

1. 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

Given the ongoing integration of health and social care services, it would be hard to justify excluding any service provided in a formal care setting.

A list of “professions” which are envisaged will be covered by the offence are listed at Annex A. In contrast to the care taken to specify the different groups of health professionals, the approach to delineating the various professional groups regulated by the Scottish Social Services Council borders on the disrespectful. Additionally, no distinction has been made in respect of whether such professionals are providing services to children and/or adults.

We believe that it is just as necessary to consider including both registered social workers and a full list of registered social care roles.

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

Yes No

Where informal carers hurt or steal from the person they are caring for, they can be charged under common law.

In our view, however, there does need to be robust examination of the implications of Self-directed Support arrangements and personal budgets where close family members take on a contracted and paid caring role and therefore would be covered by this offence. What would be the approach to a family carer who does receive payment for providing a specified service, but ill-treats the cared-for person outwith those hours they are providing this service?

We would therefore recommend that serious attention is given to clarifying the position of people who could be viewed as both paid and informal carers.

3. 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

As with our answer to the first question, we can think of no rationale as to why children’s social care services should not be covered by the offence. Similar to adult social care, all services involving formal, contracted delivery of care to children should be included as follows: respite, short breaks, full-time residential care, child-minding, early years, home-based support, family-based care including

kinship care, fostering and adoption (where the adoption allowance is paid) and via personal budgets. Where there is a clear contractual basis to provide care, the person taking on that role should be covered by the offence.

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

Yes No

We imagine that examples might include befrienders, lunch clubs, meals on wheels. Such arrangements are not informal although they may be unpaid, and therefore it seems to us should fall within the ambit of the offence. All such volunteers must be subject to the PVG scheme which confirms them as occupying a position of trust in respect of the people receiving the care service. If they are not held accountable for their conduct, should the voluntary organisation be charged instead?

Additionally, we can foresee difficulties in terms of the exclusion of informal carers and unpaid volunteers in the context of the development of co-production and hybridised models of support. The consultation appears founded on traditional models of care provision.

5. 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

Although we agree that there should be a focus on conduct, in our view there needs to be considerably more clarity about what sort of conduct would constitute wilful neglect or ill-treatment. Professionals will wish to know the ambit of this offence, for example either failing to follow procedures or, alternatively, following procedures which will result in harm to an individual but not “blowing the whistle”; or where there is a delay in receiving a service due to the operation of waiting lists required to manage inadequate resources. Will different thresholds apply where the offence occurs through omission as opposed to commission? We think that it essential that the carer or care provider’s position of trust, and deliberate abuse of that position, is central to any definition.

It would be helpful if there had been consideration and clarification as to the retrospective nature of the offence.

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

Yes No

It seems reasonable for the offence to be applied in the same way as the existing offence under S.316 of Mental Health (Care and Treatment) (Scotland) Act 2003.

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

Yes No

This question does not require a “yes” or “no” answer so we have not selected either.

The decision as to the culpability of the individual versus the organisation will be easier to determine where there is either clear evidence that workers were told to take particular action, but did not; or where managers were aware of a particular situation but did not take appropriate action. An example of the latter is described in Alexis Jay’s report published earlier this year on child sexual exploitation in Rotherham.

Known examples of wilful neglect or ill-treatment by one worker in a care setting will, however, often be traced up a clear chain of accountability to the management of that organisation, for example at Mid-Staffordshire NHS Hospitals Trust. Inadequate resources may play a part, but equally, and more culpably, there may have been a failure of staff training, support or management within an organisational culture which is overly obsessed with meeting targets or achieving budget cuts. Although there are many examples of “institutional abuse”, all too often the focus can be on the “bad apple” rather than paying attention to organisational factors which allow harm to recur.

8. 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

There is no reason for the penalties to differ from those already in place for the existing offences mentioned.

9. 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

There are significant existing sanctions available under regulatory and registration arrangements including professional penalties, closure of services, special measures etc.

It is difficult to see what would be gained from imposing additional financial penalties on organisations to those already proposed. To put it baldly, this would inevitably impact on the funding available for care services, any necessary improvements and hence the range, quality and provision of such services.

10. 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?

It is possible that that proposed offence could have a positive impact on people with the protected characteristics of age and disabilities. It is important, however, to take a couple of particular issues into account.

There are existing, effective legal protection measures in Scotland for adults at risk of harm who have capacity such as is offered by the Adult Support and Protection (Scotland) Act 2007. This piece of legislation is in addition to the range of protection and criminal measures available to people with mental health issues and learning disabilities under the Mental Health (Care and Treatment) and Adults with Incapacity Acts, and has no equivalent in English law. Like child protection measures, adult support and protection measures can be taken on the “balance of probabilities”. This is invaluable in complex child and adult protection situations where standards of criminal proof can be difficult to obtain, or where the criminal process cannot provide the immediate protection required.

There have been few charges laid under the existing legislation in respect of the wilful neglect and ill-treatment of people with mental health issues or learning disabilities and even fewer convictions. Historical child abuse enquiries emphasise time and again that harm continued because children were not believed. Extraordinary measures have been introduced to improve the quality of evidence obtained from child victims and support them to give that evidence in court. The Mental Welfare Commission report, “Justice Denied”, highlighted the difficulties people with mental health issues and learning disabilities have accessing justice, regardless of whether they have capacity or not. Hate crime figures published by COPFS for 2010-13 show that reported disability hate crimes are consistently less likely to result in prosecutions than other types of hate crimes, and more likely to result in no action because of evidential problems. This raises the real possibility that charges would not be pursued in respect of the new offence where the victim is not seen as a “credible witness”. We think the Scottish Government must make the issue of equal access to justice a priority.

Finally, the presence of equivalent English offences in relation to adults lacking capacity did not deter staff at Winterbourne View from abusing patients in their care. If the new offence is introduced, it must be viewed as a small element of any programme to ensure that children and adults receiving care services are treated with dignity and respect, and that the larger part of this programme will be achieved through creating an open culture and a valued workforce.

