

# Health and Social Care Alliance Scotland

## Response: Consultation on Proposals for an Offence of Wilful Neglect or Ill-treatment in Health and Social Care Settings



**19 December 2014**

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The Health and Social Care Alliance Scotland (the ALLIANCE) is the national third sector intermediary for a range of health and social care organisations. It brings together over 800 members, including a large network of national and local third sector organisations, associates in the statutory and private sectors and individuals.

The ALLIANCE's vision is for a Scotland where people of all ages who are disabled or living with long term conditions, and unpaid carers, have a strong voice and enjoy their right to live well, as equal and active citizens, free from discrimination, with support and services that put them at the centre.

### Consultation Questions

- 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?**

Yes. People who are disabled or living with long term conditions are increasingly accessing support and services across a broad variety of service contexts, many of which fall outwith the statutory sector.

The ALLIANCE strongly supports the view that people who use support and services should be able to expect the same standards of care, irrespective of the setting in which this is provided. Applying the same penalties for ill-treatment or wilful neglect across all formal health and social care settings, both in the private and public sectors is therefore of critical importance in safeguarding people's safety and human rights at all stages of their journey.

In our response to the recent consultation on the review of the National Care Standards, we called for the adoption of a human rights based approach to design, delivery and redress throughout health and social care support and services.

Adopting a Human Rights Based Approach is a practical way of ensuring that the rights of people who use support and services are respected. Rights based approaches to health and social care can help to clarify expectations of fair, consistent and respectful experiences and of redress when standards fall below this. They offer a coherent values based system by which we can *“empower citizens and unlock them from the failings of past systems, rather than locking them into a new system that lacks a clear vision”*<sup>1</sup>.

Additionally, a human rights based approach to health and social care “provides an ethical framework for person centred decision-making by ensuring that rights are only restricted when proportionate and necessary” and “can provide guidance on how to balance competing rights and duties in situations where they conflict.”<sup>2</sup>

Work with health and social care practitioners has shown that a Human Rights Based Approach can help services and individual practice to be more person-centred<sup>3</sup>. It has also proved a robust, helpful framework to support decision making with people with complex needs where issues of personal autonomy and risk need to be balanced<sup>4</sup>.

People have the right to the highest attainable standard of health, and to freedom from torture. Both of these fundamental rights should be better supported by the proposed 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) caring for another?**

The ALLIANCE notes that the proposal to only include formal contractual care arrangements within the scope of the offence may result in adults who are being cared for by unpaid carers in informal contexts being exposed to a gap in legal protection from wilful neglect.

The Equality and Human Rights Commission’s Disability Harassment Inquiry<sup>5</sup> found that abuse and neglect of disabled people sometimes takes place in their own homes and is sometimes carried out by people visiting, or living with the victim.

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<sup>1</sup> <http://www.centreforwelfarereform.org/library/by-date/personalisation-and-human-rights.html>

<sup>2</sup> ‘Close to home : An inquiry into older people and human rights in home care’, Equality and Human Rights Commission,

[http://www.equalityhumanrights.com/sites/default/files/publication\\_pdf/Close%20to%20home.pdf](http://www.equalityhumanrights.com/sites/default/files/publication_pdf/Close%20to%20home.pdf)

<sup>3</sup> <http://www.scottishhumanrights.com/careaboutrights/evaluation>

<sup>4</sup> <http://www.scottishhumanrights.com/careaboutrights/evaluation>

<sup>5</sup> EHRC (2012) Hidden in plain sight. Inquiry into disability-related harassment. Manchester: Equality and Human Rights Commission.

Applying the new offence to informal care arrangements could therefore offer increased protection of the safety and human rights of people receiving informal care.

However, if the offence is to cover informal arrangements, a proportionate approach to legislating would be required to ensure that people are not discouraged from undertaking unpaid caring responsibilities due to undue scrutiny and fear of litigation. The ALLIANCE believes that the Scottish Government should hold discussions with people who receive informal care, those who provide it and relevant organisations in order to explore this issue in detail and come to a conclusion that has been deeply informed by lived experience. The ALLIANCE would welcome the opportunity to facilitate such a discussion in partnership with the Scottish Government to support this aim.

**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, the offence should span social care services for children, on the grounds that certain groups of victims of the acts of ill-treatment or wilful neglect should not be excluded from the safeguards provided by the proposed new offence on the basis of their age.

**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?**

Applying the offence to cover this group would rightly guarantee that people who use support and services provided by the third sector have the same legal protection and rights of redress as those using statutory or private sector support and services. The third sector provides a significant proportion of health and social care, including over a third of registered social care services.

**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, this is a sensible approach given that different people may suffer different levels of harm as a consequence of the same act of ill-treatment or wilful neglect against them. Additionally, if it is the severity of the outcomes which is sanctioned against,

then this could be interpreted as implying that acts of wilful neglect or ill-treatment which result in no, or minimal harm is perceived as less serious, or acceptable.

Focussing on the conduct of the provider would therefore be a way of making sure that there is consistency in the prosecution of similar acts ill-treatment or wilful neglect, irrespective of what harm the victims suffer as a result.

It will be important that the proposed new offence links effectively with other remedies and means of redress to ensure that instances of ill-treatment or wilful neglect which may constitute other criminal offences (such as assault or manslaughter) are dealt with appropriately.

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

Yes. Whilst acts of ill-treatment and wilful neglect are most commonly viewed as carried out by individuals, employment structures, management and systems can be of critical importance and have the potential to leave individuals at risk of criminal liability when they are part of a wider poor organisational culture.

People who use support and services should be protected from ill-treatment and wilful neglect, irrespective of whether the 'perpetrator' is an individual or organisation, and the possibility of an organisation being held responsible for the offence should therefore be available as a course of action under the proposed legislation. This should help to tackle ill-treatment and wilful neglect that are the result of systemic problems, thus helping to safeguard people who may not have experienced this behaviour directly but may be at risk.

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

The offence should apply in circumstances where an organisation has attempted to cover up ill-treatment or wilful neglect and/or where it has failed to take reasonable action to prevent or stop ill-treatment or wilful neglect of people accessing their services. Organisations should be encouraged to develop and implement proactive, human rights based policies for preventing ill-treatment or wilful neglect and creating a culture in which it is clear that such behaviour will not be tolerated, along with mechanisms for staff, people receiving support and families/carers to whistle blow where such behaviour occurs.

**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?**

No comment

**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.**

In addition to the proposed penalty options of fines, and/or the issue of publicity orders and remedial orders, in the case of charities it may be appropriate to consider their removal from the charities register for a defined time period.

**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?**

The proposed offence should have positive equality impacts for people who share the above protected characteristics, by ensuring consistency in the options available in the event of someone being subjected to ill-treatment or wilful neglect.

Within the wide range of people which the proposed offence may apply to however, there will be individuals (e.g. people with learning disabilities or communication support needs) who may require additional support or advocacy in order to raise the alarm and seek redress in cases in which they have been subject to ill-treatment or wilful neglect. It would therefore be essential that that people who use support and services, unpaid carers and family members are made aware of the new offence and associated reporting mechanisms to ensure that they are enabled to access the safeguards it would provide on an equal basis.

## For More Information

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## About the ALLIANCE

The ALLIANCE has three core aims; we seek to:

- Ensure people are at the centre, that their voices, expertise and rights drive policy and sit at the heart of design, delivery and improvement of support and services.
- Support transformational change, towards approaches that work with individual and community assets, helping people to stay well, supporting human rights, self management, co-production and independent living.
- Champion and support the third sector as a vital strategic and delivery partner and foster better cross-sector understanding and partnership.