



Health (Tobacco, Nicotine etc. and Care) (Scotland) Bill – Health and Sport Committee Call for Evidence

Introduction

The Care Inspectorate is the official body responsible for inspecting standards of care in Scotland. That means we regulate and inspect care services to make sure they meet the right standards. We also carry out joint inspections with other regulators to check how well different organisations in local areas are working to support adults and children. We help ensure social work, including criminal justice social work, meets high standards. We provide independent assurance and protection for people who use services, their families and carers and the wider public. In addition, we play a significant role in supporting improvements in the quality of services for people in Scotland.

Response

NVPs and smoking in hospital grounds

Questions numbered 1-3 relate specifically to NVPs and smoking in hospital grounds. As these are matters unrelated to the statutory remit of the Care Inspectorate, we would not propose to respond in detail, save to say that we support measures designed to reduce the incidence of smoking, provided that due regard is had for the rights of individuals and the need to ensure that smoking reduction / cessation is supported by appropriate measures. We note that the creation of a number of offences is proposed. While we make no criticism of that, we would suggest that care should be taken to ensure that the criminal law does not become the default tool for the implementation of measures designed to improve public health.

Duty of candour and wilful neglect

We were supportive of both the proposed duty of candour and the proposed offence of wilful neglect at the stage of consultation. Dealing with each of these in turn, we would respond as follows :-

Duty of candour

Questions relevant to the proposed duty of candour are :-

- Question 4 – Do you support the proposed duty of candour ?
- Question 6 – Is there anything you would add / remove / change in the Bill with regards to these provisions?

Dealing with these questions together, our comments are:-

We support the proposed duty of candour, although we remain concerned that the duty as set out in the Bill is applicable to organisations only, and not to individuals providing care services. A number of care services regulated by the Care Inspectorate are provided by individuals rather than organisations. Taking care homes as an example, the Bill in its current form would make companies operating them subject to the duty, but not individuals, who may provide very similar services. The result would be that depending only on how providers of such care services choose to configure their business, some vulnerable people would have the protection intended by the duty, while some would not. This seems to us, anomalous and potentially unsatisfactory.

We note that the proposed duty will be activated where an unintended or unexpected incident has occurred in the provision of a health service, a care service or a social work service and, in the opinion of a health professional, the incident appears to have resulted in or could result in one of a number of specified outcomes and that that outcome relates to the incident in question, rather than the natural course of the person's illness or underlying condition (clause 21(2)(b)). Clause 21(3) suggests that the opinion of a health professional will be necessary in every case before the duty is engaged. While we welcome the introduction of such an 'independent' view, we are not clear as to how the view of a health professional will come to be obtained, what the 'triggers' for that might be, or what will require responsible persons to seek the opinion of a health professional and in what circumstances.

While it may be that health professionals will be in attendance in traditional healthcare settings, it is not clear from the Bill as drafted in what circumstances, an opinion in terms of clause 21(2)(b) must be sought. Further, in social care settings, it is unclear what the obligations upon providers will be in terms of the circumstances in which an opinion in terms of clause 21(2)(b) must or will be sought.

We note with some disappointment that the Bill leaves the detail of the procedure to be followed, to be set out in regulations.

We welcome the clarity provided by clause 23 to the effect that an apology required in terms of the duty does not amount to an admission of negligence or breach of a statutory duty.

We further welcome the requirement for annual rather than more frequent reporting on compliance with the duty, and are pleased to note that the Bill as drafted makes clear that reporting must not be carried out in a way which allows individuals to be identified.

We are pleased to note that it is proposed that responsible persons must notify the Care Inspectorate of the publication of a report in terms of clause 24(1) and that it is proposed to give specific powers to the Care Inspectorate to seek information as to compliance with the duty. We welcome the provisions (clause 24(8)) for reporting by the Care Inspectorate, Healthcare Improvement Scotland and Scottish Ministers on responsible persons' compliance with the requirements of legislation in relation to the

duty, which in our view, is a more proportionate approach to securing compliance than the creation of an offence in relation to non-compliance. While we consider that conferring upon the Care Inspectorate, the power to seek information and to report on the compliance of others with the duty is appropriate, and will not incur significant costs, that view proceeds on the basis that there will not be an expectation that there will be detailed and wide-ranging investigation of compliance and that reporting will be in straightforward terms. In the event that more extensive investigation and analysis or more detailed reporting is expected, that may not be capable of being achieved within existing resources.

Finally, in relation to the proposed duty of candour, we welcome the statement at paragraph 71 of the Financial Memorandum that the Scottish Government would work jointly with the Care Inspectorate and Healthcare Improvement Scotland to ensure that jointly branded information and literature on the expectations for organisations was developed using a range of formats. We consider that this would be helpful in the interests of clarity and consistency.

Offence of wilful neglect

Questions relevant to the proposed offence of wilful neglect are :-

- Question 4 – Do you support the proposal to make wilful neglect or ill-treatment of patients a criminal offence?
- Question 6 – Is there anything you would add / remove / change in the Bill with regards to these provisions?

Dealing with these questions together, our comments are:-

We support the proposal to make wilful neglect or ill-treatment of patients a criminal offence.

Our further comments are limited.

Firstly, we note that the proposed offence is restricted to the environment of adult health or social care. As we said in our response to the consultation on the proposal to create this offence, there are robust systems in place to prosecute individuals for ill treatment and wilful neglect of children, including relatively recent additions to the legal framework, such as the Protecting Vulnerable Groups (PVG) Scheme, the vetting and barring system and the requirement for individuals working in day care of children services to be registered with the Scottish Social Services Council (SSSC). These have all offered a higher level of protection for children since their introduction. However, we do not consider there to be any reason why the proposed offence should not apply to services for children. Children are as potentially vulnerable to wilful neglect or ill-treatment as adults in health and social care settings.

Secondly, and in relation to clause 27 of the Bill, which provides for commission of an offence by care providers, while we appreciate the difficulty in drafting legislation such as this and in defining terms such as “gross breach” (clause 27(3)(b)), it

appears to us that defining an offence in terms of conduct falling “far below what can reasonably be expected of the care provider in the circumstances” does not contribute to certainty in the law. While we appreciate that this clause is intended to make it clear that minor or less significant failings in care provided will not amount to an offence, it seems that in the absence of authority on this point flowing from cases which have come before our courts, it may be difficult to be clear as to when poor management crosses the threshold of criminality. That said, (a) it is difficult to readily envisage a more precise definition and (b) the issue will primarily be one for prosecutors in due course, and they will ultimately be assisted in their task by the decisions which the courts arrive at in prosecutions arising out of the alleged commission of this offence.