

**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

If introduced, then – yes. While we agree that it is important that vulnerable individuals should be protected and that any new offence should cover all formal health and adult social care settings it is not clear what the proposed legislation will add to that which is already in place. There is a lack of clarity about existing legislation and sanctions and there is a view that there is already sufficient legislation in place to deal with issues concerning wilful neglect. Some comments below -

1. There is almost no mention of what is meant by wilful neglect. We would welcome a clearer definition of the term ‘wilful neglect’. For example, how does this compare with clinical negligence or criminal neglect? In particular we would like to see how this term differs from similar charges which may be applied e.g. professional negligence
2. Similarly we would like greater explanation as to how this fits with the Adults with Incapacity and Mental Health Act.
3. We would like clarification on how wilful neglect will be differentiated from genuine error. There are concerns that individual staff members will be more likely to be exposed to the criminal justice system as a consequence of this legislation. This may impact on professional indemnity arrangements and deter individuals from entry to some healthcare professions.
4. We are concerned that such legislation may be detrimental to the NHS as it may encourage a blame culture prone to litigious action. The intention of the legislation is to improve patient safety; however it may have the opposite effect. For example, a possible reluctance by medical staff to take part in the vastly improved and more open and transparent Significant Clinical Incident reviews, as this may be used as evidence of wilful neglect. It may encourage defensive care which may not be in the best interests of the patient.
5. Such legislation may make staff reluctant to speak out about care issues as there would be concerns that they or a colleague may face criminal charges rather than disciplinary action.
6. There are concerns that in their anxiety to deflect any potential charge of ‘wilful neglect’, health and social care workers may ‘over-treat patients’ to the detriment of the latter’s comfort and personal wishes.
7. It is difficult to see how the legislation’s approach is facilitative of a learning approach for system failures. It seems more like a punitive approach rather than learning from system failure approach. It confuses a series of issues of treatment, poor treatment, neglect and it is not clear how wilful neglect is defined.
8. We feel that if this legislation is designed to augment the action taken against individuals who are currently unregulated by a professional body, it might be better to introduce regulatory bodies for the individuals e.g. health care support workers.

In summary we have concerns that there is a lack of clarity in the document; existing legislation has not been fully explored to see if there are any gaps; a lack of clarity about where negligence, poor care and mistakes fit in and that there will be

few additional benefits to individuals in health and social care settings from this legislation. There may be a significant detrimental impact on patient safety, in particular, a move away from the development of a learning approach from system failures and further difficulties in the recruitment within some healthcare professions.

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

Yes  No

The offence should not cover informal arrangements where it might be assumed that an individual providing care may be ignorant of the consequences of their actions or inactions. However, a clear definition of the term 'wilful neglect' is required to better inform any response.

It is suggested that a National Carers Charter might further support the level of care offered informally.

**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

We do not understand why the consultation document does not include children within some settings of Local Authority care, unless it is because Child Protection legislation adequately covers these individuals?

In which case we return to our first point that we are not clear what this legislation adds to that in existence already.

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

Yes  No

It is only reasonable that legislation should cover these people. However, this may impact on the availability of individuals willing to offer voluntary services as they may wish to be indemnified against potential charges.

**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

Not unless there is a clearer definition of 'wilful neglect'.

We are concerned that health and social care workers may be criminalised as a result of an honest mistake or by working under pressure due to staff or time constraints.

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

Yes  No

We would welcome clarity as to how and when the offence would be applied to an organisation. How will it sit with Corporate Manslaughter?

Issues will arise when individual workers are indemnified by an organisation. The organisation will then be asked to act against itself when an individual charged with 'wilful neglect' raises the defence of organisational failure.

This may lead to the requirement that all individual health and social care workers will be required to carry their own professional indemnity, an additional cost to such workers and a potential disincentive for individuals to enter some health or social care professions.

It may also lead to a rise in litigation against organisations as it may be seen that they would be able to pay heavier fines, reducing funding available for services such as healthcare in the NHS

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

Yes  No

If it can be demonstrated that organisational culture or shortfalls have led to an individual's act of neglect or ill treatment. However, there is a concern that such legislation would prove to be too blunt a tool to identify exactly where in an organisation system failures have occurred. The threat of subsequent criminal prosecution may prove to be a disincentive to organisations engaging fully and meaningfully in a learning approach for system failures

**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

**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

Higher financial penalties may lead to an increased desire for litigation. If an NHS organisation bears severe financial penalties then services will be detrimentally impacted. A subsequently risk averse organisation may be impeded from moving forward, learning from system failures to improve quality. It may prove to be difficult to recruit appropriately qualified office bearers for Committees and Boards if such posts carry the threat of criminal charges.

**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 further protection than that which is already offered under current legislation