

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 new offence should cover formal care settings across the age groups in both the private and public sector for the reasons as follows:

It would 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 could help to drive up standards of care in all settings.

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.

It would enable a more consistent approach as not all those undertaking health and/ or social care functions are currently subject to regulation by a registering body.

It should apply to health and social care services as integration brings new joint arrangements.

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

It should apply to third sector as there is an increasing reliance on this sector to provide care.

The list of Health and Social Care Professionals in Annex A may have unintended consequences. We believe 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 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.

A more general comment: this legislation should cross reference the Adult Support and Protection Scotland Act 2007 as any adult in receipt of care services and is neglected will be an adult at risk as defined by the above legislation. The proposed legislation does not preclude the triggering of other protective processes, including adult support and protection.

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

Yes No

It would be too difficult to contextualise informal care in this way due to the variance in these arrangements often without any formal contracts that define role, responsibility and outcomes. It could be counter-productive to include informal care by family members as may prevent carers or people cared for asking for help when carers are not able to meet the needs of the person cared for. There is a risk of criminalising carers under stress.

Where neglect occurs in carer arrangements there is no breach of a legal obligation to provide care which differentiates informal carers from formal carers. There are already procedures to address informal carer issues through Adult Support and Protection and through care management and carers' assessments. Existing legislation is sufficient and would lead to the criminal investigation if relevant.

There are occasions when an adult at risk is deliberately subjected to harm by someone who would otherwise be regarded as in a position of trust. This may well be a family member.

It would be relevant to include carers directly employed by the service user or their proxy under SDS direct payment or through an agency. They have a contract of employment and therefore are legally obliged under their contract to provide a level of care and support and 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.

Again 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

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 and health care services for children including residential and community settings.

The following should be included in the proposed legislation: Residential care; residential schools; young person's unit (health facilities); nurseries

and health provision for children such as mental health services etc.

The proposed legislation provides the opportunity of prosecution of the organisations and/or their managers where neglect is endemic /systemic

The following should be excluded: kinship care and foster carers as there is sufficient legal provision in place to protect children within such circumstance.

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 with the voluntary agency to provide care and support. The agency has a responsibility to make appropriate checks, supervise work carried out, provide training and appropriate resources.

The offence should not apply to the individual unpaid volunteer.

Clarity is needed around a 'paid volunteer' as the definition of a volunteer is classed as unpaid.

There needs to be 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

Social Work Scotland is of the view that 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 an act where someone suffered harm due to an event. This could include individual actions as well as actions by the organisation through lack of training, proper processes, supervision, inadequate response to complaints etc.

We would emphasise that poor standards do not necessarily equate to 'wilful neglect' as factors such as waiting lists (related to inadequate resources) may play an important part. The potential for misconceived private prosecutions is a concern.

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

Yes No

Social Work Scotland is of the view that the offence should apply to organisations as well as to individuals and may make successful prosecution in this area more possible. There are some difficulties with the wording of Section 315 of the Mental Health Care and Treatment Act and Section 83 of the Adults with Incapacity Act when addressing harm in a care setting. The use of mental health legislation appears to require there being an identifiable individual who is directly responsible for the harm. In the experience of Adult Support and Protection services this is not always possible.

Often where concerns are raised about the conduct of an individual, this is symptomatic of failings within the wider organisation. A person may be subject to ill treatment or wilful neglect as a result of the way that the organisation manages or organises its' activities – 'institutional abuse'- amounting to a breach of their duty of care. For example, if the organisation is not allocating sufficient time to staff to complete essential elements of the care plan; if practices result in high staff turnover and lack of respect for personal privacy of service users etc.

In these cases a culture of poor care exists and problems raised with managers are not addressed. Staff themselves may not receive support from their organisation. This is clearly the responsibility of the senior managers or owners of care service to address. Where harm is systemic there should be an avoidance of blame of individuals. It is important not to assume that the neglect is solely due to the actions of an individual.

It is important to achieve a balance between assuring accountability and

achieving openness and transparency which includes staff and organisational learning- including learning from mistakes and concerns expressed.

"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.

The specific role and function of external regulation and inspection agencies –SSSC and the Care Inspectorate needs to be understood and considered in order that the legislation results in more effective action in the longer, as well as shorter term. This need for clarity also applies to understanding what this new legislation will add to existing legislation on ASAP, Mental Health & AWIA. It is important that we are not distracted from lessons learned about openness and/or cause confusion over the appropriate application of different legislative options.

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

Yes No

- A pattern of inadequate nutrition, fluids, heat, privacy, access to social activity, cleanliness, attention to personal hygiene is present.
- Service users' calls for help or evidence of distress are routinely not responded to or are responded to in an aggressive or punitive manner.
- Evidence of poor infection control practices and evidence of poor nursing practice
- A failure to provide access to appropriate health, social care or educational/ employment services.
- Misuse of service users drugs or drug errors. Withholding/obstructing medical treatment.
- A tolerance of a culture of disrespect, name calling, poking fun at service users
- Restraint or control or manual handling practices are used inappropriately or unlawfully.
- Inadequate attention given to medical needs, unreasonable delay in seeking medical attention.
- 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.
- Breaches in basic care standards that have the potential to cause or have caused significant harm.
- Evidence that the organisation has breached its duty of care through lack of adequate and appropriate policies, procedures and systems

to promote acceptable levels of care and evaluate and monitor the care being provided.

- Where complaints have been received and no appropriate action has been instigated to prevent recurrence of the issues raised.
- Evidence of an inadequate approach to safe care at all levels within the organisation.
- 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 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

Social Work Scotland is of the view that this is a matter for others to decide on – however, we would suggest that consideration be given to barring individuals from owning, managing, working in or having a business 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

Social Work Scotland does not wish to express a view on penalty options.

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?

Social Work Scotland is of the view that, subject to the satisfactory clarification of issues raised here, that the proposed legislation will have significant positive impacts for people who share the protected characteristics of disability/ age. It will support the findings of recent inquiries. It is important that the application of the legislation is understood – i.e. it will be applied to those who are in a position of/ have an understanding of trust- creating an imbalance of power that can be exploited.

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.

Organisations should be held accountable for their implementation of the equalities legislation to encompass the protected characteristics and for harm caused by failing to deliver services appropriately.