

## **Introduction**

1. Scottish Care welcomes this opportunity to contribute to the Scottish Government's consultation on Proposals for an Offence of Wilful Neglect or Ill-Treatment in Health and Social Care Settings. Please find below some points of general comment together with our response to the specific questions as requested.
2. Scottish Care is the representative body for independent social care services in Scotland. This encompasses private and voluntary sector providers of care home, care at home and housing support services across the country. Scottish Care counts over 400 organisations as members, which totals over 830 individual services. Scottish Care is committed to supporting a quality orientated, independent sector that offers real choice and value for money. Our aim is to create an environment in which care providers can continue to deliver and develop the high quality care that communities require and deserve.
3. In relation to older people's care, this sector provides 83% of the care home places in Scotland and over 50% of home care hours. There are more older people in care homes any night of the week than in hospitals - as at 31st March 2014 there were 902 care homes for older people providing 38,441 beds to 33,187 residents any night of the year, with 88% of these residents located within the independent sector.

## **Scottish Care's General Response to the Consultation**

1. In principle, Scottish Care and its members are supportive of any additional measures which aim to enhance quality of care and the safety of those receiving care. People being supported within health and social care settings, particularly by services provided by the independent social care sector which Scottish Care represents, are often amongst the most vulnerable in society and anything that improves existing safeguards is welcomed by providers and Scottish Care alike.
2. However, Scottish Care believes that there needs to be a clear articulation as to what the introduction of this new offence would add to existing measures in place to protect those in receipt of health and social care services. In Scottish Care's opinion, there appears to be no clear evidence that there is a gap in existing powers whereby appropriate bodies, including law enforcement agencies, are unable to appropriately penalise those who commit harm against others within health and social care settings. For this offence to be established there would need to be clarity on how it enhances the landscape including existing criminal law, Adult Support and Protection legislation, the professional regulation of the workforce and the operation of the Care Inspectorate and Health Improvement Scotland.
3. Scottish Care also has concerns that, particularly with there being a poor evidence base for the need for this new offence, it may have a detrimental effect on perceptions of health and social care services and reinforce fears of poor care. Whilst harm is an important area to address and no poor care should be tolerated, the vast majority of services perform well and staff within these services are committed, caring and compassionate. We see the introduction of this offence as potentially having a negative impact on health and social care

staff, at a time when they are already often undervalued and the sectors as a whole are experiencing significant recruitment and retention issues.

4. Furthermore, Scottish Care would be concerned that the introduction of this new offence could negatively affect the culture of openness and transparency that we are trying to establish across health & social care, particularly as we move towards health and social care integration and have seen recent examples of the failings of care in circumstances where this open culture is not embedded. Individuals and services may feel less able to speak out about issues or mistakes and have these addressed in a satisfactory way at a lower level if there is a fear of escalation to criminal proceedings.
5. Scottish Care believes that if this offence was to be established, there would need to be an explicit definition of what is deemed 'wilful' neglect or ill-treatment. Failures of care are often a result of a set of complex circumstances and those working in health and social care services, as well as those implementing sanctions, need to have an unambiguous understanding of when this offence is applicable. 'Wilful' implies a degree of pre-meditation, and the definition needs to outline what this means in practice, as well as what sorts of action or inaction can be deemed wilful. To do so would make application of the offence in appropriate cases more straightforward, and would mitigate against services and individuals acting in an unhelpfully risk averse manner in day-to-day practice as a result of confusion.
6. Scottish Care suggests that the proposals feature consistent use of language, referring to an individual as 'person' as opposed to 'patient'. This is to ensure that the language is applicable to both health and social care settings, and that it is in keeping with the personalisation agenda whereby people are defined as individuals, not by the support and care they require.
7. It should be noted that Scottish Care and its membership do not seek to oppose the introduction of this new offence, but feel that in order for it to be established, welcomed and applied effectively, the case for its necessity needs to be better evidenced and articulated. Therefore any concerns raised in this response are not arguments against its inception, but questions and considerations that we feel must be addressed at an early stage.

## **Scottish Care's Response to Questions Posed in the Consultation**

1. **Do you agree with our proposal that the new offence should cover all forms of health and adult social care settings, both in the private and public sectors?**

Scottish Care believes that it would be logical for the offence to cover all health and adult social care settings, particularly given the implementation of health and social care integration in April 2015. However, we believe that voluntary sector social care settings which aren't simply informal arrangements should also be covered by the offence. In a setting whereby an element of formal care planning is undertaken and an element of the care is professional, it is rational for the service or individual to be liable for inclusion under the new offence.

**2. Do you agree with our proposal that the offence should not cover informal arrangements, for example, one family member (generally termed unpaid carer, or carer) for another?**

Scottish Care agrees that untrained familial or neighbourly care acts should not be covered under the offence. Indeed, to do so may actively deter people from entering into low-level, informal care-giving and support which plays a crucial role in the anticipation and prevention agenda, and may discourage community support more generally.

**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 of the offence and explain your view.**

We believe that children's social care services should be covered by the offence. The rationale for introducing this offence and using it as a means of deterring people from neglecting and harming others should be based on the capacity in which the individual or organisation is providing the care rather than the setting or client group, therefore there would be no logical differentiation between adult and children's services.

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

Yes. If individuals are working for an organisation, regardless of sector, an element of professionalism and knowledge of the organisation's values, expectations and acceptable conduct can be expected and therefore individuals should be expected to meet these. Again, the negative motivations of an individual when causing wilful harm or neglect to a person they are supporting are what should form the basis of introducing this offence, rather than the role or pay-grade they are operating within.

**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?**

Scottish Care does not agree that any harm should be excluded from consideration when applying the new offence. It is certainly true that certain forms of harm can be difficult to measure, such as psychological harm, and are no less serious in terms of impact on an individual and therefore these instances need to be treated appropriately. However, it is generally untenable to consider harmful activity without looking at what harm taken place and therefore this needs to be considered in the round. Otherwise, it could make successful prosecution very difficult.

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

Yes, anyone providing services in health and social care settings has a duty of care and should be accountable for their acts and omissions. However, the offence should only apply to organisations if their role in harming an individual can be properly evidenced, beyond the poor conduct of an individual.

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

The balance between individual and organisational responsibility can be very difficult to establish in failings of care as there are usually a number of contributing factors. If this offence was to be introduced, those applying it to organisations would need to be fully informed as to the context in which a service operates and the impact of factors such as commissioning and funding, which can have very real influence on the delivery of a service and the recruitment of suitable staff. However, this does not detract from instances where harm or ill-treatment is directly attributable to an organisation, such as failures to implement safe recruitment practices, or a lack of appropriate leadership or monitoring, and in these instances then the organisation should be prosecuted accordingly.

**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?**

If the offence was to be introduced, it would seem logical to apply the same set of penalties as those already in existence in similar legislation, as long as these were deemed by appropriate parties to be effective at present.

**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.**

Scottish Care does not agree that additional penalties should be applied for organisations through this legislation. Instead, we believe it would be more effective to strengthen regulation so that service operators who weren't deemed fit and who had been found to be inexcusably contributing to the harm or ill-treatment of individuals in their care could be banned from delivering care, in the same way that individual workers can have their registration removed by their professional workforce regulators. This should only be applicable if there is evidence that an organisation has failed on a number of occasions, or has failed to implement safeguards and improvements to practise after an incident of harm.

**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?**

Scottish Care has no comment to make on this question, other than to suggest that the offence is applicable to individuals and organisations providing health and social care services to any client group, including those with protected characteristics, in a way that is deemed harmful.