COSLA welcomes the opportunity to respond to this call for evidence but would point out that the very tight timescales imposed on the call of written evidence, particularly during the holiday season, mean that some elements of this response may not have been subject to the usual rigorous discussion through our committees and therefore our response should be considered with that caveat.

**NVPs and smoking in hospital grounds**

COSLA is committed to the actions set out in the current national strategy “Towards A Generation Free From Tobacco” and is generally supportive of the objectives of this Bill. However, we suggest that the proposals outlined in the consolation will need to be properly resourced if we are to continue to make progress toward the strategic goals.

1. **Do you support the Bill’s provisions in relation to NVPs?**

   In terms of a proposed minimum purchase age of 18, a ban on the sale of NVPs via vending machines, a requirement for NVP retailer to register on the tobacco retailer register, a prohibition on ‘proxy-purchasing’ for under 18s, a restriction on domestic advertising and promotions (except for point of sale advertising), the introduction of an age verification policy for the sale of NVPs age verification, and a ban on staff under the age of 18 selling tobacco and NVPs; we would support the proposals set out in the Bill.

2. **Do you support the proposal to ban smoking in hospital grounds?**

   At this time it is unclear whether legislation is necessary or indeed practicable. Actions to achieve this outcome are currently being progressed by health boards and local authorities as part of the existing national smoke free strategy. Further time is needed to identify effective local approaches to this within a context of nominal resources.

   Organisations like health boards and local authorities may use internal disciplinary provisions to ‘enforce’ this policy for their employees if they want to prevent their employees smoking in the grounds of NHS property.

3. **Is there anything you would add/remove/change in the Bill with regards to NVPs or smoking in hospital grounds?**

   We support a more flexible and localised approach which builds on public support rather than prohibition.
Duty of candour and willful neglect

4. Do you support the proposed duty of candour?

COSLA and the Scottish Government are jointly committed to ensuring that people using health and social care services can expect to be safe from harm. We are fully supportive of continuous improvement in relation to quality and safety across health and social care standards and recognize the need for the disclosure and remedy of harm. However, it is not clear that legislation is the most effective or only way to achieve this policy objective.

Safety, support and protection are writ large through both NHS and local authorities’ existing statutory duties, for example in relation to child protection, adults with incapacity and adult support and protection. Openness, safety and protection are also key drivers of national policies on quality and central to the outcomes we expect the new Integration Authorities to deliver over the coming period.

Both the NHS and local authority social work services have a long-fostered a culture of openness and candour where things go wrong in a person’s care or support. The General Medical Council and Nursing and Midwifery Council standards explicitly require their members to be candid with people harmed by their practice and updated guidance is expected later this year. Furthermore, a range of the duties placed upon the social work profession require open and honest discussion of circumstances with the potential to cause harm, for example in relation to adult support and protection.

Evidence base

The evidence base for introducing legislation in England, and for the duty proposed for Scotland, are both focused upon the healthcare system with data for social care being scarce. This is perhaps not surprising. There is a strong argument that the framework of duties and regulatory regime which social care services operate within, have driven a culture of candour in adult social care for some time.

Councils have statutory duties in relation to adult support and protection which necessitate open discussion and joint management of risk of harm, irrespective of its source. Councils and third party providers are also required to report a wide range of notifiable harmful incidents to the Care Inspectorate. Furthermore, policy drivers such as self-directed support pass choice and control to the service-user within the context of continuous review of whether support is meeting agreed outcomes. Within that context, very early discussion of when things are going wrong is the norm, and would normally take place before any harm occurs.

The less episodic nature of adult social care, as compared with healthcare, tends to mean that people are supported by social care providers for longer periods of time. The establishment of longer term relationships that
results from this also tends to promote candour in practice, as something that is accepted as the 'right thing to do.' This, coupled with the factors outlined above, may suggest that there is less of a requirement for legislation to ensure candour within the social care setting.

**Improvement approach**

That is not to say that there is not room for improvement, however this may better-achieved through guidance and training across the new health and social care partnerships. This would obviously have resource implications, however additional guidance and training may be a far more cost effective way of realizing the policy intent.

Furthermore, ensuring a consistent approach across health and social care will require time for new integration arrangements to bed in, with the type of change sought being a shift in cultures towards one of openness and transparency across all services. Securing this change will require bespoke improvement support which is sensitive to local circumstances and can support partnerships to develop flexible approaches. Introducing a blanket duty with prescribed bureaucratic requirements can mitigate against such approaches.

**Children and young people**

The concept of harm, and therefore of an incident which would activate a duty of candour procedure, may need to be given separate consideration within the context of services for children and young people. Local authorities have specific protection duties in relation to children and young people, and systems already exist for anticipating harm and mitigating against it. Introducing a separate duty on top of these systems and duties risks duplication and could serve to diminish the focus on outcomes which is at the heart of our policy focus for children and young people, as expressed through Getting It Right For Every Child.

**Resourcing and capacity**

Should Parliament decide to proceed with the Bill proposals, four interconnected issues arise. Firstly, councils (in partnership with NHS Boards) would need to review existing systems against the requirements of any new duties. We do not agree with the financial memorandum’s assertion that existing systems would be sufficient to ensure fulfillment of a new duty. As a minimum, there would be a need for infrastructure investment in staff training and additional administration.

Secondly, even if existing systems were deemed to include the required components, there remains the question of capacity. Should a new duty of candour lead to an increased volume, there will be an increased burden on that system and it risks becoming unsustainable.

Thirdly, volume (and therefore capacity) is driven by the definition of incidents which would activate a duty of candour. The Bill’s description of
such incidents is reasonably clear in respect of specific types physical harm, however psychological harm and the shortening of life expectancy are more difficult to define or to attribute. This means that it is difficult to estimate the likely volume of incidents triggering the duty of candour and associated procedures.

For example, psychological harm may be more difficult to define within the context of adults who lack capacity or who are suffering from a mental health problem. Constructing a clear definition and guidance and dealing with events within this context will necessarily be more complex. This could lead to both an unintended impact on care planning and risk management, more complex processes for dealing with ‘trigger’ events, and an increased volume in cases.

Finally, employer’s liability insurance and personal indemnity insurance could be affected by the act of apologising. While this is clearly not an acceptable reason for failing to apologise, the financial implications of liability do need to be fully considered and clearly set out.

Conclusion

The social care profession has a long history of operating with culture of openness that supports frank discussion of potential harm, the management of risk and the effectiveness of different interventions within that context. It is not clear that a new duty of candour on health and social care services is the best or only way of securing a culture of openness and transparency across the newly-integrated health and social system. Careful consideration of all other avenues for achieving this policy intent is required, and it may be that securing the desired culture change should be a matter for guidance, training and bespoke improvement support, rather than legislation.

5. Do you support the proposal to make willful neglect or ill-treatment of patients a criminal offence?

As previously stated, COSLA and the Scottish Government are jointly committed to ensuring that people using health and social care services can expect to be safe from harm. Safety, support and protection are writ large through both NHS and local authority statutory duties; they are also a key driver of national policies on quality and central to the outcomes we expect the new Integration Authorities to deliver over the coming period.

In addition to this focus on support and protection, the Mental Health (Care and Treatment) (Scotland) Act 2003 (s.315) and the Adults with Incapacity (Scotland) Act 2000 (s.83) set out offences of wilful neglect or ill-treatment in respect of mental health patients and adults with incapacity. Additional protection duties are conferred by the Adult Support and Protection (Scotland) Act 2007, and children and young people are provided with specific protection via the Children (Scotland) Act 1995 and the new Children and Young People (Scotland) Act 2014. Furthermore, providers of
care across all sectors are also under a general duty of care, enforceable by law and subject to regulatory control.

Against this backdrop, the case for further legislation needs careful consideration in terms of its likely utility, interface with existing legislation, and the potential for unintended consequences. COSLA has a long-standing view that any piece of proposed legislation should have to pass a high bar in order to make it into statute and so we would want to ensure that the Scottish Government responds to the following questions:

- If the legislation is, in part, designed to facilitate the prosecution of ill-treatment or wilful neglect in a way that has not been possible within the current statute, is there evidence or case studies that can be cited to demonstrate the necessity of the proposed legislation?

- If the legislation is, in part, designed to deter people from ill-treating or wilfully neglecting people they are paid to care for, is there evidence that the proposed legislation would have this effect?

- Can the definition of ill-treatment and wilful neglect be drawn tightly enough to satisfy the intent of the legislation but avoid unnecessarily criminalising people or organisations, who otherwise would simply have been censured for poor practice?

COSLA is absolutely committed to the principle that the state should take strong action against ill-treatment or wilful neglect and should the case be made that new legislation will aid prosecution, enhance deterrence and avoid criminalising poor practice, then we would recommend to our members that we should support the central thrust of the legislation.

*The case for legislation*

COSLA is committed to ensuring that people who receive health and social care services can expect to be safe from harm and are supported in an environment which respects individuals' dignity and promotes openness and transparency, including when things go wrong. If we are to realise this policy intent, careful consideration of the evidence base regarding the most effective means of achieving these aims is required. This should include an examination of best practice in relation to leadership and organisational culture, workload, staff training and support, support for families, and strong advocacy services.

Cases such as the ill-treatment of people with learning disabilities at Winterbourne View care home in 2012, would suggest that the presence of the facility to prosecute has limited impact on staff behaviour. Indeed, the Winterbourne View Report highlighted issues of leadership, staff training and support, organisational culture and the need for strong advocacy services. It is not clear that legislating is the best or only way to achieve the necessary change in these areas. We think, therefore, that the onus is on the Scottish Government to more fully articulate the deterring impact of its proposed legislation.
In some cases, criminal penalties may have the unintended consequence of negatively impacting on a culture of openness and willingness to whistle blow. Within this context it is important to recognise that the likely interface between a new offence of wilful neglect and proposals to introduce a duty of candour could produce unintended consequences. For example, while a culture of greater openness and transparency is clearly desirable, the simultaneous introduction of a wider-reaching criminal offence of neglect could actually mitigate against that culture.

Should Parliament decide to proceed with legislation, issues relating to the definition of wilful neglect and ill-treatment and the scope of the proposed offence will require to be considered. These are discussed in the remainder of our response below.

**Definition**

COSLA agrees that any offence of wilful neglect or ill-treatment should be based on conduct and not outcomes. This is in line with the similar offences set out in the Mental Health and Adults with Incapacity Acts, which places the focus on an individual’s actions and the extent to which they carry the risk of harm, rather than whether that risk was in fact realised. This allows for greater protection of individuals in that the realisation of harm is often as the result of an individual’s actions plus external factors which may or may not be present at any given time. In striving to prevent the risky behaviour in the first place, greater protection may be afforded overall. Focusing on conduct rather than outcomes may also act as a greater deterrent.

In focusing on conduct, there is a need to clearly define what conduct would be considered to constitute ‘wilful neglect’ or ‘ill-treatment’. While there appears to be no clear definition presented within the Bill, wilful neglect implies that deliberate acts of omission would be within the scope of criminal wrongdoing. While we would agree to this as a general principle, it does raise questions about how generously this definition could be applied, either at the level of individual inaction or organisational inaction – and how easy it would be to disentangle where liability rests within this context. We think it is important to err on the side of a tight definition of wilful neglect.

**Scope**

The circumstances leading to wilful neglect or ill-treatment are often complex and can include organisational issues such as lack of support or training for staff, inadequate staffing ratios, organisational culture and poor leadership. Indeed, there have been cases where such circumstances have been deemed to amount to an organisation breaching its duty of care. If we are to ensure that people receiving health and social care are safe from harm, it will be important to consider the factors which can contribute to such care worker / care provider behaviour.
The Scottish Government’s consultation on proposals for an offence of wilful neglect raised the question of whether an offence should apply only in ‘formal’ care settings. It doesn’t appear to be clear whether a person’s home would be considered an informal or formal care setting for the purposes of the Bill. It is our view that any legislation should apply to care provided in a person’s home. Our joint policy ambition, expressed by the new national health and wellbeing outcomes, is to shift the balance of care from institutional to community settings and support people to live independently in their own home for as long as possible. Care will therefore be increasingly provided in person’s own home and protection should therefore be extended to this setting.

‘Formal’ and ‘informal’ care is also conceived of in terms of the person providing it. It is not clear whether the Bill’s provisions would apply to ‘informal’ carers such as family members and volunteers. The use of the term ‘care worker’ would suggest they do not, however clarification is needed. It should be noted that in some cases family members can be employed as carers through self-directed support, for example as a personal assistant. It is our view that the offence should extend to family members in these circumstances, insofar as they are acting as a paid employee with attendant responsibilities and liabilities – again, the Bill should be clarified in this respect.

Resources

Should Parliament proceed with legislation, there will be financial implications for local authorities (and other care providers) in terms of staff training and awareness-raising. We do not agree with the statement in the financial memorandum which asserts ‘there will be no new costs falling on local authorities’. The financial impact on councils will require full and proper consideration and, in line with our current political agreement, all costs to local authorities arising from new duties or policy initiatives the Scottish Government wishes to introduce must be met in full by the Scottish Government.

6. Is there anything you would add/remove/change in the Bill with regards to these provisions?

Yes see above.

COSLA