



## **Care Inspectorate response to Scottish Government consultation on proposals for an offence of wilful neglect or ill-treatment in health and social care settings**

### **Introduction**

The Care Inspectorate is the independent scrutiny and improvement body established under the Public Services Reform (Scotland) Act 2010, which brings together the scrutiny work previously undertaken by the Care Commission, HMIE child protection team and the Social Work Inspection Agency. Our role is to regulate and inspect care and support services (including criminal justice services) and carry out scrutiny of social work services. We provide independent assurance and protection for people who use services, their families and carers and the wider public. In addition, we play a significant role in supporting improvement in the quality of services for people in Scotland.

We welcome the opportunity to respond to this consultation and would be happy to be involved in any future discussions. The proposal is consistent with the position of the UK as a signatory to the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, and the Care Inspectorate broadly supports the proposal as a body designated as part of the UK's National preventive mechanism in terms of that protocol.

### **Consultation questions**

**Q1) 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?**

**Yes**

**No**

We agree that the new offence should cover all formal health and adult care settings in both the private and public sector to ensure protection for people using services in all settings. As we expand upon in question 2, we do not consider there to be any reason why the proposed offence should not also apply to children's services or why a particular service offered to children should be excluded from the scope of the proposed new offence.

We consider that there are some additional factors which must be considered in order to ensure that the creation of the proposed offence does not have unintended consequences. Firstly, there is a risk of a perception among the workforce or

potential workforce in health and social care that working in those sectors comes with a risk of prosecution. This may discourage individuals from entering what is already, in some areas, a depleted workforce. Arguably, however, individuals who are not committed to providing a high standard of care should be discouraged from entering the workforce. Further, we ask whether there are other spheres in which such an offence might not be equally relevant – Education, for example. In addition, we would highlight that those receiving care during the transitions between childcare and adult care are very vulnerable and would ask that issues around definition and responsibility are addressed appropriately.

We also note that the list of professionals who may commit the offence extends to individuals employed in certain types of social care for adults regulated under the Public Services Reform (Scotland) Act 2010, but not to all such services. In addition, the list of professions which would be covered by the offence would have to be extended if the scope of the offence is to be extended to services for children.

**Q2) 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) caring for another?**

Yes

No

We agree with this proposal, on the basis that were the offence to apply in relation to these types of arrangement, that may create a disincentive to many who currently provide unpaid care, to continue to do so, in that failings in the provision of such care would have the potential to result in prosecution.

**Q3) 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.**

Yes

No

We note that there are robust systems in place to prosecute individuals for ill treatment and wilful neglect of children. Relatively recent additions to the legal framework, such as the Protecting Vulnerable Groups (PVG) Scheme, the vetting and barring system and the requirement for individuals working in day care of children services to be registered with the Scottish Social Services Council (SSSC), have all offered a higher level of protection for children since their introduction.

However, we do not consider there to be any reason why the proposed offence should not apply to children's services or why a particular service offered to children should be excluded from the scope of the proposed new offence. Children are as potentially vulnerable to wilful neglect or ill-treatment as adults in health and social care settings.

**Q4) 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

No

We do not consider that treating volunteers in the same way as paid employees is appropriate, in that the result (a potential risk of prosecution in respect of failings in the care provided) may act as a disincentive to volunteer.

**Q5) 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

We agree that the emphasis should be on the act itself, rather than its consequences. It should not have to result in someone being injured before someone is held accountable when the practice of that person could have resulted in injury or harm to the individual.

**Q6) Do you agree with our proposal that the offence should apply to organisations as well as individuals?**

Yes

No

We support the introduction of a new offence applicable to organisations, as well as individuals, and believe this may have the greatest impact in areas of care that are not subject to regulation under the Public Services Reform (Scotland) Act. For example, while a range of sanctions currently apply to registered service providers, organisations providing care to children for two or less hours per day, or supervised activities for school age children, are not required to be registered and are therefore subject to relatively little scrutiny or potential sanctions.

Our only concern is that applying the offence to organisations might discourage them from continuing to offer care to groups they regard as “high risk”, in case the actions of their staff in difficult or challenging circumstances should leave them vulnerable to the risk of prosecution.

**Q7) How, and in what circumstances, do you think the offence should apply to organisations?**

We suggest that the offence could apply to organisations in the same way that it applies to organisations in section 315 of the Mental Health (Care and Treatment) (Scotland) Act 2003. Organisations might be held liable where the offence is

committed by a person during that person's employment with the organisation, regardless of whether that employment is paid or unpaid, is under a contract of service or a contract for services – subject to statutory defence(s) such as having taken reasonable precautions.

We consider that there should be scope for the offence to apply to organisations where their policies, procedures, training or working practices have brought about neglect or ill-treatment or where organisations have failed to prevent it. It should also apply where the instructions of senior managers or owners have resulted in staff neglecting people.

**Q8) 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

We agree that this would seem appropriate.

**Q9) 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

We suggest that the courts should have the option of applying additional penalties in respect of organisations. Such penalties might include a mechanism to apply certain restrictions to the operation of the organisation (depending on the nature of the organisation's activities) for a specified period of time. In serious cases, the organisation or those having control over it could be prevented, whether for a defined period or indefinitely, from providing health or social care. We also suggest that consideration be given to the power to exclude directors/ trustees of organisations convicted of the offence from being directors/trustees of similar organisations in the future.

**Q10) 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?**

We suggest that consideration be given to the gender balance in employment in the provision of health and social care and any subsequent potential consequences, although the proposed offence would apply equally to wilful neglect or ill-treatment across all protected characteristic groups. We also refer to our concern, expressed above, that applying the proposed offence to organisations might result in them

withdrawing provision for groups they consider “high risk”, which may have the potential to impact adversely upon particular protected characteristic groups.

The proposals do however, offer opportunities to reduce and mitigate mistreatment and hate incidents exacted on people with particular characteristics who may be more likely to be in care settings (older people, people with disabilities etc). We would like to see mention of this opportunity in corresponding guidance in the subsequent implementation of the proposals.

In order to help mitigate the impact on any negative issues in relation to equality it is important to engage with groups representing particular protected characteristics and service users on an on-going basis.