

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

The offence is unnecessary. Healthcare practitioners have sufficient regulatory framework to deal with the circumstances it is suggested the proposed offences will cover.

Such conduct is already appropriately dealt with by regulators. If a practitioner is found to have committed serious misconduct then they are likely to be erased from the register. Therefore in all likelihood ending their career. This is sufficient a safeguard.

The fear of criminal investigation likely to make practitioners more guarded whilst engaging in regulatory proceedings. There will be occasions when the practitioner is conflicted between the duty to cooperate fully and the potential risk of exposing themselves to criminal proceedings. In some circumstances practitioners will be reluctant to accept fault in regulatory proceedings for fear that criminal proceedings may result. This will significantly damage the effectiveness of regulatory proceedings.

The new offence also runs in contradiction to the aims of concurrently open Scottish Government consultation on the Duty of Candour. It is highly likely that some 'disclosable events' as defined under the proposed duty of candour in Scotland could be fall within the proposed offence (albeit the mens rea would be required before prosecution can be pursued), leaving the practitioner in conflict. The fear of criminal investigation in some circumstances could stop the practitioner informing the relevant person about the incident thus weakening the application of the duty of candour.

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

Yes No

This would be difficult to monitor and unfair to criminalise informal arrangements as carers do not have the training or skills of those contracted to care for patients.

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

Not area of expertise

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

Yes No

Will stop people volunteering for charities.

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

The offence should not be imposed.

Neglect and ill treatment will still have to be defined and in doing so a threshold for harm will have to be reached for the conduct to be serious enough to amount to an offence. Therefore the level of harm will have to be considered. Harm must occur before a criminal offence can occur. In addition without a threshold the decision as to which circumstances should be prosecuted will be left to the discretion of the Police and the Procurator Fiscal, resulting in inconsistencies and a lack of certainty for medical practitioners.

It is of interest that the Scottish Government's Consultation on the duty of candour suggests levels of harm can be defined and events should be disclosed to relevant persons on the basis of the level of harm the individual suffers. However this consultation suggests that if a threshold of harm was set out in legislation then this could give rise to a situation where two people were subjected to the same ill-treatment or neglect by the same practitioner but because one was more seriously harmed than the other, a prosecution could only be brought in respect of the more seriously harmed individual. Furthermore, it is suggested that setting a harm threshold may give rise to uncertainty about when the offence would apply. Surely a consistent approach must be adopted in relation to both this offence and the duty of candour, particularly as they are so closely related. We would suggest that having no threshold will mean even more uncertainty than setting one.

No definition for 'ill treatment or 'neglect' have been suggested, this clearly needs rectified. Without clear definitions the practical application of the new offence will be left to prosecutorial discretion potentially leading to more medical professionals being subject to criminal investigation, for human error rather than for the conduct envisaged by the Government. Such approach would result in the Courts defining the scope of the offence in retrospect and on an ad hoc basis. The current consultation does not provide sufficient detail and safeguards to ensure the offence is appropriately applied.

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

Yes No X

Should not apply to anyone

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

Yes No X

Comments

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 X

Comments

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

Comments

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?

Comments