

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 the proposal is to go ahead then it should cover all health and adult social care settings, there would be no rationale for making a distinction between settings or sectors. However, we have serious reservations about the proposal. Specifically, it has not been made clear why the existing offences in statute and the existing statute including Human Rights legislation is not sufficient to deal with the potential harm which this proposal seeks to deal with. If current legislation is sufficient to deal with situations of concern in which alleged neglect or ill-treatment cannot be attributed to deliberate misconduct, as set out in section 7 of the proposal document, it is not clear why they would not be sufficient to deal with situations which can be attributed to deliberate misconduct, where such misconduct has been historically dealt with under current legislation. Similarly, if the existing offences in statute would apply where a cared-for person is neglected or mistreated by the unpaid carer (as stated in section 14) then it is not clear to us why additional legislation is needed for paid carers. neglect

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 is our view that the offence, if created by new legislation, should equally apply to informal arrangements. If the act of ill-treatment or wilful neglect cannot be adequately dealt with in current legislation, then new legislation should apply to all circumstances in which these acts take place. The only rationale that we can see for only applying it to formal care arrangements, would be if it is intended to use the act to prosecute those with management responsibilities for the care arrangements which wouldn't exist for informal arrangements – see also later comments.

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

If the act is to come into existence we can see no rationale for excluding any health or care arrangements, so it would seem logical for it to cover all health and social care arrangements for all ages. However, our reservations about the need for the act apply equally to children where legislation already exists for dealing with neglect and abuse which we believe includes ill-treatment as referred to in the proposal.

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

Yes No

Again, if this offence is to come into effect, it should apply equally to all people who provide care or treatment whether in a paid or voluntary capacity. We assume that, for those working on behalf of a voluntary organisation, those responsible for management and deployment of resources (and those responsible for commissioning the services of the voluntary organisation where those services are commissioned eg current legislation on Health and Social Care Integration Commissioning) within the voluntary organisation would also be liable under the legislation.

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 /

Though the offence might concentrate on the act, it would seem proportionate to take into account the harm suffered as well as the act of wilful neglect or ill treatment. This would not necessarily mean that the same act causing less harm in one individual than another would not be prosecuted, so does not imply the need for a pre-determined threshold of harm, but rather that the law should deal proportionately with harm when the range of possible harm is so broad.

In addition, we do not have a good enough understanding of the definition of neglect if it does not take account of harm caused, and we think that the Act would need considerable interpretation or guidance to interpret what is meant by neglect if it does not take account of any harm suffered.

We would also like to ask for clarification where neglect may be perceived by some but be at odds with an individual's rights, for instance if someone makes an informed decision to not eat or drink in order to hasten their own death, would those who are caring for that person be perceived as neglecting them if they complied with their wishes but allowed them to starve, and how would that conflict be dealt with? Or if there were differing opinions amongst carers (or others eg family members) about the rights and wrongs of the person exercising their right not to eat or drink, would that expose carers supporting that individual to prosecution under this legislation?

It will be extremely important that in progressing the legislation the meaning of WILFUL NEGLECT is very clearly defined so that it is clear where the legislation would be used and where it would be more appropriate to use existing mechanisms, including for example professional regulation, local disciplinary, management and improvement work

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

Yes / No

If the offence is to come into legislation then it should equally apply to the organisation and those with management responsibilities and with responsibility for the deployment of resources where those decision have a bearing on the conduct or circumstances of the person committing the act of neglect or ill-treatment. Or where the organisation or those in positions of authority failed to ensure an adequate standard of care which resulted in neglect. This liability would presumably go up to Ministerial level where decisions about resources are made that impact on care, or where performance management failed to identify and rectify inadequacies in levels of staffing or care that resulted in neglect. It might be useful to look at Health and Safety legislation and apply the same principles here, similarly regarding penalties,

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

Yes No

For instance, where a Chief Executive or manager, or NHS Board can be identified as being responsible for making or failing to make decisions or actions about the deployment of resources (eg staffing, training, skills development), processes or cultural issues that has directly contributed to a situation where patients have been neglected. We would only expect this legislation to be used where it was clear that the organisation or individual should clearly have known that their actions would result in neglect and harmful outcomes and it can therefore be shown that the actions taken by the organisation, in themselves, were wilful. It might be helpful to understand whether this should be consistent with the approach taken on organisational responsibilities in Health & Safety legislation.

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

No comment.

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

We would expect the first approach would be sanctions on the organisation (which would include fines),
Beyond this consideration should be given to whether the approach to individuals

responsibility outlined in Health & Safety legislation would be appropriate.

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?

It may be that some of these characteristics would contribute to a mitigation of the offence by an offender, for instance if the offender were incapable of taking responsibility for their actions due to a disability under the terms of the Adults with Incapacity Act.

There may also be limits of a service and therefore of paid carers / professionals working in that service to comply with the wishes of some people with protected characteristics in relation to those characteristics, in which case a test of reasonableness would be applied. We would assume that a similar test of reasonableness would be applied to any charges of wilful neglect that came about within this proposed legislation. (An example might be the ability of a local service to provide a health professional of the same gender as a patient if the patient considered that a requirement of their religion. In a small service delivering in remote settings, it is not always possible to provide a same-sex professional in an emergency situation). We would not want this legislation to be used in that circumstance to charge the service with neglect.

Other than that, we cannot see any issues that are raised by any of the equality characteristics identified.