RCN Scotland Response to the Scottish Government Consultation on Proposals for an Offence of Wilful Neglect or Ill-treatment in Health and Social Care Settings

Introduction

With a membership of over 415,000 registered nurses, midwives, health visitors, nursing students, health care assistants and nurse cadets, the Royal College of Nursing (RCN) is the voice of nursing across the UK and the largest professional union of nursing staff in the world. RCN members work in a variety of hospital and community settings in the NHS and the independent sector. The RCN promotes patient and nursing interests on a wide range of issues by working closely with the Scottish and UK Governments, the Scottish and UK Parliaments and other national and European political institutions, trade unions, professional bodies and voluntary organisations. There are around 40,000 RCN members in Scotland.

The RCN submission

1. The RCN would never condone the wilful neglect or ill-treatment of a patient by a nurse. Such conduct goes against the fundamental tenets of health and social care professionalism and the ethical duty of care that all health and social care professionals have towards their patients and social care users. However our primary concern about the creation of a new criminal offence, even if it is intended for only the most exceptional cases of neglect or ill-treatment, is that it will detract from the wider aim of encouraging greater openness in health care by individuals and organisations, when something goes wrong, which we know enhances patient safety. There is a lack of evidence that the wide range of existing criminal, civil and professional sanctions, for addressing neglect or ill-treatment, have proved to be inadequate to deal with the most serious failings in health care delivery. Nor has any evidence been produced that individual health professionals and organisations are not currently being held accountable in these circumstances, and that this gap needs to be closed by the new offence. We are concerned that there is a significant risk that the threat of criminal proceedings against the individual would be counterproductive, inhibiting the type of culture change that the RCN and Scottish Government support and that Robert Francis in his report on the events at Mid-Staffordshire NHS Foundation Trust called for. If individuals are fearful of being blamed they are less likely to report concerns and speak out openly and honestly. Whereas Francis identified the need to incentivise a culture of transparency, learning and improvement, this new offence has the potential to be a major disincentive to the creation of such a culture.

2. Our experience and that of our members is that there is still a "culture of blame" in the NHS (and independent health care sector), and a focus on individuals when errors occur. Once again, whilst we acknowledge that the intention is to focus, through this offence, on the most serious incidents of deliberate harm, we believe that the further criminalisation of health care, will encourage organisations, staff, and patients, their families and carers, to "look for someone to blame". Staff need to be supported and helped to improve systems of care when mistakes are made, or care falls short of optimum. Staff need to be comfortable about raising concerns about standards of care. Further criminalisation of health care risks contributing to a "climate of fear". See Paragraph 9 below.

3. As is widely recognised in all of the recent reviews following the Francis Report, when errors or harm occurs to patients in the vast majority of cases, this is as the result of some form of system breakdown and failure rather than the wilful neglect

of one individual. The legal focus on the individual has the potential to detract attention away from system learning and improvement. When care falls below the required standards nurses most commonly report to us that this is as a consequence of factors such as low staffing levels, lack of training and development, poor support, ineffective or misguided leadership. It is crucial that individual and organisational responsibilities are equally considered when allegations of wilful neglect are being investigated. Again if this balance is lost it has the potential to fatally undermine the culture change which is needed.

4. From a nursing perspective it is extremely important to be crystal clear that poor nursing standards do not automatically equate to wilful neglect. The Nursing Profession strives to deliver the best care possible but when this does not happen it is most frequently the result of some of the broader organisational issues already identified, not any deliberate or reckless act by an individual nurse. In addition it may be entirely appropriate, following a clinical assessment and prioritisation decision making process, that some patients may have to wait for care and or treatment. It is crucial that there are no automatic assumptions of wilful neglect and that individual patient perceptions and experiences of care are considered in the context of the clinical environment and decision making at the time. The RCN stress this point because we were concerned to note in a HSJ news article (Wilful neglect offence extended, 7 March 2013 p8) that the DH response as to why this new criminal offence was being introduced in England and Wales was, "this offence will send a strong message that poor care will not be tolerated".

5. The personal stress on a health professional being investigated for an alleged criminal offence cannot be underestimated. The process is often lengthy and the rates of successful prosecution in relation to existing criminal offences have been very low. For this reason there must be absolute clarity about the definition of all elements of the offence.

6. The emphasis throughout in this consultation document is on the need to address deliberate instances of mistreatment or neglect which have caused harm to patients. There are already a range of criminal offences, civil law and professional disciplinary measures and sanctions to address a wide range of instances of "patient abuse" or ill-treatment, whether the victims are mentally ill, lack capacity or are simply vulnerable through age and/or ill-health, even though possessing full capacity.

7. In Scotland in addition to the common law crimes against the person such as assault, there already exists the common law crimes of wilful and culpable cruel and unnatural treatment or neglect and reckless conduct causing actual injury, even where no assault has taken place. A charge of causing physical injury by any means is relevant. Any form of cruel and unnatural treatment of persons is criminal. (Macdonald, Criminal Law, pages 124 to125.) Reckless conduct which causes actual injury is a crime at common law. (HMA v Harris 1993 JC 150, Paton v HMA 1936 JC 19, Quinn v Cunningham 1959 JC 22, The Principal Reporter v J.P.N.,C.G Sheriff George Jamieson 2014 SCDUMF 52, 2014 GWD 30-592) . The crime may be committed intentionally or recklessly, but not negligently. (See, Gerald H Gordon, The Criminal Law of Scotland, Michael G. A. Christie ed., 3rd Edn, vol , 2001 paras 29-44 to 29.50). Accordingly the Scottish criminal justice system can already deal effectively with cases of deliberate neglect or mistreatment when they arise and which the Consultation recognises are uncommon. These existing crimes are not referred to or considered in the Consultation. No details are produced as to the number of such cases reported to the Police nor are there details of the numbers of such cases reported to the COPFS. Reference is also made to section 12(1) of the Children and Young Persons (Scotland) Act 1937. Further consideration is needed

as to how the proposed new offence fits with that offence. It is to be noted that section 12 provides that offence is committed only where the wilful ill-treatment or neglect causes the child unnecessary suffering or injury to health. See the comments made by the English Court of Appeal in R v Parulben Patel [2013] EWCA Crim 965. Parulben Patel illustrates the complexities that can arise in the criminalisation of healthcare and in construing the meaning of the word "wilful" whatever the legislature might of had in mind. The accused did not escape conviction even where her actions were out of stress and panic. If a new offence is to be created, we submit it should contain the words "in a manner likely to cause the person unnecessary suffering or injury to health." (see R v Sheppard [1981] AC 394 and R v Turbill [2013] EWCA Crim 1422).

8. Our research in relation to the number of reports and prosecutions under the existing offences of wilful neglect or ill-treatment in respect of mental health patients, set out in section 315 of the Mental Health (Care and Treatment) (Scotland) Act 2003 and in respect of adults with incapacity, set out in section 83 of the Adults with Incapacity (Scotland) Act 2000, suggests that the number of cases where a prosecution has been commenced is extremely low. We submit that the combination of the existing common law crimes and statutory offences is sufficient to address the concerns of any gap set out in the Consultation.

9. We also consider that the existing role and powers of the regulators in the field of health and social care, including the General Medical, General Dental, Nursing and Midwifery and Scottish Social Services Councils have not been fully considered in the Consultation. We submit they provide important safeguards against the behaviours which are sought to be addressed through the new offence. The threshold for a finding of impaired practise or misconduct in terms of the rules of those regulators is that of the civil standard, lower than the criminal standard. The rules of evidence are less rigorous than in a criminal court. This provides greater protection to patients and service users. Given the requirements of registration virtually all health and social care workers in Scotland are required to register with the appropriate regulator. No gaps in registration are identified in the Consultation. A finding of impaired fitness to practise or misconduct that results in erasure from the register will effectively end that persons career. There is no need for an additional criminal sanction, especially one with a higher threshold of proof. Our experience is that when a matter is reported to the Police in a healthcare setting and a criminal investigation is commenced, both the employer and the regulator will delay their investigations until the Police investigation and any resultant prosecution is completed. Often the person against whom the allegation is made will be suspended from work and will be subject to an interim suspension order by the relevant regulator pending the finalisation of criminal proceedings. That delay and uncertainty produces an obvious unfairness, inconvenience and damage to reputation for the victim, witnesses, some of whom may themselves be vulnerable and for the suspect, particularly where false, unfounded allegations have been made. Unsuccessful prosecution or a successful prosecution after material delays produce adverse consequences for the regulator in the successful presentation of its cases.

10. Nowhere is it stated why the creation of a new offence is likely to add something of value to those existing remedies, nor is there any evidence presented of instances where perpetrators, of such neglect or ill-treatment, have gone unpunished or not otherwise been held accountable.

11. It is essential that there is an awareness of the unintended negative consequences which can arise. This Consultation is proceeding concurrently with a Consultation on Proposals to Introduce a Statutory Duty of Candour for Health and

Social Care Services, which we broadly support and welcome. The Duty of Candour Consultation rightly identifies fear, a culture of blame, and professional and institutional repercussions as barriers which inhibit disclosure. We submit that it is likely staff will be less open and honest when things go wrong out of fear that by doing so may expose them or their colleagues to criminal charges of ill-treatment or wilful neglect, or will result in them initiating a criminal process creating years of uncertainty and the stresses of the adversarial criminal justice system. There are also other material risks. The new offences could cause some healthcare professionals to practice inappropriately defensive care where the more strident patients and users are treated more favourably to protect themselves from possible accusations. Individual carers could become scapegoats when their actions have been constrained by management or organisational practices or under-resourcing, for example by providing inadequate induction, training, equipment, staff or safe systems of work over which the individual has no control. The current financial resource challenges being faced in the NHS in Scotland are well documented. Reference is made to the report laid before the Scottish Parliament by Audit Scotland and to the announcements made about the challenges faced by NHS Grampian. In all the circumstances we submit that right now the disadvantages outweigh the advantages of the new offence. We submit that the statutory duty of candour should be introduced and the new culture of openness be allowed to become embedded over a five year period before further consideration is given to the introduction of any new offence.

12. We submit that when it is accepted things have gone wrong the process should focus more on the patient as a victim by introducing the practices of restorative justice with the consent of the patient, the members of staff and the organisation, and using the skills of a mediator or facilitator independent of the organisation concerned.

13. Subject to the general views expressed above, we respond to your particular questions as follows:

Responses to particular questions:

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 do not agree that a new offence should be created now. If an offence is created now and subject to our comments above about its terms, we agree with this specific proposal for the reasons set out in the Consultation.

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 do not agree that a new offence should be created now. If an offence is created now and subject to our comments above about its terms, we agree with this specific proposal for the reasons set out in the Consultation.

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 ☐

We do not agree that a new offence should be created now. If an offence is created and subject to our comments above it should cover all formal social care services for children in both the public and private sector. Reference is made to section 12(1) of the Children and Young Persons(Scotland) Act 1937. Further consideration is need as to how the proposed new offence fits with that offence. It is to be noted that section 12 provides that this offence is committed only where the wilful ill-treatment or neglect causes the child unnecessary suffering or injury to health. See the comments made by the English Court of Appeal in in R v Parulben Patel [2013] EWCA Crim 965 for the unsatisfactory position which is created if these words do not appear in 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 ☐ No ☐

We do not agree that a new offence should be created now. If an offence is created and subject to our comments above it should not apply to people who are providing care or treatment on a voluntary basis on behalf of a voluntary organisation.

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 do not agree that a new offence should be created now. If an offence is created and subject to our comments above it should provide that it is committed only where the wilful ill-treatment or neglect causes the person unnecessary suffering or injury to health. Reference is made to section 12(1) of the Children and Young Persons (Scotland) Act 1937. See the comments made by the English Court of Appeal in R v Parulben Patel for the unsatisfactory position which is created if these words do not appear in the offence.

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

Yes ☐ No ☐

We do not agree that a new offence should be created now. If an offence is created now and subject to our comments above about its terms, we agree with this specific proposal for the reasons set out in the Consultation.

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

Yes ☐ No ☐

It should apply where the tests set out in the Corporate Manslaughter and Corporate Homicide Act 2007 are satisfied.

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 ☐

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 ☐

The penalties applicable to a breach of the Corporate Manslaughter and Corporate Homicide Act 2007 should apply. Penalties should include unlimited fines, remedial orders and publicity orders. A remedial order will require the organisation to take steps to remedy any management failure that led to the offence. The court should also be able to impose an order requiring the organisation to publicise that it has been convicted of the offence, giving the details, the amount of any fine imposed and the terms of any remedial order made.

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?

No comment