A new statutory criminal offence of ill-treatment or wilful neglect of patients has been proposed by the government. Aon’s public sector expert Bill Sulman assesses the insurance implications for public sector organisations.

Wilful neglect or ill-treatment of patients is set to become a statutory criminal offence in England and Wales following a Department of Health consultation in this area. The introduction of the new offence, which could result in up to 240 cases a year, is designed to send a strong message that poor care will not be tolerated.

The consultation, which stemmed from the public inquiry into events at Mid Staffordshire NHS Foundation Trust, put forward two offences, one relating to individuals and a separate one for organisations.

These offences will apply to all formal healthcare provision for adults and children in both the NHS and private sector and to all formal adult social care provision, whether public or private sector.

Penalties for individuals convicted under the new offence will mirror those for similar offences under the Mental Capacity Act 2005. These range from fines of up to £5,000 and/or a prison sentence of up to five years.

Organisations found to be culpable will receive penalties similar to those for convictions of corporate manslaughter under the Corporate Manslaughter and Corporate Homicide Act 2007. These include fines but also publicity orders and remedial orders. It is expected that these offences will be introduced later this year. As the Department of Health’s proposals were broadly supported by respondents to its consultation, it committed to legislating at the earliest possible opportunity. Rather than create a bespoke Bill, it intends to establish the new offences by adding clauses to the Criminal Justice and Courts Bill, which is currently before Parliament.
Insurance response

The nature of these new offences means there are implications for public sector insurance. As it is similar in style to corporate manslaughter, both to the individual involved and with regard to the corporate responsibility, we expect that insurers will respond in a comparable way.

This means the market will not offer indemnity for fines and penalties, in line with Health & Safety Executive (HSE) prosecutions. However, as with corporate manslaughter, it is likely that if action is taken against an individual or individuals, there will be a vicarious liability on their employer, creating a liability on the organisation.

We have spoken to insurers regarding this point and are awaiting clarification but we would hope that if a public liability claim of this nature is brought against an organisation, insurers would provide indemnity to the organisation for the legal costs of defending the action.

Greater clarity is also required from the government regarding the definition of organisation within this offence. Although the offence covers both the private and public sector, where wilful neglect takes place in a private sector care home for example, it is not clear whether responsibility would lie with that organisation or whether it would be passed to the local authority, due to its role as the inspecting authority and because of its non-delegable duty. We expect this matter will be addressed before the offences are introduced later this year.

We will keep you informed of any developments in this area, both in terms of the legislation but also how this affects your insurance cover.

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