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Accusations of misconduct among staff working with vulnerable adults in England and Wales: their claims of mitigation to the barring authority

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Accusations of misconduct among staff working with vulnerable adults in England and Wales: their claims of mitigation to the barring authority

Abstract

The vetting and barring scheme known as the POVA (Protection of Vulnerable Adults) List established in England and Wales by the Care Standards Act (2000) was intended to provide greater assurance about the quality of social care for adults. This article reports on a part of a larger research study investigating the Protection of Vulnerable Adults (POVA) List. It focuses on different kinds of mitigation used by staff to counter allegations of harming vulnerable adults and how these differ in relation to various types of abuse as well as other factors. The results are based on quantitative analyses of a detailed sample of 298 referral records of the POVA List and qualitative interviews with civil servants administering the POVA scheme. Details of the mitigation claimed by 135 workers are examined and these elements are described in relation to mitigation for the person and mitigation of the misconduct. Messages from the analysis are discussed in relation to the workforce, employers and adult safeguarding systems.

Key words: vulnerable adults, adult abuse, mitigation, work environment, POVA List, training

Introduction

Since July 2004 employers of staff working with vulnerable adults in social care services regulated under the Care Standards Act 2000 in England and Wales have been required to refer workers (or volunteers) dismissed for misconduct that harmed vulnerable adults or placed them at risk of harm to the Protection of Vulnerable Adults (POVA) List (see authors 2007, Barnes 2006). Employers are required to consult the List before employing people to work with vulnerable adults to ensure their suitability.

This article focuses on the range of mitigating factors used by referred staff to counter allegations of abuse and how such factors are related to types of abuse and the outcome of referrals. The results are based on research involving quantitative analyses of a detailed sample of 298 referral records to the POVA List and an analysis of in depth interviews with civil servants who administer the scheme.

The researchers developed and used three vignettes (fictional scenarios) to generate more specific discussions relating to hypothetical but 'real-life' referrals to the POVA List including discussions around mitigation (see authors 2008). Details of the prevalence of different types of behaviour prompting a referral and their relationships with staff characteristics are reported in authors (forthcoming).

There are important reasons to explore this area. First, in 2009, the Safeguarding Vulnerable Groups Act (2006) will introduce a new system, integrating the POVA List with List 99 and the Protection of Children Act (POCA) List (which contain names of barred teachers and staff working with children respectively) and extending the coverage of the barring schemes to cover the National Health Service (NHS), the prison and the educational workforces (Gillespie 2007). Making decisions concerning this more professionalized and unionised workforce is likely to result in greater controversy and legal arguments about alleged and actual misconduct and its effects. The second is that we know little about how care workers accused of mistreatment or neglect perceive the impact of care contexts in generating the allegations (see LaDuke 2000, for discussion of this issue in United States (US) nursing). Mitigation is one of the few opportunities to consider such workers' perspectives rather than relying on high profile media reports or inquiry investigations which are likely to focus on serious problems (Stanley and Manthorpe 2004). Finally, studying mitigation offers opportunities to consider what legal measures might be of benefit in preventing actions that may give rise to abuse and neglect; an area where the evidence base is thin (Halega and Kingston 2007).

Background

The POVA List, established by Part VII of the Care Standards Act 2000 (c. 14), forms part of the statutory scheme of regulation of the social care workforce and employers. The POVA scheme places a duty on employers to refer care worker for possible inclusion on the List if through their misconduct (action or inaction) they harmed or placed at risk of harm a vulnerable adult. Harm is defined as 'ill treatment or the impairment of health or impairment of development'. Those making referrals to the POVA List must demonstrate the impact of the harm caused to vulnerable adults. 'Harm' also includes placing vulnerable adults at risk of harm through non-action or neglect. Detailed discussions of different scenarios of cases which give rise to the requirement to be referred to the POVA List are reported in Authors (2008), while findings related to the process and duration of referrals are discussed in Authors (in press).

Referrals to the List made by employers are investigated and evaluated by civil servants who make a recommendation to the Secretary of State for Health as to whether the individual concerned should be listed and so barred from working in the sector (1). In order to list an individual under the Care Standards Act 2000, the Secretary of State must be satisfied that the care provider reasonably considered the worker to be guilty of misconduct which harmed or placed at risk of harm a vulnerable adult, and that the worker is unsuitable to work with vulnerable adults (s 82(7)). An individual provisionally listed for more than nine months, may have the issue of their inclusion determined by the Care Standards Tribunal instead of the Secretary of State.

The effect for workers of being placed on the List is grave: they may not otherwise apply for removal from the List until ten years have passed (ss 87 and 88) although they may appeal against the decision to the Care Standards Tribunal (CST),

established by the Protection of Children Act 1999. Barred individuals commit a criminal offence if they work in or apply for a paid or unpaid care position (s 89).

For the decision makers concerned, there is clearly a need to balance the rights of the parties involved. The Department of Health (DH) (2000) guidance on adult protection policies, *No Secrets*, characterises abuse as ‘a violation of an individual's human and civil rights by any other person or persons’ (DH, 2000: 9). However, it has also been established that barring an individual from working in the sector even provisionally while the referral is examined, involves a determination of that worker’s civil rights and obligations (*R. (on the application of Wright) v Secretary of State for Health* [2007] EWCA Civ 999). The Court of Appeal held that if an individual was not allowed to make representations before being provisionally listed, then this was in breach of their Article 6 (European Convention on Human Rights) fair hearing rights. This was because of the potential for serious and irreversible prejudice to the worker by their inclusion, although Dyson LJ added that this would not apply where the resultant delay would place a vulnerable adult at risk of harm (*R. (on the application of Wright) v Secretary of State for Health* [2007] EWCA Civ 999, 114 (Dyson LJ)).

Individuals may offer representations in defence against the facts of the allegation and also cite mitigating factors in an attempt to avoid the assessment of unsuitability. Conventionally understood, mitigation is brought forward to extenuate or lessen the gravity of any wrongdoing in order to reduce the severity of the punishment that it attracts (Martin and Law 2006; Walker 1999). It is therefore to be distinguished from a defence and, can be considered between judgment, where wrongdoing has been assessed as having occurred, and sentencing (Shapland 1981). In the POVA context, it is at the stage of considering suitability that questions of mitigation arise. Thus, in the case of *Quallo v Secretary of State for Education and Skills* [2003] EWCST 213 (PC), concerning an allegation of excessive restraint by the referred person, although the CST was satisfied that the misconduct had occurred, the Tribunal found good mitigation in both a lack of training and the fact that the worker’s performance ‘fell below par on one particular day’ (*Quallo v Secretary of State for Education and Skills* [2003] EWCST 213 (PC)). More than one civil servant interviewed for this study referred to this case as being influential on their approach to considering referrals to the POVA List.

It is worth stressing that the POVA List is essentially a binary decision; there are no degrees of prohibition as there are in education cases under section 142 Education Act 2002 (*Alabi v Secretary of State for Education and Skills* [2004] EWCST 339 (PC)). Thus, mitigation cannot reduce the severity of the outcome: to be successful, a case for mitigation needs to be strong enough to outweigh factors tending to lead to a judgment of unsuitability. The binary nature of the POVA decision makes distinguishing mitigation, excuse and justifications unattainable. In criminal law mitigation is distinguished from excuse, the former may result in reducing the punishment while, if proven, the later may lead to the non-conviction of a person (Bayles 1992, Duff 2001). However, within the POVA referral system, a referral start with the assumption that a member of staff is ‘guilty’ of an action or no action and the POVA team is required to consider all mitigating factors to decide the suitability of this worker. Given the potentially severe impact on the person of being listed, questions of mitigation take on great significance.

Members of the POVA team referred to a civil standard of proof in operation (namely on the balance of probabilities), although this is not actually set out in the Care Standards Act for these decisions. However, the Care Standards Tribunals (to which barred individuals have a right to appeal) work formally to this standard of proof and this was seen as an important influence on the work of the POVA team. Further, the civil standard of proof is not a fixed point; a sliding scale is employed, relating to the seriousness of the situation: the more serious, the higher level of proof is required (The Secretary of State for Health, 2007). Several members of the POVA team referred to this subtlety in the interviews and this was a complicating factor in the work of the team.

It is fairly easy to see that any factor used in an argument that a referred person should or should not be confirmed on the POVA List, needs to be proved to this level. However, it is more difficult to understand how any level of proof could be applied to the judgement that the different aspects warrant or do not warrant confirmation on the POVA List. Such judgement must take account of any mitigation used by the referred person to counter any allegations. In this article we examine how the use of different mitigating factors varies in relation to a referred person's characteristics and to the type of employment setting as well as the reason for the referral itself. Further, the article explores how POVA team members conceived and weighed different mitigating factors in the process of barring.

Methods

A mixed method approach was adopted for this study, including quantitative and qualitative elements (Onwuegbuzie & Teddlie, 2003). This aimed to produce a rounded picture of the factors involved in decisions to place staff members on the POVA List. We compared any patterns and associations found in the quantitative data with the factors identified through the qualitative elements. In this way, the findings have been given more depth, and we have been able to make some generalisations with known degrees of confidence.

In addition to analysing summary data about all referrals to the POVA List over a 30 months period (which did not include details of mitigation), all the written information accompanying a sample of 298 referrals, over the same period was provided by the POVA team and a detailed set of data was abstracted and entered into SPSS. The sample excluded the small number of referrals that had been cross-referred from the List relating to children (the Protection of Children Act or POCA List) and was purposively selected to contain equal proportions of cases: that were confirmed on the POVA List; where the investigation was ongoing; and where a decision had been taken not to confirm the individual on the List.

The sample dataset contained information about the circumstances, reasons for and mitigating factors surrounding each referral. We were thus able to explore relationships with a number of the background variables and to analyse both the number and different types of mitigating factors used. Information was abstracted from these written records in relation to: characteristics of referred staff; stated reason(s) for referral; the genesis of the referral; the context of the reason(s) for

referral; the employment status of the person referred; what is known about the 'victim' if any and mitigation claimed by the referred person.

The decision making process

Referrals go through several stages before a decision is taken about whether to confirm a person on the POVA List. A detailed analysis of the process is presented in authors (in press), in summary, focusing on all referrals that has been completed (n=3418) a large proportion (about two thirds) of referrals resulted in a decision not to proceed and the cases were closed at the pre-provisional stage without any investigation; almost a quarter of referrals were closed (i.e. a decision was taken not to bar the individuals concerned) after an investigation had taken place (a small number of which were successful appeals); and about one tenth of referrals were confirmed on the POVA List.

Staff are referred to the POVA List if they have caused harm or risk of harm of various kinds (in this study these are referred to as 'types of abuse'). Full analysis of reasons of referrals and any relationships with workers' and service users' characteristics are presented in the full report (authors 2008).

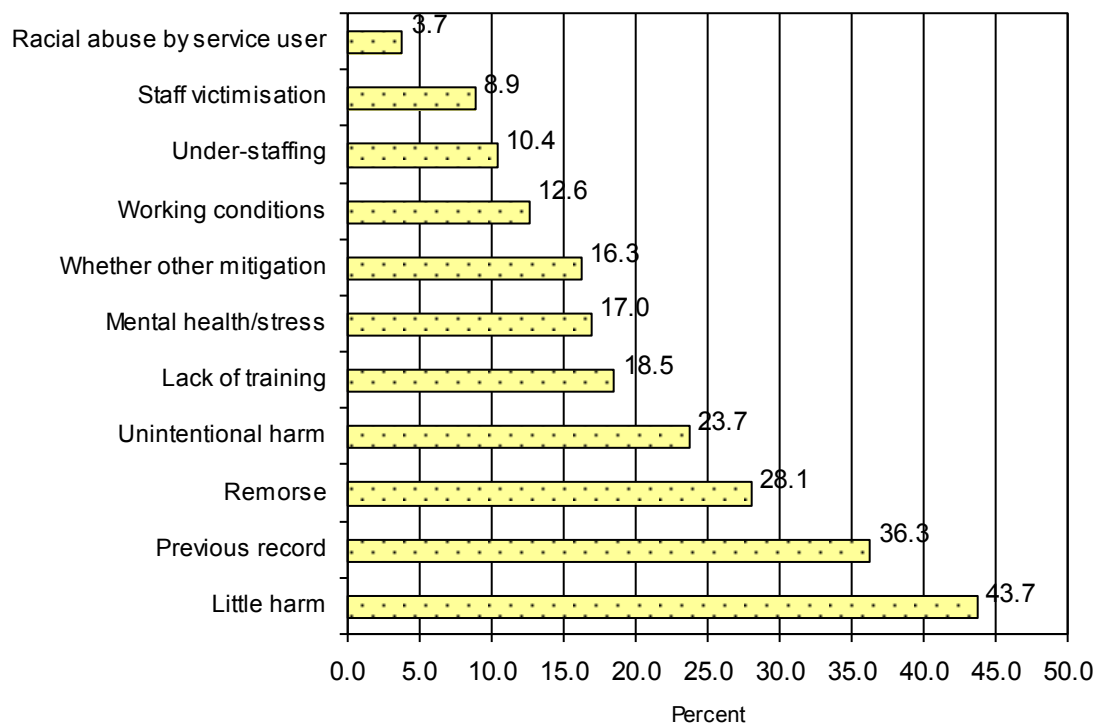
Findings

Quantitative analysis of referrals: mitigating factors

Among the 298 referrals only 135 (45 percent) referred people used any mitigation. The proportion of staff using any mitigation was higher among women than men (47 vs. 41 percent) and was lowest among staff younger than 25 years: only 35 percent of this group used any form of mitigation. In relation to mitigating factors, Figure 1 shows that the most cited mitigation was that the misconduct had caused 'little harm' (44 percent of cases), followed by 'previous record', meaning good work record (in 36 percent of cases). Around 28 percent used 'remorse' as mitigation, while 24 percent indicated that harm had been 'unintentional'. Difficult working conditions and under-staffing were cited by 13 and ten percent respectively. Staff mental health/stress and staff victimisation were cited by 17 and nine percent respectively. A small percentage of staff, four percent, claimed in mitigation that they had been racially abused by service users.

Women seemed more likely to use 'little harm' and 'previous record' (45 and 39 percent vs. 38 and 27 percent respectively) as part of their mitigation, while men used 'mental health/stress' and 'other' mitigation (22 and 24 percent vs. 15 and 13 percent respectively). The analysis shows that 'little harm' was used as mitigation more by staff aged 50 or above (62 percent among staff aged 50 or more vs. 44 percent among all staff). Remorse and unintentional harm were also cited more by older staff from the same age group (41 and 35 percent vs. an average of 37 and 28 percent respectively). On the other hand, relatively younger staff (younger than 35) cited 'working conditions' more than older staff (22 percent vs. seven percent in the other two age groups).

Figure 1 Proportion of staff claiming different mitigation among those who claimed any mitigation (N=135)



Overall there were small differences between job roles in terms of the types of mitigation claimed. Frontline care staff seemed to use ‘little harm’ and being ‘racially abused by service users’ very slightly more than other workers (43 and four percent compared with 42 and three percent on average respectively). Those working in residential settings tended to use ‘little harm’, ‘previous record’, and ‘lack of training’ as part of their mitigation more than those working in domiciliary services, who tended to use ‘remorse’ more and ‘working conditions’ slightly more. However, none of these differences was very marked.

To summarise these different mitigating factors we applied Principle Component Analysis (Jolliffe, 2002) in an attempt to identify if some different mitigations relate to underlying factors or dimensions (see Table 1). Three factors seem to underpin the ten mitigations depicted in Figure 1. Remorse, little harm, mental health/stress, and previous record seemed to be affected by a common factor which may reflect characteristics related to the referred workers. Another factor related to the work environment reflects on using ‘working conditions’, ‘staff victimisation’, ‘racial abuse by service users’ and ‘under staffing’ as mitigation. A third factor, related to training and practice, is reflected in claims of ‘lack of training’ and ‘unintentional harm’.

Table 1: Results of factor analysis, using principle component analysis (sample dataset)

Mitigation used	Component matrix Factor loading		
	1	2	3
Remorse	0.697	-0.088	-0.142
Little harm	0.641	-0.606	-0.162
Mental health/stress	0.613	0.378	-0.133
Previous record	0.598	-0.484	-0.129
Working conditions	0.464	0.424	-0.331
Staff victimisation	0.358	0.365	0.071
Racial abuse by service user	0.017	0.427	-0.477
Under staffing	0.097	0.407	0.362
Lack of training	0.211	0.021	0.628
Unintentional harm	0.438	0.282	0.543
Total % of variance explained (extraction sums of square loadings)- cumulate to 49.8%	23.83	13.38	12.60

The results surround three different aspects: one relates to the person who is referred, the second relates to the working environment and workload, and the third relates to claims of not being well prepared, whether from lack of training or unintentional harm.

Types of mitigating factors and type of alleged abuse

Those who were accused of physical abuse were most likely to use any mitigation (56 percent) while those who were accused of sexual abuse were least likely (26 percent) (compared to an average of 45 percent). Among referrals with some elements of physical abuse, pointing to a good work history or ‘previous record’ at 37 percent was most commonly cited, followed by ‘little harm’ at 34 percent. In relation to ‘neglect’ the most cited mitigation was ‘unintentional harm’ at 35 percent. The most commonly used types of mitigation over financial abuse were ‘previous record’ and ‘remorse’ at 44 percent. Only seven referrals with some element of sexual abuse used any mitigation: in five cases this was ‘little harm’.

Mitigating factors and outcome of referral

Among the 135 referred staff who used any form of mitigation, 63 percent (n=85) of referred staff used any individual mitigation; 30 percent (n=40) used mitigation related to work environment and 36 percent (n=48) claimed being unprepared either due to lack of training or unintentional harm as mitigation.

We examined the relationship between claiming different types of mitigation (personal, work environment, or being unprepared) with the outcome of the referral. It is important to note the purposive nature of the sample, at this point, which was selected to include equal proportions of barred, ongoing and closed referrals. Table 2 presents the distribution of the outcome of referrals among those who did not claim any mitigation; those who claimed mitigation related to the individual referred; those

related to the work environment and those related to being unprepared due to lack of training or unintentional harm.

Table 2 Distribution of referrals according to type of mitigating factors used and outcome of referrals

Mitigation claimed	Confirmed		Provisional		Removed		Total
	N	%	N	%	N	%	
No mitigation	51	32.2	57	36.1	50	31.6	158
Any mitigation	48	32.3	37	28.0	47	35.6	132
Individual mitigation	34	41.0	21	25.3	28	33.7	83
Work environment mitigation	11	28.2	13	33.3	15	38.5	39
Being unprepared mitigation	21	43.8	15	31.3	12	25.0	48
Total	99	34.1	94	32.4	97	33.4	290

The data show a similar proportion, 32 percent, of referrals where mitigation was or was not claimed resulted in confirmation on the POVA List. However, the percentage of removed cases was higher among those claiming any mitigation than those who claimed none (36 vs. 32 percent). Moreover, the proportion of referrals resulting in confirmation on the List was highest among those who claimed being unprepared due to lack of training or unintentional harm (44 percent) followed by those claiming mitigation related to themselves as individuals (41 percent); while lowest among those claiming mitigation related to the work environment (28 percent). Such results resonate with those obtained from the qualitative interviews with the POVA team where different weight was given to claims of unfair work conditions, which will be discussed in the next section of this article.

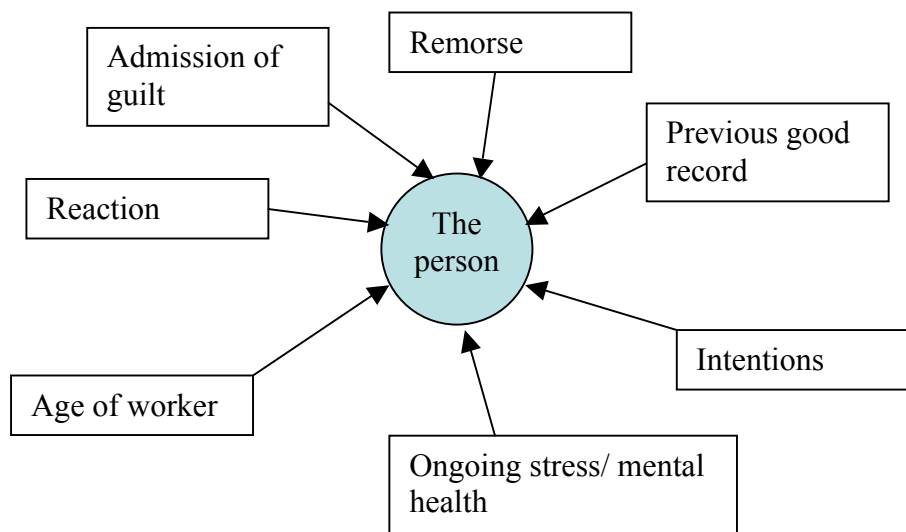
Qualitative analysis of mitigation

The treatment of mitigation was explored in 16 interviews with POVA team members. Respondents often drew a distinction between the types of misconduct and situations that justified dismissal and those of greater significance which should result in a referred person being confirmed on the List. Three inter-related principles were discernable: ‘equity’, ‘evidence-base’ and a ‘precautionary’ approach to decision-making, in which the potential for harm to people using services outweighed the possibility of injustice to referred people, particularly in difficult judgements.

Where the mitigation claimed by a referred person suggested that it had been impossible to avoid the misconduct because of poor working conditions, reports from the regulators (Commission for Social Care Inspection (CSCI) or Care Council for Wales (CCW)) about the care setting or service were useful evidence.

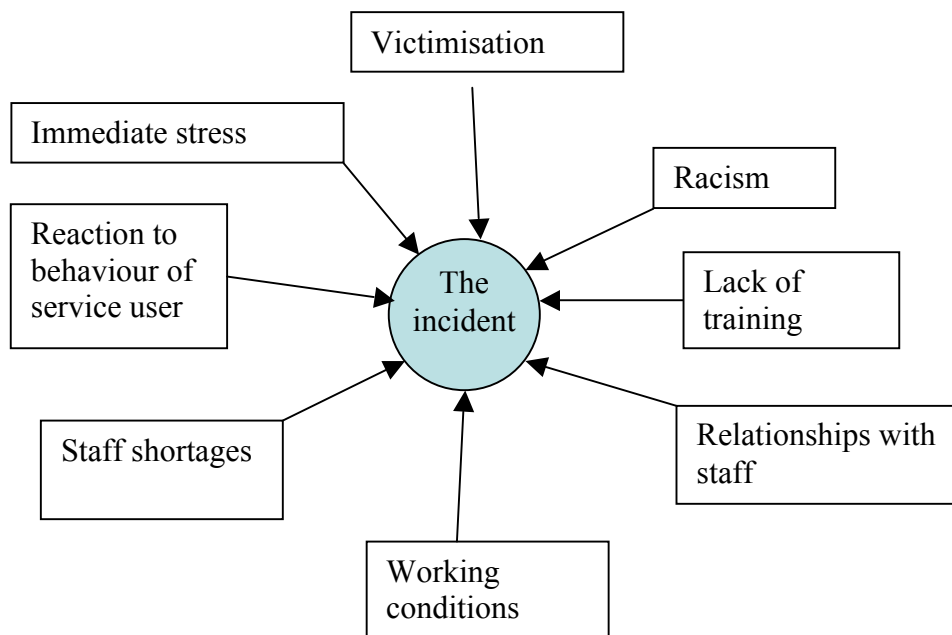
Mitigating factors were commonly perceived as cumulative. However, mitigation was often perceived as constrained by the type of misconduct and level of harm. Two separate but linked types of mitigation were evident: mitigation of the misconduct and for the person. Mitigation for the person involved establishing that the referred person possessed certain general characteristics reducing the likelihood of the person being judged as unsuitable to work with vulnerable adults (see Figure 2).

Figure 2 Mitigation for the person



Mitigation of misconduct involved identifying factors explaining immediate conditions surrounding the incident(s), which support a more positive interpretation of the role of the referred person (see Figure 3).

Figure 3 Mitigation of misconduct



Where misconduct and harm were established, mitigation was perceived as a necessary but not sufficient condition of closing a case. Making decisions involved a complex weighing of the effects of mitigation against the harm and misconduct.

Several respondents stressed the difficulty of making a general judgement about the importance of different mitigating factors, because:

‘each case has its unique set of circumstances, every case is unique, so you know you would give a lot of weight to mitigation in one case in another that may be outweighed by other factors.’

19DSM POVA team member

Mitigating factors related to referred person

Both the quantitative and qualitative analyses indicated that some mitigating claims are related to more general factors about the individual, which may alter the interpretation of the misconduct. Many of these were linked and strengthened in combination.

Admission of Guilt and Remorse

Many respondents viewed it as important whether the referred person admitted responsibility for the misconduct and harm. An admission of guilt was felt to reduce the likelihood of repeated abuse, particularly when accompanied by an attitude interpreted as genuine remorse. It was perceived to be linked to an understanding of why and how the misconduct had caused harm. Such understanding was interpreted as reducing the likelihood of the person repeating the misconduct.

Showing remorse was one of the most common forms of mitigation, being used in over a quarter, 28 percent, of referrals where mitigation was reported. A referred person expressing ‘genuine’ remorse was seen in a better moral light, which would help count towards a decision to close a case. Whether the remorse expressed by referred people was genuine was addressed by several POVA team members. When a referred person expressed remorse and how it was recorded were important in judging this as ‘genuine’ mitigation.

Reactions

How the referred person reacted immediately after the incident and in the longer term was perceived by many respondents as being significant in making a judgement about their suitability. The reaction was often linked to remorse. If the referred person showed willingness to make long-term changes, this too was often seen as a positive reaction and therefore as a factor reducing the likelihood of the person being confirmed on the POVA List. This factor would be based on an interpretation of the information included with the referral, rather than claims of the referred person.

Age of worker

The quantitative analysis showed differences in mitigations claimed according to the ages of referred staff. The interviews reflected that age was interpreted as a complex mitigation: both youth and older age were seen as possible mitigation by some

participants or as counting against a referred person by others, for a variety of reasons. Further, being confirmed on the POVA List was seen to affect people of different ages differently, although again, contradictory interpretations of this were given. Several respondents felt that the impact of confirming younger referred people was greater, because of their age. Age was linked to experience and opportunities for training by several participants: training was seen as a key factor when interpreting its importance as a mitigating factor. Similarly, there was some perception that older workers 'should know better'.

Ongoing stress/personal mental health

Stress was mentioned by about one seventh, 17 percent, of those using any form of mitigation. Two forms of stress were identified from the interviews: ongoing personal stress, which changed the overall picture of the person and a stressful situation, which mitigated the misconduct (see below). However, ongoing stress was considered by interviewees to have limited application in terms of the types of misconduct and harm involved in POVA referrals. Furthermore, some saw it as not mitigating at all. Evidence supporting claims of personal stress was deemed crucial and it was also important to establish a direct link between the stress and the misconduct. For some members of the POVA team stress could mitigate for the referred person if it could be shown that it had caused the referred person to act 'out of character'. At the same time, for others, stress was not necessarily mitigation at all. However, they acknowledged that a more powerful case could be made if evidence was provided to support the claim of being stressed and that the referred person was addressing the underlying causes.

Good record

Where a good record could be established, it directly contributed to an assessment that a referred person would be unlikely to repeat the misconduct and therefore should not be confirmed on the POVA List. Good record was the second most commonly cited mitigation by staff (36 percent). A good record was seen as more powerful in combination with other forms of mitigation and an important part of the overall picture of the referred person. However, like all mitigation, its value was constrained by the types and extent of misconduct and needed to be supported by sound evidence. Several members of the POVA team referred to the CST tribunal judgement mentioned above which decided that a single incident did not on its own always render a person unsuitable. A good record was seen as reducing the likelihood of repeating the misconduct by several members of the POVA team. However, it was suggested that in some circumstances a good record, like age and experience, could be interpreted as indicating that the person should have known better.

Mitigating factors related to work environment//Mitigation of misconduct

The quantitative principle component analysis of referrals shows that some mitigating factors relate to the work environment, these corresponded closely to the types of mitigation that we have characterised as 'Mitigation of misconduct' through the qualitative analysis of the interviews with the POVA team. This group of mitigating

factors tended to alter the interpretation of the misconduct more in favour of the referred person because it reflects elements outside the referred person's control (see Figure 3). Below we will discuss each of these mitigating factors separately.

Staff shortages

Shortages of staff were seen by many in the POVA team as making it much harder, if not impossible, to do the job properly and thereby shifting responsibility more towards the employer. However, this was one of the less common forms of mitigation identified from the sample of referrals, with only 10 percent using this. It was seen by many of the POVA team as a possible cause of immediate stress, which mitigated the misconduct on a particular occasion. This was a more simple aspect of mitigation, in that, where it could be evidenced, it was fairly unambiguously seen as a mitigating factor. Combining a claim about shortages of staff with the other aspects of mitigation strengthened its value as mitigation. However, its influence as mitigation was affected by the harm and type of misconduct, similar to other mitigating factors.

Working conditions

In addition to staff shortages, other aspects of the working environment were seen as potential mitigation. Again, this was one of the less common forms of mitigation, identified in about an eighth, 13 percent, of referrals that had any form of mitigation. The overall quality of the environment, staff support and supervision, and working practices were seen as being the employers' responsibility.

Victimisation

Victimisation, by other staff members or a service user, was seen as being more of a mitigation of misconduct, in that for it to be valid as mitigation, some doubt had to be cast over the allegations. Victimisation was cited by around nine percent of referred staff who used any mitigation. A few respondents from the POVA team felt that in some circumstances employers were using them to '*make staffing decisions for them*' (1DMS POVA team member). Proving that a referred person had been victimised was described as difficult, requiring a very close reading of the original evidence related to the referral.

Relationships with colleagues

Another aspect of victimisation, mentioned by several interviewees, was the referred person's relationship with his or her colleagues. There were circumstances where interviewees expressed suspicions about whether other staff had colluded to try to get the referred person dismissed. Again these situations were considered to be difficult to prove one way or the other. This could be viewed as mitigation of the misconduct, as it tended to raise questions about the veracity of witness statements and the overall interpretation of what happened. Where poor relationships with staff were asserted or suspected, it could raise questions about allegations and, in one instance, a member of

the POVA team referred to the possibility of a ‘conspiracy’ against one referred person.

Experiences of racism

As a special instance of victimisation, racism raised similar issues, in terms of proof and the extent to which a claim of being the victim of racism can ‘excuse’ misconduct. Members of the POVA team felt that the matter needed careful examination. While racism was perceived as important, a view was also expressed that it did not necessarily alter the interpretation of the misconduct.

Being unprepared for the work

Both kinds of issues loading onto the third factor of the principle component analysis, which we have termed ‘being unprepared for the work’ were linked more to issues categorised as ‘Mitigation of the misconduct’ in the qualitative analysis (see Figure 3). This factor therefore could be seen perhaps as a subset of this kind of mitigation, rather than being a completely separate grouping.

Lack of training

Lack of training was cited by around 19 percent of referred workers who used any forms of mitigation. The qualitative interviews suggested that the boundary was blurred at times between claims of lack of training and poor working conditions. Training was seen as the responsibility of the employer. Therefore, if the referred person could successfully argue that they had not received the training required for the safe performance of allocated tasks, this could change the interpretation of the misconduct. For example, a lack of training in using a hoist was described by one member of the POVA team as shifting responsibility for the misconduct towards the employer. As with other mitigating factors, the need for evidence was stressed by the POVA team. Similarly, participants noted constraints on the importance ascribed to training as mitigation in circumstances of very serious harm or where behaviour was obviously unreasonable.

Reaction to behaviour of service user

This was a complex type of mitigation, in that work with people who present physical and verbal challenges is very much part of the social care role, which therefore reduces the weight given to this as a defence. However, most respondents noted the possibility of it being a mitigating factor. How far it was taken into account was again linked to context, such as training, as well as an interpretation of whether the referred person’s response could arguably be reasonable and proportionate to the behaviour of the user. In combination with other factors in the work environment, the behaviour of the user could strengthen mitigation. Whether the worker had been aware of or followed care plans was also influential. However, if behaviour was such that no training could adequately prepare a care worker, this increased the weight accorded to the mitigation. Whether actions were reasonable and immediate responses to genuinely challenging behaviour were seen as pivotal by many interviewees.

Discussion

These data provide unique opportunities to explore aspects of harm and risk that are subject to high levels of concern among politicians and the public (Hussein et al 2007). The study is limited in a number of respects nonetheless. First, the data are limited to one aspect of harm and risk of harm, being confined to regulated social care services and to cases where employers have made a decision to refer. Such cases are likely to involve behaviour that is at the serious end of the spectrum of abuse or harm, and that which has been observed or evidenced. Second, the claims of mitigation in the case files were sometimes untested and untestable. Third, some of those referred may not have been able to express themselves in written format. Few were supported by legal or professional representatives. The research team may have been biased in its interpretations although we attempted to minimise this risk by (i) building up a research team with a range of professional backgrounds, gender and age ranges to reach consensus, and (ii) discussion of the data and their interpretation with a range of stakeholders (authors 2008).

Nevertheless, the study provides key findings particularly related to mitigating factors of referred staff. Both the quantitative and qualitative analyses indicated that mitigating factors can be grouped into those related to the person, the working conditions and preparedness for the job. The identification of the two elements of work environment and preparedness to work strengthen the argument that abuse can not only be attributed to individuals' characteristics but also can be significantly relate to the environment and work culture (White et al 2003). The claims of not being fully prepared to do the job, which was cited by 36% of those who claimed any mitigations, highlights the importance of adequate induction and training of staff working with in social care. The issue of training in social care has been the subject of research over many years and in particular since the introduction of *No Secrets* and what is viewed, by some, as the 'mainstreaming' of staff involvement in safeguarding roles (Slater 2002).

The fact that the most common claim of mitigation was that no real harm had occurred focuses on changing the understanding of the misconduct, rather than the person: it is an important finding because it puts the onus of those who consider that harm has been caused (or risked) to justify this claim or risk having the referral unconfirmed and leaving staff free to work in areas where it may be best they do not. Proving or substantiating harm may require considerable input from the wider care team in some cases, such as psychologists, or from criminal justice and legal practitioners. As we noted in an earlier study of the first referrals to the POVA List, there are many occasions where employers have not shared information about incidents with local health and social care professionals who may possess specialist skills, such as adult safeguarding teams or inspectors (authors 2007).

Second is the importance of a 'good record' as mitigation. Establishing the record of staff many of whom are not professionally qualified or registered is potentially problematic. Supervision is one means of collating records of staff conduct but, together with appraisals, is reported infrequent (Skills for Care, 2008). In this context staff records provide limited evidence of good record, or its opposite. Further, weighing the importance of information about a referred person's record against the

misconduct and harm involved adds an emotional and moral dimension to the judgement.

The vexed question of admission of guilt and its role in contributing to the decision to bar was also an important factor. Admissions of guilt and remorse were viewed by the POVA team as important, as is commonly the case in criminal procedures, where reduced sentences may be the result, although the link is not straightforward (Ward, 2006; Tudor, 2007). In the world of care work, the risks of admission of guilt are finely balanced and policy makers may wish to explore further the extent to which these should influence decisions. For example, admission of guilt in effect transfers responsibility for proving suitability from the POVA Team to the referred person, thus making this a risky strategy for referred people. However, admitting guilt and particularly showing remorse were reported as strong factors in judging the likelihood of repeating the harm.

Moreover, the relationships between types of mitigation, whether related to personal character, nature of the misconduct, or being unprepared for the work and the outcome of referral are intriguing and suggest further investigation. Both the quantitative and qualitative data analyses indicate that when workers successfully argue that their misconduct is due to working conditions or lack of training, which can be seen as the employer's fault, they are more likely to have their case considered favourably and they are less likely to be placed on the List.

There are important messages arising from this study. The first is for the large numbers of people (estimated at 11.3 million: Home Office, 2008) working in England and Wales who are shortly to be subject to the vetting and barring processes introduced by the Safeguarding Vulnerable Groups Act 2006. Accounts of mitigating factors are important parts of the POVA decision making process and it appears that they are carefully considered by the POVA team and will have to be by its successors. Second, for employers there is a need to be able to counter false or exaggerated claims of mitigation, by being able to provide details of staffing or training, or to supply evidence that may give less credence to claims of victimisation or challenging behaviour. Third, for those working in adult safeguarding services, there may be a need to promote localised good practice training and skill development around recording of incidents and service 'near misses' or critical incidents.

The world of adult safeguarding has been dominated by inquiries and scandals (Stanley and Manthorpe 2004) and incidents where the voices of those accused have been generally silent. Those who have been exonerated of misconduct are often unable to tell their story (Rees and Manthorpe in press). If we are to learn more of how to safeguard vulnerable people then knowledge of what factors are implicated in situations of misconduct or harm may contribute to this.

Footnotes

- (1) The Department for Education and Skills has been replaced by the Department for Children, Families and Schools.

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