

Ill-treatment or wilful neglect consultation
c/o Mia Snook
Room 2E11 Quarry House
Quarry Hill
Leeds
West Yorkshire
LS2 7UE

20 March 2014

Dear Mia,

Ill-treatment or wilful neglect consultation

The Health Foundation is an independent charity working to improve the quality of healthcare in the UK. We are here to support people working in healthcare practice and policy to make lasting improvements to health services. We carry out research and in-depth policy analysis, fund improvement programmes in the NHS, support and develop leaders and share evidence to encourage wider change.

We are grateful for the opportunity to respond to the Department of Health's proposals for a new offence of ill-treatment or wilful neglect. We understand that the rationale for the new offence is to close the gap identified by the National Advisory Group on the Safety of Patients in existing legislation.¹ Specifically, whilst there exists legislation relating to the neglect of children and ill-treatment or wilful neglect of adults who lack capacity or those subject to the Mental Health Act, there is no similar legislation covering adults with full capacity.

Overall, the Health Foundation supports the introduction of this new criminal offence as part of a suite of actions, led both locally and nationally, to improve the safety of patients.

We support the new offence because:

- Regulation works most effectively when there are a wide and varied range of sanctions of increasing severity, dependent on nature of the conduct of the individual or organisation and the level of harm caused

¹ NHS England, 2013. *A promise to learn – a commitment to act: improving the safety of patients in England*

- Making wilful neglect a criminal rather than a civil liability protects everyone rather than just those with the means to take civil action, and sends the message that the State considers this behaviour to be unacceptable
- It will help to focus our minds on distinguishing between the different types of harm and protocol violations, some of which are unavoidable or even necessary, and others which are deliberate and/or reckless
- It can be applied equally to organisations and individuals which may serve to strengthen the hand of staff working in conditions that seriously impede their ability to deliver safe and compassionate patient care.²

The consultation document asks some specific questions around the scope of the offence. We do not propose to comment on most of these questions, and will leave it to those with the relevant expertise to do so. However, we do wish to make three broad points that we believe will aid the successful introduction of the legislation:

- It should be applied consistently across different healthcare settings and provisions, so that it will carry the confidence of patients and the public. For instance, there seems to be little justification for the offence to be applicable only to NHS services, and not also to the independent sector.
- The proposed approach will focus on the conduct of the offender not the outcome for the patient. This takes a different approach to the Duty of Candour Review, where staff will be required to be honest with patients for anything other than 'low levels of harm'.³ This distinction seems appropriate, given that the two areas of new legislation are tackling different problems – the Duty of Candour seeks to improve openness with patients, while this legislation seeks appropriate punishment for wilful acts of negligence – but we suggest that this is made clear to people.
- The Impact Assessment estimates that there may be up to 240 prosecutions per year, which is higher than the language that has been used so far, which talks of 'very rare' cases. This would equate to more than one person for every acute trust in England. We suggest that more work is done to ensure that the risk of professionals becoming too risk averse, and the effect this might have on a culture of openness, is mitigated.

We believe that, alongside the introduction of the new offence, greater emphasis needs to be placed on building capability and understanding at each level of the NHS to enable people to design and work in safe systems of patient care. In addition to supporting the design of the

² Based on the article *Would criminalising healthcare professionals for wilful neglect improve patient care?* in *BMJ* 2014;348:g133

³ Sir David Dalton and Prof. Norman Williams, 2014. *Building a culture of candour: A review of the threshold for the duty of candour and of the incentives for care organisations to be candid.*

Patient Safety Collaborative Programme and the approach to inspecting for safety by the Care Quality Commission, the Health Foundation is undertaking a range of activities to improve how we measure and monitor safety, and help the NHS move towards a proactive approach to safety where risks are identified and mitigated before they lead to harms to patients.⁴

Yours sincerely

John Illingworth
Policy Manager

⁴ More about the Health Foundation's work on patient safety can be found at:
<http://www.health.org.uk/areas-of-work/topics/patient-safety/>