

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 x No

If there is to be these new offences then it only makes sense that they apply to all situations and places where care is provided. Applying them to only restricted times or places of care would be unjust and most likely of dubious legality.

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

Yes No x

This is a very difficult to define area.
The whole paper seems to have been written in haste and with not enough thoughtfulness.
This questions seems to pertain to point 14 of the declaration, but like other part of the text as well, point 14 is very poorly written. There are grammatical errors (e.g. “different to” should read “different from”), omissions (e.g. “carried by virtue” most likely should read “carried out by virtue”) and misprints (e.g. “if ...a cared-for person in neglected...” most likely should read “if...a card-for person is neglected...”) which make the whole paragraph rather unreadable and incomprehensible.

We are not sure that there is a need for these new offences.
In point 14 is stated that “if... a cared-for person (is) neglected or mistreated (...) then the existing offences in statue would apply.” Does this mean there are already offences covering “ill-treatment” and “neglect”. If so, the need for these new offences is not really made. The only reason seems to be to extend a mental health legislation. However, there is no explanation on whether and if so how the changes in mental health care have had any beneficial effects to make an extension necessary.

“Wilful Ill-treatment” is an activity and as such there are already a lot of offences covering the mistreatment of other people (e.g. malpractice, assault, abuse etc).
“Wilful neglect” is a passive non-action, an omission. From the text it is unclear on how the neglect is defined. Who makes the definition on what a “neglect” is? Is it enough for the cared-for or the relatives or friends to perceive “a neglect”? Is there a set of actions or values that need to be omitted to constitute “ neglect”?
It could be difficult to prove that it was “wilful” or “deliberate” as in a lot of care settings it might be result more of underfunding, understaffing or suboptimal training and skills rather than with bad intentions.

Is the definition of a “darer” an unpaid carer? Or do we really have to be very daring to care for anyone once these new offences are in place? Or is “darer” in this context a special Scottish phrase?

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

Obviously if there were to be new offences then they should apply to any person receiving care with no age limits or mental capacity limits.

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

Yes No

There is little or no difference between a person employed in a caring role by a voluntary or a statutory organisation. Equally, any law about caring should apply to any organisation which administers care.

Any activity of caring that is under a contract should be covered to assure fairness. "Paid volunteer" seems to be a contradiction in terms.

This raises questions of obligations while volunteering and clearly an unpaid volunteer is in a different category from a paid professional and has different obligations.

Though unpaid volunteers should be judged by different standards and held to different levels of account from paid, trained professionals egregious neglect by an unpaid carer cannot go entirely ignored. The law already applies sanction to a parent who allows a baby to starve to death. I am not qualified legally so am unaware of current statutes in this regard. Clearly the level of culpability for any neglect varies with the level of responsibility or obligation one has to the person to whom one is offering any care and with their abilities both to recognise neglect and seek alternative assistance if needed. The parent who neglects their baby is far more culpable than the school child who calls in on an elderly person on the way home from school to pass a few friendly words and do the odd minor job. Drawing up statute to cover all such situations is clearly impossible. Subtle drafting of such statutes would be needed. I trust others than those who wrote this document would be employed in such a delicate and sensitive task. Ultimately, in serious cases, a significant degree of judicial discretion needs to be allowed.

It will be particularly important to include voluntary organisations here who might not equip or support their volunteers well enough to fulfil their caring role.

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

Neglect and ill-treatment are by definition modes or conduct rather than outcomes.

However, “wilful neglect” will be very difficult to define unless the outcome is taken into consideration.

Is it enough for a care-receiver to feel neglected? Or for family and friends to perceive a neglect? Or does there have to be a measurable or describable result from the omission in order to prove “a neglect”?

There may also have to be definitions on what might be allowed to neglect, especially in constrained resource situations.

“act of wilful neglecting” is a problematic term as it usually involves a “not acting”. Omission can have catastrophic results when someone is choking or bleeding, if feeding is neglected over a long period. But it could be acceptable if it involves not providing a luxury. Or it could even be deliberate and desirable if the not feeding allows someone to die with dignity.

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

Yes No

The offence should apply to organisations where it can be demonstrated that the chain of command/management failed to exercise adequate supervision of their subordinates/employees; where they neglected to ensure an adequate standard of care was being provided, this should include failure to provide adequate resources to enable an adequate standard of care unless it can be demonstrated that they made serious efforts to provide such resources but were prevented from so doing by circumstances beyond their control and that such circumstances were brought to the attention of those who may be in a position to alter such provision. Ultimately this should mean that government ministers could be held to account for failure to provide adequate resource. A valid defence would, in my view, be that they had stood for election on a platform which explicitly delineated the limits of provision they were prepared to fund and were elected on such a platform. Under such circumstances responsibility lies with the electorate who voted for them.

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

Yes No

This cannot be answered with “yes” or “no”!

See comments to the last question.

The whole chain of command in the organisation will need to be included if there are any issues of underfunding or understaffing or under-resourcing.

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 x No

It would seem illogical for the penalties applicable within the mental health act to differ from those applied in the case of care out with the mental health arena.

Again any such sanction should ultimately be applicable to the relevant Secretary of State as detailed in my response to the Applicability section.

I'm afraid I don't understand the difference between summary conviction and conviction on indictment and clarification of such legal terminology would be useful and appreciated.

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?

We find this matter problematic. Clearly sensitivity and kindness need to be the guiding principles of all care giving but there are clearly limits beyond which it is not reasonable to expect care givers to go in caring for any one individual. There is the potential for unreasonable and possible vexatious demands being made and it is entirely wrong for carers potentially to be subjected to legal sanction in such circumstances. Am I potentially to be subject to sanction because I wear leather shoes in the presence of and thereby offend an evangelical, fundamentalist vegan, should such a category of individual exist? What are my obligations to cater for the needs of a Satanist who wishes to perform 'religious' rituals involving animal sacrifice on hospital property while an in-patient? These are clearly ridiculous examples but serve to illustrate my point that some form of limit to the obligation for carers to cater to individual 'needs' or wishes must exist. Again drafting legislation in this regard is extremely difficult and I have no easy answer but neither, I strongly suspect, do those who wrote this document.

It will also be extremely difficult for organisations to always comply with very specialised demands. This will be particularly pertinent for small, remote and rural situations, like here in Shetland. We can get visitors from all over the world, visiting or getting stranded on these islands, but may not be able to provide for all probabilities (e.g. people with a history of maltreatment by Nazis not wanting a German doctor, male Muslim not wanting to be touched by a female carer, female patients requesting female doctors etc.) which might not be available out-of-hours, in remote locations and in bad weather.

