

New 'willful neglect' offense needed for healthcare sector, say lawyers

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A new criminal offence of "wilful neglect" is needed for individuals and organisations in the healthcare sector, to send out a clear message that appalling care warrants public censure and sanction, say leading lawyers in the journal *BMJ Quality & Safety*.

Existing regulation is not up to the job, argue Professors Karen Yeung of The Dickson Poon School of Law, King's College London, and Jeremy Horder of the Department of Law at the London School of Economics.

Many patients are just as vulnerable as those who are mentally incapacitated, they point out, yet they do not enjoy the same protection against wilful neglect or ill treatment in criminal law. This must be changed, they say.

In his far reaching report into the failings of care at Mid Staffordshire NHS Foundation Trust, published a year ago, Robert Francis QC recommended legal sanctions for breaches of "fundamental standards" of care.

The recommendation was taken up and further refined in the subsequent Berwick Report into the safety of the NHS, published last summer.

The authors looked at the key tasks for criminal law to perform in the context of healthcare provision and whether these were covered by existing legislation. They then considered whether it would be fair and just to introduce a new criminal offence to support compliance with

regulatory standards.

Patients can seek redress through the civil courts, but civil liability has a limited role, not least because it is essentially regarded as a private matter without public interest criteria, say the authors.

There are several existing criminal offences which could be applied to healthcare provision, including manslaughter by gross negligence. But this is normally applied to individuals or small companies, and would be inappropriate for the management of a hospital, regional authority, or clinical commissioning group, they argue.

Similarly, there are criminal offences under existing legislation that could be invoked for causing the death of patients, but these are unlikely to cover wilful neglect, ill treatment, catastrophic management failure or uncaring attitudes that do not result in death, they emphasise.

Robert Francis suggested that a line be drawn between "serious harm" worthy of a [criminal offence](#) and lesser harms that would not be criminalised. But, say the authors, this would be difficult, in practice, because there is no legal definition of "serious" harm.

A preferable approach, they suggest, is to focus on the element of fault—the [wilful neglect](#) or ill treatment involved in the conduct. This avoids criminalising understandable or momentary errors or lapses, but includes behaviours such as persistent verbal abuse, or discharging patients before they are well enough.

The offence, which would be more likely committed through a "couldn't care less attitude" should be eligible to be tried in either the Magistrates' or Crown Court, and attract a maximum prison sentence of 2 years or an unlimited fine in the case of an organisation, they say.

The purpose of the new law wouldn't be to foster a punitive approach to the promotion of quality care, but to act as a backstop against the worst excesses, they insist.

"The criminal law's role in this context is not to play a frontline part in deterring and coercing people into complying with proper standards of behaviour," they write. "Rather, its central function applies only to the worst kinds of unacceptable ill treatment."

As such, [criminal law](#) has a uniquely symbolic significance that less draconian regulations and civil liability do not, they say.

It is "the most powerful and important social institution through which we hold to account, and express public censure of, those who have mistreated others in a wholly unacceptable and highly culpable way," they conclude.

More information: How can the criminal law support the provision of quality in healthcare? *BMJ Quality & Safety*, Online First, [DOI: 10.1136/bmjqs-2013-002688](#)

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