FALSE OR MISLEADING INFORMATION

The Department of Health (DH) has issued guidance for NHS provider organisations on the offence of providing false or misleading information. The purpose of this briefing is to set out the legislative background; to explain the offence in more detail; set out who it is likely to affect and provide guidance on how best to comply with the legislation.

THE CARE ACT 2014

Section 92 of the Care Act 2014 (the Act) has put in place a new criminal offence that applies to NHS provider organisations and in certain circumstances to individuals who work in provider organisations.

The Act specifies that organisations that supply, publish or otherwise make available certain types of information, that is determined to be false or misleading commit an offence (where that information is required to comply with a statutory or other legal obligation). The offence also applies to the ‘controlling minds’ of the organisation, where it can be shown that they have consented or connived in an offence committed by a care provider.

The offence actually goes further than the recommendations of the Report of the Mid Staffordshire Public Inquiry which proposed an offence where a director provided information they knew not to be true. The offence in respect of organisations is a strict liability offence. This means that to establish that an offence has been committed only requires that information published or supplied by the organisation, that is required to comply with a statutory or other legal obligation, is inaccurate or misleading. The intent of the provider to supply accurate information is not a defence and not relevant to the offence.

For an offence to have been committed by an individual requires first that an offence was committed by the organisation, so it must be shown that false or misleading information was published or supplied by the organisation before an individual can be prosecuted. However in certain circumstances, the offence could apply both to an organisation and to one or more individuals.

The provisions set out above come into force from 1 April 2015.

The nature of the offence

The publication or supply of false or misleading information is a criminal offence that will be investigated by the police and subject to prosecution by the Crown Prosecution Service. It will be a matter for the Crown Prosecution Service to decide if there is sufficient evidence to proceed to trial and whether it would be in the public interest to do so. To obtain a conviction the prosecutor must prove, as a matter of fact, that the information was supplied or published by the organisation in question and that it was false or misleading.

For the purposes of the Act false information is information that can be proved to be incorrect.

The ‘misleading’ element of the offence is more complex. The information published or supplied must mislead the intended audience or recipient in some way, so as to cause them to act in a way towards the provider that would
otherwise differ had the information been published or provided in a non-misleading way. This means that accurate information provided in a way that misleads can lead to prosecution.

The categories of information to which the offence applies

The offence applies to commissioning and other data sets and other specified information including information in quality accounts. A full schedule of the data sets and other information is set out in The False or Misleading Information (Specified Care Providers and Specified Information) Regulations 2015. These can be found at: http://www.legislation.gov.uk/ukdsi/2015/9780111129234/schedule

To whom does the offence apply?

The offence applies to NHS foundation trusts, NHS trusts and other organisations that provide care and treatment for the NHS. The application of the offence is determined by whether the services are funded by the public purse, so services commissioned by local government, for example, still fall within the scope of the offence.

The offence may also be committed by individuals. For an individual to be convicted it must be proven that an offence was committed by a body corporate and it is proved that the offence is ‘committed by, or with the consent or connivance of, or is attributable to neglect on the part of a director, manager or secretary of the body, or a person purporting to act in such a capacity.’

A secretary in this instance would mean a company secretary and it is likely that a manager would need to be of at least equal status to be prosecuted. But it should be noted that this legislation can lead to the prosecution of managers below board level.

Consent and neglect are well understood terms. Connivance means ignoring or turning a blind eye to another person’s wrongdoing, co-operation or indirectly condoning an act by another person.

It should be noted that a higher standard of proof applies to secure a conviction against an individual. To secure a conviction it would need to be proven that the individual concerned was aware that the information in question could be construed as false or misleading, but was prepared to authorise its publication or that the individual had been negligent in their duties so as to allow false or misleading information to be published.

The penalties

On conviction organisations can be subject to an unlimited fine and be compelled to take remedial action and to publicise the conviction and the action taken to remedy the situation. Clearly there will also be reputational consequences for the organisation involved and these may be greater than the financial consequences.

The possible consequences for individuals are very serious. While individuals cannot be compelled to take remedial action, they can be subject to an unlimited fine, a custodial sentence of up to two years or both.

Complying with the legislation and avoiding committing an offence

It is a defence for both the provider and the individual that they exercised all due diligence and took all reasonable steps to prevent false or misleading information being published. Organisations will need to ensure that they have put the right systems and processes in place to secure the provision of good quality information and that they can demonstrate adherence to these systems and processes. For information supplied as a matter of routine, boards will want to assure
themselves that controls are in place to deal with the key risks to data accuracy and that these controls are operating effectively. For prominent public information such as quality accounts, boards will wish to be assured before supplying or publishing information that not only is the data supplied accurate, but also that it could not be misconstrued or interpreted differently to the way in which they intend to be understood. Boards will also want to be clear that their interpretation of the data is reasonable and would be the interpretation made by the courts.

The board and other senior managers within the organisation are ultimately responsible for making certain the appropriate procedures are in place to ensure that information published or submitted by their organisation is not false or misleading. If such process and procedures are not in place or do not operate well then individuals, as well as the organisation itself, are at risk of prosecution. So it is important that directors and senior managers jointly and severally assure themselves.

Given the volume of data produced by the NHS it seems likely to us that there may well eventually be a prosecution of an organisation, notwithstanding diligent efforts to ensure that information is accurate. Whether there will be prosecutions of individuals will depend on whether due diligence was exercised and whether the board and senior managers could reasonably have been expected to be aware of the provision or supply of false or misleading information despite best efforts being made.

Further information including case studies can be found at: https://www.gov.uk/government/publications/the-false-or-misleading-information-offence-guidance

Future expansion of the provisions

The Health and Social Care Information Centre (HSCIC), the lead organisation in England for the collection, analysis and publication of health and social care data, supports there being a future process for considering adding to the data to be included in the legislation. NHS Providers is concerned that action taken regarding the accuracy of information should be proportionate and will lobby accordingly on behalf of its members. The views of members on the operation of the current provisions and on their possible expansion would be welcomed. Please contact: john.coutts@nhsproviders.org

NHS Providers February 2015