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THE NEW CRIMINAL OFFENCES UNDER THE CRIMINAL JUSTICE AND COURT ACT 2015

AND

THE IMPACT ON PROVIDERS OF HEALTH AND SOCIAL CARE

Introduction

The Criminal Justice and Courts Act 2015 ("the Act") created new criminal offences for individuals (care workers) and organisations (care providers) that provide care. The CQC has also issued guidance to help providers in this area.

1. The New Criminal Offences - Ill Treatment or Wilful Neglect

The Act established two new **criminal** offences of ill-treatment or wilful neglect. From 13 April 2015 it has been a criminal offence under the Act, for an individual care worker (section 20) or care providers (section 21) to ill-treat or wilfully neglect anyone that they provide care to.

Section 20 – Ill-treatment or wilful neglect: Care worker offence

It is now an offence:

"*for an individual who has the care of another individual by virtue of being a care worker to ill-treat or wilfully to neglect that individual*."

The offence concentrates on the actions of the individual care worker and not on the harm that was caused as a result.

A care worker is anyone who is paid to provide health care or adult social care, and therefore is likely to capture a very wide range of individuals.

Section 21 – Ill-treatment or wilful neglect: Care provider offence

The second offence can only be committed by the care provider. The offence concentrates on the organisation's management of its activities, and whether this amounts to a gross breach of the duty of care owed by it to the service user.

The definition of "*Care Provider*" is likely to include all Care England members.

2. How will a Care Provider have committed an Offence under the Act?

It is worth setting out the details of the offences in full. The providers of residential and/or other care, with the notable exception of local authorities, will have committed the offence of ill-treatment or wilful neglect where:

a) *an employee (one of its care workers) have ill-treated or willfully neglected a service user to whom they have been providing care;*

b) *the organisation and management of the care providers operating systems and activities constitutes a gross breach of the duty of care owed to the service user that care was being provided to; and*

c) *If that breach had not occurred the ill-treatment or wilful neglect would not have or would have been less likely to have occurred.*

Penalties on conviction include substantial fines and, for individuals, 5 years' imprisonment.

3. Potential Implications for Care Providers

The new offences create a number of potential risks:-

a) The risk of employees (care workers) openness and honesty being diminished due to fear of being subjected to criminal charges. The care provider offence may go some way to alleviating this however care providers should encourage staff to be open and report any incidents whilst demonstrating that effective management and supervision procedures are in place.

b) Increased risk of reputational damage, a conviction may be exposed by a publicity order (order for the conviction to be published) or by other means, equally an investigation or prosecution of an individual may be exposed which can bring extremely negative publicity.

c) Prosecution will trigger a local safeguarding enquiry which may result in a restriction or ban on future placements and may result in the removal of funded service users.

d) Impact on current and future insurance cover and policies, insurance premiums may increase; insurance cover may not be available for the litigation costs of defending a prosecution and/or for any fines or penalties imposed (current and future policies);

e) Increase in civil compensatory claims being made for negligence following successful conviction; the impact on insurance in respect of this should also be reviewed.

4. Reducing the Risks

If investigated, a care provider will need to show that reasonable and appropriate steps have been taken to prevent the ill-treatment or wilful neglect from being committed by the employee. The measures that may reduce the risk of being subject to prosecution of an offence are all matters of best practice and should reflect the steps you already take to demonstrate compliance with the fundamental standards, but by way of a quick reminder it is worth considering the following:

- investing in training and guidance for employees to ensure staff understand the implications of the offences;
- encouraging openness with employees to ensure good reporting, so that better systems and protections can be developed;
- a review of current insurance policies and consider the impact on future policies. It may also be necessary to consider any impact the offences may have on employer liability insurance;
- ensuring safeguarding and whistleblowing procedures are up-to-date and adequate; and
- adopting and promoting a robust reporting system so that poor behavior is reported and monitored, and any potential failings dealt with swiftly.

Summary

We recommend that care providers familiarise themselves with the guidance issued by the CQC and that this is used to put in place thorough management and supervision processes.

If faced with the risk of prosecution the care provider should seek advice immediately.

For more information please contact

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