

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

Fife Council agrees that the proposed offence should cover all formal health and adult care settings, particularly in light of Health and Social Care Integration. This supports an equitable and consistent standard of care across sectors.

Consideration should be given for the proposed legislation to apply to circumstances where supported people are employing/commissioning their own staff within the supported person's home. Although the setting is a person's home, it can also be considered as a 'care setting' for the purposes of contracted care and support. This is of particular significance in relation to self-directed support and potential increase of personal assistants through option 1 direct payments.

The proposed offence is a criminal offence and must be applicable in all contractual circumstances where vulnerable people are provided with care and support. To restrict the applicability of the offence to the proposed settings, risks an untenable situation where a reckless act or omission resulting in wilful neglect or ill-treatment could be prosecuted in one setting but not another.

Fife Adult Protection Committee (APC) regard the introduction of legislation focussing on wilful neglect and ill-treatment as a positive move. It is clear that adults not protected by either the Mental Health (Care and Treatment) (Scotland) Act 2003 or the Adults with Incapacity (Scotland) Act 2000 may be at risk of harm through wilful neglect or ill-treatment in health or care settings. It is therefore crucial that those individuals are afforded the same protection.

The APC are concerned that there is no mention of the Adult Support and Protection (Scotland) Act 2007 in the proposal and would urge that this is remedied.

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

Yes No

This question caused most debate.

The proposed offence could deter informal and unpaid carers from providing the care they would otherwise provide to vulnerable people.

Wilful neglect/ill treatment may be difficult to evidence in informal circumstances. For example, an informal carer may deny that they are a carer for the purposes of the Act.

Consideration should be given to the risk of transferring legal assumptions into informal settings and holding family members/informal carers to account without legal agreement – state imposed responsibilities without consent of the ‘carer’ within the family. Could this raise a Human Rights issue in terms of interference with a (carer) person’s right to respect for private and family life? There is an existing body of Scottish criminal law which has a wide range of measures to prosecute physical, sexual and financial harms which could prove effective in the informal settings, albeit limited.

Conversely, to exclude a section of society from the protection of an offence of wilful neglect and ill treatment could be perceived as inequitable. The same wilful acts and omissions can be caused to two separate people (one formal and one informal) resulting in the prosecution of a formal worker and no effective prosecution in an informal arrangement. Whilst it is acknowledged that the Children and Young Person (Scotland) Act, AWI and Mental Health legislation provide a degree of criminal sanctions for the proposed offence, this has limited applicability, i.e., people under the age of 16 years harmed by those with parental responsibility, people affected by incapacity and mental disorder respectively. This does not extend to those not so affected but nonetheless vulnerable to wilful neglect and ill treatment. It is however noted that adult protection law does allow for intervention to address carer issues through care management for example.

The extent to which the proposed offence is applicable to informal arrangements depends on the definition of ‘informal’ ‘wilful’, ‘neglect’ and ‘ill-treatment.’

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

This offence should also apply to wilful neglect and ill treatment against children in all circumstances across services.

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

Yes No

Should the offence be defined to apply to any person providing care and support to another, in a formal or informal setting, under any contractual arrangements, the offence should apply to the voluntary sector.

This could risk a reduction in volunteers within the health and social care sector; however the voluntary organisational support could serve to mitigate such an outcome.

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

The proposed offence should focus on the act of wilfully neglecting or ill-treating an individual. It is the case that some vulnerable people in receipt of care/support have a higher than average pain threshold and may not either feel or be able to communicate pain/harm. For any harm which results in grievous or actual bodily harm, criminal offences against the person in Scottish common law should also apply.

There should be consideration of clear definitions of 'wilful', 'neglect' and 'ill-treatment, which must provide circumstances of what is a significant departure of a reasonable duty of care.

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

Yes No

The proposed offence should apply to both individuals and organisations. A person may be subject to wilful neglect or ill treatment because of an organisation's failure to provide a reasonable standard of service/support, through mismanagement/lack of policy/lack of training, for example. Individuals may be prevented from carrying out their support/care role because of institutional constraints/culture, which has the effect of ill treatment or wilful neglect of another. Therefore, organisations must also be held to account in such situations.

However, there are a number of regulators and inspectorates across the health and social care sector to regulate care and support practice. The standard of proof must require a significant departure of the existing reasonable duty of care as poor standards caused by wider structural constraints, such as resources should not be routinely viewed as wilful neglect or ill treatment.

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

Yes No

The proposed offence should apply to organisations where there is a clear breach of organisational and sector requirements, for example individuals employed/contracted by the organisation are prevented from carrying out their activities and meeting their reasonable duty of care because of the organisational incompetence, which as a direct consequence a person is subjected to wilful neglect

or ill treatment. This could be considered as a 'but for' test, i.e., but for the organisational incompetence the resulting ill treatment or wilful neglect of another would not have occurred.

The responsibility placed on an organisation should not detract from an individual support/care responsibility to meet the required standard of care and support.

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

The penalties to be imposed are a matter for the Scottish Government and judiciary.

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

There are a range of regulators and inspectorates whose sanctions should be considered in light of the proposed legislation.

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?

The proposed legislation offers protection for vulnerable people, particularly those affected by age and disability and those not covered by existing legislation. It offers the potential to create greater equality and protection for people at risk of ill treatment and wilful neglect, in ways which current legislation cannot manage.

The provision of a definition of wilful neglect and ill treatment could serve to provide clarity of the thresholds required to distinguish the offence from poor standards.

Questions arising:

It can be assumed that the proposed offence refers to both acts and omissions, in terms of 'wilful', is this a 'wilful intent' and/or 'reckless' as to the consequences of the act or omission?

Will the offence relate to one incident and/or a series of incidents?

To what extent will the proposed legislation impact on the current shift towards

increased choice and control for supported people, with potentially unwanted criminal interventions?

To what extent has the proposed offence been considered in the context of the employment of family members through self-directed support? Based on the proposal, a family member personal assistant has a higher duty of care than the same person outside of their employee role – how could it be proven that the wilful neglect or ill treatment was undertaken during the employment period?

In light of current criminal legislation, AWI, MHCT, ASP, CYP acts, what is the evidential basis for introducing another offence? To what extent will this act as a deterrent for those who ill-treat or wilfully neglect vulnerable people with capacity? Is current legislation utilised to its full potential?