Between October 2014 and January 2015, the Scottish Government undertook a public consultation on a proposed new criminal offence of wilful neglect and ill-treatment in health and social care settings. The consultation paper contained ten questions, inviting views on specific proposals for the new offence. A total of 103 responses were received. Key points from the analysis of the responses are summarised here.

Main Findings

- Respondents were largely supportive of the introduction of the new offence, and there were generally high levels of agreement with the proposals covering specific aspects of the legislation. However, respondents often expressed concerns and caveats in their comments.

- Around one-fifth of organisational respondents argued that the legislation was not needed and / or would have significant unintended consequences.

- Across all questions, respondents highlighted the need for consistency across client groups and settings, the importance of an integrated approach to promoting culture change and improved standards, the possible impact on staff recruitment, and the need to consider existing regulatory and legislative frameworks. Respondents also emphasised the need for clear definitions, and clarity about how the offence would operate in practice.

- Most respondents thought that the offence should cover all formal health and social care settings for adults, and all social care settings for children. This was seen as fair and equitable and consistent with other similar legislation.

- Most respondents thought that the offence should not cover informal (unpaid) care because of the absence of contractual obligations, training, and professional or regulatory arrangements.

- Most respondents also thought that the offence should apply to people providing services on a voluntary basis on behalf of a voluntary organisation, believing that the law should not differentiate based on the status of the organisation delivering the care.

- Respondents were largely in favour of basing the offence on the act of wilfully neglecting or ill-treatment an individual, rather than on the harm suffered by that individual. This was seen as supporting improved standards, and as being in line with other legislation.

- There was a clear view that the offence should apply to organisations in order to take account of wider organisational failings, and to hold service providers to account.

- Respondents supported penalties that were consistent with those available through other similar legislation. However, some also argued for stiffer penalties to be available; and there was support for courts to have the option of applying additional penalties for organisations.

- Respondents were largely positive about the equality implications of the proposed new offence.
Background
Between October 2014 and January 2015, the Scottish Government undertook a public consultation on a proposed new criminal offence of wilful neglect and ill-treatment in health and social care settings. The consultation paper invited views on the Government's proposals related to the implementation of the new offence.

The consultation questionnaire contained ten questions on: the care settings that the offence should cover; whether the offence should be based on conduct rather than harm caused; whether the offence should apply to both organisations and individuals; appropriate penalties; and equality considerations. Six of the questions asked if respondents agreed with a specific proposal and included a yes / no tick box as well as an opportunity to provide comment. The remaining four questions were open, with no tick box option.

Analysis and interpretation of the findings
The approach to the analysis was mainly qualitative in nature with the aim of identifying the main themes and the full range of views in the responses submitted. Quantitative analysis of the tick box responses was also undertaken to gauge the level of agreement / disagreement with specific proposals. Where appropriate, agreement or disagreement was imputed for respondents who had not completed the tick box questions, and these imputed responses were included in the analysis. The key points from the analysis are summarised below.

The analysis found that, irrespective of whether ‘yes’ or ‘no’ was ticked in response to certain proposals, respondents often raised the same issues and concerns in relation to those proposals. The quantitative findings should therefore be treated with caution, as they do not properly reflect the range and complexity of views presented by respondents.

Responses and respondents
The consultation received 103 responses in total: 95 (92%) from organisations and 8 from individuals (8%). Organisational respondents included: NHS organisations; local authorities; third sector organisations; professional bodies and trade unions; scrutiny and regulatory agencies; adult / child protection bodies; partnership bodies; and organisations concerned with the practice of law.

Most respondents (88%) submitted their views using the consultation questionnaire or a modified version of the questionnaire, while the remainder submitted their comments in free text.

Views about the creation of the proposed new offences
Although the consultation did not specifically invite views about whether the proposed offence should be created, respondents nevertheless often offered views on this issue.

In general, respondents were supportive of the introduction of the offence – they saw the legislation as helpful in offering a consistent level of protection to all individuals receiving health and social care, and in holding to account those who intentionally harmed or neglected these individuals. There were also high levels of agreement with the specific proposals set out in the consultation document, although respondents often also expressed a range of caveats or concerns.

However, nearly a fifth of all organisational respondents questioned the need for, or expressed serious reservations about, the creation of a new offence.

This group argued that existing legislation and professional regulation already provided adequate protection; that the intended beneficiaries did not require special protection; that the creation of a new offence was a disproportionate response to a relatively small number of recent incidents; and that there was no evidence that a criminal sanction would act as a deterrent. These respondents were also concerned about unintended consequences relating to costs, the potential for undermining existing regulatory frameworks, and the possible negative impacts on organisational culture and quality of care.

In general, these respondents went on to answer the individual consultation questions, and often expressed agreement with specific proposals, despite their overall opposition to the creation of the offence.

Importantly, the comments made by this group were also frequently reflected in the caveats and concerns expressed by other respondents.

In their comments on individual proposals, respondents frequently emphasised:

- The need for consistency across settings and client groups
- The importance of the offence, its application and prosecution being part of an integrated approach to promoting positive culture change and improving standards of care across the health and care sector
- The possible risks of deterring individuals from joining the health and social care workforce (in formal and informal and paid and unpaid capacities)
- The importance of ensuring that any new offence took account of and was properly aligned with existing regulatory and legislative frameworks.
Main points relating to specific aspects of the proposals

Whether the offence should cover all formal health and adult social care settings

Most respondents (91%) thought that the offence should cover all formal health and social care settings, both in the private and public sectors. This was seen as fair and equitable to all service users and consistent with other similar legislation. It was also argued that this would lead to better and more consistent standards of care.

In relation to defining the professionals who would be covered by the legislation, there were two main views: (i) that the list included in the consultation document was incomplete and (ii) that it would not be possible to create a comprehensive list and therefore a more general definition of relevant professionals might be preferable.

Respondents often commented on the applicability of the offence to personal assistants employed directly by an individual with care needs (e.g. via self-directed support). Although respondents (including all local authority respondents) generally thought the law should apply to this group of care staff, this was not a unanimous view.

Whether the offence should NOT cover informal arrangements

Most respondents (73%) agreed that the offence should not cover informal (unpaid) care arrangements. These respondents highlighted the absence of contractual obligations and the fact that unpaid carers are not professionally trained or subject to professional or regulatory arrangements. Respondents were also concerned that it may deter people from taking up a caring role, or deter those in caring roles from seeking help for fear of being accused of a criminal offence.

Whether the offence should cover social care services for children

Most respondents (88%) agreed that the offence should cover social care services for children. They cited reasons of consistency and equity, and generally saw no reason not to extend the protection to children. Respondents suggested a range of specific children's social care services that should be covered, with some also arguing for the inclusion of education services.

However, respondents also highlighted the substantial body of legislation and regulation already covering children's services. Some therefore thought that it was unnecessary for the proposed new offence to apply to children's services; others argued instead for a review of the existing legislation and/or clarity about how the new offence would align with existing legislative frameworks.

Whether the offence should apply to volunteers

Most respondents (85%) thought that the offence should apply to people providing services on a voluntary basis on behalf of a voluntary organisation. Respondents felt strongly that the law should not differentiate based on the status of the organisation delivering the care, but had more mixed views on whether it should apply to individual volunteers. Although many felt that the status of individual volunteers should not be relevant, others highlighted contractual, training and regulatory issues and queried how the law would be applied in practice to this group.

Whether the offence should be based on conduct or actual harm suffered

Most respondents (85%) thought that the offence should be based on the act of wilfully neglecting or ill-treating an individual, rather than any harm suffered as a result of that behaviour. Respondents argued that this would support improved standards in the delivery of care, and would also be in line with other legislation. By contrast, those disagreeing with this proposal argued that the absence of a 'harm' threshold would encompass too many incidents, create uncertainty and cause difficulties in identifying and evidencing the offence in practice.

Whether the offence should also apply to organisations

With few exceptions, respondents thought the offence should apply to organisations, as well as to individuals (96% were in agreement). This was seen to take account of the fact that the conduct of individuals was often symptomatic of wider organisational failings, and to recognise the importance of holding service providers to account. Respondents also thought that this was consistent with other legislation and would help drive service improvement. However, respondents also highlighted the difficulties of attributing relative culpability relating to organisations and individual employees in instances of neglect or ill-treatment.

There were concerns about how the legislation would be implemented in relation to organisations; e.g. how 'wilfulness' would be established and how the offence would be evidenced; how any 'threshold' would be set; and how it would be applied to individual managers, owners, etc.
Respondents offered a range of broad criteria and specific examples for determining organisational culpability. There were, however, calls for the legislation to be clear about what would constitute wilful neglect or ill-treatment at organisational level.

Penalties

Most respondents (85%) thought that the penalties associated with the new offence should be equivalent to those for other similar offences. The importance of consistency was a key theme, although respondents also argued for stiffer penalties to be available and for flexibility to allow penalties to reflect the circumstances of the case. A common concern was that penalties (and monetary penalties in particular) should be seen as contributing to wider service improvement.

Whether courts should have additional penalty options for organisations

Two-thirds of respondents (67%) thought that courts should have additional penalty options available for organisations. They wanted stiffer penalties or, more commonly, penalties that were more clearly linked to service improvement and existing regulatory frameworks.

Impacts on groups with protected characteristics (equalities groups)

Respondents were largely positive about the equality implications of the proposed new offence. Older people and disabled people were seen as particularly likely to benefit from the legislation; it was also suggested that those from minority ethnic groups may be less likely to benefit from the protection offered as they were more likely to be cared for by family at home. The two main issues cited were the need to facilitate access to justice for vulnerable groups and the risk of vexatious claims relating to equality-related care requests.