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

ENABLE Scotland

About ENABLE:

ENABLE Scotland is the largest voluntary organisation in Scotland of and for children and adults who have learning disabilities and their families. We have a strong voluntary network with around 5000 members in 44 local branches and via individual membership.

Around a third of our members have a learning disability. ENABLE Scotland campaigns to improve the lives of people who have learning disabilities and their families and carers. ENABLE Scotland provides social care services to more than 2,000 people across Scotland who have learning disabilities or mental health problems.

We welcome the opportunity to contribute to the Health and Sport Committee’s Stage 1 scrutiny of the Health (Tobacco, Nicotine etc and Care) Scotland Bill. Our comments relate to the Duty of Candour and the Offence of wilful neglect or ill treatment.

ENABLE Scotland welcomes the Scottish Government taking forward actions to reflect the learning from the Winterbourne scandal by bringing forward this Bill to protect the dignity and rights of vulnerable adults, including those who have learning disabilities.

We therefore welcome the proposed introduction of a statutory duty of candour on organisations providing health and social care and a new offence of wilful neglect or ill-treatment in health and social care settings.

Duty of Candour (Part 2, Sections 21-25):

ENABLE Scotland supports the proposed Duty of Candour. It is our belief that it is right that any person harmed by the provision of a health or social care service is informed of the fact and an appropriate remedy offered, regardless of whether a complaint has been made or a question asked about it.

Notwithstanding, we wish to make the following comments and suggestions to members of the Committee, in relation to the Duty of Candour:

- Incident which activates duty of candour procedure (s.21)

  ENABLE Scotland is clear that for the duty of candour to work in practise the process needs to be clear. We hope the Committee will take this time to seek clarity on the process relating to the requirements to activate the duty of candour procedure, the trigger point. The Bill, in its current form, is not clear as to the steps involved to get from the occurrence of an “unintended or unexpected incident” at s.21(2)(a), to the identification that this incident appears to have resulted in or could result in one of the predefined outcomes and causal link, in the opinion of a registered health professional, at s.21(2)(b)(i).
For example, where an unintended incident occurs in a social care setting, would it then be for the social care provider to advise the person to seek the opinion of a registered health professional, before we can establish if the duty of candour procedure should be activated? Or would it be for the individual to seek out the opinion when they feel they have been harmed by an incident. ENABLE Scotland would suggest that if the former is intended, this should be made clear on the face of the Bill. Conversely, if the latter is intended, we would emphasise that this would be people who have learning disabilities would need to be supported to do this.

It would appear that the trigger point for the duty of candour procedure requires the opinion of a registered health professional to identify the harm or 'outcome' that has occurred and the causal link to the 'unintended or unexpected incident', (s.21(1)(b)). ENABLE Scotland would suggest that this does not fit well with the current 'self-identifying' culture of registered social care provision. By that we mean the culture of identifying issues or events that have occurred through our care provision which we are, for example, required to disclose to the Care Inspectorate. We would urge committee members to look at mechanisms which could be described as ‘self-identifying’, currently in place for adult and child protection. Furthermore, to seek clarity from Scottish Government as to why the opinion of a registered health professional has to be sought by care providers before the duty of candour procedure would be activated; and how that process would be implemented in practise.

- **“Person” (s.21(1)) and “relevant person” (s.22(3))**
  ENABLE Scotland notes that, in relation to “person” who is the recipient of a health, care or social work service (at s.21(1)) and “relevant person” (at s.22(3)), the Bill does not distinguish between adults and children. We therefore ask the Committee to confirm that children would be included with the scope of the new duty.

- **Responsible Person (s.25)**
  Should it be the case that children would be included within the scope of the duty, we would suggest that it is worthwhile Committee members considering whether the provisions of the proposed new statutory duty should extend to education settings. Recent reports on the alleged misuse of seclusion and restraint in a specialist school setting in Scotland ¹ demonstrate the need for transparency and accountability in regards to harm that has occurred in education settings.

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• The form and manner in which information must be provided, at s.22(2)(f).

On this matter ENABLE Scotland would emphasise that regulations must make explicit the requirement for accessible communication. When informing a person with a learning disability of harm that has occurred, disclosures must always be appropriate and accessible.

Any written communication (formal apology, confirmation of actions taken, summary of face-to-face meetings) provided to the person who has been harmed must be provided in an accessible format appropriate to the individual’s needs. For example if the person has a learning disability, written information should always be provided in Easy Read. This would also apply where the person harmed is a child and their parent has a learning disability.

When informing children and young people of harm that has occurred, this should always take place in the presence of an appropriate adult, usually the parent or carer. Disclosure to children and young people should be undertaken by a member of staff who is experienced in working with children and who has the necessary communication skills. This is particularly important when communicating with children and young people with no or limited verbal communication skills who may require to be communicated with using different methods e.g. BSL, Makaton, Talking Mats.

Article 12 of the UNCRC emphasises that children have the right to express their views and have their opinions taken into account when adults are making decisions that affect them. This principle should be carefully adhered to in situations where a disclosure is being made.

• Support to persons affected by the incident (s.22(2)(g))

ENABLE Scotland would already in practice put in place support for any person who had been harmed. It should be noted that the provision of this support has associated additional costs.

We recommend that further consideration be given to the financial liability for the provision of ongoing appropriate support.

There is a recognised inherent risk in the provision of social care. ENABLE Scotland would suggest that the financial burden aligned to that risk does not lie solely with the provider but must also apply to the commissioner of social care services who could be required to reassess the support required by the individual in order to meet changing circumstances.

• Training to be undertaken and provided (s.22(2)(j) and (k))

ENABLE Scotland emphasise that clear guidance must be issued and suggest that this is accompanied by a national training tool. This would ensure consistency in approach to implementing procedures necessary to support an organisational duty of candour. Furthermore, a national
training resource would help relieve some of the pressure on resources in respect of this duty.

- **Reporting and Monitoring (s.24)**
  Whilst broadly in favour of the proposed requirement to report publicly, we do have some comments on the mechanisms for this reporting.

  ENABLE Scotland would be concerned that these provisions, in their current form, will create unnecessary administrative duplication. In particular we would ask that the Committee gives consideration to how the timing and format of reporting fits with existing reporting requirements.

  ENABLE Scotland would urge that the committee considers the necessity for public reports beyond reports that would already be made by social care providers to the Care Inspectorate; anything to be contained in the proposed public reports as 'disclosable incidents' would already be reportable to the care inspectorate as 'reportable incidents'. In fact the definition of harm at s.21(4)(c) of the Bill is significantly less than the range of incidents and accidents already reported to the Care Inspectorate. The Committee should consider whether it is the intention of the Bill that some incidents would be reportable to the regulator but not required to be disclosed to the individual or their representatives. ENABLE Scotland suggest that this provision should look to align with incidents that would currently be reportable to the regulator.

  ENABLE Scotland would suggest, as an alternative to creating a separate reporting framework, that under existing reporting requirements there could be a section for recording duty of candour requirements to check that the incident has also been disclosed to the relevant person and the requirements of the duty of candour procedure have been met.

  Further, ENABLE Scotland note the timing of the report to be produced at the end of the financial year. The Committee will be aware that the Care Inspectorate requires care providers to produce and annual return in January/February. We would ask that the Committee look to how these reporting requirements can be better consolidated and aligned.

**Offence of ill-treatment and wilful neglect (Part 3, sections 26-31):**

ENABLE Scotland supports the proposals to make wilful neglect or ill-treatment of care recipients a criminal offence.

In order to strengthen the Bill we would make the following suggestions to the Committee:
• **Meaning of “care worker” and “care provider” (s.28)**

ENABLE Scotland notes that this section, in its current form, refers only to “adult health care” and “adult social care”. We advocate that the new offence should cover all health and social care services provided for children.

We would highlight that disabled children are more likely to be receiving health and social care services than their non-disabled peers. It is therefore appropriate that disabled children in receipt of any type of health and social care service should be fully protected from harm and neglect under the law.

ENABLE Scotland note the Scottish Government’s intention to consult further on extending these provisions to children in both health and social care situations. We would suggest that, at that time, it would be worthwhile considering whether the provisions of the proposed new offence should also extend to education professionals and educational settings.

ENABLE Scotland would also highlight to the Committee that, while provisions make reference to apprenticeship, there is no reference to student or trainee practitioners. ENABLE Scotland would suggest that this is a gap which should be remedied.

• **Informal Care Providers**

ENABLE Scotland responded to the Scottish Government’s consultation on whether the proposed offence should apply to informal care arrangements, advocating that informal arrangements should be included in the offence.

ENABLE Scotland would highlight that only around 35% of people who have learning disabilities have a package of formal support in place. We would urge that people receiving informal/family care should not be exempt from protection offered by the proposed new offence.

We recognise that this is not a popular position to take but it is our view that it is the welfare of vulnerable people, including people who have learning disabilities, that should be guiding the decision to include or preclude informal care arrangements from the proposed offence.

ENABLE Scotland would however stress that legislation which includes informal care arrangements should be framed carefully to ensure it does not criminalise carers who are not getting adequate support. We would emphasise that there is a difference between ‘wilful neglect’ and not coping. Family carers must receive adequate and appropriate support to carry out their caring role, failure to do so leads to the burden of care becoming too much and leaves carer and cared-for person vulnerable.
In General

It is our view that while the creation of this new offence is a positive step, more needs to be done to address the practical challenges associated, the most prominent being the fundamental need for procedures which would enable individuals to make a complaint about conduct in a health and social care setting.

While the proposed changes provide a recourse to justice where offences have been committed, there is no provision for a platform for these groups to access police or legal assistance should they require intervention from neglect or ill-treatment at the hands of carers. Legislation and subsequent guidance must address a fundamental need for procedures which would enable individuals to make a complaint about conduct in a health and social care setting.

ENABLE Scotland would highlight that there will be individuals, whom this Bill is intended to protect, who may not speak up, for various reasons, when they are being subject to neglect or ill-treatment. We emphasise that there is role for advocacy services and the third sector to play in informing people of their rights and providing platforms for disclosure of unlawful conduct experienced. An example of this in practice would be the third party reporting procedures put in place with respect to hate crime reporting. ENABLE Scotland would suggest that a similar procedure could apply with respect of this proposed legislation.

ENABLE Scotland would also emphasise that careful consideration should be given to how people who lack capacity in certain circumstances can access justice without incurring the financial cost of putting a guardian in place.

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