Department of Health

New offence of ill-treatment or wilful neglect

Consultation document

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New offence of ill-treatment or wilful neglect

Consultation Document

Prepared by the Department of Health

Contents

Introduction

1. This consultation sets out our proposals for the development of a new, clear and specific criminal offence of ill-treatment or wilful neglect of patients and service users. This offence would apply in both England and Wales, as criminal law is not devolved in Wales.

2. We want to hear your views on each of the proposals within this document, which will inform the development of the precise formulation of the statutory offence. Following the conclusion of this consultation, we will be seeking to legislate as soon as Parliamentary time allows.

Background

3. 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.

4. 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.

5. 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 report[1], 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.

6. In that context, the National Advisory Group identified a small but significant gap in existing legislation. Currently there are specific criminal offences which address wilful ill-treatment or

[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

neglect of children[2], and ill-treatment or wilful neglect of adults who lack capacity[3] or those subject to the Mental Health Act 1983[4], at the hands of those entrusted with their care. However, there is no equivalent specific offence in relation to adults with full capacity. The National Advisory Group acknowledged that there is a range of existing regulatory and legislative mechanisms that could apply to such adults in some cases, saying "indeed there already exists a series of robust sanctions and powers available to regulators such as CQC and the Health and Safety Executive". It nevertheless took the view that there is a role for this new offence.

7. The National Advisory Group therefore recommended the creation of a new statutory offence for those "found guilty of wilful or reckless neglect or mistreatment of patients". Its view was that this 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.

8. The Government published its full response to the Francis report on 19 November 2013[5]. 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 reviews established subsequently. It accepted the National Advisory Group's recommendation on a 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.

[2] Section 1, Children and Young Persons Act 1933.

[3] Section 44, Mental Capacity Act 2005.

[4] Section 127, Mental Health Act 1983.

[5] *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

The recommendation

9. The full details of the recommendation of the National Advisory Group can be found in its report. However, key elements are the creation of a new "general offence of wilful or reckless neglect or mistreatment" which:
    - may be committed by both organisations and individuals;
    - applies where the individual or organisation wilfully neglects or ill-treats someone in a way that causes serious harm or death; and
    - creates penalties for the offence which are equivalent to those under section 44 of the Mental Capacity Act 2005.

10. Section 44 of the Mental Capacity Act 2005 created an offence of ill-treating or wilfully neglecting a person who lacks capacity, or whom the offender reasonably believes to lack capacity. The offence may only be committed by certain persons who have a caring or other specified responsibility for the person who lacks capacity. The penalties are, on summary conviction up to 12 months imprisonment, a fine not exceeding the statutory maximum, or both, or on conviction on indictment up to 5 years imprisonment or a fine, or both. The full text of section 44 is at Annex A.

11. The National Advisory Group described what it meant by "wilful", saying that in its view neglect is wilful if it is "intentional, reckless or reflects a 'couldn't care less attitude'". We do not propose to define "wilful" in this legislation as it has a widely accepted meaning, established by case law.[6] Essentially, the "wilful" element connotes acting deliberately or recklessly.

12. The National Advisory Group also made it clear that genuine errors or accidents should never lead to prosecution, but should be used as learning tools to improve the quality of services in future. The Government fully agrees with that approach, which accords with the current state of the law.

[6] As summarised in 'Archbold - Criminal Pleading, Evidence and Practice 2014' (Sweet & Maxwell), para 17-47, "The leading case is *R v Sheppard* [1981] A.C, HL, in which the majority held that a man "wilfully" fails to provide adequate medical attention for a child if he *either* (a) deliberately does so, knowing that there is some risk that the child's health may suffer unless he receives such attention *or* (b) does so because he does not care whether the child may be in need of medical treatment or not."

The Government's position

13. The Government accepted the finding of the National Advisory Group that there is a gap in the existing legislation. We also agree that whilst alternative statutory and common law offences do exist[7], it is not certain that they could cover every situation that a specific offence of ill-treatment or wilful neglect would. So, it is right to create the proposed new offence in order to provide consistency of approach in relation to ill-treatment and wilful neglect.

14. 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. But 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.

15. It is entirely possible that a situation could arise where two patients, one 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. Clearly, this is a situation we would want to avoid.

Development of proposals for consultation

16. The creation of a new offence, in any field, requires careful development. As a result, we have been working closely with a range of stakeholders in the development of the proposals in this consultation document, both within Government and across the health and adult social care sectors. We have scrutinised every element of the National Advisory Group's recommendation to establish how best to implement it, and discussed our propositions with a cross-Government Working Group, bringing together all the Government Departments with an interest[8].

17. Extensive discussions have also taken place with key stakeholders outside of Government to ensure that they are aware of the content of the recommendation and the potential implications. These discussions around the detail of the recommendation and the development of the offence have been vital in shaping the development of the proposals within this consultation, and we would like to thank the organisations and individuals who

[7] For example, in the Offences Against The Person Act 1861, the Health and Safety at Work Act 1974, or common law offences such as assault.

[8] Wilful Neglect Working Group membership includes: Department of Health, Ministry of Justice, Home Office, Department for Education, Crown Prosecution Service, and the Attorney General's Office.

have taken the time to meet with us.[9] We will be continuing these discussions with other stakeholders throughout the consultation period.

The Government's proposals

18. There are some elements of the National Advisory Group's recommendations that we can accept without qualification. So, we envisage that the offence will cover only clear cases of ill-treatment or wilful neglect, not genuine error or accident. Similarly, it should cover individuals and organisations, although there is a question here about how best to describe the offence in relation to an organisation, as explained in section C below. Finally, we accept that penalties for individuals should mirror those in section 44 of the Mental Capacity Act 2005.

19. But there are other elements where our thinking and the feedback from stakeholders suggests a slightly different approach may be needed. These fall into four broad categories:

    - scope of the offence;
    - elements of the offence;
    - how to describe the offence in relation to organisations; and,
    - other issues.

    The rest of this document sets out the Government's thinking on the key issues under each of these headings, and asks questions to seek the views of respondents.

[9] We have met so far with the GMC, BMA, MPS, MDU, MDDUS, NHS Employers Policy Board, NHS Confederation, Academy of Medical Royal Colleges, and NMC.

A. Scope of the offence

i) NHS or wider

20. The National Advisory Group recommended that the offence should apply to "all NHS patients". In practice this would mean adults and 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. (However, see paragraphs 23 to 29 below for further discussion of the issues in relation to children's services.)

21. The remit of the review extended only to the NHS, and as such we are aware that the recommendation could not extend beyond those services. However, it does seem that the principles behind the recommendation apply much more widely, across all formal health and social care settings, whether NHS, local-authority funded, or in the independent sector. Furthermore, section 44 of the Mental Capacity Act 2005, which the National Advisory Group cites as the model it wants the new offence to emulate, is applicable in any health or social care setting. So, in our view, focussing only on the NHS would not fully resolve the legislative gap issue, and would not reflect the spirit of the recommendation.

22. Our view, therefore, is that there are very strong arguments that the new offence should not be restricted to only NHS services, but should apply across all formal health and social care settings. Some examples of the types of setting that this approach would cover are at Annex B.

We propose that the new offence should apply in all formal adult health and social care settings, in both the public and private sectors. Do you agree with this approach? Please explain your view.

ii) Children

23. There is a comprehensive legislative framework for protecting children and keeping them safe from harm. For example, in the civil law, section 17 of the Children Act 1989 places a duty on local authorities to safeguard and promote the welfare of children in need by providing a range and level of services appropriate to those children's needs. Under section 47 of that Act, local authorities have a duty to make inquiries when there is reasonable cause to suspect that a child in their area is suffering or is likely to suffer significant harm. A child who is being ill-treated or neglected is likely to be a child in need or potentially a child suffering or likely to suffer significant harm.

24. Unfortunately, despite support and intervention, some parents and carers do inflict deliberate cruelty on their children. In those cases we turn to the criminal law to prosecute those people who commit an offence.

25. There is an existing offence of child cruelty under section 1 of the Children and Young Persons Act 1933 ("the 1933 Act"). The full text of section 1 is at Annex C. This offence covers cruelty to children by people aged 16 and older. The offence applies where an individual with responsibility for any child or young person under 16, wilfully assaults, ill-treats, neglects, abandons, or exposes him, or causes or procures him to be assaulted, ill-treated, neglected, abandoned, or exposed, in a manner likely to cause him unnecessary suffering or injury to health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement). The penalties are, on summary conviction up to 6 months imprisonment, a fine not exceeding the statutory maximum, or both, or on conviction on indictment up to 10 years imprisonment or a fine, or both. The Ministry of Justice has recently undertaken a targeted informal consultation on the adequacy of the existing law.

26. The offence of child cruelty under section 1 of the 1933 Act may only be committed by certain persons who have responsibility for the child. For example, the existing offence would cover situations such as cruelty to a child by a parent, guardian, child-minder, foster carer or other person who could be said to be responsible for the child. Organisations such as hospitals may not fall within the scope of section 1 of the 1933 Act. Accordingly, we believe the new offence of ill-treatment or wilful neglect should also cover those persons or organisations that ill-treat or neglect children who are patients, not just adults who are patients, to meet the recommendation of the National Advisory Group.

27. The Government remains of the view that the creation of a new offence for those who are not the actual perpetrator but who may suspect abuse, sometimes referred to as mandatory reporting, would not improve existing reporting procedures. There is already legislation and statutory guidance to tell professionals what should happen if they are concerned about a child. We believe it is more effective to focus on the appropriate prosecution of the actual perpetrators of offences against children. For this reason the Ministry of Justice has recently reviewed the adequacy of the current child cruelty offence. We want to ensure that our proposed new ill-treatment or wilful neglect offence appropriately targets perpetrators of ill-treatment or wilful neglect against children.

28. As explained in the section above, we would want there to be parity of coverage whether the offence is committed against an adult or a child. Therefore we would welcome views on whether, as we are proposing for adults, the new offence should be extended beyond NHS services for children to health service provision in the private sector, such as privately employed school nurses.

Should the new offence apply in all formal health settings in both the public and private sector used by children (including services used by both children and adults)? Please explain your view.

29. Adult social care is not directly analogous with children's services. We would welcome your views on whether non-health services for children should be included within the proposed

offence. Such services could include areas such as children's social care (fostering, children's residential care, and social work), services for children with disabilities (which may or may not be described as health services), early years provision and education.

Should the new offence apply in any other settings used by children (including services used by both children and adults)? Please explain your view and what sorts of services you believe should or should not be included.

30. The remainder of the consultation questions in this document cover whether the offence should extend to informal arrangements, whether it should focus on conduct of the provider/individual rather than harm caused to the victim, how the offence might be described in relation to organisations, penalties for conviction of the offence, and those areas for prosecution discretion. These are issues that have relevance for children's health and care services, particularly if the offence were to extend to some or all children's services as discussed above. We would therefore welcome your views on the remainder of this consultation, even if your primary interest relates specifically to children.

iii) Formal service provision

31. There is also a question as to which types of provision should be subject to the offence. The National Advisory Group's recommendation could only apply in respect of formal NHS services, because of the remit of its review. But if the offence is going to apply more widely than the NHS, then we need to consider whether it should also extend more widely to cover informal as well as formal health and social care settings. This could mean including completely personal family carer arrangements and potentially situations where, for example, someone is keeping a friendly eye on an elderly neighbour. We know, sadly, that ill-treatment and wilful neglect can occur in these settings, but that does not mean that bringing all these sorts of arrangements within scope of the new offence would be a proportionate response.

32. Our view is that "formal arrangements" cover those situations where a person (whether an individual or an organisation) is employed or contracted to provide particular services. These arrangements give rise to a contractual or other formal obligation to provide those services to a reasonable standard, including to any standard agreed with the commissioner/employer. This seems to represent a significant and important difference from informal arrangements, where the care provided is usually based on a family relationship or friendship and there is no element of prescribed obligation.

33. Equally, we do not want to do anything that could place these sorts of informal arrangements in jeopardy. For example, it would be completely at odds with what we are trying to achieve if in practice the new offence actually led to family members deciding not to help look after their relative for fear of being subject to prosecution. Having said that,

there is existing legislation in the Domestic Violence, Crime and Victims Act 2004 which could apply in certain circumstances if the care-giver and the person receiving care are members of the same household.

34. In addition, we are taking steps to improve the way carers are supported in their caring responsibilities. The Care Bill, currently before Parliament, includes provisions explicitly relating to the powers and duties of local authorities to assess and meet the needs of carers who are not under an employment or contractual arrangement to provide care. This seems a far more appropriate way to pre-empt and address these problems.

35. In relation to children's services we believe that the existing offence of child cruelty would capture any informal arrangements we believe should be liable for prosecution, for example parents or carers who wilfully neglect a child they have responsibility for. Therefore our view is that the proposed new offence should not be extended to cover such arrangements.

36. For all these reasons, we think that the offence should apply only to formal health and social care settings, where there is a contractual or employment duty to provide services.

We propose that only formal health and social care arrangements, as described above, should be within scope of this offence. Do you agree with this approach? Please explain your view.

B. Elements of the offence

i) Conduct or outcomes

37. The National Advisory Group was clear that the ill-treatment and wilful neglect offence should apply only where "egregious acts or omissions cause death or serious harm". Thus they are proposing that the ill-treatment or neglect must cause serious harm to the victim in order for the proposed offence to be made out – ill-treatment or wilful neglect which caused less than serious harm would not, on this approach, be prosecutable.

38. Whilst it is easy to see the rationale behind this approach, it does raise a number of issues. For example, it does not align with existing legislation on ill-treatment and wilful neglect, particularly section 44 of the Mental Capacity Act 2005, which, as indicated earlier in this document, seems to be the exemplar for how the National Advisory Group envisages the new offence would operate. The section 44 offence does not as one of its elements require an individual to suffer any harm (nor harm of a specific level of severity); instead it focuses entirely on the conduct of the offender, not on the outcome for the patient.

39. The proposal for a harm element has a number of other implications:

    - no matter what level it was set at, including a harm element would mean that the gap in legislation identified by the National Advisory Group would not fully be closed by the implementation of the new offence, because section 44 of the Mental Capacity Act 2005 does not have such an element;
    - linked to this, setting a threshold could be perceived as effectively condoning "lesser" ill-treatment or wilful neglect, when in fact the Government is clear that there should be a zero tolerance approach to any such conduct. For example, inconsistency could arise where two people suffer the same ill-treatment or wilful neglect, from the same practitioner with the same intent, but are affected differently, so that one is harmed much more seriously than the other. In this scenario, a prosecution could not be brought in relation to the lesser affected person, because the harm did not meet the severity threshold.

40. We understand that the National Advisory Group were seeking to avoid the risk of creating a disincentive to establishing an open and honest culture in service providers, with the offence only coming into play in the most serious cases where the element of "wilfulness" is demonstrated. Similarly we have listened carefully to the arguments of stakeholders we have spoken with, to avoid creating a "climate of fear" among health and social care professionals.

41. Set against that, however, is the argument that, as with existing wilful neglect legislation, it should be a matter for the investigating and prosecuting authorities to use their experience and judgement to decide whether a particular allegation has any substance and merits investigation and/or prosecution. Thus, in practical terms, the new offence would be similar

in terms of the liability of providers or individual practitioners to that which now applies in relation to other wilful neglect legislation.

42. Bearing all these issues in mind, our view is that the disadvantages of including a harm element outweigh the merits. Therefore, we propose that there should not be a harm element built into the offence.

We propose that the new criminal offence should focus entirely on the conduct of the provider/practitioner, rather than any consideration of the harm caused to the victim of the offence. Do you agree with this approach? Please explain your view.

C. Describing the offence for organisations

43. The National Advisory Group was clear in its report that the offence should apply to both individuals and organisations. We agree. It has been suggested that this would conflict with the introduction of Fundamental Standards as part of the Care Quality Commission's (CQC) registration requirements, on which we are consulting[10], but we do not believe that this is the case.

44. The proposed Fundamental Standard on safeguarding service users from abuse will include (subject to parliamentary approval) "neglect and acts of omission which cause harm to a service user or place the service user at risk of harm". These developments mean that in future, in the vast majority of cases, CQC will be able to pursue prosecutions against registered organisations where they judge the Fundamental Standard to have been breached.

45. However, we believe that there may be cases where the failures are so serious as to merit prosecution more broadly than solely in the context of CQC regulation. An important distinction here is that the new criminal offence is for *wilful* neglect. The draft regulation on the Fundamental Standard on abuse does not include that qualification. Thus, in this context, the new offence would cover those cases of neglect where there is evidence of the perpetrator acting or omitting to act either deliberately, even though they know there is some risk to a patient or service user as a consequence, or because they do not care about that risk.

46. The aim of the ill-treatment and wilful neglect proposals is to have a consistent sanction across the health and social care settings. This should include health and social care organisations, as much as the individuals who work in them. We are clear, therefore, that there should be an offence applicable to organisations (such as corporate bodies and partnerships). Having said that, there are some practical issues that need to be considered. As with some other offences involving organisations, there can often be a potential difficulty in proving *mens rea*, that is, in demonstrating the mental element of the offence by proving that the "directing mind", usually someone at the very top of the organisation, embodied the company in his or her actions and decisions. It was to resolve this difficulty that the law in relation to corporate manslaughter was reformed in 2007.

47. One option would be to take a similar approach to section 44 of the Mental Capacity Act 2005, which applies to "a person", whether an individual, corporate body or partnership. In order to prove that there has been *wilful* neglect on the part of an organisation, it is necessary to prove that a sufficiently senior individual acted in the capacity of the "directing

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10 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/274715/Introducing_Fundamental_Standards_-_a_Consultation.pdf

mind" of the organisation and that individual was wilful, such that the organisation as a whole is guilty of the offence. As explained above, experience has shown that it is difficult to find sufficient evidence to bring prosecutions against organisations in this way.

48. Alternatively, we could adopt an approach similar to that which underpinned the development of the corporate manslaughter offence in the Corporate Manslaughter and Corporate Homicide Act 2007. So, the legislation could be framed such that an organisation would be guilty of an offence if the way in which its activities are managed or organised by senior management (a) causes a person to be the subject of ill-treatment or wilful neglect; and (b) amounts to a gross breach of a relevant duty of care owed by the organisation to that person. The test would be whether the conduct of the organisation falls far below what can reasonably be expected in the circumstances. This approach would also allow scrutiny of the collective actions/failings of the organisation's senior management.

49. On balance we think that the second option is likely to be the more effective in this context. However, we are very keen to hear what you think about these suggested approaches, or indeed if there may be others we could be considering.

Do you agree that an approach based on the way in which an organisation managed or organised its activities is the best, most effective way to establish the offence in respect of organisations? Please explain your view.

D. Other issues

i) Penalties

50. The National Advisory Group made recommendations on penalties in respect of both individuals and organisations. For individuals it suggested that penalties should mirror those specified in section 44 of the Mental Capacity Act 2005. These are, on summary conviction, up to 12 months' imprisonment, or a fine of not more than the statutory maximum, or both, or on conviction by indictment, imprisonment for up to 5 years, or a fine, or both. We see no reason not to accept this proposal.

We propose that penalties for individuals convicted of this offence should mirror those set out in section 44 of the Mental Capacity Act 2005. Do you agree? Please explain your view.

51. As regards organisations, the National Advisory Group suggested that sanctions might include:
    - removal of the organisation's leaders and their disqualification from future leadership roles;
    - public reprimand of the organisation; and
    - *in extremis,* financial sanctions, but only where that will not compromise patient care.

52. We agree with the first two of these proposals, which reflect work going on elsewhere to improve the quality of organisational leaders, in particular the link with our proposals to establish a Fit and Proper Persons Test for directors (or equivalent) of organisations registered with the CQC. Similarly, the Care Bill currently progressing through Parliament includes provisions in relation to organisations convicted of supplying or publishing false or misleading information for "remedial orders" (requiring the organisation to take steps to correct the situation) and "publicity orders" (requiring the organisation to publicise the conviction, whether a remedial order has been issued by the court and, if so, what steps it is taking to comply with that order). This reflects provisions already in place in the Corporate Manslaughter and Corporate Homicide Act 2007, and we would envisage adapting them to apply in relation to an organisation's conviction of an ill-treatment or wilful neglect offence.

53. Whilst the National Advisory Group's caution as to the use of financial penalties is understandable, this has to be balanced against the fact that, in practice, fines are the conventional punishment for organisations, both in the health and social care sectors and elsewhere. For example, fines are also proposed in the Care Bill in relation to penalties for organisations convicted of supplying or publishing false or misleading information.

54. However, there are safeguards in place to address the concerns of the National Advisory Group. The usual approach would be for the Court to determine at the sentencing stage whether a fine is appropriate, and if so what the level of the fine should be. Organisations

would have the opportunity to present evidence to demonstrate that a fine would put effective patient care at risk.

55. In our view there seems to be little to justify making an exception to this approach for the ill-treatment and wilful neglect offence, especially if it is to cover all health and adult social care settings, including the independent sector.

Do you agree with our proposals in relation to penalties in respect of organisations? Do you think there are other penalties which would be appropriate?

ii) Matters for prosecutorial discretion

56. This consultation document sets out the proposed scope of the new offence. However it is also important that there is clarity about the behaviours and actions which we do not propose to be captured under the offence. As set out above, the National Advisory Group was clear that it is vital that this offence does not capture genuine accidents or errors. Discussions since November with professional representative organisations have also driven home that medicine is not error free – genuine accidents or mistakes will inevitably occur. We accept that, and recognise that these incidents should be used to learn from, increasing the skills and knowledge of the organisation and/or the individual practitioner. But there are other scenarios where the offence should not apply.

57. For example, in our view, the offence must not act as an inhibitor to health and social care professionals exercising informed clinical judgement on priorities or appropriate treatment. An example of this is a health care professional having to prioritise treatment in a busy Accident and Emergency Department. This may result in another patient spending longer in discomfort than they would otherwise have done, but that should not of itself mean that the clinician should be charged with ill-treatment or wilful neglect.

58. We also recognise that prioritisation and allocation of health and adult social care services is often made at an organisational level, for example where a Clinical Commissioning Group or Trust sets selection criteria for a particular treatment, for example on bariatric surgery. Again, we would not consider situations where care or treatment has not been provided because these selection criteria were not met, as falling within the scope of the new offence.

59. In each of these examples, a key element to consider is that of wilfulness. In bringing any prosecution, it will need to be established that the neglect was wilful or the actions/omissions amounted to ill-treatment.

60. Obviously, it would not be possible to cover every such situation, and it would not be appropriate to list possible exclusions in primary legislation. These are just examples of the

sorts of situations which we would expect investigating and prosecuting authorities to take into consideration when deciding whether it is in the public interest to pursue an allegation.

61. Some of the stakeholders we have talked with have raised concerns about the possibility of malicious or vexatious allegations being made by individuals who have exhausted all the other avenues available to them for pursuing a complaint or concern, or where prosecuting authorities have decided not to proceed with a particular case.

62. We recognise that in this sector, as in many others, this is a potential risk. However, there are already arrangements in place to provide protection to defendants in private prosecutions. Such defendants can refer the case to the Director of Public Prosecutions (DPP) and request intervention. The case papers can then be obtained by the Crown Prosecution Service (CPS) and reviewed to determine whether the evidential and public interest tests set out in the Code for Public Prosecutors are met. If the tests are not met, the CPS will intervene to take over the prosecution and stop it from proceeding.

63. These arrangements are available in respect of the Mental Capacity Act 2005, and it therefore seems sensible to adopt a similar approach in respect of the new offence.

We propose adopting the same approach to referral of private prosecutions to the DPP as is available in respect of the section 44 offence in the Mental Capacity Act 2005. Do you agree? Are there other ways to address this issue?

Equality issues

64. Section 149 of the Equality Act 2010 establishes the Public Sector Equality Duty (PSED), requiring a public authority in the exercise of its functions to have due regard to the need to:
    - eliminate discrimination, harassment, victimisation and any other conduct prohibited by the 2010 Act;
    - advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and
    - foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
65. The 2010 Act describes “protected characteristics” for the purpose of the PSED as: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and, sexual orientation. It also specifies that Ministers of the Crown and government departments are public authorities for the purpose of the PSED.
66. Thus, in the development of the new offence discussed in this consultation document, we must ensure that we have due regard to the obligations placed upon Ministers by the PSED, and other duties on the Secretary of State. In parallel with this consultation, we are conducting an initial screening exercise which seeks to identify the scope of those who may be affected and whether the proposed policy may have equality impacts for affected persons who share a protected characteristic. We are also using this consultation exercise to obtain the views of stakeholders on possible impacts to inform the screening exercise and, if appropriate, a full equality impact assessment.

Do you think that any of the proposals set out in this consultation document could have equality impacts for affected persons who share a protected characteristic, as described above? If so, please tell us about them.

Responding to this consultation

In this document we have set out our proposals for a new offence of ill-treatment and wilful neglect and the reasoning behind them. We now want to hear the views of as many people as possible on these proposals, and also to identify any other issues, challenges or implications which we have not yet identified.

The proposals and consultation questions are listed at Annex D, however please feel free to add any other feedback which falls outside the scope of these questions.

In line with the Government's commitment to implement the reforms coming out of the Francis Inquiry as soon as possible, we want to move forward on this quickly. In addition, our previous stakeholder engagement activity means that many of the key stakeholders are already aware of our proposals and have had some time to consider their response to them. Therefore, this consultation will run for one month closing on 5pm on 31 March.

To respond to this consultation you can:

Email to:
WN.consultation@dh.gsi.gov.uk

Write to:
Ill-treatment or Wilful Neglect Consultation
c/o Mia Snook
Room 2E11 Quarry House
Quarry Hill
Leeds
West Yorkshire
LS2 7UE

ANNEX A

Section 44, Mental Capacity Act 2005

44 Ill-treatment or neglect

(1) Subsection (2) applies if a person ("D") –

(a) has the care of a person ("P") who lacks, or whom D reasonably believes to lack, capacity,

(b) is the donee of a lasting power of attorney, or an enduring power of attorney (within the meaning of Schedule 4), created by P, or

(c) is a deputy appointed by the court for P.

(2) D is guilty of an offence if he ill-treats or wilfully neglects P.

(3) A person guilty of an offence under this section is liable –

(a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 5 years or a fine or both.

ANNEX B

EXAMPLES OF THE TYPES OF SETTING TO BE COVERED BY THE OFFENCE

NB: not intended to be comprehensive

All NHS hospitals and ambulance services

All independent sector hospitals (whether or not they are providing NHS-funded services).

Community health and care services (e.g. district nurses)

Primary care services

Nursing homes, whether NHS, local authority or independent sector

Adult Care homes, whether NHS, local authority or independent sector

Domiciliary care, including where the care provided is funded through personal budgets or direct payments

Day care services

Voluntary sector providers of healthcare or adult social care

Services provided for the Armed Forces and/or their families

Prison health services

ANNEX C

Children and Young Person Act 1933 section one

1 Cruelty to persons under sixteen.

(1) If any person who has attained the age of sixteen years and has responsibility for any child or young person under that age, wilfully assaults, ill-treats, neglects, abandons, or exposes him, or causes or procures him to be assaulted, ill-treated, neglected, abandoned, or exposed, in a manner likely to cause him unnecessary suffering or injury to health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement), that person shall be guilty of a misdemeanour, and shall be liable—

(a) on conviction on indictment, to a fine or alternatively, or in addition thereto, to imprisonment for any term not exceeding ten years;

(b) on summary conviction, to a fine not exceeding the prescribed sum, or alternatively, or in addition thereto, to imprisonment for any term not exceeding six months.

(2) For the purposes of this section—

(a) a parent or other person legally liable to maintain a child or young person, or the legal guardian of a child or young person, shall be deemed to have neglected him in a manner likely to cause injury to his health if he has failed to provide adequate food, clothing, medical aid or lodging for him, or if, having been unable otherwise to provide such food, clothing, medical aid or lodging, he has failed to take steps to procure it to be provided under the enactments applicable in that behalf;

(b) where it is proved that the death of an infant under three years of age was caused by suffocation (not being suffocation caused by disease or the presence of any foreign body in the throat or air passages of the infant) while the infant was in bed with some other person who has attained the age of sixteen years, that other person shall, if he was, when he went to bed, under the influence of drink, be deemed to have neglected the infant in a manner likely to cause injury to its health.

(3) A person may be convicted of an offence under this section—

(a) notwithstanding that actual suffering or injury to health, or the likelihood of actual suffering or injury to health, was obviated by the action of another person;

(b) notwithstanding the death of the child or young person in question.

ANNEX D

Summary of proposals and consultation questions

A. Scope of the offence

i) NHS or wider

We propose that the new offence should apply in all formal adult health and social care settings, in both the public and private sectors.

Do you agree with this approach? Please explain your answer.

ii) Children

Should the new offence apply in all formal health settings in both the public and private sector used by children (including services used by both children and adults)? Please explain your answer

Should the new offence apply in any other settings used by children (including services used by both children and adults)? Please explain your view and what sorts of services you believe should or should not be included.

iii) Formal service provision

We propose that only formal health and social care arrangements should be within scope of this offence.

Do you agree with this approach? Please explain your view.

B. Elements of the offence

i) Conduct or outcomes

We propose that the new criminal offence should focus entirely on the conduct of the provider/practitioner, rather than any consideration of the harm caused to the victim of the offence.

Do you agree with this approach? Please explain your view.

C. Describing the offence for organisations

Do you agree than an approach based on the way in which an organisation managed or organised its activities is the best, most appropriate way to establish the offence in respect of organisations? Please explain your view.

D. Other issues

i) Penalties

We propose that penalties for individuals convicted of this offence should mirror those set out in section 44 of the Mental Capacity Act 2005.

Do you agree? Please explain your view.

Do you agree with our proposals in relation to penalties in respect of organisations? Do you think there are other penalties which would be appropriate?

ii) Matters for prosecutorial discretion

We propose adopting the same approach to referral of private prosecutions to the Director of Public Prosecutions as is available in respect of the section 44 offence in the Mental Capacity Act 2005.

Do you agree? Are there other ways to address this issue?

Equality issues

Do you think that any of the proposals set out in this consultation document could have equality implications? If so, please tell us about them.