

Response of the Nursing and Midwifery Council to the Scottish Government consultation on *Proposals for an Offence of Wilful Neglect or Ill-treatment in Health and Social Care Settings*

Introduction

- 1 The Nursing and Midwifery Council (NMC) is the regulator for nursing and midwifery in the UK. We exist to safeguard the health and wellbeing of the public. We set standards of education, training, conduct and performance for nurses and midwives, and hold the register of those who have qualified and meet those standards. We have clear and transparent processes to investigate and deal with nurses and midwives who fall short of our standards.
- 2 We note the consultation document does not seek views on the creation of the new offence but focuses on the detailed proposals for implementation. Our response below makes a number of comments which broadly reflect the issues we raised in relation to the consultation previously carried out by the UK Government on plans to introduce an equivalent offence to that being proposed¹.

Consistency across the UK

- 3 The extension of the existing offence of wilful neglect or ill-treatment mirrors similar plans already underway in England and Wales. For the fundamental policy aim of better protection for patients to be achieved, it is essential that cases of wilful neglect or ill-treatment are dealt with consistently across the UK. The Scottish Government should work to ensure that there is alignment with the counterpart offences applicable in England and Wales, unless there is a compelling argument to justify taking a different approach in the Scottish context.

Which care settings should be covered

- 4 The NMC regulates all nurses and midwives in the United Kingdom, across both the public and private healthcare providers. We agree with the proposal in the consultation document that any offence for wilful neglect or ill-treatment should be introduced across all formal adult and health and social care settings in both public and private sectors.
- 5 Our Code applies consistently across all sectors and roles that nurses and midwives undertake. All registered nurses and midwives are accountable for adhering to their professional standards as set out in the Code at all times. Failure to comply with the requirements in the Code may bring their fitness to practice into question.

¹ NMC Response to the Department of Health consultation on a new criminal offence of ill-treatment or wilful neglect. Available at: <http://www.nmc-uk.org/Documents/Consultations/NMC-responses/2014/NMC%20response%20to%20DH%20Wilful%20neglect%20consultation%20March%2014.pdf>

- 6 The NMC believes that all patients should be afforded the same protection wherever wilful neglect or ill-treatment may have occurred. Limiting the application of the new offence by making a distinction between the settings it will cover would create an unhelpful discrepancy and conflict with the remit of professional regulators such as the NMC.
- 7 Similar to the above, for reasons of consistency and equity, we consider it essential that the scope of the proposed offence should also extend to settings where care is given to children.

Basing the offence on conduct or outcomes

- 10 The NMC agrees that the offence should be entirely focused on conduct rather than outcomes. The NMC Code focuses entirely on the conduct of nurses and midwives. Therefore if the offence were solely focused on conduct, it would be consistent with the approach the NMC takes.
- 11 We also believe that there should be no harm threshold required to trigger the new offence. Should a healthcare professional's behaviour constitute wilful neglect or ill-treatment, they should face the consequences of their actions irrespective of the harm caused by that behaviour.
- 12 It is important to avoid the situation described in the consultation document where should two people be subjected to the same ill-treatment or neglect but suffer different levels of harm, a prosecution could only be brought in respect of the more seriously harmed individual. Introducing a harm element would not only result in people being treated differently under the law despite being exposed to the same mistreatment, but also create a potential for inconsistencies in how the offence will be implemented given the judgment involved as to what would meet the threshold.

Applying the offence to organisations

- 13 Since the NMC's remit does not extend to regulating organisations, the manner in which the new offence would apply to organisations is not an issue appropriate for us to comment on.

Penalties

- 14 We have no comments to make on the proposed penalties for individuals and organisations in proven cases of wilful neglect or ill-treatment, other than to highlight the effect criminal proceedings may have on any related regulated action.
- 15 It is imperative to be aware that criminal proceedings and action by a professional regulator fulfil different objectives. The outcome of a criminal investigation, and in particular the proposed penalties, may not satisfy the wider need for public protection so regulatory action may still be needed. Our concerns about the potential implications for fitness to practice proceedings while

allegations of wilful neglect or ill-treatment are being investigated are further elaborated upon below.

Equality considerations

- 16 The proposed new offence is likely to have positive equality impacts as it extends the protection currently afforded to mental health patients and adults with incapacity to anyone receiving care in a health or care setting. The NMC recommends that the Scottish Government conducts a full equality impact assessment of these proposals at the earliest opportunity.

Impact on regulatory action by the NMC

- 10 We do not consider that the Impact Assessment produced for the consultation fully takes into account the impact of these proposals on regulatory activity.
- 11 We acknowledge that one potential benefit arising from the introduction of this offence is that, in the event of a criminal conviction, the level of investigation required within our Fitness to Practise (FtP) directorate would be reduced, meaning that the FtP case could be dealt with quicker and with less resource.
- 12 However, we do have some concerns about the impact on our proceedings caused by some of the cases which may be captured by this new offence. Where a criminal investigation has concluded that a nurse or midwife is not guilty of a criminal offence, this does not necessarily mean that there will not be other professional issues raised in relation to the nurse or midwife, which we will need to investigate. We consider that there may be significant delay on our proceedings due to the amount of time required by the authorities to investigate these cases and take a decision on whether to prosecute. It should be noted that such delays may well have an impact on patient safety.
- 13 These patient safety concerns could be addressed by ensuring that arrangements are in place for the release of relevant information by the police or prosecuting authorities to regulators at the earliest stage. In appropriate cases, this will enable interim restrictions to be placed on the nurse or midwife so that the public is protected while the criminal investigations are ongoing.
- 14 We consider that the impact is most likely to be felt at the initial stage of our FtP proceedings, as there may be an increase in the number of matters being referred to the NMC. This would have an effect on resources.
- 15 Finally, we would also note that this new offence may have an impact on the extent to which nurses and midwives co-operate with inquiries into incidents of harm given the issue of self-incrimination in relation to criminal proceedings.