

**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 intention expressed here is to create an offence similar to that which exists for mental health patients under section 315 of the Mental Health (Scotland) Act 2003, and for adults with incapacity under section 83 of the Adults With Incapacity (Scotland) Act 2000. However, these provisions exist to protect vulnerable groups without capacity or with limited capacity in circumstances where they are accordingly unlikely to be able to use or invoke the existing complaint, regulatory and disciplinary systems to address sub-standard care, and yet those providing care are likely to have rights and obligations to take decisions for them.

It is not clear why there should immediately be considered a need to provide for a similar sanction for adults with capacity, who are making decisions about their own treatment and are and are likely to be able to engage with existing complaint, disciplinary and regulatory systems.

The paper accepts that there are existing remedies and means of redress, even in circumstances where there is no deliberate misconduct; the paper does not,

however, detail the systems which exist or address the manner in which these are lacking to provide the protection required for adults with capacity. More importantly, although the paper's express and very valid aim is to provide such protection, the paper moves immediately to an assessment that the best means of doing so is by creation of a criminal sanction as a deterrent. It is respectfully suggested that the two examples relied upon with the paper as demonstrating a need for such a sanction do not provide evidence that this is in fact the best or the correct approach.

Considering firstly the events at Mid Staffordshire NHS Foundation Trust, it is respectfully suggested that there is much to learn from the Report of the Mid Staffordshire NHS Foundation Trust Inquiry. What is most clear from that report is the recognition of the failure of regulatory and supervisory systems to identify the sub-standard care pattern arising and to check this, and the emphasis upon the need for health care professionals to develop a shared culture of common values and standards and to be mentored, led and supported in developing and maintaining such standards, creating an institution where sub-standard care is neither accepted nor ignored. The recommendations reflect a need to strengthen regulatory frameworks, to empower the Care Quality Commission to fulfil a role similar to the Health and Safety Executive in industry, and to ensure transparency and full disclosure in dealings of care establishments with regulators. The first step was emphatically not to create a sanction and to hope that the deterrent effect would be sufficient.

Further, logically, if there are existing complaint, regulatory and disciplinary frameworks and possible sanctions arising from these, it is not at all clear why adding a further and additional sanction, albeit a criminal one, would have the desired effect.

Nowhere is this clearer than in the example given within the paper of Winterbourne View. It must be borne in mind that Winterbourne View cared for adults with learning difficulties and autism, who would therefore have been subject in Scotland to the existing specific provisions of the 2000 Act, which already gives rise to a criminal sanction for wilful neglect or ill treatment. However, it is worth highlighting that the staff involved in abuse of service users at Winterbourne View were in fact prosecuted and convicted in significant numbers after that abuse was brought to light by the BBC. The deterrent of the criminal sanction was not enough to protect service users, and much criticism was levied at the failure of regulatory and supervisory systems to identify and curtail unacceptable conduct, let alone to hold those responsible to account.

It is respectfully suggested that these examples serve to demonstrate, not that an additional criminal sanction applied in cases involving adults with capacity will assist in the protection of those individuals, but that a more thorough examination of the existing leadership, training and mentoring systems, and also of regulatory, disciplinary and complaint systems is warranted to identify how such situations can arise nonetheless and how these systems can be developed to stop that occurring again; prevention rather than sanction after the event.

It is respectfully suggested that the current paper proceeds immediately to the

assumption that, despite remedies and means of redress already existing but failing to provide protection in all cases, the best means of affording protection is to create a further sanction. It is respectfully suggested that there is at present no clear explanation of why that should be the start point, nor any detailed examination or analysis of the status quo to demonstrate why this is a gap which requires to be addressed in this manner. Further, taking on board the Mid Staffordshire NHS Foundation Trust Inquiry and the Winterbourn View Serious Case Review, there is a significant risk that we are not learning the lessons of these past experiences or taking on board the carefully considered conclusions and recommendations arising.

That said, in the event that an offence is considered justified and necessary, there appears to be no cogent reason to limit this to public settings, or to private settings, only.

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

Yes  No

In the event that there is considered to be a need for such an offence, extending this to informal arrangements would potentially bring individuals within the ambit of the legislation without their being aware of this. If, for example, one family member cares for another during a sudden and short lived physical illness, this could be covered by an offence extending to informal arrangements.

Further, if the offence is intended to address situations where there has been a breach of a fundamental standard which would be understood by members of caring professions as a core value intended to be known to, subscribed to, upheld and promoted by all, it is not reasonable to assume that those who informally care for family members would know of, understand and be able to adhere to those standards.

The offence addresses more than wilful neglect, and also covers ill treatment, which need not be wilful. However, while the Consultation paper expressly identifies that the offence would not cover incidents of "genuine mistake or accident", there is scope for action being taken by individuals which is well intentioned, but misguided or wrong, simply by virtue of their not being health professionals, being without training or qualification, and lacking the guidance and regulation of, for example, the Care Quality Commission in devising and maintaining their approach to care.

There seems a significant likelihood of causing greater fear and secrecy amongst those involved in such informal care arrangements by making them subject to this offence than would be created even amongst professionals. This is a cause of significant concern in a situation where the regulatory and disciplinary frameworks which give protection and accountability in professional settings do not apply. In the absence of any regulatory body with the entitlement to investigate care

provision and to require changes to be made to bring care up to a standard reflecting shared values, this gives reason for concern that the creation of such an offence may make it yet more difficult to gather information or evidence about any suspected issue of sub-standard care in such an informal setting.

There is also a need to recognise that those seeking to care for family members on a voluntary and informal basis face a challenging and stressful task without the benefit of professional training, but also without the supervision, management, leadership and guidance available to professional carers. Considering the Mid-Staffordshire Inquiry recommendations, to impose a criminal sanction would be to give a basis for punishment without any of the benefit of the positive frameworks discussed for support and leadership of those who could potentially be held to account under the sanction.

**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

In the event that an offence is necessary, arguably the position of children is more akin to the position of those other vulnerable groups already protected by similar statutory offences, in that children are less able to access the complaint, regulatory and disciplinary systems which an adult with capacity is more likely to be able to invoke.

Further, children who have been cared for in a professional social care setting long term are less likely to have a frame of reference or a clear picture of an appropriate standard of care to compare and contrast with the standard of care which they are receiving, and accordingly may be less aware of situations which would entitle them to access those systems even if that were otherwise possible.

However, it must also be recognised that child protection is a closely considered and closely regulated field, and that there is already significant provision in the law of Scotland for mechanisms to hold those responsible for cruelty to or neglect of children to account, via regulatory and disciplinary systems but also via the criminal Courts. The Children and Young Persons (Scotland) Act 1937 and Children (Scotland) Act 1995 create a framework offering a wide variety of protections for children, but it particularly important to note the provisions of s12 of the 1937 Act as amended, which states:

“If any person who has attained the age of sixteen years and who has parental responsibilities in relation to a child or young person under that age or has care of a child or such a young person, wilfully assaults, ill-treats, neglects, abandons, or exposes him, or causes or procures him to be assaulted, ill-treated, neglected, abandoned, or exposed, in a manner likely to cause him unnecessary suffering or injury to health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement), that person shall be guilty of an offence.”

Noting that the question of whether the offence currently under consideration

should concentrate on the act of wilful neglect or ill treatment or should concentrate on the likely consequences, it is accepted that the offence currently considered could have a still wider scope than this provision. However, the 1937 Act provisions reflect the special position of children as a vulnerable group in need of additional protection, and inclusion of children in the same offence would ensure that they receive any additional protection the provision affords to adults with capacity.

There is a question over the extent to which children's services should be covered, and for example it is questionable whether a private fostering arrangement should be any more logically covered by this offence than the informal arrangement or care of one adult with capacity within a family by another, particularly as the 1937 Act would still apply there. Indeed there is a question over application to foster care at all, in circumstances where the aim of foster care is to provide a family setting, where it has recently been settled that foster carers approved by private agencies are not to be considered employees of that agency, and there the 1937 Act would apply to foster carers just as it would to a parent's care for his or her own child. The nature of foster care in a domestic setting by parents who bring their own skills and values forward at the time of approval being sought and gained is not a neat fit with an offence more directed at professional care in an institutional or semi-institutional setting. While it is accepted that the offence is said to cover adults being cared for in the home, this is a quite distinct situation from a child becoming part of a foster family, and being provided with a home in the domestic setting of the foster family. For reasons similar to those behind the decision that foster agencies should not be vicariously liable for the carers they approve in *NA v Nottinghamshire County Council* [2014] EWHC 4005, it is suggested that this form of carer should be treated in the same way as a parent or family member caring for a child in his or her own home, rather than in the same way as a health professional or professional care giver in a more institutional setting and that accordingly the 1937 Act should be relied upon in preference to the new offence.

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

Yes  No

If a person is providing care, and being paid for this, in precisely the same way as a non-voluntary organisation, and the only distinction is the voluntary status of the organisation, it is far from clear why the individual in receipt of the care should be offered less protection, or the individual or organisation should consider that they can elide responsibility to meet the same high standards, or should expect not to be held accountable to the same extent.

It is suggested that voluntary organisations providing care are not distinct from non-voluntary organisations in the same way that those providing informal care for a family member in a non-professional fashion and setting are distinct from professional or commercial organisations providing care.

There may be concern that those who seek out voluntary roles in providing care

may be put off by the possibility of being subject to such criminal provisions. However, considering the motivation of those who undertake to provide such voluntary care, it seems likely that this is either a path into a future career in which such a criminal sanction would be a factor, or is work undertaken for altruistic reasons, and in neither case is the creation of a possible criminal sanction likely to prevent volunteers from coming forward. For those seeking paid roles in voluntary organisations, as discussed, their position would be no different to those carrying out similar work in non-voluntary bodies, which appears equitable.

**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

Wilful neglect is such a broad term that it will encompass acts which are properly, reasonably and responsibly undertaken. Thus a responsible decision not to allocate resources, to provide certain treatment or to prioritise certain patients would be wilful and would amount to neglect. If there is any justification for such an offence at all, it should only be where there has been serious harm or death in consequence. There is otherwise the considerable risk of creating increased fear and a culture of hiding errors. Regulatory and disciplinary procedures are already well-designed to deal with more minor issues.

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

Yes  No

We agree that if there is to be an offence, it should cover both individuals and organisations.

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

Yes  No

We consider that there is no justification for the proposed offence at all. However, if the offence is created it should only apply to organisations where a duty of care was owed to an individual; there was a gross breach of that duty by the organisation; there was no reasonable excuse for the breach; and it resulted in serious harm or death. Any offence drawn any more widely creates serious risk of clinical and operational decisions not being taken in the best interests of all service users, but rather with a view to avoiding prosecution.

**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

We do not agree that there should be summary conviction. Given the likelihood that a conviction would be career-ending for any professional, the offence should be triable on indictment only.

**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

**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?**

No specific issues or opportunities.