

**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

We agree that the new offence should cover all formal health and adult social care settings in both the private and public sectors. It should also apply to the private and third sectors as there is an increasing reliance on this sector for the provision of social care.

It should apply to health and social care services as integration will bring new joint arrangements. It has the potential to drive up standards of care in all settings.

The new offence will provide protection and redress to people who do not meet criteria for the Mental Health Care and Treatment Scotland Act 2003 or Adults with Incapacity Scotland Act 2000 where neglect is an issue.

It should apply to care at home services especially as people are now supported outwith institutional care for as long as possible and "hospital at home" is preferred for people with long term conditions.

It would provide the option of pursuing prosecution of care home owners or agency managers where neglect arises out of failures in management/leadership and a culture of poor practice.

In terms of the list of Health and Social Care Professionals in Annex A, we feel that all people carrying out a caring role should be covered. If an attempt to limit "professionals" to a specifically designated group is made, then it is possible that the majority of the workforce and especially care home and company owners may be excluded.

Some clarification would be required – namely, clarification of the terms "formal" and "setting" being used in this context, especially in relation to Self Directed Support where care can be commissioned, contracted and funded through public funding but managed by an individual within their own home.

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

Yes  No

There are already procedures to address informal carer issues through Adult Support and Protection and through care management.

However, if informal carers were to be excluded from this legislation then some adults would have less access to redress and protection than others who either purchase their own care or receive care in a care home or hospital or are cared for by formal service arrangements at home.

It would be relevant to include carers employed under SDS as seems to be the implication in the consultation document. They have a contract of employment and

therefore are legally obliged under their contract to provide a level of care and support - if this is not forthcoming then it may not be adequate to address through employment law. If carers employed through SDS are not included this would lead to lower levels of protection/redress for those arranging their own care.

There would need to be clarity around the definition of "informal", giving clear guidance on support purchased through benefits e.g. Attendance Allowance, Carer's Allowance etc. and whether these are classed as formal or informal.

In rural areas / in exceptional circumstances Personal Assistants under SDS may actually be family members - blurring the boundaries between 'formal' and 'informal' care.

**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

The new offence should cover social care services for children across all sectors.

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

Yes  No

Yes, in circumstances where there is a contract in place to provide care and support.

There needs to be absolute clarity around the wording – "**on behalf** of a voluntary organisation".

**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 be based upon conduct and not outcomes as this is the course of action most likely to offer protection and act as a deterrent.

It is very difficult to prove that the neglect directly caused the harm and therefore the offence should focus on the neglectful actions or omissions.

Although there may be times when it is difficult to evidence wilful neglect when there is no actual harm, it is important to concentrate on the act of wilful neglect as opposed to assuming that this can only be addressed following a harmful act. This could include individual actions as well as actions by the organisation through lack of training, proper processes, supervision, inadequate response to complaints etc.

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

Yes  No

Often where concerns are raised about the conduct of an individual, this is symptomatic of failings within the wider organisation. It is important therefore not to assume that the neglect is solely due to the actions of an individual. In these cases a culture of poor care exists and problems raised with managers are not addressed. There may be poor training, low numbers of staff, poor procedures and/or a tolerance of poor care by qualified staff. Staff themselves may not receive support from their organisation. This is clearly the responsibility of the senior managers or owners of the care home or care at home service to address. Where harm is systemic there should be an avoidance of blame of individuals.

"Wilful neglect" should be clearly defined however otherwise "wilfulness" may be hard to prove. The definition could be linked to (but not defined by) the national care standards.

Clear links to the Care Inspection process would need to be developed with information sharing between the Inspection process and Contract Monitoring processes in order to obtain a full picture of incidents and concerns relating to all aspects of failed duty of care.

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

In the following circumstances:

- Where a pattern of inadequate nutrition, fluids, heat, privacy, access to social activity, cleanliness, attention to personal hygiene is present.
- Where service users' calls for help or evidence of distress are not responded to or are responded to in an aggressive or punitive manner.
- Where restraint or control or manual handling practices are used inappropriately or unlawfully.
- Where inadequate attention is given to medical needs.
- Where any failure in the service including inadequate training, low staffing levels or poor care practices which have the potential to cause harm or have caused harm which are brought to the attention of adult support and protection services, Police Scotland and/or the Care Inspectorate and are not addressed within a reasonable period.
- Where breaches in basic care standards have the potential to cause or have caused significant harm.
- Where there is evidence that the organisation has breached its duty of care through lack of appropriate systems to evaluate and monitor care being provided.
- Where complaints have been received and no appropriate action has been instigated to prevent recurrence of the issues raised.
- Where there is evidence of an inadequate approach to safe care at all levels within the organisation.
- Where governance arrangements within the organisation do not address issues of neglect immediately and comprehensively, looking at a whole system response to such issues.

This could apply to any level within the organisation including senior managers and owners who have a significant role in decision making about how the care is managed and organised.

Suggest a need to look at similar frameworks in place in respect of other offences such as Corporate Manslaughter.

**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

Yes, but in addition individuals should be barred from owning, managing, working in or having an association with care organisations in the future.

**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

A "publicity order" making the concerns public (as is within legislation in England).

In respect to organisations, courts should be given greater discretion according to the circumstances of each case. For example a large organisation successfully prosecuted and having been found to have made significant profits through the provision of services should be subject to far greater financial penalties than the £10000 available under section 315 of the Mental Health Act.

However any fines imposed should be balanced with the need for the organisation to continue to provide a quality service to those in receipt of their care.

**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 legislation will have significant positive impacts for people with the protected characteristics of disability or age.

There is a concern that some ethnic communities may prefer to care for relatives at home by family members and may therefore not have access to the same protection and redress should informal carers not be included in the proposed legislation.

In general, the proposed legislation could be seen as a positive development to

provide a level of protection to vulnerable people not currently covered by other mental health legislation.