

4. Questions Appertaining to the Proposed New Law

- a. 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

UKHCA cannot identify any grounds for differentiating between elements of the health and social care sector over such an important consideration as the wilful neglect of vulnerable members of the community. The nature of the provider and the environment in which care is given are insufficient causes to justify a failure to apply the rules equitably and uniformly: our position is unequivocal in that there must be one rule for all.

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

Yes No

UKHCA cannot see any moral justification for excusing wilful neglect because it has been an act of commission or omission by an informal carer. Instances of child

neglect attract judicial sanction universally and we do not see any moral case or operational grounds for ignoring instances of wilful neglect because harm has been caused by an informal carer. Our position is that any neglect, wilful or otherwise, is a discriminatory and harmful act that cannot be offset in law because of sensitivities around, for example, familial association: our position is unequivocal in that there must be one rule for all but recognise that this is not the case in English law as it stands.

- c. 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

UKHCA cannot identify any category of abuse that should not attract the full rigour of the law. Furthermore, we cannot see any grounds for sustaining an argument that wilful neglect of children should be treated more favourably simply because that service is provided by the State, for example: Crown Immunity does not have any traction in the provision of modern, safe and sustainable care services, least of all for vulnerable children.

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

Yes No

UKHCA considers that our responses to the preceding questions equally apply to the voluntary provision of care: wilful neglect is morally unjustifiable in any context and should not be excused on the grounds that it is provided *ex gratia*. It is still care and the fact that it is provided voluntarily does not create a licence to wilfully neglect those who have placed their trust at a time of vulnerability

- e. 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

UKHCA considers that the scope of harm suffered as a consequence of wilful neglect is the determinant of the scale of punishment to be levied against the perpetrator and is therefore a matter for the judiciary. We therefore consider that the new law should focus on describing and proscribing acts that will give rise to actual or potential harm by wilful neglect or ill treatment, leaving the Courts to determine the severity of the sanction. UKHCA considers that the ethical conduct of the care-provider should be the focus of scrutiny rather than the intended, or unintended, outcome of that conduct: the response to the scale of actual harm inflicted or potential harm should be a matter for the Courts.

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

Yes No

UKHCA response to 4.d. above equally applies in this context: the *nature* or legal status of the organisation that gives rise to wilful neglect or ill treatment is a secondary concern. The principle has to be that potential or actual harm has arisen by either omission or commission. Whilst we have some concerns about the due process around prosecuting the 'legal personality' of an organisation we do consider that the involvement of an organisation should not be seen as hindering a decision to pursue those who have committed wilful neglect or ill treatment. An 'organisation' is the sum of those people who make up the organisation: various legislative measures and case law have established instruments to pursue individuals, regardless of organisational status. The Partnerships (Prosecution) (Scotland) Act 2013 provides the State with various remedies and the Aitkenhead case defined the separate legal identity of Trusts as not exempt from criminal liability simply by reason of a lack of separate legal personality. UKHCA considers that unincorporated associations must therefore be treated in the same way as other forms of legally responsible organisations and therefore Trustees should be prosecuted individually in their capacity as responsible persons within and guiding the activities of an organisation.

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

Yes No

UKHCA considers that acts of wilful neglect should extend across the spectrum of persons and agencies involved in the delivery of care services. Whilst we consider that specific acts should be subject to the full force of the law, as outlined in this response to your consultation, we think that the proposed law should also address situations of aggravated neglect and ill treatment.

In this context we see that the doctrine of joint liability should apply to all parties involved in the provision of care, including commissioners. We do not consider that commissioners of care can be absolved from their responsibilities or that the duty of care held by statutory authorities can be discharged in full by simply contracting service-provision to third parties. We consider that where there is a clear and reasonable foresight of harm arising from, for example, the commissioning of care with inadequate resources or poor contractual frameworks, commissioners should also be held to account: there should not be a privileged position that, in effect, allows a statutory authority to offset liability.

UKHCA consider that the criteria of *mens rea*, the 'directing mind' does not, and should not, only extend to the top of an organisation where considerations of wilful neglect and ill treatment are concerned. We consider that where actions have been taken that have led to wilful neglect, ill treatment or an aggravated breach of a duty of care corporately then the law should be framed in such a way that the corporate entity should be pursued. We are of the firm opinion that this must apply across the entire spectrum of organisations involved in the delivery of care.

- h. 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

UKHCA considers that the consequences of s315 and s83 are, for practical purposes, indistinguishable and are not an unreasonable sanction to apply upon conviction.

- i. 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

UKHCA considers that existing legislation offers the authorities sufficient options to pursue organisations for wilful neglect and ill treatment: the Corporate Manslaughter and Corporate Homicide Act 2007 and the Health & Safety at Work Act 1974 can be applied to all organisations including statutory authorities. We do not consider that additional legislation is likely to be of any benefit.

- j. 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?**

UKHCA view is that the management of any issues arising from the proposed changes in the law concerning persons with protected characteristics is a public health consideration and should form a key component within the commissioning of care services.

UKHCA is of the opinion that where social isolation, impaired cognitive and/or physical health coupled with identified risk factors are present there is an ideal opportunity for the development of culturally sensitive homecare services in such a way as to eliminate risks to those with protected characteristics by the careful framing of service contracts.

Signed for United Kingdom Homecare Association



Duncan White

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