflict with the new duty of candour which the Scottish Government is proposing. Although this duty is targeted at an organisational level, it will be front line professionals who are affected through their direct interaction with the patient. If the new criminal sanctions are introduced, healthcare professionals will feel concerned about highlighting errors if it means there is a potential for criminal investigation and prosecution. Consequently, the new sanctions could undermine the duty of candour. Healthcare professionals are likely to feel trapped by conflicting duties.

The appropriate way to support accountability is through the development of programmes of mentoring, training and leadership to facilitate an open environment focused on learning. Clinical teams should feel supported and encouraged to discuss near misses and other patient safety incidents to ensure mistakes are learnt from. Additional requirements could also be introduced for organisations to demonstrate how they support their healthcare staff to fulfil their existing ethical and professional obligations and be open with patients about failings in care.

Done properly, this would be a more appropriate way to prevent situations of poor care by professionals and ensure proper accountability for patients.

If a new offence is introduced, everything possible should be done to mitigate the risks of undermining a culture of transparency and learning. Safeguards should include restricting the offence to where death or serious harm is caused and where there is a breach of a duty of care which is gross and without reasonable excuse.

Harm threshold

The proposals fail to acknowledge the need to balance greater accountability to patients against the need to encourage a transparent, open learning culture.

The Scottish Government should place a harm threshold in the offence to mitigate the negative effects of the offence on the culture of transparency and learning in healthcare. This will help ensure sanctions would only apply to appropriately serious cases and aid in consistent application.

This would also prevent the offence creating processes that mirror regulatory proceedings or disciplinary proceedings.

Definition of 'wilful' and criminalising appropriate and reasonable exercise of judgment

There is a risk that the proposed offence and the established definition of neglect could criminalise behaviour the Scottish Government does not intend to criminalise.

In England and Wales our informed understanding is that '"Wilful neglect" means [see R v Sheppard [1981] A.C, HL] either an intentional/deliberate or reckless neglect. The term "neglect" means, in straightforward terms, a failure to act. The meaning also encompasses knowing the risk involved. The Scottish Government has not provided a definition of "Willful neglect", and so for the purposes of responding to this consultation we are unsure whether the definition will mirror R v Sheppard.

As examples, the exercise of reasonable clinical judgment over resource allocation or the appropriate triaging of patients could constitute a deliberate failure to act. Furthermore, as these decisions involve an assessment of the relative risks and benefits to the patients, the individual would also know that patients may suffer as a result of their decision.

It appears, therefore, that the exercise of judgements on treatments and prioritisation and the allocation of resources would fall within the scope of the proposed offence.

If the Scottish Government does not intend for these activities to fall within the scope of the proposed offence, then exclusions need to be provided for in the primary legislation. It will not be sufficient to leave these issues to prosecutorial discretion as this will leave healthcare professionals uncertain as to whether their clinical decision making is captured by the criminal law.

Additional Criminal allegations arising from civil proceedings

In addition to potentially criminalising clinical judgments and decisions about resources, the proposed offence risks effectively criminalising behaviours that generally are currently dealt with solely by the civil courts.

A successful clinical negligence claim in the civil courts requires a pursuant to demonstrate that there was a duty of care owed to them and that the duty was breached and that the breach caused harm.

Most individuals captured by the scope of the proposed offence would have a duty of care to the individual.[3] A breach of a duty of care in a clinical negligence case can be by act or omission.

[3] Furthermore, we think it appropriate that the scope of the offence is explicitly defined by the existence of a duty of care.

Furthermore, as noted above, decisions in a healthcare context necessarily involve an assessment of the relative risks and benefits to patients and may satisfy the definition of wilful.

Consequently, there is the potential for successful clinical negligence claims to also attract criminal allegations of wilful neglect under the proposals. (Note that this will still be the case if the offence were to incorporate an outcome element for the patient of a particular level of harm, as a successful negligence claim also has a harm element.)

For example, in our experience one of the most common reasons for clinical negligence litigation is an allegation of a delay in referral and diagnosis. Most clinical decisions involve an assessment of the relative risks and benefits to the patient. Therefore, an erroneous decision not to refer and/or investigate at a particular stage could be held to be not only neglect but also wilful on the basis that there would be recognised risks which the healthcare professional would have considered in formulating their treatment plan. The healthcare professional could then be sued for negligence. Under the proposals if the claim was successful (or at least as part of the claim it was demonstrated that the healthcare professional was negligent), then the fact that the negligent decision was wilful, by virtue of being taken knowing the risk to the patient, might also open that professional up to a criminal prosecution.

We think it is disproportionate and inappropriate that a criminal allegation under the proposed offence might flow so easily from a clinical negligence case. It is already the case that a healthcare professional who has been the subject of a clinical negligence claim can be investigated by the relevant professional regulator (and/or face disciplinary proceedings from their employer) with the possibility of sanctions by the regulator.

Criminal investigations should only follow on from serious harm and to ensure this the offence should have additional safeguards. The offence should only apply to a breach of a duty of care that is reckless and without reasonable excuse and where the breach causes death or serious harm.

Prosecutorial discretion

The legitimate exercise of clinical judgment ought to be excluded from the offence. It would be disproportionate for a claim for clinical negligence to have the potential to lead so easily to a criminal allegation.

Investigating and prosecuting authorities will be bound by the words of the Act and it is the responsibility of the Scottish Government to properly outline the scope and extent of the offence and any defences in legislation.

MPS has experience of the confusion that is caused when primary legislation does not set out the scope of criminal offences in sufficient detail. Failure to provide the right level of detail, and instead relying on prosecutorial discretion, will likely lead to confusion and fear amongst healthcare professionals.

Additional safeguards in the offence

The additional safeguards in the offence for both individuals and organisations could be:

- the offence should require a breach of a duty of care
- the breach should be 'gross'
- the breach should be 'without reasonable excuse'
- the breach caused death or serious harm.

In order to protect those making difficult clinical decisions properly, the definition of the proposed offence should include a '*requirement that such neglect should be assessed in circumstances where there is a duty of care to act and a breach of that duty by failing to act…. which would enable an objective assessment to be made of the doctor's acts or omissions and a determination whether such acts or omissions were reasonable or not in the light of the scope of his duty'*.

An appropriate solution would be incorporating a term such as "without reasonable excuse" in the definition of the proposed offence.

Questions

The Scottish Government has insufficiently justified the need for a new offence for wilful neglect or ill-treatment. We think the current regulatory, disciplinary and criminal framework when properly applied provides a deterrent, suitable punishment and accountability for patients.

However, if the Scottish Government is minded to introduce a new offence it should contain additional safeguards to protect clinical judgment, decisions about resource allocation and to prevent criminal allegations arising too easily from civil proceedings.

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

Yes. We agree that if the Scottish Government is to introduce an offence it should apply across health and social care and both private and public sector. We do not however believe that the offence should be restricted to formal provision.

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

We do not think this offence is justified for either formal or informal settings. However, if the Scottish Government is to proceed with this new offence, then it must cover both.

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 of the offence and explain your view.

Yes. While we do not believe an additional offence should be introduced, we believe that if the Scottish Government is minded to proceed, then we see no reason why the offence should not apply in all settings used by children. The offence should be as widely applicable as possible in order for there to be a consistent, clear application of the offence.

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

Yes. While we do not believe an additional offence should be introduced, we believe that if the Scottish Government is minded to proceed, then there is no reason why the offence should not 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. The offence should be as widely applicable as possible, in the interests of consistency.

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?

No, we strongly disagree. The consultation document cites events at the Mid-Staffordshire NHS Foundation Trust, which led to the establishment of the National Advisory Group on the Safety of Patients in England ("the National Advisory Group"). In responding to the consultation on proposals to introduce a new offence of wilful neglect in England, MPS gave close consideration to the report by the National Advisory Group, which recognised the need to balance greater accountability for patients against the need not to impede an open and transparent learning culture.[4] The recommendation was that the offence should only apply to 'egregious acts or omissions that cause death or serious harm.'

We believe that the Scottish Government should place a harm threshold in the offence to mitigate its negative effects on the culture of transparency and learning in healthcare.

If an offence, such as the one proposed, was created to deal with exceptional circumstances, then it would be easier to justify. It would also prevent the offence creating processes parallel to regulatory proceedings in most circumstances. However, without a harm threshold, the offence as proposed could lead to the police feeling obliged to investigate cases of alleged neglect unless it is clear there is no case to answer. The result could be a significant number of inappropriate criminal investigations which are disruptive and time-consuming, and cause distress to healthcare workers under investigation.

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

Yes. While we do not believe an additional offence should be introduced, we believe that if the Scottish Government is minded to proceed, then it is appropriate for the offence to apply to organisations, and for thresholds to be the same, in the interests of consistency.

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

When seeking to establish the offence in respect of organisations, MPS considers the best approach to be one that is based on the way in which an organisation is managed or organised.

The Francis Report was clear that it is the culture at senior management level in a Trust which will generally determine whether instances of neglect of patients can occur. Where there is an

[4] The National Advisory Group on the Safety of Patients in England, A promise to learn – a commitment to act: Improving the Safety of Patients in England, (August 2013).

appropriate working environment, with support provided to healthcare professionals, versus one with a culture of criticism and excessive scrutiny, it is likely that wilful neglect would be rare.

At present, hospital managers can be prosecuted summarily or on indictment for failure to comply with s7 of the Health & Safety at Work Act 1947 which provides:

It shall be the duty of every employee while at work-

To take reasonable care for the health and safety of himself and of other persons who may be affected by his acts or omissions at work; and

As regard any duty or requirement imposed on his employer or any other person by or under any of the relevant statutory provisions, to co-operate with him so far as is necessary to enable that duty or requirement to be performed or complied with.

We believe that managers of organisations should be subject to the same scrutiny as the individuals providing the care. Given that prosecution under health and safety legislation is already an option for the Procurator Fiscal to consider, the inclusion of a provision for the offence to apply to organisations would provide greater consistency.

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?

In order to promote consistency 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.

It is entirely appropriate that a range and scale of options should be available for the Procurator Fiscal to consider when determining whether to prosecute an individual for wilful neglect. This would also allow the Sheriff to consider implied alternatives such as a community payback order or fine rather than imprisonment.

A range of options for conviction would assist the relevant regulatory bodies in assessing the gravity of the allegations and the sanctions to be imposed on the individual, for example, conditions, suspension or erasure from the register.

A conviction would almost certainly end the career of the professional involved and we think it would not be appropriate for this decision to be made in a justice of the peace court.

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

Yes. Courts should have additional penalty options such as those available under the Corporate Homicide Act 2007. Those include:

- Order to remedy breach; and
- Order to publicise its failures and the steps being taken to remedy.

We believe that any additional penalties should be used to promote change and encourage lessons to be learned.

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 have no comment to make on equality issues in respect of this consultation.

About MPS

MPS is the world's leading protection organisation for doctors, dentists and healthcare professionals. We protect and support the professional interests of more than 290,000 members around the world. Our benefits include access to indemnity, expert advice and peace of mind. Highly qualified advisers are on hand to talk through a question or concern at any time.

Our in-house experts assist with the wide range of legal and ethical problems that arise from professional practice. This includes clinical negligence claims, complaints, medical and dental council inquiries, legal and ethical dilemmas, disciplinary procedures, inquests and fatal accident inquiries.

Our philosophy is to support safe practice in medicine and dentistry by helping to avert problems in the first place. We do this by promoting risk management through our workshops, E-learning, clinical risk assessments, publications, conferences, lectures and presentations.

MPS is not an insurance company. All the benefits of membership of MPS are discretionary as set out in the Memorandum and Articles of Association.

CONTACT

Should you require further information about any aspects of our response to this consultation, please do not hesitate to contact me.

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