

Criminal Justice and Courts Bill

Fact sheet: offences of Ill-treatment or Wilful Neglect of Persons Receiving Health Care or Adult Social Care Services

Background

1. On 9 June 2010, the then Secretary of State for Health, Andrew Lansley, announced a full public inquiry into the role of the commissioning, supervisory and regulatory bodies in the monitoring of Mid Staffordshire NHS Foundation Trust. The Inquiry was chaired by Robert Francis QC, and built on the work of his earlier independent inquiry into the care provided by the Trust between January 2005 and March 2009.
2. Robert Francis published his final report into the events at Mid Staffordshire NHS Foundation Trust in February 2013. Part of the Government's immediate response was to establish a number of specific reviews focussing on issues raised in his report, and Professor Don Berwick was asked to chair an independent review on improving the safety of patients in England.
3. The National Advisory Group on the Safety of Patients in England ("the National Advisory Group") was established to support Professor Berwick with the review. In its final report¹, published in August 2013, the National Advisory Group focussed on the importance of achieving a careful balance between culture changes which support openness and transparency and supporting staff and organisations to learn from error and improve their practice; and the need to assure accountability to the patient. Automatically looking for someone to blame following an accident or genuine mistake would not support those cultural changes. Nevertheless, the National Advisory Group also accepted that there needs to be a system in place to deal with those cases where the act or omission is not accidental, but amounts to ill-treatment or wilful neglect.
4. In that context, the National Advisory Group identified a small but significant gap in existing legislation, and recommended that a new statutory offence of ill-treatment or wilful neglect of patients be created to fill that gap. Its view was that the new offence, analogous to similar offences that already exist, would act as a deterrent and, more importantly, place the ill-treatment or wilful neglect of all patients on an equal footing in terms of the sanctions available.
5. The Government published its full response to the Francis report on 19 November 2013². In it, as well as responding in detail to every recommendation from that report, the Government also responded to the recommendations made by all the specific

¹ *A promise to learn – a commitment to act: Improving the Safety of Patients in England*. Published August 2013:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/226703/Berwick_Report.pdf

² *Hard Truths: The Journey to Putting Patients First*, published 19th November 2013.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270368/34658_Cm_8777_Vol_1_accessible.pdf

reviews established subsequently. It accepted the National Advisory Group's recommendation on an ill-treatment or wilful neglect offence, and committed to developing proposals for public consultation on the precise formulation of the new offence, and the sanctions, as soon as possible, with a view to legislating as soon as Parliamentary time allows. The Government consulted on proposals during March 2014.

The current position

6. Currently there are specific statutory offences which address wilful ill-treatment or neglect of children in some circumstances³, and ill-treatment or wilful neglect of adults who lack capacity⁴ or those subject to the Mental Health Act 1983⁵, at the hands of those entrusted with their care. However, there is no equivalent specific offence in relation to adults with full capacity and in relation to children in some circumstances. This means that currently it is entirely possible that a situation could arise where two patients, for example an adult with full capacity and one without, are being subjected to the same type of conduct, by the same person with the same intent, but a prosecution for ill-treatment or wilful neglect could only be brought in respect of the patient without capacity.
7. We acknowledge that there is a range of existing regulatory and legislative mechanisms that could apply in respect of the treatment of such adults in some cases, for example, the prosecutory powers of regulators such as CQC and the Health and Safety Executive, or provisions of the Offences Against the Person Act 1861 and common law offences such as assault.
8. In addition, it is true that there have been several cases recently where employees have been charged and convicted of ill-treatment and/or wilful neglect of vulnerable people in their care. However, these prosecutions have generally been brought under section 44 of the Mental Capacity Act 2005, or section 127 of the Mental Health Act 1983, as the victims either lacked capacity or were subject to the 1983 Act. For example, the prosecutions following the Winterbourne View scandal were brought under section 127 of the Mental Health Act 1983.
9. There is already a comprehensive legislative framework for protecting children and keeping them safe from harm, both in civil and criminal law. For example, under criminal law, the existing offence of child cruelty under section 1 of the Children and Young Persons Act 1933 applies where an individual with responsibility for any child or young person under 16, wilfully assaults, ill-treats, neglects, abandons, or exposes that child, or causes or procures that child to be assaulted, ill-treated, neglected, abandoned, or exposed, in a manner likely to cause him unnecessary suffering or injury to health. In civil law, the Children Act 1989 provides a framework for local authority intervention where children are in need or at risk of harm. Local authorities have duties to safeguard and promote the welfare of children under sections 17 and 47 of that Act. Additionally,

³ Section 1, Children and Young Persons Act 1933.

⁴ Section 44, Mental Capacity Act 2005.

⁵ Section 127, Mental Health Act 1983.

children's services and education are governed by a regulatory framework that provides protection for children within those settings. All are subject to rigorous regulation and inspection. However, this existing legislative and regulatory framework does not apply to the provision of health care to children in all settings. For example, the child cruelty offence in the 1933 Act is generally accepted as applying to individuals, not organisations. So, for example, it is likely that it could not readily be used to prosecute, say, an NHS trust hospital whose management or organisation of its activities has caused or enabled a child to be ill-treated or wilfully neglected whilst receiving treatment on hospital premises.

10. The Government therefore shares the view of the National Advisory Group that new, specific offences of ill-treatment or wilful neglect of recipients of health or adult social care are required to fill this gap the gap in legislation. One offence will apply for an individual perpetrator, and the other offence, formulated differently, will apply for organisations.
11. In addition, the penalties attached to the existing offences differ, so there is currently no uniformity in terms of the sanctions that may be imposed on conviction. So it is right to create the proposed new offences in order to provide consistency of approach in relation to ill-treatment and wilful neglect.

Consultation outcome and the final formulation of the offence

12. In March 2014, the Government consulted on the proposed formulation of the new offence(s). Over 130 responses were received, and there was broad support for each of the proposals set out. The high-level formulation of the offence therefore remains as proposed in the consultation.
13. The purpose of these new clauses is to create new statutory criminal offences of ill-treatment or wilful neglect by individual care workers or care provider organisations.
14. In line with the outcome to the consultation, the offence(s) will apply:
 - to all formal healthcare provision for adults in both the NHS and private sector, other than in specific excluded children's settings and services which are already subject to existing legislative and regulatory safeguards;
 - to all formal healthcare provision for children in both the NHS and private sector, other than in specific excluded children's settings and services which are already subject to existing legislative and regulatory safeguards;
 - to all formal adult social care provision, in both the public and private sectors, including where care is self-funded; and,
 - to individuals and organisations paid to provide or arrange for the provision of these health and adult social care services, but with the offence for organisations formulated differently from that for individuals.
15. Penalties for individuals will mirror those attached to the offence of ill-treatment or wilful neglect of persons without capacity set out in section 44 of the Mental Capacity Act 2005. For organisations, penalties will include fines, and/or the issuing of publicity

16. The offence(s) will not apply:

- to the provision of any non-health children's services (eg children's social care);
- to informal caring arrangements where the care is not provided as part of paid work;
- in situations that are the result of a genuine accident or error;
- to any sectors other than health care or adult social care; and,
- to the provision of health care for children or adults in some specified settings or services, such as schools or children's homes.