Health (Tobacco, Nicotine etc. and Care)(Scotland) Bill

WithScotland

Duty of Candour and Wilful Neglect

Background to WithScotland

WithScotland supports those working in direct practice, policy and research around child protection and adult support and protection. We connect research with practice; exchange knowledge and ideas working with Adult and Child Protection Committees to develop practice and inform policy. At the heart of WithScotland is the principle of improving outcomes for children in need of care and protection, and adults at risk of harm.

This consultation is a welcome development and WithScotland is supportive of the need to strengthen the agenda for the protection of adults at risk of harm. There is a growing body of research, policy and legislation around protecting people who have experienced or are likely to experience harm. From our perspective there is a need for the various legislation and policy areas relating to harm and protection to interlink as noted below.

Please find below our views in connection with the questions posed in the call for views.

**Do you support the proposed Duty of Candour?**

We are in support of this duty. However it has strong links to the Adult Support and Protection (Scotland) Act 2007 (ASPA) which should be highlighted in that similar organisations should refer under ASPA. There is a need to encourage consistency and ensure that these organisations do not adhere to one duty without referencing another. It may be useful either in statute or regulation to note that organisations need to indicate whether a referral has been made under ASPA when reporting on Duty of Candour and where they have not done so state the reason why. Specific work has been carried out by Scottish Government to highlight the issue for care homes and independent hospitals which can be located here.

**Do you support the proposal to make Wilful Neglect or ill-treatment of patients a criminal offence?**

With Scotland supports the need for sanctions to be available with regard to Wilful Neglect as it will provide a route to redress harm in settings where it has been difficult to do so in the past e.g. the use of Section 315 of the Mental Health (Care and Treatment) (Scotland) Act obviously only applies where the person is experiencing a mental illness. Establishing sanctions around Wilful Neglect would add a level of protection for those that have been harmed or potentially harmed due to other vulnerabilities. It may also address the issue of those owning and managing care services who perpetrate harm through inadequate care provision, enabling charges to be made against them as opposed to simply those they employ. It will be particularly helpful in taking
steps following Large Scale Inquiries under ASPA as well as supporting the ASPA prevention agenda. This would be especially true if those convicted were also restricted with regard to carrying out future roles in the care sector, perhaps alongside the remedial and publicity orders.

With regard to statutory sector provision of care, Wilful Neglect has strong links to the ASPA in that similar organisations should refer also make ASPA referrals. There is a need to encourage consistency and ensure that these organisations do not adhere to one duty without referencing another. It may be useful either in statute or regulation to note that organisations need to indicate whether a referral has been made under ASPA when reporting around Wilful Neglect and where they have not done so to state the reason why.

Whether the issues should be addressed through a criminal offence or other methods of sanction would require greater analysis of any unintended consequences e.g. individuals who may not be autonomous being charged with a criminal offence due to the way in which their practice is directed or resourced by the organisation for which they work.

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

There do not appear to be any references to ASPA. However, there are clear cross overs with this Bill and the existing ASPA legislation which should be made clear. It is possible that in some circumstances where there is a Duty of Candour or an incident of Wilful Neglect that a referral should also be made under ASPA. Referencing this would strengthen both processes and ensure consistency of reporting.

There has been a low level of ASPA referrals from some statutory agencies. This is perhaps due to the same reasons noted in the Policy Memorandum for this Bill when discussing the need to legislate for Wilful Neglect and Duty of Candour e.g. incidents being classified as requiring actions under other processes etc. Essentially agencies that require to be bound by legislation regarding Wilful Neglect and Duty of Candour also need to be reminded of their other duties. Cross referencing the two Acts would provide an important link. Without doing so there is a risk that situations of Wilful Neglect and Duty of Candour are reported under one process but where relevant, are not then reported under ASPA. The insertion of a straightforward reference to the duty to refer under ASPA for statutory agencies would address this issue and support the Wilful Neglect and Duty of Candour duties, demonstrating the legislative links for agencies with regard to their service users and patients experiencing harm.

The wording of the Bill should also make clearer statements with regard to whether the offences will apply to those providing services on an individual basis directly to service users/patients under a private arrangement including Self-Directed Support. Further reading and reference to other Acts seems to indicate that such individual providers may not be included. If this is the case this would create a two tier system leaving service users and patients making
such arrangements vulnerable in a way that they would not be if they chose to receive services from an organisation. This then would create a dichotomy where those receiving care on an individual basis have a lesser degree of protection under law than those receiving care from an organisation. In our view Wilful Neglect should apply to anyone providing a care service where there is a contract in place.

With regard to care settings, regardless of the technical grouping, there is a growing importance that any care setting be included in such legislation. Within Adult Support and Protection we are experiencing a growing number of Large Scale Inquiries. These are essentially Adult Protection inquiries where there is more than one (or potentially more than one) person at risk of harm, usually within some form of residential care setting. There has been a recent increase in these types of inquiries in some local areas. Therefore from an Adult Protection perspective we also wish to emphasise the need to cover those that provide this type of care regardless of their organisational category e.g. public, private, voluntary etc. In addition to this legislation also needs to provide the ability to be able to hold the owners and management of an establishment to account preventing them from moving onto or opening another service where they have been found culpable in the perpetration of harm. The remedial and publicity orders may be useful in this regard.

With regard to learning from incidents requiring reports under Duty of Candour and Wilful Neglect there would be an advantage to collating this with learning from adult protection Significant Case Reviews, providing a useful local and national resource, perhaps supported by central collation and publication.

Finally, when considering applying Duty of Candour and Wilful Neglect to child care settings and scenarios most if not all of the above comments will be applicable.

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