

**Do you agree with our proposal that the new offence should cover all formal health and adult social care settings, both in the private and public sectors? Please explain your views.**

Yes  No

The new offence should cover formal care settings in both the private and public sector for the reasons as follows.

It would provide protection and redress to people who do not meet criteria for the Mental Health Care and Treatment Scotland Act 2003 or Adults with Incapacity Scotland Act 2000 where neglect is an issue.

It could help to drive up standards in care settings.

It would provide the option of pursuing prosecution of care home owners or managers where neglect arises out of failures in management and a culture of poor practice.

The legislation should include care at home services especially as people are now supported out with institutional care for as long as possible and "hospital at home" is preferred for people with long term conditions.

It should apply to third sector as there is an increasing reliance on this sector to provide care.

It should apply to health and social care services as integration brings new joint arrangements.

A more general comment: this legislation should cross reference the Adult Support and Protection Scotland Act and the Children and Young People's Act.

**Do you agree with our proposal that the offence should not cover informal arrangements, for example, one family member caring for another?**

Yes  No

It could be counter productive to include informal care by family members and may prevent carers or people cared for asking for help when carers are not able to meet the needs of the person cared for. There is a risk of criminalising carers. Where neglect occurs in carer arrangements there is no breach of a legal obligation to provide care which differentiates informal carers from formal carers. There are already procedures to address carer issues through Adult Support and Protection and care management. Existing legislation is sufficient and would lead to criminal investigation if relevant.

It would be relevant to include carers directly employed by the service user or their proxy under SDS direct payment or through an agency. They have a contract of

employment and therefore are legally obliged under their contract to provide a level of care and support and if this is not provided then it may not be adequate to address through employment law. If carers employed through SDS are not included this would lead to lower levels of protection/redress for those arranging their own care.

There would need to be clarity around the definition of “informal”, giving clear guidance on support purchased through benefits e.g. Attendance Allowance, Carer’s Allowance etc. and whether these are classed as formal or informal

**Should the new offence cover social care services for children, and if so which services should it cover? Please list any children’s services that you think should be excluded from the scope the offence and explain your view.**

Yes  No

The new offence should cover social and health care services for children including community and residential settings.

The following should be included in the proposed legislation: Residential care; residential schools; young person’s unit (health facilities); nurseries and health provision for children such as mental health services etc.

**Should the offence apply to people who are providing care or treatment on a voluntary basis on behalf of a voluntary organisation?**

Yes  No

Yes in circumstances where there is a contract in place to provide care and support.

The agency has a responsibility to make appropriate checks, supervise work carried out, provide training and appropriate resources . However, the offence should not apply to the individual unpaid volunteer.

**Do you agree with our proposal that the new offence should concentrate on the act of wilfully neglecting, or ill-treating an individual rather than any harm suffered as a result of that behaviour?**

Yes  No

It is very difficult to prove that particular actions or omissions directly caused harm and therefore the offence should focus on the ill treatment, neglectful actions or omissions.

"Wilful neglect" should be clearly defined however otherwise "wilfulness" may be hard to prove. The definition could be linked to (but not defined by) the national

care standards.

**Do you agree with our proposal that the offence should apply to organisations as well as individuals?**

Yes  No

There are some difficulties with the way Section 315 of the Mental Health Care and Treatment Act and Section 83 of the Adults with Incapacity Act are worded when considering prosecution of care agency owners or managers. These pieces of legislation appear to focus on there being an identifiable individual who is directly responsible for the harm. In the experience of Adult Support and Protection services this is not always possible.

Where concerns are raised about the conduct of an individual, this can be symptomatic of failings within the wider organisation. It is important not to assume that the neglect is solely due to the actions of an individual. In some cases a culture of poor care exists and problems raised with managers are not addressed. There may be poor training, low numbers of staff, poor procedures and/or a tolerance of poor care by qualified staff. Staff themselves may not receive support from their organisation. This is clearly the responsibility of the senior managers or owners of care service to address. Where failings are systemic there should be an avoidance of blame of individuals.

"Wilful neglect" should be clearly defined however otherwise "wilfulness" may be hard to prove.

**How, and in what circumstances, do you think the offence should apply to organisations?**

Yes  No

Where inadequate nutrition, fluids, heat, privacy, access to social activity, cleanliness, attention to personal hygiene are evident. Where service users' calls for help or evidence of distress are routinely not responded to or are responded to in an aggressive or punitive manner. Where restraint or control or withdrawing choice are used inappropriately or unlawfully. Where inadequate attention is given to medical needs. Where any problems in the service which have the potential to cause harm or have caused harm which are brought to the attention of adult support and protection services, Police Scotland and/or the Care Inspectorate and are not addressed within a reasonable period. Where breaches in basic care standards have the potential to cause or have caused significant harm. Where systemic failures to provide adequate staffing levels, staff training and support are evident.

**Do you agree that the penalties for this offence should be the same as those for the offences in section 315 of the Mental Health (Care and Treatment) (Scotland) Act 2003 and section 83 of the Adults with Incapacity (Scotland) Act 2000?**

Yes  No

In addition to the penalties available under Mental Health legislation individuals should be barred from owning, managing, working in or having a business association with care organisations in the future.

**Should the courts have any additional penalty options in respect of organisations? If so, please provide details of any other penalty options that you think would be appropriate.**

Yes  No

The fines available under mental health legislation seem inadequate when applied to large organisations. There should be a higher maximum limit. However any fines imposed should be balanced with the need for the organisation to continue to provide a quality service to those in receipt of their care and therefore fines should be imposed according to circumstance.

**What issues or opportunities do the proposed changes raise for people with protected characteristics (age; disability; gender reassignment; race; religion or belief; sex; pregnancy and maternity; and sexual orientation) and what action could be taken to mitigate the impact of any negative issues?**

The changes should bring increased protection/redress for all people with a disability or those who are infirm due to age in addition to people with a mental disorder. We can see no adverse effects on people with protected characteristics.