

**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.**

No

### **The MDU**

The MDU is the largest Medical defence Organisation in the UK providing medico-legal advice and assistance to our members who make up around 50% of the UK's doctors and over 30% of dentists. One of the areas where we have experience of assisting our members is with criminal investigations arising from their treatment of patients. It is in this context that the following comments are made.

### **Our comments on the proposal above**

We do not agree with the introduction of an offence of wilful neglect/ill treatment for the reasons set out below. We do not believe that there is a gap in the law. We note the existing offences in respect of mental health patients under the Mental Health (Care and Treatment) (Scotland) Act 2003 and in respect of adults with incapacity in the Adults with Incapacity (Scotland) Act 2000. There is no argument contained within the consultation document as to why the extension of these offences outwith those two areas is necessary or would be beneficial. We understand the need for special protections for patients who lack capacity or are subject to mental health legislation, however, we believe it is disproportionate to create a new offence for other adults, especially in the absence of any evidence that there is any need for the creation of a new offence. For example, we note that there have been no prosecutions under the 2000 Act in the 13 years since it came into force. We believe there are already adequate legal and regulatory safeguards for patients that are not fully explored in the consultation document. Although it refers to other remedies and means of redress (which would include powers under the Health and Safety at Work Act 1974) it does not discuss the powers of the Healthcare Professionals' Regulators: the General Medical Council, General Dental Council and the Nursing and Midwifery Councils all have the power to take action against their registrants if they were alleged to have wilfully neglected or ill-treated a patient. Their threshold for action, which could include removal from the professional register, is the civil standard (and not the higher criminal standard). Erasure will effectively end the healthcare professional's career.

If a new criminal offence were to be introduced we have concerns around the potential costs of investigations: it is our experience (from defending doctors in relation to other criminal prosecutions arising from the clinical care of patients) that the cost of such investigations can be substantial (tens of, and sometimes hundreds of, thousands of pounds). That means a cost to the taxpayer for prosecutions (and often for the cost of locum practitioners to cover the work of a doctor or other healthcare worker within the NHS who is unable to continue in post during investigation) and to the healthcare professional, through the cost of defence for the individual charged, for example in subscriptions to a medical defence organisation or, if not a member of a defence organisation (and not eligible for legal aid) by way of privately instructed solicitors' fees.

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

No

We do not agree that the new offence is required; however, if the new offence were to become law, it is difficult to understand why it would apply to one category of people who wilfully neglect or ill-treat a person but not to another category. We note that the proposal above would mean that further legal provisions would be applied to a situation where care is provided by a qualified carer who is regulated by a professional body in an environment open to inspection and with multiple staff and patients present, but not to an unregulated carer working in isolation. This proposal illustrates that the introduction of the new offence is likely to create more inconsistencies than are considered - by the consultation document - to exist at present.

**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.**

No

We do not agree that the proposed new offence is required for the reasons set out above.

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

No

We do not agree that the new offence is required; however, if the new offence were to become law, it is difficult to understand why the offence would apply to one category of people who wilfully neglect or ill-treat a person but not to another category. If the intention is to protect patients, that protection should extend to all who treat or have any involvement in their care, in whatever environment or circumstance. We would draw attention to the points made in our response to the above question in relation to informal care arrangements.

**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?**

No

We do not agree that a new offence is required. However, if the new offence were to become law, then it is our view that the absence of a threshold for harm is likely

to lower the threshold for investigation (erring on the side of caution) leading to a greater number of investigations that do not result in a prosecution (since it will include situations where no harm has occurred within the alleged offence, making the assessment as to whether there has been neglect or ill-treatment more difficult). We also note the concerns of the National Advisory Group on the Safety of Patients in England to the effect that introducing the offence without a threshold of harm might act as "...a disincentive to establishing an open and honest culture in service providers" (see p14 "New Offence of Ill Treatment or Wilful Neglect, Dept of Health Consultation, Feb 2014).

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

No  X

We do not agree that a new offence is required for individuals or for organisations. It is our opinion that there would be some difficulty in prosecuting an organisation for wilful neglect, as it is difficult to see how the necessary *mens rea*, inherent in the concept of 'wilful,' would be established.

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

No  X

We do not agree that a new offence is required for individuals or for organisations. Please see our comments to the question above in relation to organisations

**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?**

No  X

We do not agree that a new offence is required for individuals or for organisations and we do not therefore agree that new penalties are necessary (for the reasons given above).

**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.**

No  X

We do not agree that a new offence is required for individuals or for organisations and we do not therefore agree that new penalties are necessary (for the reasons given above).

**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?**