



## Proposals for an Offence of Wilful Neglect or ill-treatment in Health and Social Care Settings: Consultation Analysis

**PROPOSALS FOR AN OFFENCE OF WILFUL  
NEGLECT OR ILL-TREATMENT IN HEALTH  
AND SOCIAL CARE SETTINGS:  
CONSULTATION ANALYSIS**

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## **Note about terminology**

Throughout this report, the following abbreviations will be used to refer to Acts of UK or Scottish Parliaments. Note that all Scottish Acts will include the notation '(S)'.

<i>Mental Health (S) Act 2003</i>	Mental Health (Care and Treatment) (Scotland) Act 2003
<i>Adults with Incapacity (S) Act 2000</i>	Adults with Incapacity (Scotland) Act 2000
<i>Adult Support and Protection (S) Act 2007</i>	Adult Support and Protection (Scotland) Act 2007
<i>Children (S) Act 1995</i>	Children (Scotland) Act 1995
<i>Children and Young People (S) Act 2014</i>	Children and Young People (Scotland) Act 2014
<i>Children and Young Persons (S) Act 1937</i>	Children and Young Persons (Scotland) Act 1937
<i>Health and Safety at Work Act 1974</i>	Health and Safety at Work etc Act 1974
<i>Corporate Manslaughter / Homicide Act 2007</i>	Corporate Manslaughter and Corporate Homicide Act 2007

## **EXECUTIVE SUMMARY**

1. 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.<sup>1</sup> The consultation paper set out the Government's initial thinking and invited views on proposals for the new offence.
2. The consultation questionnaire contained ten questions seeking views on the care settings that the offence should cover; whether the offence should be based on conduct rather than the harm caused; whether the offence should apply to organisations as well as 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.

### **Number of responses received**

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

### **The analysis and interpretation of the findings**

4. The analysis found that, irrespective of whether respondents ticked 'yes' or 'no' in response to certain proposals, they often raised the same issues and concerns. The quantitative findings should therefore be treated with caution, as they do not properly reflect the range and complexity of opinions presented by respondents. This has to be borne in mind when interpreting the quantitative findings of the analysis.

### **Overview of the findings**

#### ***Views about the creation of the proposed new offence***

5. Although the consultation did not specifically invite views about whether the proposed offence should be created, respondents nevertheless often offered comments on this issue.
6. 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 caveats or concerns.

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<sup>1</sup> *Proposals for an offence of wilful neglect and ill-treatment in health and social care settings.*

7. However, nearly a fifth of all organisational respondents questioned the need for, or expressed serious reservations about, the creation of a new offence. Those who thought that the new offence was unnecessary 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.
8. These same points were also raised in response to individual consultation questions. Importantly, the comments made by this group were also frequently reflected in the caveats and concerns expressed by respondents who largely supported the introduction of the offence.

### ***Frequent questions on the proposed offence***

9. In relation to the proposed offence itself and the questions posed in the consultation, respondents frequently (in their answers to all questions) emphasised the:
  - 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.
10. Across all the proposals there were calls for clarity about how the offence would operate in practice, and for clearer definitions of key terms including 'wilful neglect', 'ill-treatment', '*paid*' volunteers and '*informal*' carers. Respondents also asked for clarity about: the professions that would be covered by the offence and the circumstances that would give rise to organisational culpability.

### **Main points raised in relation to specific proposals**

#### ***Whether the offence should cover all formal health and adult social care settings (Q1)***

11. Ninety-one percent (91%) of respondents agreed 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 across the whole sector.



12. 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.
13. 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 cover NOT cover informal arrangements (Q2)***

14. 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 carers from seeking help for fear of being accused of a criminal offence.

***Whether the new offence should cover social care services for children (Q3)***

15. Eighty-eight percent (88%) of respondents agreed that the offence should cover social care services for children. Respondents cited reasons of consistency and equity, and generally saw no reason not to extend the protection to children. Respondents suggested a range of specific social care services that should be covered, with some also arguing for the inclusion of education services.
16. However, respondents also highlighted the substantial body of legislation and regulation already covering children's services. Thus, some thought that it was unnecessary to have 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 (Q4)***

17. Most respondents (85%) thought that the offence should apply to people providing services on a voluntary basis on behalf of a voluntary organisation. Comments indicated that 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 (Q5)***

18. Most respondents (85%) thought that the offence should be based on *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 (Q6 & 7)***

19. With few exceptions, respondents agreed that the offence should apply to organisations, as well as to individuals. 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 agreed that this was consistent with other legislation and would help drive service improvement. However, respondents also highlighted the difficulties of attributing relative culpability in instances of neglect or ill-treatment.
20. There were concerns about how the legislation would be implemented in relation to organisations; e.g. how 'wilfulness' would be established; how any 'threshold' would be set; how it would be evidenced; 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, also calls for the legislation to be clear about what would constitute wilful neglect or ill-treatment at organisational level.

#### ***Views about penalties (Q8)***

21. 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 a wider service improvement.

#### ***Whether courts should have additional penalty options for organisations (Q9)***

22. 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) (Q10)***

23. Respondents were largely positive about the equality implications of the proposed new offence. Older people and those with disabilities were seen as particularly likely to benefit from the legislation; it was suggested that those from minority ethnic groups may not benefit from the protection offered by the legislation 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.

# 1 INTRODUCTION

1.1 This report presents an analysis of responses to a public consultation undertaken by the Scottish Government between October 2014 and January 2015. The consultation document, *Proposals for an Offence of Wilful Neglect or Ill-treatment in Health and Social Care Settings*, invited views on the Government's proposal to create a new criminal offence of wilful neglect or ill-treatment of people receiving care or treatment in health and social care settings. This offence would be similar to those that currently exist in relation to people with mental illness and adults with incapacity.<sup>2</sup>

## About the consultation

1.2 The consultation contained ten questions. It sought views about:

- The type of care settings the offence should cover (Qs 1-4)
- Whether the offence should be based on a care provider's behaviour, or the harm that results to the individual who has been neglected / mistreated (Q5)
- Whether and how the offence should apply to organisations as well as individuals (Qs 6-7)
- What the penalties for such an offence should be and whether the courts should have additional penalty options available for organisations (Qs 8-9)
- The potential impact of the proposals on people with protected equalities characteristics (Q10).

1.3 The consultation questions are listed in full at Annex 1 of this report.

1.4 The consultation document was sent directly to all local authorities and NHS Boards in Scotland and to 50 other organisations with an interest in this area. The consultation paper was also available on the Scottish Government website and was promoted via a press release.

1.5 At the time this consultation was carried out (between October 2014 and January 2015), the Scottish Government was also undertaking a separate consultation on proposals to establish a statutory duty of candour in health and social care services. As the timescales for the two consultations overlapped, and the stakeholders for both consultations were the same, many of the respondents who replied to this consultation referred to the other in their response, and at one respondent submitted a single response for both consultations.

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<sup>2</sup> *Mental Health (S) Act 2003 and Adults with Incapacity (S) Act 2000.*

## 2 THE CONSULTATION RESPONSES AND RESPONDENTS

2.1 This section provides details about the individuals and organisations that took part in the consultation.

### Number of responses received

2.2 Altogether, the consultation received 103 responses – 8 from individuals and 95 from organisations (Table 2.1). Most of the responses were received by email, while a small number were received by post. In addition, 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 – often in the form of a letter. In general, the comments submitted by this latter group of respondents addressed the consultation questions, but often also included additional material not directly related to the questions asked.

**Table 2.1: Number and type of respondents**

Type of respondent	Number	%
Individual	8	8%
Organisation	95	92%
<b>Total</b>	<b>103</b>	<b>100%</b>

2.3 The organisational respondents included NHS and local government organisations; third sector agencies (both service providers and those with a co-ordination / representative role); agencies responsible for the scrutiny and regulation of professional practice and / or services; a range of organisations that support, train or represent health and social care professionals; and organisations concerned with the practice of law. (See Table 2.2.) Annex 2 provides a complete list of the organisations that responded to the consultation.

**Table 2.2: Organisational respondents**

Respondent type	Number	%
NHS	19	20%
Local government	17	18%
Third sector service provider / service user organisations	14	15%
Professional associations, support agencies and trade unions	13	14%
Scrutiny / regulatory bodies	11	12%
Adult / child protection groups or partnership bodies	9	9%
Third sector representative / co-ordinating agencies	9	9%
Law organisations	3	3%
<b>Total</b>	<b>95</b>	<b>100%</b>

## **Approach to the analysis**

- 2.4 The approach to the analysis was mainly qualitative in nature – that is, the aim was to identify the main themes raised by respondents in their free text comments. Since these comments were made spontaneously, it is not appropriate to report counts for the different themes raised.
- 2.5 Most of the consultation questions included a yes / no question – asking respondents to indicate whether they agreed with the Scottish Government’s proposals on specific issues. In some cases, respondents using the questionnaire did not tick the box to indicate ‘yes’ or ‘no’. Other respondents did not submit their views using the consultation questionnaire form. In both of these cases, yes / no responses have been imputed on the basis of an analysis of the respondents’ comments. However, if it was not clear from the respondent’s comments whether they agreed or disagreed with the proposal, if they expressed uncertainty about their views, or if their comments discussed the pros and cons of a particular proposal, without stating their own view, their response was coded as ‘unclear’.
- 2.6 Throughout this report, the figures shown in tables include these imputed responses. Note, however, that not all respondents answered all questions, and therefore, the total number of responses varies for each question, as shown in the tables.

### **3 VIEWS ABOUT THE CREATION OF THE PROPOSED NEW OFFENCE**

- 3.1 Chapters 4 to 8 of this report present respondents' views in relation to the questions set out in the consultation document. The consultation questions asked about specific issues related to the implementation of a proposed new criminal offence of wilful neglect or ill-treatment of people receiving care and treatment in health and social care settings. However, the consultation document did not explicitly invite comments about whether such an offence is needed or should be created.
- 3.2 Nevertheless, 18 of the organisations responding to the consultation (nearly one-fifth of all organisational respondents) questioned the need for the new offence, or expressed serious reservations about the proposal. These 18 respondents included 6 of the 19 NHS respondents; 5 of the 13 professional associations; and all three of the law organisations. The four remaining respondents in this group represented third sector and local government organisations.
- 3.3 These respondents emphasised their support for the general aim of the policy – i.e. that vulnerable individuals receiving health and social care should be protected from harm. However, they did not support the creation of a new criminal offence of wilful neglect / ill-treatment of people receiving treatment and care in health and social care settings.
- 3.4 In general, these respondents also went on to answer the individual consultation questions although their comments were often prefaced by statements such as:
- ‘We do not agree with the introduction of an offence of wilful neglect or ill-treatment. However, if the proposal is to go ahead, then our view regarding this question is as follows....’
- 3.5 Thus, these respondents often indicated agreement with specific proposals despite their overall opposition to the creation of the offence.
- 3.6 Although this group comprised a minority of the respondents to the consultation, the extent to which their views might be held more widely is not clear, as the consultation document did not ask for views on whether the offence should be created. However, many of the comments made by this group were reflected in caveats and concerns expressed by other respondents.
- 3.7 Respondents who objected to the creation of the offence offered two broad viewpoints: (i) they did not consider the creation of a new offence to be necessary and (ii) they were concerned about the unintended consequences which might result from its creation.

## Proposed new offence is unnecessary

3.8 Respondents did not think that the consultation document had made the case for introducing the new offence. In particular, respondents believed that existing legislation and current professional and regulatory arrangements were adequate to respond to situations of ill-treatment or neglect of people receiving health and social care services.

- **Existing legislation is adequate:** Respondents commented that, in addition to the provisions of the *Mental Health (S) Act 2003* and the *Adults with Incapacity (S) Act 2000* which were discussed in the consultation document, a range of other legislation including the *Adult Support and Protection (S) Act 2007*, the *Children (S) Act 1995*, the *Children and Young People (S) Act 2014*, the *Health and Safety at Work Act 1974* and existing human rights legislation also offered protection and legal redress in this area. They pointed out that the consultation document had not referred to this wider body of legislation. Other respondents commented that existing common law was adequate to address issues of neglect and ill-treatment in health and social care settings.

While some respondents believed that this larger body of legislation made the proposed new criminal offence unnecessary, others emphasised that if a new criminal offence were created, it should at least take account of and / or be consistent with existing legislation. The need to learn from the limited use made of the provisions for criminal prosecution in existing mental health and adults with incapacity legislation was particularly noted.

The point was also made that the abuse of adults with learning difficulties and autism at Winterbourne View did not justify the creation of a new criminal sanction, as this situation would have been covered in Scotland by the *Mental Health (S) Act 2003*.

- **Current professional regulation is adequate:** Respondents noted that existing professional regulators (e.g. the General Medical Council, the General Dental Council, the Nursing and Midwifery Council, etc.) have the power to take action against their registrants if they are found to have mistreated a patient. These powers include the removal of an individual from the professional register, which effectively ends a healthcare professional's career. There were concerns that criminal investigations would result in delays to the investigations conducted by regulatory bodies. The point was also made that the process of criminal prosecution would require a higher standard of proof than regulatory proceedings do. Therefore, there was the potential for the new offence to result in *less* protection of individuals than the current regulatory systems already provide. There was a suggestion that if the Scottish Government needed to address a gap in existing professional regulation (for example, in relation to health care support workers or social care workers), then a more suitable method might be to establish additional regulatory bodies, rather than

create unnecessary legislation. In general, respondents wanted much more detail about the relationship between the proposed criminal sanction and current regulatory frameworks.

- **Intended beneficiaries do not require special protection:** An organisational respondent with legal expertise pointed out that the provisions available through the *Mental Health (S) Act 2003* and the *Adults with Incapacity (S) 2000 Act* were intended to protect vulnerable groups who might not have the capacity to engage in existing complaint, regulatory or disciplinary systems, and whose care providers have rights and obligations to take decisions for them. This respondent suggested that adults who have capacity, and are able to make decisions about their own treatment and engage with existing complaint systems, did not need a similar protection.
- **There is no evidence that a criminal sanction would act as a deterrent:** Respondents made the point that the consultation document had not provided evidence to show that the availability of a criminal sanction would act as a deterrent to the neglect or ill-treatment of people receiving health or social care services. Moreover, the abuse at Winterbourne View indicates that the possibility of prosecution had not acted as a deterrent in this case.
- **There is no evidence of a widespread problem of ill-treatment or wilful neglect in Scotland:** Respondents suggested that the creation of a criminal sanction seemed to be disproportionate to the problem that existed.
- **Creating a criminal sanction is contrary to the findings of the Mid Staffordshire inquiry and the Winterbourne View report:** In both these cases, recommendations focused on issues of leadership, staff training and support, organisational culture, regulation and inspection, etc. There was a view among respondents that creating a new offence risked not learning the lessons from these cases.

## Unintended consequences

3.9 Respondents identified possible unintended consequences which could result from the introduction of a new criminal offence. These included:

- **Cost:** It was noted that the cost of investigations and court proceedings related to the criminal prosecution of doctors often runs into the tens or hundreds of thousands of pounds. There are additional costs for locum practitioners to cover the work of doctors or other healthcare professionals who are unable to work during an investigation. The payment of resultant fines levied against organisations was also raised. These are costs which would effectively be paid by the taxpayer, with a potential for impacting on budgets for frontline health and care services. There was a call for the



proposals to be subject to a cost benefit analysis for each sector of the health and adult social care workforce.

- **Undermining existing regulatory frameworks:** Respondents believed that the proposed new legislation would result in making practitioners less willing to engage with, or accept fault in regulatory proceedings, or to participate in Significant Clinical Incident reviews, for fear that criminal proceedings may result. There was a view that if the new legislation was introduced, then there should be additional safeguards to protect clinical judgement and decisions about resource allocation and to prevent criminal prosecutions arising too easily from a complaint.
- **Undermining a learning culture and culture of openness in health and social care services:** There was concern that the proposed offence would undermine a learning approach to system failure, risk averse and instead encourage a blame culture and litigious action against health and social care staff. Concerns were also raised about the impact of the proposal on professional indemnity insurance arrangements and costs. Ultimately, it was suggested, the proposal may lead to increasing difficulties in recruiting to both frontline and leadership roles in health and social care services.

Some respondents specifically noted that the proposed new offence appears to contradict the aims of the Scottish Government's proposal to create a statutory duty of candour in health and social care services, since some 'disclosable events' (in relation to the duty of candour) could leave a practitioner open to possible criminal prosecution. Moreover, the fear of a criminal investigation might make a practitioner reluctant to inform others about a potentially 'disclosable event'.

- **Poorer standards of care:** Respondents thought that, in order to protect themselves from possible criminal prosecution, health and social care practitioners would begin to practice 'defensive care' (e.g. ordering unnecessary investigations), or 'over-treat' service users to the detriment of their comfort and personal wishes. There was also a perceived risk that organisations as a whole might become more risk-averse in the services they provided or the groups they worked with.
- **Perceptions of poor care:** There was a view that the creation of the offence would have a detrimental effect on perceptions of health and social care services and reinforce fears of poor care.

3.10 The remainder of this report will now consider respondents' replies to the consultation questions.

## 4 WHICH CARE SETTINGS SHOULD BE COVERED BY THE OFFENCE

- 4.1 The first section of the consultation document focused on how an offence of wilful neglect or ill-treatment should be defined. The Scottish Government set out its view that the offence should cover both health and social care settings in both the statutory and third sectors. Furthermore, the Scottish Government believed that the offence should be restricted to formal health and social care settings, but that informal arrangements for care (where care is provided on the basis of a family relationship or friendship, where there is no contract of employment) should not be included.
- 4.2 Annex A of the consultation document included a provisional list of professions which the Government envisaged being covered by the proposed offence.
- 4.3 The consultation document also set out the Government's view that the proposed offence should cover all formal situations where health care is provided to children, but asked for views about whether social care services for children should be covered (as the range of social care services for children is different to those delivered to adults).
- 4.4 The consultation asked four questions:

**Question 1:** 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?

**Question 2:** Do you agree with our proposal that the offence should not cover informal arrangements, for example, one family member (generally termed unpaid carer, or carer) caring for another?

**Question 3:** 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 of the offence and explain your view.

**Question 4:** Should the offence apply to people who are providing care or treatment on a voluntary basis on behalf of a voluntary organisation, whether on a paid or unpaid basis?

### Whether the offence should cover all formal health and adult social care settings (Q1)

- 4.5 Altogether, 99 respondents replied to Question 1. Table 4.1 below shows that 91% were in favour of the proposal that the offence cover all formal health and adult social care settings (both in the private and public sectors), while 3% were not in favour. In addition, 6% of respondents did not tick either 'yes' or 'no' and made comments in response to the question which were unclear (i.e. they expressed neither agreement nor disagreement, they expressed mixed views, or they made comments that did not directly address the question).

**Table 4.1: Question 1 – Do you agree that the new offence should cover all formal health and adult social care settings, both in the private and public sectors?**

Respondent type	Yes		No		Unclear		Total	
	n	%	n	%	n	%	n	%
NHS	19	100%	—	0%	—	0%	19	100%
Local government	16	94%	—	0%	1	6%	17	100%
Third sector service provider / service user organisations	12	100%	—	0%	—	0%	12	100%
Professional associations, support agencies and trade unions	11	85%	1	8%	1	8%	13	100%
Scrutiny / regulatory bodies	10	100%	—	0%	—	0%	10	100%
Adult / child protection groups or partnership bodies	8	100%	—	0%	—	0%	8	100%
Third sector representative / co-ordinating agencies	7	78%	—	0%	2	22%	9	100%
Law organisations	—	0%	2	67%	1	33%	3	100%
Individual respondents	7	88%	—	0%	1	13%	8	100%
<b>Total</b>	<b>90</b>	<b>91%</b>	<b>3</b>	<b>3%</b>	<b>6</b>	<b>6%</b>	<b>99</b>	<b>100%</b>

Percentages do not all total 100 due to rounding.

- 4.6 In total, 93 respondents made comments at Question 1.
- 4.7 Among the 90 respondents who indicated support for the proposal were 11 respondents who disagreed with (or questioned) the need for legislation in this area. These respondents expressed their serious reservations about the proposal for new legislation, but said that ‘if the proposal is to go ahead, then it should cover all health and adult social care settings’.
- 4.8 The three respondents who ticked ‘no’ to Question 1 were all opposed to the introduction of the new criminal sanction, and their comments at Question 1 largely focused on this issue rather than on answering the question asked. One of these three respondents did address the question, stating: ‘In the event that an offence is considered justified and necessary, there appears to be no cogent reason to limit this to public settings, or to private settings, only.’
- 4.9 Four of the six respondents who expressed unclear views were also opposed to the introduction of the new criminal offence. These respondents stated that they supported the policy intent behind the proposals, but did not necessarily feel that the creation of a criminal sanction was justified. This group of respondents did not generally address the question asked.

## ***Respondents' reasons for agreeing with the proposal***

- 4.10 Those who ticked 'yes' or who said they agreed that the new offence should cover all formal health and adult social care settings in the private and public sectors, gave the following reasons for their views, focusing on issues of consistency, integration and service standards:
- The proposal was seen to be fair. Respondents argued that *all* service users have the right to be protected, irrespective of care setting.
  - The proposal would provide protection to people who are not covered by the *Mental Health (S) Act 2003* or the *Adults with Incapacity (S) Act 2000* (thus addressing a gap in current legislation) – this view was particularly prevalent amongst local authorities.
  - The proposal was seen to be consistent with existing legislation, and with efforts to integrate health and social care.
  - The proposal would lead to better standards of care and consistency of care across different settings – again, this was a view put forward by local authorities.
  - The offence would convey a clear message that neglect and mistreatment in health and care settings is unacceptable and would result in serious consequences.
- 4.11 Among those who ticked 'yes' at Question 1, there was a view that the offence should also apply to:
- Third sector agencies delivering health and social care, and
  - Not only the individual accused of wilful neglect or ill-treatment, but also their supervisor, the care home owner and / or agency managers.
- 4.12 Both of these issues were also raised in response to other questions in the consultation.
- 4.13 There was some disagreement about whether the offence should apply to (or could apply to) care at home services and personal assistants employed directly by a person receiving care (for example, through self-directed support arrangements). In general, respondents (including all local authority respondents) thought it should apply to these types of services. However, a few respondents thought it should not, while others thought it may be difficult to police care in people's own homes. Those who thought personal assistants, in particular, should be exempt from the legislation argued that the responsibility for not allowing neglect / ill-treatment to happen would, in this case, lie with the employer i.e. the person or their informal carer. Furthermore, standards of care would also be defined by the employer and any incidence of wilful neglect or ill-treatment by personal assistants would be dealt with through employment law or existing criminal law.

### ***Comments about the list of Health and Social Care Professionals in Annex A***

- 4.14 Respondents often made comments about the list of health and social care professionals listed in Annex A of the consultation document. In general, this list was perceived to be incomplete, particularly in relation to the identification of social services professionals.
- 4.15 While some respondents made suggestions for additional groups to be included in the list,<sup>3</sup> others believed it would be impossible to compile a definitive list of all health and social care professionals, and that any attempt to do so would inevitably result in large sections of the workforce being mistakenly excluded. This group suggested instead that a clear, but more general definition of 'professionals' (for example, 'all individuals paid through a contractual arrangement to provide care or support') would be preferable.
- 4.16 A few respondents also questioned whether the proposed offence ought to be extended to include education professionals and educational settings.

### ***Calls for clearer definitions***

- 4.17 There were frequent calls for clear definitions of 'wilful neglect' and 'ill-treatment' before any legislation is introduced, and the point was made that the consultation document itself interchangeably used the terms 'neglect' for 'wilful neglect' and 'mistreatment' for 'ill-treatment'. The request for clear definitions of these terms was made, not only in comments at Question 1, but across most of the other questions too. Respondents wanted to know how 'wilful neglect' was distinguished from 'clinical negligence' or 'criminal neglect' (both of which are already subject to appropriate sanctions). Moreover, since 'neglect' is effectively a non-action, respondents queried whether it would always be possible to recognise when 'neglect' had taken place. There was also a question about how 'wilful neglect' would be differentiated from genuine error.
- 4.18 Some respondents suggested that the creation of a precise definition of 'wilful neglect' is likely to be challenging. There were also concerns that practitioners working in certain areas of medicine that require greater degrees of professional judgement and decision-making would be at risk of being accused of wilful neglect. Other respondents (including those representing law organisations) pointed out the difficulties of proving intent, which is implied by the use of the word 'wilful'.

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<sup>3</sup> Suggestions included: counsellors, psychotherapists, support workers, occupational therapy assistants, home care services, personal assistants employed through self-directed care arrangements, care home owners, all student / trainee practitioners, health visitors, paramedics and healthcare scientists (biomedical and clinical scientists, physiologists and physicists who may all be involved in the treatment of patients).

- 4.19 While respondents welcomed the statement that the offence is not intended to cover instances of genuine error or accident, they were concerned that this distinction may be lost unless there were clearer definitions.
- 4.20 Respondents also wanted clearer definitions for the terms ‘formal’ and ‘setting’, particularly in relation to self-directed support arrangements delivered in people’s homes. It was also noted that health and care professionals can work across a very wide range of settings, not only including health centres, hospitals, care homes and private practices, but also in the professional’s own home, in the service user’s own home, and in commercial premises.
- 4.21 Definitions of ‘avoidable’ and ‘unavoidable’ harm, and the differences between ‘competence’ and ‘conduct’ were also requested.

### **Concerns**

- 4.22 Respondents who broadly agreed with the proposal that the new offence should cover all health and adult social care services in the private and public sectors nevertheless raised some concerns about possible unintended consequences. These largely echoed the unintended consequences identified by respondents who were opposed to the creation of the new offence as described in Chapter 3.
- 4.23 Respondents particularly highlighted the risk that the proposals would:
- Undermine efforts to move towards a more open and transparent culture within health and social care services (where adverse events are disclosed and reviewed regularly to promote learning and improvement) and lead to a blame culture
  - Deter individuals from entering health and social care professionals – thus exacerbating, in some areas, what is already a depleted workforce
  - Result in police / criminal investigations impeding the necessary safeguarding activities of local authorities and regulators, and hinder services from conducting their own reviews and learning lessons.
- 4.24 There was also a concern that there would likely be a cost to local authorities and other care providers from implementing the new legislation, in terms of staff training and awareness raising, and there was a view that the Scottish Government should meet these additional costs.

### **Whether the offence should cover informal arrangements (Q2)**

- 4.25 The second question in the consultation document asked respondents if they agreed that the offence should not cover informal arrangements such as one family member (unpaid carer) caring for another. Altogether, 92 respondents replied to this question. Table 4.2 shows that nearly three-quarters (73%)

agreed that the offence should not cover informal caring arrangements, and just over a fifth (22%) disagreed – i.e. these respondents thought the offence should include informal caring arrangements. Five respondents (5%) did not tick either ‘yes’ or ‘no’, and expressed unclear or mixed views in their comments.

4.26 The analysis of respondents’ comments at Question 2 suggested that there may have been some confusion about what this question was asking. (See paragraphs 4.30 and 4.31 below.) Therefore, the figures presented in Table 4.2 should be treated with caution.

**Table 4.2: Question 2 – Do you agree with our proposal that the offence should not cover informal arrangements?**

Respondent type	Yes		No		Unclear		Total	
	n	%	n	%	n	%	n	%
NHS	13	72%	4	22%	1	6%	18	100%
Local government	16	94%	—	0%	1	6%	17	100%
Third sector service provider / service user organisations	6	46%	6	46%	1	8%	13	100%
Professional associations, support agencies and trade unions	8	67%	4	33%	—	0%	12	100%
Scrutiny / regulatory bodies	6	86%	—	0%	1	14%	7	100%
Adult / child protection groups or partnership bodies	7	78%	2	22%	—	0%	9	100%
Third sector representative / co-ordinating agencies	3	50%	2	33%	1	17%	6	100%
Law organisations	2	100%	—	0%	—	0%	2	100%
Individual respondents	6	75%	2	25%	—	0%	8	100%
<b>Total</b>	<b>67</b>	<b>73%</b>	<b>20</b>	<b>22%</b>	<b>5</b>	<b>5%</b>	<b>92</b>	<b>100%</b>

Percentages do not all total 100 due to rounding.

4.27 In total, 87 respondents made comments at Question 2.

### ***Respondents’ reasons for wanting to exclude informal arrangements***

4.28 The respondents who ticked ‘yes’ at Question 2 (who thought that the new offence should not cover informal caring arrangements) offered the following reasons, relating to the nature of informal care and the potential impact on carers, as well as wider legal issues. Some of these points echoed statements made in the consultation document:

- There are no legal or contractual obligations upon ‘informal carers’ to provide care and no contracts that define role, responsibility and outcomes; thus they could not be prosecuted for failing to provide care.

- Unpaid carers are not professionally trained or subject to professional codes of conduct.
- Carers might be reluctant to ask for help when they need it, or to report incidents of unintended harm for fear of criminal sanctions.
- It would deter people from providing informal care-giving and support, which plays a crucial role helping people to remain independent in their homes.
- There are already procedures in place to address wilful neglect / ill-treatment in informal settings through adult support and protection legislation.
- Common law would cover situations of 'informal care'.
- It would be difficult to prove the offence in the context of informal arrangements.

### ***Respondents' reasons for wanting to include informal arrangements***

4.29 Among the 22% of respondents who ticked 'no' at Question 2 (who thought the new offence should cover informal caring arrangements), the main reason given was that it would be unfair and inequitable not to do so. Respondents suggested it would be 'perverse' to exclude informal arrangements where neglect can also take place, and that there was no 'moral justification' for excusing wilful neglect simply because it involved a family relationship. Respondents noted that there have been 'a number of high-profile incidents of family members' neglect and ill-treatment of very vulnerable people in their care'. Respondents thought that no individual should receive less protection from wilful neglect or ill-treatment than any other individual. This group of respondents also believed that:

- Including informal arrangements in the legislation would help to raise public awareness about the 'hidden harm' that may be present in informal caring arrangements.
- *Not* including informal arrangements would: (i) create a 'legal anomaly' and introduce a greater inconsistency than the proposed legislation was supposed to address in the first place, and (ii) cause uncertainty for paid staff who may have concerns about a family member's conduct.

4.30 It was not clear whether all the respondents who ticked 'no' at Question 2 were aware of the statement in the consultation document that neglect or ill-treatment by a carer can already be prosecuted as an offence under existing statute.

4.31 There may also have been some confusion among respondents about the wording of Question 2. For example, one respondent who ticked 'no' at Question 2 nevertheless stated that they agreed that family members providing care should not be prosecuted, since existing legislation would



address abuse among this group. However, this respondent went on to say that situations in which families ‘informally contract’ with non-family members to deliver care to a relative should be included.

### ***Concerns raised by respondents***

4.32 Respondents who thought that ‘informal’ care arrangements should be covered by the offence (i.e. those who ticked ‘no’ at Question 2), highlighted some concerns. These largely echoed the reasons given by those who thought ‘informal’ arrangements should not be covered. (See 4.27 above.) For example:

- The proposed offence might deter informal and unpaid carers from providing care.
- Wilful neglect / ill-treatment could be difficult to substantiate in informal circumstances.
- The legislation would need to be framed carefully to avoid criminalising carers who are not getting adequate support and who are struggling to cope.

### ***Clarification about the relationship between ‘informal care’, self-directed support and other caring arrangements***

4.33 Respondents frequently raised the issue of self-directed support. In general, respondents (including all local authority respondents) thought that self-directed support (SDS) arrangements – where a person in need of care can contract directly with ‘personal assistant’ to provide that care in their own home – should be covered by the offence. The point was made that if these arrangements were not included, it would result in a lower level of protection for people who are arranging their own care. However, this was not a unanimous view, and a few respondents gave reasons (as discussed above in relation to Question 1) why this would not be appropriate.

4.34 Several respondents commented that the question of whether ‘informal care’ should be covered by the offence was a complex issue which required further consideration. At the same time, there were repeated calls for clarification about what the consultation document referred to as ‘informal care’. Respondents also wanted clarification about the position of people who could reasonably be viewed as both paid and unpaid carers for the same individual.

4.35 Other scenarios highlighted by respondents as needing clarification regarding the potential for liability in cases where: (i) an unpaid carer who is also a legal guardian has responsibility for contracting with personal assistants and (ii) a non-family member is paid (for example, through SDS, attendance allowance or carers’ allowance) to provide care or other support (such as cleaning or shopping), but is not employed on a contract.

### ***'Informal care' is not equivalent to care at home***

- 4.36 Respondents emphasised that the definition of 'informal care' should not be linked in any way with the concept of care provided in an individual's own home. It was pointed out that current policy aims to shift the balance of care from institutional to community settings, and to support people to remain independent in their own homes for as long as possible. As a result, many formal health and care services are now delivered in people's homes.

### ***Need to demonstrate why existing legislation is not sufficient***

- 4.37 One third sector respondent supported the view that it would not be appropriate for the proposed offence to apply in situations where an informal caring arrangement exists. The respondent acknowledged the statement in the consultation document that, in such cases, 'existing offences in statute would apply'. However, this respondent called for the Scottish Government to demonstrate which existing offences this statement refers to, and to explain why these are not also sufficient as a framework to cover wilful neglect or ill-treatment by health and social care professionals.

### **Whether the offence should cover social care services for children (Q3)**

- 4.38 The consultation document stated the Scottish Government's position that the proposed offence should include all formal situations where health care is provided to children, for example, in NHS hospitals or independent hospitals. However, since the range of social care services provided to children is different to those delivered to adults, Question 3 in the consultation document sought views about whether social care services for children should be covered by the offence.
- 4.39 A total of 88 respondents replied to Question 3. Table 4.3 shows that 88% thought the new offence should cover social care services for children, and 3% thought it should not. Eight respondents (9%) did not tick either 'yes' or 'no' at Question 3 and they made comments that expressed unclear or mixed views.
- 4.40 All of the NHS respondents agreed that the new offence should cover social care services for children. In addition, 12 of the 77 who indicated agreement with the question were respondents who disagreed with the need for the new offence but nevertheless thought that if it is created, it should cover all formal social care services for children.

**Table 4.3: Question 3 – Should the new offence cover social care services for children?**

Respondent type	Yes		No		Unclear		Total	
	n	%	n	%	n	%	n	%
NHS	18	100%	—	0%	—	0%	18	100%
Local government	14	88%	1	6%	1	6%	16	100%
Third sector service provider / service user organisations	9	90%	—	0%	1	10%	10	100%
Professional associations, support agencies and trade unions	10	83%	1	8%	1	8%	12	100%
Scrutiny / regulatory bodies	6	86%	—	0%	1	14%	7	100%
Adult / child protection groups or partnership bodies	6	67%	1	11%	2	22%	9	100%
Third sector representative / co-ordinating agencies	6	86%	—	0%	1	14%	7	100%
Law organisations	2	100%	—	0%	—	0%	2	100%
Individual respondents	6	86%	—	0%	1	14%	7	100%
<b>Total</b>	<b>77</b>	<b>88%</b>	<b>3</b>	<b>3%</b>	<b>8</b>	<b>9%</b>	<b>88</b>	<b>100%</b>

Percentages do not all total 100 due to rounding.

4.41 Altogether, 83 respondents made comments at Question 3.

4.42 The three respondents who indicated disagreement with the proposal (i.e. they ticked ‘no’) all stated that existing legislation already addresses offences against children. One respondent cited the *Children and Young Persons (S) Act 1937*, section 12 (Cruelty to Persons under Sixteen), which makes it an offence to wilfully neglect, ill-treat or abandon a child under 16 whatever the setting.

4.43 The eight respondents whose views are shown in the table above as ‘unclear’ generally wanted further information before responding to the question. In particular, they wanted clarification about the existing legislation which was in place to address offences against children. Some respondents within this group, like those who ticked ‘no’, stated that existing legislation already existed to protect children.

### ***Respondents’ reasons for including children’s social care services in the offence***

4.44 In general, the 88% of respondents who supported the idea that the new offence should cover social care services for children, gave reasons that related to consistency and equity. Respondents argued that ‘children and young people should be afforded the same rights as adults’, and there was a view that ‘where there is a contractual basis to provide care, the person taking

on that role should be covered by the offence'. Respondents thought it would be 'illogical', 'perverse' and 'anomalous' if children were not given the same level of protection regarding their care as that provided to adults.

- 4.45 Respondents often noted that there is existing legislation which protects children from neglect, ill-treatment and abuse. However, some suggested that they would welcome a review of this legislation (and in particular, the 1937 Act referred to above), to ensure 'its effectiveness in the 21st century'. One respondent noted that the 1937 Act only applies where the wilful ill-treatment or neglect 'causes the child unnecessary suffering or injury to health' – thus suggesting that it may not be possible to prosecute an act of wilful neglect or ill-treatment under this legislation, unless it could be proven that harm had been suffered as a result of that act. (The issues of intent and harm are discussed further in Chapter 5.)

*Which services should be included*

- 4.46 Respondents argued that the new offence should cover both residential and community care settings for children, and they identified the following specific services for children which they thought should be included:

- Respite care
- Short breaks
- Residential care
- Residential schools
- Schools for children with learning disabilities and long term conditions
- Secure care
- Adoption services
- Child-minding
- Early years services (including private nurseries)
- Home-based support services
- After school care
- Children and Family social work services
- Children's hospices run by the third sector.

- 4.47 Although Question 3 concerned only the inclusion of social care services, some local authority respondents also suggested that certain types of health services for children should be covered by the offence, including: young person's units; children's hospitals or hospices; and child and adolescent mental health services.

- 4.48 Some respondents also suggested that schools (including independent and private boarding schools and other educational establishments) and young offender institutions should be covered by the proposed offence.

- 4.49 There was disagreement about whether kinship care and foster care should be included, with some respondents commenting that there is already sufficient legal provision to protect children in these situations, and others suggesting that any situation in which a child is cared for by someone other than their immediate family members should be included.

***Other issues raised by respondents***

- 4.50 Many of the respondents who indicated support for the new offence to cover social care services for children nevertheless pointed out that child protection is a closely regulated field, and that a substantial body of existing legislation already allows criminal prosecution for cases of cruelty or neglect of children. There was a concern (not only among those respondents who were opposed to the creation of the new offence, but also among other respondents) that if the proposed new offence covered children's services, the legislation and associated guidance in this area could become overly complicated. Respondents repeatedly called for clarification about how the proposed new offence would enhance the existing legislation in this area, or a commitment to ensuring that the new offence contributes meaningfully to the existing legislative frameworks without creating duplication.

**Whether the offence should apply to the 'voluntary' sector (Q4)**

- 4.51 Question 4 in the consultation sought respondents' views about whether the proposed offence of wilful neglect or ill-treatment should cover people providing care or treatment on a voluntary basis on behalf of a voluntary organisation.
- 4.52 A total of 91 respondents replied to Question 4. Table 4.4 below shows that 85% were in favour of the proposal that the offence should apply to people who are providing care or treatment on a voluntary basis on behalf of a voluntary organisation and 8% were not in favour. A further 8% of respondents made comments in response to the question without clearly indicating agreement or disagreement (e.g. they expressed mixed views, or they made comments that did not directly address the question).

**Table 4.4: Question 4 – Should the offence apply to people who are providing care or treatment on a voluntary basis on behalf of a voluntary organisation, whether on a paid or unpaid basis?**

Respondent type	Yes		No		Unclear		Total	
	n	%	n	%	n	%	n	%
NHS	18	100%	—	0%	—	0%	18	100%
Local government	16	100%	—	0%	—	0%	16	100%
Third sector service provider / service user organisations	10	83%	1	8%	1	8%	12	100%
Professional associations, support agencies and trade unions	8	73%	2	18%	1	9%	11	100%
Scrutiny / regulatory bodies	4	57%	1	14%	2	29%	7	100%
Adult / child protection groups or partnership bodies	9	100%	—	0%	—	0%	9	100%
Third sector representative / co-ordinating agencies	6	75%	1	13%	1	13%	8	100%
Law organisations	1	50%	1	50%	—	0%	2	100%
Individual respondents	5	63%	1	13%	2	25%	8	100%
<b>Total</b>	<b>77</b>	<b>85%</b>	<b>7</b>	<b>8%</b>	<b>7</b>	<b>8%</b>	<b>91</b>	<b>100%</b>

Percentages do not all total 100 due to rounding.

4.53 There was a clear balance of opinion in favour of the offence being applicable to volunteers operating on behalf of voluntary organisations. All those representing statutory service providers / commissioners (i.e. local authorities and NHS bodies) and partnership bodies agreed with this proposal, while views were more mixed amongst other groups.

4.54 Half the respondents who had initially expressed reservations about the introduction of the offence, nevertheless agreed that volunteers working on behalf of voluntary organisations should be included within the scope of the legislation should it be introduced.

***Views in support of including those providing care and treatment on a voluntary basis on behalf of a voluntary organisation***

4.55 The comments from those agreeing that the offence should apply to those providing care on a voluntary basis on behalf of a voluntary organisation offered a range of reasons, which indicated that respondents had approached the question in a number of ways, with some focusing on voluntary organisations while others focused on individual volunteers. Thus, the reasons they gave for agreeing with the proposition covered both of these perspectives and included the following:

- Those in receipt of care should have the same legal protection available regardless of the specific care arrangements in place, and the status of the organisation (statutory, voluntary or private) or the individuals delivering services should not be a factor.
- Voluntary organisations and volunteers had a longstanding history in the care sector and indeed were playing an increasing role through outsourcing and models such as co-production, and any legislation had to recognise and take account of this.
- Paid and unpaid workers had the same duty of care towards those receiving services.
- The legislation should apply in all circumstances where there was a contractual arrangement in place to provide care services.
- Services such as lunch clubs, meal on wheels and befriending services might be staffed by volunteers but were nevertheless ‘formal’ and should come within the remit of the legislation.

***Views opposed to including those providing care and treatment on a voluntary basis on behalf of a voluntary organisation***

4.56 Those who did not agree that the offence should apply to those providing care and treatment on a voluntary basis on behalf of a voluntary organisation (i.e. those who disagreed and those who did not give a clear overall view in their comments) highlighted the following issues: the existence of other legislation which covered this situation; the desirability of consistent arrangements across the UK; the possible absence of clear contractual arrangements and lines of supervision and responsibility; and the risk of deterring people from doing voluntary work. This group also raised the issues of the importance of recruitment, training and supervision of volunteers, and of the need for clear definitions should this proposal go ahead.

***Comments relating to voluntary organisations***

4.57 Those focusing on voluntary organisations in their comments were particularly clear that there was no reason for the offence not to apply, highlighting the fact that such organisations were often providing services on a commissioned basis, funded by the public purse, and therefore should be subject to the same scrutiny as other bodies. It was further suggested that commissioning bodies had a responsibility to satisfy themselves that all organisations delivering services on their behalf were operating to appropriate standards.

***Comments relating to volunteers working on behalf of voluntary organisations***

4.58 Many respondents, however, discussed the distinct circumstances relating to care services being delivered by volunteers on behalf of voluntary organisations, and the following points were made:

- People providing care services are in a position of trust, and voluntary organisations have a duty to make sure they have appropriate governance arrangements in place (covering disclosure checks, training, supervision, etc.) for all those working on their behalf, regardless of whether they are paid or not. (The risk of organisations ‘over-regulating’ volunteers was, however, noted as a concern by one respondent.)
- Like paid staff, volunteers should understand the values and ethos of the organisation they are working for, should adhere to a code of conduct and understand that they have a duty of care to those receiving services, and organisations had a responsibility to ensure that volunteers were aware of their responsibilities and obligations.
- While it was appropriate for the legislation to encompass volunteers, those operating in such a capacity may need additional training and support to make them aware of the legal framework and their related responsibilities.

4.59 Others, however, discussed the nature of the organisation-volunteer relationship as a key to whether an individual volunteer should be subject to the law. Some respondents thought that the existence of a formal contract would be required for an individual to be held responsible, and queried how the law would be applied in practice if this was not the case. One respondent, suggested, further, that ‘volunteering’ inherently implied a degree of flexibility in relation to how (and when) people worked, which may not, therefore, be compatible with a contractual duty to provide a set level of service. A further view was that the less formal relationship between volunteers and voluntary organisations itself created risk, and it was therefore more important that clients had legal protection in these circumstances.

4.60 There was also a suggestion (from the local authority sector in particular) that the organisation-volunteer relationship meant that the law should apply to the voluntary organisation and not the individual volunteers working on their behalf. Respondents offered two reasons for this view: (i) because they were responsible for the checking, training and supporting of volunteers, and (ii) because they were ultimately responsible for the conduct of the volunteer and the care provided.

4.61 Several respondents in this group acknowledged the argument that the risk of criminal prosecution may deter people from volunteering but suggested that this was either unlikely given the motivations of those interested in volunteering, or that this could be addressed through appropriate procedures and support from organisations. Indeed, several respondents offered the view that volunteers should benefit from the same standards of training and support as paid staff, and that including them in the scope of the legislation could have a positive effect in clarifying roles and responsibilities for those carrying out duties in a voluntary capacity. At the same time, there was also a view that volunteers were ‘different’ to paid staff with different obligations and



standards and that, while they should be held accountable, this would need to be recognised in the drafting of the law.

- 4.62 Finally, one respondent queried whether it was appropriate for services for vulnerable groups to be provided by volunteers.

***Definitional and drafting issues***

- 4.63 Respondents raised a number of definitional issues in relation to this question. In addition to the call for a clear definition of 'wilful neglect' and 'ill-treatment', respondents also wanted clarification in respect of the term 'paid volunteer' as well as the phrase 'on behalf of a voluntary organisation'.
- 4.64 Respondents were concerned that the term 'voluntary' did not inadvertently encompass unpaid carers (including kinship care arrangements). There was calls for the drafting of the legislation to make it clear that the offence was intended to cover: (i) formal services or services akin to paid services, albeit that they may be delivered by volunteers and (ii) activities undertaken by a volunteer on behalf of an organisation, rather than in an a personal capacity.

## 5 BASING THE OFFENCE ON CONDUCT OR OUTCOMES (Q5)

5.1 In the consultation document, the Scottish Government argued that the proposed offence should be based on the conduct of the individual or organisation, rather than based on any harm caused as a result of their actions. The rationale for this was that:

- No measure of deliberate neglect or mistreatment is acceptable and the law should reflect this.
- If a threshold of harm was set out in legislation, this could give rise to a situation where two people were subjected to the same ill-treatment or neglect by the same worker but because one was more seriously harmed than the other, a prosecution could only be brought in respect of the more seriously harmed individual.
- Setting a harm threshold may give rise to uncertainty about when the offence would apply.
- Neither the *Mental Health (S) Act 2003* nor the *Adults with Incapacity (S) Act 2000* define a required level of harm, and therefore to establish one for the purposes of the new offence would create an inconsistency.

5.2 Question 5 in the consultation document asked respondents' views about this issue.

**Question 5:** 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?

5.3 Altogether, 99 respondents responded to Question 5. Table 5.1 below shows that 85% agreed with the proposal to focus on the act of wilful neglect, rather than any outcome from that behaviour, and 11% disagreed. Four respondents (4%) did not tick 'yes' or 'no' and expressed unclear or mixed views about this issue.

5.4 All the local authority respondents and all the scrutiny / regulatory organisations indicated support for the proposal. Supporters of the proposal also included seven respondents who did not feel that the new offence was needed.

5.5 All of the law organisations disagreed with the proposal.

**Table 5.1: Question 5 – 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?**

Respondent type	Yes		No		Unclear		Total	
	n	%	n	%	n	%	n	%
NHS	15	83%	3	17%	—	0%	18	100%
Local government	17	100%	—	0%	—	0%	17	100%
Third sector service provider / service user organisations	12	92%	—	0%	1	8%	13	100%
Professional associations, support agencies and trade unions	7	58%	3	25%	2	17%	12	100%
Scrutiny / regulatory bodies	10	100%	—	0%	—	0%	10	100%
Adult / child protection groups or partnership bodies	8	89%	1	11%	—	0%	9	100%
Third sector representative / co-ordinating agencies	7	78%	1	11%	1	11%	9	100%
Law organisations	—	0%	3	100%	—	0%	3	100%
Individual respondents	8	100%	—	0%	—	0%	8	100%
<b>Total</b>	<b>84</b>	<b>85%</b>	<b>11</b>	<b>11%</b>	<b>4</b>	<b>4%</b>	<b>99</b>	<b>100%</b>

Percentages do not all total 100 due to rounding.

5.6 A total of 91 respondents made comments at Question 5. A major theme in these comments was a repeated call for a clearer definition of ‘ill-treatment’ and ‘neglect’. This call came both from those who had indicated support for the proposal and those who did not. The issues raised by respondents are discussed below.

### Respondents’ reasons for agreeing with the proposal

5.7 The 84 respondents who agreed that the offence should focus on conduct rather than outcomes gave the following reasons for their views, covering issues of consistency, standards and conduct, and practical application:

- The proposal would be consistent with similar offences set out in the *Mental Health (S) Act 2003* and the *Adults with Incapacity (S) Act 2000*. Where actual harm is suffered, other legislation could apply.
- It will improve standards and accountability, and send out a message that no level of neglect or mistreatment is acceptable.
- Focusing on conduct rather than outcomes may act as a greater deterrent.
- It is difficult to prove that certain actions or omissions had the effect of causing harm, particularly in relation to psychological harm and harm to vulnerable individuals (i.e. those with mental or cognitive disabilities) who may not be able to communicate harm / pain.

- It would be impractical to develop a threshold of harm.
- Harm may not result from unacceptable conduct, but unacceptable conduct should still be punished.
- Different individuals will have different thresholds of harm / pain, and so the measure of this would be subjective.

5.8 Respondents who agreed with the proposal, however, often did so with significant caveats. Most of these related to the need for clarity about ‘what sort of conduct would constitute wilful neglect or ill-treatment’. However, NHS respondents also noted that such acts are already covered by professional regulatory frameworks.

### **Respondents’ reasons for disagreeing with the proposal**

5.9 Ten of the 11 respondents who disagreed with the proposal were organisations not in favour of the creation of a new offence. The arguments put forward by respondents disagreeing with the proposal were complex and detailed, and often included a discussion of different scenarios. In addition, many of the arguments echoed the reasons that respondents gave for disagreeing with the proposal to create a criminal offence of ‘wilful neglect’ or ‘ill-treatment’. Law organisations offered slightly different reasons for disagreeing and these are presented first, before turning to the reasons given by other respondents.

5.10 The reasons given by the law organisations for disagreeing with the proposal in Question 5 are presented below. They highlight concerns about applying the law, and raise issues about the impact of the proposal on caring professions, and consistency with other legislation:

- A threshold for harm would need to be reached for a person’s conduct to be serious enough to amount to an offence. Harm must occur before a criminal offence can occur.
- Contrary to the statements made in the consultation document, not setting a threshold for harm is likely to result in more uncertainty than setting one.
- ‘Wilful neglect’ is a broad term which could potentially encompass acts that are properly, reasonably and responsibly undertaken (e.g. triaging patients or taking decisions not to allocate resources in certain circumstances).
- It would be difficult to define ‘wilful neglect’ without some reference to harm.
- It will deter individuals from entering social care professions.
- The approach proposed is inconsistent with the approach proposed in relation to establishing a statutory duty of candour – which suggests that levels of harm can be defined and events should be disclosed to relevant persons on the basis of the level of harm an individual suffers.

- 5.11 Other respondents gave the following reasons for disagreeing, again referring to issues of implementation, as well as the impact on professional practice:
- The absence of a threshold for harm may result in a significant number of investigations that nevertheless do not result in prosecution (since if no harm has occurred, it will be more difficult to assess whether neglect or ill-treatment has occurred).
  - Introducing an offence without a threshold of harm might act as a disincentive to establishing an open, transparent learning culture within services. It will create a culture of fear and litigation.
  - Without a stated harm threshold, the offence could give rise to unduly disproportionate penalties among those found guilty of wilful neglect or ill-treatment – where all actions (regardless of their effect) are given the same penalty.
- 5.12 One medical professional support body suggested that the proposals were inconsistent with the recommendations made by the National Advisory Group on the Safety of Patients in England (established following the inquiry into events at the Mid Staffordshire NHS Foundation Trust), which called for an offence of wilful neglect or ill-treatment to apply only to ‘egregious acts or omissions that cause death or serious harm’.

### **The need for clear definitions**

- 5.13 As noted above, respondents repeatedly emphasised the need for clear definitions of ‘ill-treatment’ and ‘wilful neglect’ – often highlighting scenarios where practitioners may make reasonable and deliberate decisions not to treat an individual, for example, to allow them to die with dignity.
- 5.14 The law organisations, in particular, suggested that, without clear definitions, the practical application of the offence would be inconsistent, would require considerable interpretation, and potentially result in unexpected adverse consequences.
- 5.15 Respondents often expressed concerns about the difficulty of defining these terms unless the outcomes are taken into consideration. There were also concerns about how neglect and ill-treatment could be defined to distinguish it from genuine mistakes and errors on the one hand, and ‘poor standards’ (which can result from a lack of resources) on the other. Respondents pointed out that, without a clear definition of ‘wilful neglect’, there was a risk that health and social care professionals would be criminalised for mistakes or for prioritising their workload due to pressures on resources, staff and time.
- 5.16 Respondents also commented that clear definitions were required to make it clear where the legislation would be used, and where it would be more

appropriate to use existing professional regulation or local disciplinary arrangements.

### ***Suggestions about definitions***

5.17 In relation to comments about the need for clear definitions, a few respondents made suggestions about what a definition for 'wilful neglect' or 'ill-treatment' should encompass. For example:

- That an individual is in a position of trust and abused that position
- That there has been a breach of a duty of care, and that breach has been both 'gross' and 'without reasonable excuse'
- The definition of 'wilful neglect' could be linked to (but not defined by) national care standards
- The definition should include a reference to the *frequency* of an act or omission (to distinguish between isolated incidents and repeated patterns of neglect / ill-treatment)

5.18 There was also a view that the new offence in Scotland should be consistent with the steps being taken in England and Wales in relation to the creation of a similar offence. The point was made that regulated health and care professionals move freely between the four UK countries; therefore differences between the countries' legal definitions of unacceptable professional behaviour should be avoided as they might gradually:

- Result in differences in practice across the UK, and
- Make it more difficult for the regulatory bodies to set UK-wide standards and hold all their registrants to account equitably.

5.19 Finally, although not directly related to the question of definitions, there was a view that the legislation should aim to reflect the positive NHS values as set out in the 2020 Workforce Vision:

- Care and compassion
- Dignity and respect
- Openness, honesty and responsibility
- Quality and teamwork.

## 6 VIEWS ON THE APPLICATION OF THE OFFENCE TO ORGANISATIONS

- 6.1 This chapter presents views on the proposal that the new offence should apply to organisations as well as individuals. The consultation included two questions on whether, how, and in what circumstances the offence should apply to organisations.

**Question 6:** Do you agree with our proposal that the offence should apply to organisations as well as individuals?

**Question 7:** How, and in what circumstances, do you think that the offence should apply to organisations?

- 6.2 The points raised in response to these two questions covered similar ground and so these questions have been analysed together.

### **Views on whether the offence should apply to organisations as well as individuals (Q6)**

- 6.3 In total, 97 respondents replied to Question 6. Table 6.1 below indicates that 96% of respondents agreed that the offence should apply to organisations as well as individuals, 2% disagreed, and 2% expressed unclear views (i.e. they did not tick 'yes' or 'no' to the question and it was not clear from their comments whether they agreed or disagreed).
- 6.4 It is clear that, with few exceptions, respondents agreed that the offence should apply to organisations as well as individuals. Nearly all of those who had reservations about the introduction of the proposed new offence nevertheless agreed that, should it be introduced, it should apply to both individuals and organisations.

**Table 6.1: Question 6 – Do you agree with our proposal that the offence should apply to organisations as well as individuals?**

Respondent type	Yes		No		Unclear		Total	
	n	%	n	%	n	%	n	%
NHS	20	100%	—	0%	—	0%	20	100%
Local government	17	100%	—	0%	—	0%	17	100%
Third sector service provider / service user organisations	12	100%	—	0%	—	0%	12	100%
Professional associations, support agencies and trade unions	11	92%	1	8%	—	0%	12	100%
Scrutiny / regulatory bodies	7	100%	—	0%	—	0%	7	100%
Adult / child protection groups or partnership bodies	8	89%	—	0%	1	11%	9	100%
Third sector representative / co-ordinating agencies	9	100%	—	0%	—	0%	9	100%
Law organisations	2	67%	1	33%	—	0%	3	100%
Individual respondents	7	88%	—	0%	1	13%	8	100%
<b>Total</b>	<b>93</b>	<b>96%</b>	<b>2</b>	<b>2%</b>	<b>2</b>	<b>2%</b>	<b>97</b>	<b>100%</b>

Percentages do not all total 100 due to rounding.

### ***Reasons for agreeing with the proposal***

6.5 Respondents offered two main – and inter-linked – reasons for believing that the proposed offence should apply to organisations as well as individuals.

These related to the impact of the organisational context on the conduct of individuals, and the principle (moral or legal) of corporate responsibility, as noted below:

- The organisational context: A common view in the responses was that neglect or ill-treatment by an individual member of staff was often ‘symptomatic of failings within the wider organisation’; others discussed how neglect and ill-treatment often arose where organisational and / managerial policies and practices gave rise to a culture of poor care.
- Corporate responsibility: Respondents highlighted: (i) the duty of care that organisations had to service users and staff, and (ii) their overall responsibility for the quality of care provided by those acting on their behalf, and for ensuring those delivering services are properly equipped and supported to do so. It was further argued that the principle of corporate responsibility and holding organisations to account would promote ‘zero tolerance’ and was ‘at the heart of fostering an environment in which care is prioritised’.

6.6 Respondents were of the view that it was inappropriate to blame (or scapegoat) individual frontline staff members for systematic organisational



failings, and that prosecuting individuals in this way would not necessarily address the need for wider service improvement. As such, respondents agreed that there should be the option to prosecute organisations too.

- 6.7 It was also suggested that including organisations within the scope of the legislation was: (i) consistent with not defining the offence in terms of actual harm caused, and (ii) afforded greater protection to service users, and (iii) may increase the chances of successful prosecutions by allowing all contributing factors to be assessed, and removing the need to identify a named individual who was directly responsible for the neglect or ill-treatment. (This was seen as a difficulty with existing legislation.)
- 6.8 Two further arguments in support of including organisations within the scope of the legislation focused on the principle of consistency with other legislation, and the potential benefits for service improvement:
- Consistency with other legislation: Here, respondents referred to other existing legislation which enabled organisations to be held to account, and saw no reason for the approach with this legislation to differ. They also suggested that consistency would aid clarity and understanding. Most commonly, respondents argued for consistency with the *Mental Health (S) Act 2003* and the *Adults with Incapacity (S) Act 2000*, both of which already allowed for prosecution of organisations as well as individuals for comparable offences of wilful neglect and ill-treatment in respect of adults with mental disorders and learning disabilities and adults otherwise 'at risk'. Respondents also highlighted the *Health and Safety at Work Act 1974* and the *Corporate Manslaughter / Homicide Act 2007* which both allow for the prosecution of organisations. (It should be noted that some respondents cited these existing pieces of legislation as grounds for arguing that the proposed new offence was, in fact, not required.)
  - Service improvement: A number of respondents thought the inclusion of organisations in the scope of the offence would play a useful part in broader efforts to improve standards of care and treatment. The risk of prosecution would, it was suggested, provide an incentive to organisations to ensure that procedures, practices and management arrangements were fit for purpose, and that sufficient resources were in place to provide an appropriate level of care.

### ***Caveats, concerns and qualifications***

- 6.9 Alongside the overall support for the offence to apply to both organisations and individuals, respondents also noted a range of qualifications, caveats and concerns.
- 6.10 The most common issue raised was the complexity of situations contributing to neglect and ill-treatment and the related difficulty of determining individual

and organisational responsibility with regard to any particular incident. Respondents emphasised that the legislation needed to respond to a wide spectrum of situations. These ranged from those involving individual culpability only (e.g. where individual members of staff within well-managed organisations had wilfully mistreated service users and taken steps to hide this from colleagues and supervisors), to those where organisational culture and practices could be seen to have directly contributed to poor care amounting to wilful neglect and ill-treatment.

6.11 Most respondents saw a place for individuals *and* organisations to be held to account by the law. Some talked about joint or shared responsibility, while others highlighted the need to consider the circumstances of each case on its merits. Others, however, offered general 'rules' as to how the balance of responsibility might be determined, with two opposing perspectives offered:

- Liability should generally rest with organisations in the first instance, with individuals being held responsible only in instances where it can be shown that organisations had fulfilled all their duties.
- Liability should only rest with organisations where their operations had fallen far below expected standards, or where there was a clear breach of a duty of care which resulted in serious harm.

6.12 There was also recognition that it would not always be easy to determine the balance between individual and organisational culpability (e.g. the extent to which organisational systems and pressures had contributed to an offence; or the extent to which an individual had 'colluded' with the organisation). The responsibility of individual staff members to raise concerns about quality of care was also noted, and there were calls for guidance on this to be provided.

6.13 There were also concerns that extending the scope of the offence to organisations may:

- Not be conducive to creating a culture of openness and transparency that supports service improvement; it was further suggested that the threat of criminal action may be a disincentive to engaging with service improvement efforts
- Result in 'scapegoating', with organisations trying to blame individuals to avoid prosecution (and alternatively, individuals seeking to shift the blame to their employers)
- Deter service providers from taking on the care and treatment of high-risk clients, or influence care decisions made in individual cases
- Result in increased litigation against organisations, with costs of defending against a criminal action or civil pay-outs in turn impacting on funds available for frontline services.

- 6.14 As noted above, those agreeing with the proposal that the offence should apply to both organisations and individuals included respondents who were opposed to, or had significant reservations about, the introduction of the new offence. The comments from this group were, by and large, in line with the comments put forward by other respondents. There were, though, two issues raised by NHS respondents in this group in particular. The first related to situations where care workers were indemnified by their employer. It was suggested that a situation could arise whereby an individual care worker accused of wilful neglect took action against their employer claiming organisational failure and leading to the anomalous situation of an organisation taking action against itself. It was suggested that this could lead to a requirement for care workers to provide their own professional indemnity insurance – which would represent a significant cost to the individual and may deter people from seeking employment in this sector. The second issue related to the question of whether government ministers might ultimately be held to account for policy and funding decisions that impact upon the quality of frontline care and give rise to accusations of wilful neglect and ill-treatment.

### ***Reasons for disagreeing with the proposal***

- 6.15 A small number of respondents did not agree with this proposal (i.e. they either explicitly disagreed or provided comment without offering a clear view on the proposal itself). Such respondents either restated their overall view that the legislation was not required, or indicated that there may be difficulties in practice in prosecuting and applying the legislation to organisations. Both of these points were also raised by respondents who agreed with the proposal.

### **How the offence would be applied to organisations (Q7)**

- 6.16 A small number of respondents addressed the issue of how the offence would be applied to organisations, with most noting concerns that this may pose difficulties in practice. There were, for example, concerns about determining the balance between individual and organisational culpability (as discussed above); how ‘wilfulness’ would be established at organisational level; and how the offence would be evidenced to allow a prosecution to proceed. The importance of differentiating between (perceived) poor-quality care (e.g. extended waiting times as a result of prioritisation in times of resource constraints) and unintentional harm and wilful neglect and ill-treatment was also stressed. More generally, there were calls for clarity about how this legislation would align with other existing legislation which could be used against organisations.
- 6.17 Although the consultation question asked whether the offence should apply to organisations in general, many respondents also commented on how responsibility might be attributed within organisations, and how the law might be enforced against particular staff and office bearers such as: board members; trustees; directors; owners; managers at all levels; supervisors; and

senior staff and other frontline staff (individually and collectively). Even though they may not have neglected or ill-treated service users directly, respondents saw it as important that the law enabled such staff and office bearers to be held to account. There were a number of comments arguing that those at the top of organisations or in overseeing roles (e.g. management boards, directors, local authorities) rather than individual managers should be held accountable for systemic failings. There were several calls for examples to be provided on this issue.

- 6.18 The potential difficulties of identifying those individuals whose actions (or inactions) amounted to wilful neglect or ill-treatment and building a case against them was noted. The need for this to be addressed in the drafting of the legislation was also noted (by, for example, explicitly allowing for a corporate entity to be pursued), as was the need to stipulate that ‘managers’ were covered by the legislation.
- 6.19 A small number of respondents took a particularly wide view in discussing the concept of organisational responsibility and how this might be applied. Local authorities, commissioning bodies (e.g. Health and Social Care Partnerships), the government and ministers were all mentioned as potentially bearing some liability for incidences of neglect and ill-treatment, particularly where a lack of resources were implicated in the quality of care provided.

### ***Circumstances in which the offence would apply to organisations***

- 6.20 Respondents approached discussion of the types of circumstances which would justify prosecution of organisations in two ways: by indicating broad criteria; and by describing more detailed examples of situations and types of action (and inaction) which should result in organisations being prosecuted.
- 6.21 In terms of broad criteria, respondents offered various descriptions of the circumstances in which the offence should apply to organisations, including the following:
- Where an organisation’s conduct amounts to a breach of its duty of care, or breach of other legislation
  - Where the neglect and ill-treatment goes wider than any one individual
  - Where the culture, practices and policies of an organisation can be seen to contribute to ill-treatment or neglect
  - Where organisations provide ‘care services of such low standards or with such poor funding that it is inevitable that the recipients of services will suffer from neglect’
  - Where organisations have failed to take reasonable steps to prevent neglect or ill-treatment.

- 6.22 Although most took a broad view of the circumstances in which organisations should be held responsible, some took a narrower view. They suggested that organisations should be held responsible where their conduct fell ‘far below expected standards’, where they had failed to address previously identified poor practice or had tried to cover up poor practice; where the failings were repeated or regular; where it could be demonstrated that the organisation ‘should have known that their (the organisation’s) actions would result in neglect and harmful outcomes’; or where the organisation’s role in the neglect could be properly evidenced.
- 6.23 One local authority respondent explained that organisations should only be held responsible if what they termed as the ‘but for’ test was met; i.e. ‘but for the organisational incompetence, the resulting ill-treatment or wilful neglect would not have occurred’.
- 6.24 Respondents often also went on to describe more detailed examples of the type of conduct which would contribute to circumstances where organisations should be held responsible. Examples offered by respondents related to a wide range of issues included the care and treatment provided; organisational policies, practices and procedures; recruitment, training and staff development; leadership and supervision arrangements; staffing levels; monitoring, evaluation and feedback arrangements; and the provision of adequate resources.
- 6.25 One professional association for social workers offered a detailed list of indicators which may point to system-wide problems for which organisations should be held to account, as follows:
- A pattern of inadequate nutrition, fluids, heat, privacy, access to social activity, cleanliness, attention to personal hygiene is present
  - Service users’ calls for help or evidence of distress are routinely not responded to or are responded to in an aggressive or punitive manner
  - Evidence of poor infection control practices and evidence of poor nursing practice
  - A failure to provide access to appropriate health, social care or educational / employment services
  - Misuse of service users’ drugs or drug errors
  - A tolerance of a culture of disrespect, name-calling, poking fun at service users
  - Restraint, control or manual handling practices used inappropriately or unlawfully
  - Inadequate attention given to medical needs, unreasonable delay in seeking medical attention, or withholding / obstructing medical treatment
  - Breaches in basic care standards that have the potential to cause, or have caused, significant harm

- Evidence of an inadequate approach to safe care at all levels within the organisation
- Where any failure in the service including inadequate training, low staffing levels or poor care practices which have the potential to cause harm or have caused harm which are brought to the attention of adult support and protection services, Police Scotland and/or the Care Inspectorate are not addressed within a reasonable period
- Evidence that the organisation has breached its duty of care through lack of adequate and appropriate policies, procedures and systems to promote acceptable levels of care, and to evaluate and monitor the care being provided
- Evidence that complaints have been received and no appropriate action has been taken to prevent recurrence of the issues raised
- Governance arrangements within the organisation that do not address issues of neglect immediately and comprehensively, looking at a whole system response to such issues.

6.26 This list of indicators was specifically referred to by a number of respondents, and – while not exhaustive – reflected many of the points included in other responses.

6.27 Although respondents often gave detailed accounts of the circumstances which might contribute to organisational culpability, there were also calls for the legislation itself to make clear what was expected of organisations and what would constitute organisational wilful neglect or ill-treatment. There were several references to the Corporate Manslaughter framework for assessing an organisation's conduct.

### ***Comments on the interface with the regulatory system***

6.28 The interface with scrutiny and regulatory regimes was noted by a number of respondents in considering the question of extending criminal responsibility to organisations. In general, respondents argued for a system-wide approach to addressing poor quality care and improving standards across the health and social care sectors. Respondents were of the view that any new offence had to be considered within the wider legal, professional regulation, scrutiny and inspection framework through which organisations were already monitored and held to account. The following more specific points were also made:

- That failure to act on recommendations resulting from inspections should be seen as contributing to organisational culpability
- That there would need to be clear links with the inspection process and channels for information sharing in order to ensure a full picture could be established regarding incidents and concerns

- That it would be important to differentiate the circumstances which merited commissioning authority, regulatory body, or criminal justice intervention
- That criminal prosecution and regulatory intervention served two separate purposes and needed to be co-ordinated to complement each other; there was a particular concern that ongoing criminal proceedings could delay regulatory action which would address service improvement needs.
- That the standards used by the Care Inspectorate in carrying out its inspections could be used in assessing whether organisational culpability under the law, and that the National Care Standards could be used to inform any definition of 'wilful neglect'.

6.29 There was a specific suggestion for a new regulatory body to oversee organisations that might be subject to the new offence, and for a system of reporting and self-reporting to be established (a comparison was drawn with the work and procedures of the Information Commissioners Office).

6.30 It was also suggested that the Scottish Government should consider how its arrangements for communicating and implementing the new offence can best promote and support co-ordination with the relevant regulatory bodies.

## 7 PENALTIES

7.1 This chapter presents respondents' views on the proposed penalties for the new offence. The consultation document outlined the Scottish Government's proposal that the penalties should reflect those already in place for existing offences under the *Mental Health (S) Act 2003* and the *Adults with Incapacity (S) Act 2000*, but also invited views on the need for additional penalties for organisations only. Two questions were posed, as follows:

**Question 8:** Do you agree that the penalties for this offence should be the same as those for the offences in the Mental Health Act 2003 and Adults with Incapacity Act 2000?

**Question 9:** Should the courts have any additional penalty options in respect of organisations?

7.2 Again, in relation to these two questions, there was a degree of cross-over in the points covered in response to each question, and so both questions have been analysed together.

### **Views on the proposal for penalties to be the same as those for existing offences (Q8)**

7.3 The consultation document provided details of the current penalties as follows:

- On summary conviction: imprisonment for a maximum term of 12 months, or to a fine not exceeding the statutory maximum (currently £10,000), or both
- On conviction on indictment: imprisonment for a maximum term of 2 years, or a fine (of an unlimited amount), or both

7.4 Altogether, 84 respondents replied to Question 8. Table 7.1 below shows that 85% of respondents agreed that the penalties for the new offence should be the same as those for equivalent offences already in place under the *Mental Health (S) Act 2003* and the *Adults with Incapacity (S) Act 2000*. Twelve percent (12%) disagreed, and 4% ticked neither 'yes' nor 'no' and made comments which expressed unclear or mixed views.

7.5 All the NHS organisations, scrutiny and regulatory bodies, and third sector representative agencies were in favour of the proposal. Those agreeing with this proposal also included two-thirds of those who expressed reservations about the legislation as a whole.



**Table 7.1: Question 8 – Do you agree that the penalties for this offence should be the same as those for the offences in the Mental Health (S) Act 2003 and Adults with Incapacity (S) Act 2000?**

Respondent type	Yes		No		Unclear		Total	
	n	%	n	%	n	%	n	%
NHS	19	100%	—	0%	—	0%	19	100%
Local government	13	81%	2	13%	1	6%	16	100%
Third sector service provider / service user organisations	10	83%	1	8%	1	8%	12	100%
Professional associations, support agencies and trade unions	9	82%	2	18%	—	0%	11	100%
Scrutiny / regulatory bodies	5	100%	—	0%	—	0%	5	100%
Adult / child protection groups or partnership bodies	7	88%	1	13%	—	0%	8	100%
Third sector representative / co-ordinating agencies	5	100%	—	0%	—	0%	5	100%
Law organisations	—	0%	2	100%	—	0%	2	100%
Individual respondents	3	50%	2	33%	1	17%	6	100%
<b>Total</b>	<b>71</b>	<b>85%</b>	<b>10</b>	<b>12%</b>	<b>3</b>	<b>4%</b>	<b>84</b>	<b>100%</b>

Percentages do not all total 100 due to rounding.

7.6 Altogether, 73 respondents made comments at Question 8.

### ***Views of those agreeing with the proposal***

7.7 It was clear from the comments that the principle of consistency was of key importance to respondents who agreed with the proposal. Respondents emphasised the importance of consistency across equivalent offences, and described the proposal as ‘sensible’ or ‘logical’. Respondents also suggested that such consistency would ensure equality under the law across different client groups, sectors and settings, and would be helpful in providing clarity or preventing confusion, and in raising awareness and understanding about – and ultimately compliance with – any new offence.

7.8 Alongside their support for consistent penalties across equivalent offences, many respondents offered general comments on the appropriateness of the penalties currently in place for existing offences. There were also more specific comments on current limits for fines and imprisonment, as noted below.

### ***General comments on current penalties***

7.9 Respondents’ comments often suggested support for the principle of consistency, rather than support for the currently available penalties per se. Although some respondents described the current penalties as ‘adequate’ or

‘appropriate’, more commonly people called for the penalties to be reviewed, or they argued explicitly for tougher penalties for those convicted of wilful neglect. Although not always stated, there was an implication that respondents wished to see this for offences under the *Mental Health (S) Act 2003* and the *Adults with Incapacity (S) Act 2000*, as well as for the proposed new offence.

- 7.10 Respondents also wished to see greater discretion in penalty setting, to allow penalties to reflect the circumstances and seriousness of the harm caused in any given case. This point was also made by some respondents in their comments at Question 5 (discussed above).

### **Comments on current fines**

- 7.11 Most commonly, respondents wished to see an increase in the level of fines permitted by the law, with some favouring unlimited fines. However, some respondents also wished to see fines that reflected the income / means of individuals and – more often – the profits of organisations. One respondent specifically argued that applying the same upper limit to organisations and individuals was iniquitous, given the potential for this to have a far greater impact on an individual. In the case of organisations, it was also suggested that a fine alone may not represent a sufficient penalty; and that fines should be levied on appropriate managers and office bearers if they were found to be at fault.

- 7.12 Most of the comments about fines focused on their application to organisations with the dominant view being that the law should allow for higher fines. However, there were also comments from those who offered caveats or voiced concerns in relation to this issue. Concerns raised included the following:

- Increasing the limit on fines might encourage increased complaints against organisations.
- Increased fines would impact on budgets for services, and the level of fines should be balanced with the need for organisations to continue providing quality care. There was a view that a fine should *only* be levied if it would not impact on services.

- 7.13 Other points made included the following:

- That fines on organisations should be ‘proportionate’ and should not have the effect of putting organisations out of business if the offence would not have merited closure through the regulatory system.
- That there was nothing to be gained from higher financial penalties, in terms of addressing shortcomings in services. There was, however, a suggestion from one respondent that financial penalties could be linked to a

service improvement plan which could provide a degree of incentive for addressing failings.

### ***Comments on imprisonment***

7.14 There were fewer comments on the option of imprisonment. However, the following comments – each made by one or two respondents only – demonstrate the range of views:

- It would be disproportionate for individuals to be at risk of a custodial sentence while organisations were only at risk of a fine.
- Appropriate managers or office bearers should be subject to custodial sentences if an organisation was found to be at fault.
- The maximum custodial sentence should be extended to five years, in line with the situation in England.

### ***Views of those disagreeing with the proposal***

7.15 Those who did not agree with the proposal made points which often overlapped with the views of those agreeing with the proposal. Comments included the following (all offered by one or two respondents only): that the penalties for existing equivalent offences were too lenient; that penalties should be restricted to fines only, with a custodial sentence being seen as appropriate for ‘a more serious criminal offence such as assault’; that other disposals such as the barring of convicted offenders from working or offering services in the health and social care fields and compensations for victims should be available. The nature of these comments suggests that, in most cases, respondents disagreed with what they perceived to be the current penalties rather than the principle of having the same penalties for all the equivalent offences.

7.16 This group also included respondents who disagreed with the proposal within the context of disagreeing with the need for a new offence to be introduced.

### ***Views on the provision of additional penalties for organisations (Q9)***

7.17 Question 9 in the consultation document invited views on the provision of additional penalties for organisations convicted of wilful neglect or ill-treatment. In total, 72 respondents replied to this question.

7.18 Here, views were more mixed than was the case for other proposals in the consultation. Table 7.2 below shows that two-thirds of respondents (67%) agreed that the courts should have additional penalty options in respect of organisations, a quarter (24%) disagreed and 10% expressed unclear views.

**Table 7.2: Question 9 – Should the courts have any additional penalty options in respect of organisations?**

Respondent type	Yes		No		Unclear		Total	
	n	%	n	%	n	%	n	%
NHS	8	47%	5	29%	4	24%	17	100%
Local government	13	81%	2	13%	1	6%	16	100%
Third sector service provider / service user organisations	8	89%	1	11%	—	0%	9	100%
Professional associations, support agencies and trade unions	4	67%	2	33%	—	0%	6	100%
Scrutiny / regulatory bodies	4	100%	—	0%	—	0%	4	100%
Adult / child protection groups or partnership bodies	7	88%	—	0%	1	13%	8	100%
Third sector representative / co-ordinating agencies	1	25%	3	75%	—	0%	4	100%
Law organisations	—	0%	1	100%	—	0%	1	100%
Individual respondents	3	43%	3	43%	1	14%	7	100%
<b>Total</b>	<b>48</b>	<b>67%</b>	<b>17</b>	<b>24%</b>	<b>7</b>	<b>10%</b>	<b>72</b>	<b>100%</b>

Percentages do not all total 100 due to rounding.

7.19 While noting the low numbers involved, those least likely to agree with the proposal included NHS organisations; professional bodies, support agencies and trade unions; third sector representative and co-coordinating bodies; and individual respondents.

7.20 Those who expressed reservations about the legislation as a whole tended to disagree with this proposal or did not comment; just two such respondents indicated agreement with the proposal.

7.21 Altogether, 67 respondents made comments at Question 9.

### ***Views of those agreeing with additional penalties for organisations***

7.22 Those respondents who wished to see the courts have additional penalties for organisations did so because they regarded the existing options as insufficient (e.g. in responding to the seriousness of the offence) or inappropriate as a means of bringing about positive change in service standards and organisational culture. Having a range of options available was seen as important by some in giving flexibility to respond appropriately to the circumstances of an offence and the nature of the organisation involved.

### ***Suggestions for additional penalties***

7.23 Respondents suggested a range of additional penalties which they thought should be available to be imposed on organisations. A small number of

respondents suggested additional financial penalties such as seizure of assets and compensation payable to victims (with one suggestion that this should be payable upfront from public funds with subsequent recovery from the offending organisation). More often, however, respondents wished to see penalties linked to service improvement. There were specific calls for the introduction of publicity orders (making concerns about the organisation public) and remedial orders (stipulating action to be taken to address concerns), measures which were noted as being currently available to the courts in England. There was also a suggestion that the courts might be given the power to order a public enquiry.

7.24 Besides these specific disposals, however, respondents called for a range of penalties related to: (i) restrictions (temporary or permanent) on activities; and (ii) additional scrutiny and inspection. By and large, the penalties discussed in this context were already available through existing routes in the wider legislative and regulatory context. Although some explicitly referred to the courts imposing the sanctions suggested, or envisaged a system involving court referrals to other agencies, others were less clear in their comments about the court's role in determining these additional penalties.

7.25 Those respondents wishing to see restrictions on activities made the following specific suggestions in respect of organisations:

- Permanent or temporary closure of facilities or services (including closure pending further investigation), depending on the seriousness of the case
- Restrictions on activities for a set period of time
- Barring of organisations from taking on new contracts for a set period of time
- Barring of organisations from operating in the health and social care fields
- Removal from the charities register.

7.26 The following additional suggestions were made in relation to representatives of organisations (e.g. owners or managers who might be held responsible for offences):

- Barring of individuals from managing or owning an organisation or working in the health and social care field
- De-registration or suspension from professional bodies
- Barring individuals from becoming trustees or directors
- Dismissal or replacement of chief executive, board members, etc.

7.27 There was also a view that individual owners or managers should be subject to the same sanctions as frontline staff found to be directly responsible for acts of wilful neglect or ill-treatment.

- 7.28 Respondents frequently called for conviction for wilful neglect and ill-treatment to be linked to scrutiny and regulatory activity. This reflected a commonly held view that penalties should be used to promote change within a wider context of service improvement. Some respondents spoke in general terms of ‘further scrutiny’, ‘additional monitoring’, and an increased role for existing regulatory bodies in such cases, with the degree of regulatory intervention reflecting the seriousness of the case. Others made more specific suggestions which could be regarded as court sanctioned monitoring and improvement plans with the option of further penalties for non-compliance. Two further suggestions each made by one respondent were a register of failing organisations and the introduction of a system of ‘special measures’ as used in England.
- 7.29 Although the question asked specifically about court penalties, the comments from respondents did not necessarily distinguish between penalties which would be imposed directly by the court and those which would be sanctioned via other routes, possibly following a referral or directive from the court. Respondents’ concerns were functional rather than technical, and focused on achieving the desired outcomes in terms of appropriate treatment of convicted organisations and individual staff / office bearers and improved services for clients. The comments suggested that what was important to respondents were judicial and regulatory / scrutiny systems which operated in a joined up and complementary way.

#### *Penalties available through alternative legislation*

- 7.30 Many respondents also referred to existing legislation and related penalties which could be used against organisations and which also gave the option of additional penalties. Examples here included the *Corporate Manslaughter / Homicide Act 2007*; the *Health and Safety at Work Act 1974*; *Companies Act 2006*; and legislation covering charities and trustees.

#### ***Views of those disagreeing with additional penalties for organisations***

- 7.31 Those who did not agree that courts should have additional penalty options available for organisations came from all sectors. They generally argued that existing legislation and associated penalties and existing regulatory and professional frameworks meant that there was no need for the new offence to be introduced.
- 7.32 As discussed above (see again Chapter 3), they also drew attention to potential negative consequences of imposing additional penalties on organisations. These included the impact on frontline services, increased litigation, increasingly risk-averse organisations and difficulties in recruiting board members and office bearers.

## **Other comments relating to prosecution and penalties**

7.33 Alongside the views on the specific questions on penalties, respondents across all sectors – including those who agreed and disagreed with the introduction of the new offence – offered a range of other relevant comments which addressed three main themes: the overall approach to responding to instances of neglect and ill-treatment in the health and social care sector; the interface between the criminal justice and social care systems; the prosecution process. Comments for each are summarised below.

### ***Overall approach to responding to instances of neglect and ill-treatment***

7.34 A recurrent theme in the comments was the belief that available penalties should be seen within a wider context which included a strong, well-resourced regulatory system, with an emphasis on promoting service improvement.

7.35 In this context, some questioned how the proposed penalties (or additional penalties for organisations) would result in positive change, or they advocated an approach with a greater emphasis on supporting organisations in learning from incidents and achieving improvement in quality of service. Respondents noted the need to balance penalties with the need to provide quality care, and that financial penalties reduced the funds available for delivering frontline services. They also suggested that tough penalties might result in organisations becoming ‘risk averse’ in the services they offered or the client groups they worked with.

7.36 An alternative view, however, was that tough penalties for organisations in particular, and publicity related to offences and sanctions, would act to drive up standards by making it clear that there were implications for organisations which failed to provide adequate care and treatment. There was also a call for sufficient resources to be put in to enforcement and prosecution.

### ***Interface between criminal justice and regulatory systems***

7.37 There were a range of comments highlighting the importance of a coherent approach across the criminal justice and regulatory systems. Respondents highlighted the existing regulatory and professional frameworks, and saw the relevant bodies as having a key role in investigating and sanctioning individuals and organisations subject to the proposed new law. While one respondent noted a specific concern that regulatory action may be delayed by an ongoing criminal justice investigation, another suggested that sanctions issued (or likely to be issued) by regulatory or professional bodies should be taken into account in determining court disposals.

7.38 Respondents also noted the need to link effectively with the PVG / disclosure system.

### ***Comments on specific aspects of the wider criminal justice context***

7.39 The questions on penalties also gave rise to a number of comments about the prosecution process more generally as discussed below.

- The appropriate judicial forum: One respondent argued that such offences should not be heard by a justice of the peace, while another respondent went further, arguing that the seriousness of the offence merited prosecution on indictment only.
- Flexibility and discretion: Respondents identified a need for discretion and flexibility at various stages in the prosecution and determination of penalties for acts of wilful neglect and ill-treatment in order to take account of the full circumstances of the case. This included discretion in the decision to prosecute, as well as flexibility in determining penalties. Flexibility was also sought in relation to using different legislative and regulatory options.



## 8 EQUALITY CONSIDERATIONS (Q10)

- 8.1 A final question in the consultation paper asked respondents for views on any issues raised or opportunities presented by the proposed legislation for people with protected characteristics. It also asked for views on mitigating actions that might be taken. The comments received were intended to assist the Scottish Government in carrying out its full equality impact assessment.

**Question 10:** 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 should be taken to mitigate the impact of any negative issues?

- 8.2 Just over two-thirds of all respondents (71 respondents) offered comments in response to this question. Around a quarter of those responding to this question did not offer detailed comment but took the opportunity to state briefly their overall assessment of the impact of the offence on those with protected characteristics. Other respondents provided fuller comments on different groups who might be positively or negatively impacted by the legislation, the opportunities that the legislation presented in terms of equalities and the actions required to maximise those opportunities and the issues raised and the steps required to mitigate those issues.

### **Overall assessment of the impact on those with protected characteristics**

- 8.3 Most respondents were, on the whole, positive about the equality implications of the proposed offence, although a number of issues and concerns were nevertheless raised within this context, as discussed below.
- 8.4 Respondents, including those who offered brief comments only, took the opportunity to state a general belief or expectation that the proposed offence would be a positive development for everyone (including staff, volunteers and carers); for all at risk of harm; for those from vulnerable groups; for those with protected characteristics; for those not currently covered by the *Mental Health (S) Act 2003* or the *Adults with Incapacity (S) Act 2000*.
- 8.5 Those offering a more neutral assessment indicated that they saw no negative impacts relating to those with protected characteristics, or no issues or opportunities.
- 8.6 Those respondents who had reservations about the introduction of the new offence either did not comment on the equality considerations or tended to offer neutral views. Two such respondents specifically stated that the new offence would provide 'no further protection [for people with protected characteristics] than that which is already offered under current legislation', thus indicating that their assessment was based on their overall view that the

proposed offence was not needed because sufficient legal remedies were already available.

- 8.7 Respondents offering fuller comments on their positive assessment of the equalities considerations made the point that those with protected characteristics were more likely to be subject to wilful neglect or ill-treatment for a number of reasons: because they were more likely to be in receipt of health or social care (in the case of those affected by age or disability); or because their protected characteristic made them vulnerable to discrimination and harassment and may be a factor in their wilful neglect or ill-treatment. It was suggested that the new offence would give such groups confidence in knowing that neglect or ill-treatment was unacceptable. Those highlighting particular groups who would benefit focused on older people and those with disabilities, although some stressed that offences should be prosecuted regardless of protected characteristics.
- 8.8 Alongside the more positive comments about equality impacts, respondents highlighted a number of groups who they thought may not get the full benefit from the new legislation. Groups here included those from minority ethnic groups who were, it was suggested, more likely to be cared for by family at home; those making use of the option under self-directed support to employ personal assistants in their own home; those from backgrounds where traditional practices and cultural norms and expectations may impact on the ability to pursue cases because of a lack of evidence or corroboration. Some made a more general point about the need for consistency in protecting those cared for in both formal and informal settings.
- 8.9 The possibility of organisations becoming more risk averse and withdrawing from providing services from some client groups was noted as having a potential impact on people with protected characteristics by one respondent.
- 8.10 While most comments focused on the equality impacts on different groups of service users and patients, a few respondents made reference to groups involved in delivering care who may be adversely affected. It was noted that the gender balance in the care sector meant that women were more likely to face legal proceedings under the new law. Two respondents commented on the potential implications for care staff with learning disabilities: one noted that the new law may have possible consequences for the employment of those with learning disabilities in caring roles; another suggested that there may be situations where the presence of such characteristics might represent 'mitigating circumstances' in the event of an accusation of wilful neglect or ill-treatment being made.

### **Issues arising and how they might be mitigated**

- 8.11 There were two main themes in the issues identified by respondents: the need to facilitate access to justice for equality groups; and a concern that equality

considerations had the potential to give rise to vexatious claims. These are discussed in turn below.

8.12 The difficulties faced by some equality groups in getting access to justice was a key issue for a range of respondents who stressed the need to ensure that the introduction of the new offence was complemented by appropriate steps to mitigate this. Groups mentioned most often here included 'hard to reach groups', older people, disabled people and, in particular, those with communication difficulties. The measures proposed by respondents focused on aiding prevention and early identification of incidents as well as facilitating access to legal redress and supporting victims, and included the following:

- Clear and accessible information for service users, their families and carers, to raise awareness of expected standards, as well as the options for taking action
- Effective complaints procedures
- Clear routes for accessing relevant agencies, including the Police and legal advisors
- (Confidential) advice lines and reporting services, including telephone and online options
- Access to support and advocacy services, with criminal justice lay visitors noted as one existing model.

8.13 A number of respondents felt it was important to recognise the reality of the difficulties faced by some groups in pursuing actions; they suggested that in some circumstances preventative measures should be prioritised to reduce the chance of neglect or ill-treatment and the corresponding need for redress.

8.14 It was also suggested that pursuing actions could have negative repercussions for those involved (including the risk of organisations / professionals trying to pass blame onto accusers), and that sensitive handling and adequate support for victims would be required to offset this.

8.15 For some respondents involved in service provision there was a concern that the new offence could give rise to unreasonable or vexatious actions against staff and organisations in cases where it had not been possible to meet requests related to the needs of specific equality groups. Examples offered included not being able to offer treatment by a practitioner of the same sex as the client. This was seen as an issue that was most likely to arise in rural and remote areas, and during 'out-of-hours' periods.

### **Opportunities presented by the introduction of the new offence**

8.16 Respondents identified a number of opportunities arising from the introduction of the new offence, relating to: empowering service users; driving service improvement and enhancing understanding of equality issues as follows:

- Empowerment of service users (and their families): Respondents suggested that the new offence would increase the opportunities for those with protected characteristics to challenge inadequate care; would offer such service users consistent options and a clear complaint 'pathway'; would make it clear that such service users did not have to tolerate sub-standard care and treatment; and would allow them to hold service providers to account in respect of their implementation of equalities legislation.
- Enhancing understanding of equality considerations: Here respondents suggested that the new offence would provide an opportunity for organisations to ensure they have appropriate policies, procedures and training in place in relation to equality and diversity. It was further suggested that policies, procedures and training should confirm the expectation that people should be treated equally and fairly, and with respect, regardless of their characteristics and background. It should also reconfirm expectations relating to whistleblowing, empowering staff to act if they became aware of neglect or ill-treatment. There was a call for this to be covered in any guidance issued to support the legislation.
- Driving service improvement: The legislation was seen as providing the opportunity to improve the quality of care and level of protection for all service users. One respondent suggested it would help 'set minimum operating standards for all organisations, to promote collective responsibility and improve outcomes for those most in need of help and support'; another suggested that meeting the needs of those from different equality groups should be addressed as part of the commissioning process.

8.17 However, while most respondents saw potential opportunities in relation to addressing equality issues, some also cautioned that the introduction of the new offence was not sufficient on its own. Here respondents highlighted:

- The importance of the legislation being 'part of a wider programme to improve care, create an open culture and ensure a valued workforce'
- The need for full understanding of the purpose and application of the new offence, and the importance of avoiding confusion with existing legislation that already provides protection for some with protected characteristics
- The need to look at and learn from the limited use made of the existing offences of wilful neglect and ill-treatment.

### **Other points raised**

8.18 A small number of respondents attached importance to the proposed equality impact assessment or engagement with relevant groups or specifically as mechanisms for identifying possible issues and impacts on groups with protected characteristics.

## ANNEX 1: CONSULTATION QUESTIONS

- Q1 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? (Yes / No)
- Q2 Do you agree with our proposal that the offence should not cover informal arrangements, for example, one family member caring for another? (Yes / No)
- Q3a Should the new offence cover social care services for children, and if so, which services should it cover? (Yes / No)
- Q3b Please list any children's services that you think should be excluded from the scope of the offence and explain your view.
- Q4 Should the offence apply to people who are providing care or treatment on a voluntary basis on behalf of a voluntary organisation?
- Q5 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)
- Q6 Do you agree with our proposal that the offence should apply to organisations as well as individuals? (Yes / No)
- Q7 How, and in what circumstances, do you think the offence should apply to organisations?
- Q8 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)
- Q9a Should the courts have any additional penalty options in respect of organisations? (Yes / No)
- Q9b If yes, please provide details of any other penalty options that you think would be appropriate.
- Q10 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?

## ANNEX 2: ORGANISATIONAL RESPONDENTS

### *NHS (20)*

- Child Protection Nursing, Midwifery and Allied Health Professions (NMAHP) Scotland Group
- Gilbert Bain Hospital Consultants' Group
- Healthcare Improvement Scotland
- NHS Ayrshire and Arran, Adult Community MH Services (9 staff)
- NHS Dumfries and Galloway
- NHS Education for Scotland
- NHS Fife
- NHS Forth Valley
- NHS Greater Glasgow & Clyde
- NHS Greater Glasgow & Clyde, Area Pharmaceutical Committee
- NHS Greater Glasgow & Clyde, Area Psychology Committee (APsyC)
- NHS Greater Glasgow & Clyde, Nursing and Midwifery
- NHS Lanarkshire and North Lanarkshire Council (joint response)
- NHS National Services Scotland
- NHS Scotland Directors of Pharmacy
- NHS Shetland
- NHS Tayside (two responses received)
- Scottish Ambulance Service
- The State Hospital

### *Local authority (17)*

- Aberdeen City Council
- Aberdeenshire Council
- Argyll and Bute Council
- City of Edinburgh Council
- Clackmannanshire and Stirling Councils (joint response)
- Convention of Scottish Local Authorities (COSLA)
- Dumfries & Galloway Council, Social Work Services
- Dundee City Council, Social Work Department
- East Dunbartonshire Council
- Fife Council

- Glasgow City Council Social Work Services and Cordia (Services) LLP (joint response)
- Midlothian Council
- Scottish Borders Council
- South Ayrshire Council, Adult Community Care
- South Lanarkshire Council
- West Lothian Council

### *Adult / child protection groups and other partnership bodies (9)*

- Angus Adult Protection Committee
- Argyll and Bute Adult Protection Committee
- East & Midlothian Public Protection Committee
- East Renfrewshire Child and Adult Protection Committees
- Highland Child Protection Committee
- Inverclyde Community Health and Social Care Partnership
- North Ayrshire Health & Social Care Partnership
- Police Scotland National Adult Support and Protection Working Group
- Renfrewshire Child Protection Committee (RCPC)

### *Third sector service provider / service user groups (13)*

- Alzheimer Scotland
- CHILDREN 1<sup>ST</sup>
- Edinburgh Health Forum
- ENABLE Scotland
- Marie Curie
- National Society for the Prevention of Cruelty to Children (NSPCC) Scotland
- Parkinson's UK in Scotland
- People First (Scotland)
- Quarriers
- Real Life Options
- Royal Blind
- The Salvation Army
- Victim Support Scotland

*Royal Colleges, professional associations, professional support bodies and trade unions (13)*

- British Association for Counselling and Psychotherapy
- British Medical Association (BMA) Scotland
- Institute of Chartered Secretaries and Administrators (ICSA)
- Medical and Dental Defence Union of Scotland
- Medical Defence Union
- Medical Protection Society
- Royal College of Nursing Scotland
- Royal College of Physicians of Edinburgh
- Royal College of Radiologists
- Royal Pharmaceutical Society
- Social Work Scotland
- The Society of Chiropractors & Podiatrists
- UNISON

*Scrutiny, improvement, regulatory or research bodies (11)*

- Care Inspectorate
- General Dental Council
- General Pharmaceutical Council
- Health and Care Professions Council (HCPC)
- Health and Safety Executive
- Health Foundation
- Mental Welfare Commission for Scotland
- Nursing and Midwifery Council (NMC)
- Picker Institute Europe
- Professional Standards Authority for Health and Social Care
- Scottish Social Services Council

*Third sector umbrella bodies or organisational representative groups (9)*

- Coalition of Care and Support Providers in Scotland (CCPS)
- The Health and Social Care Alliance Scotland (the ALLIANCE)
- National Carer Organisations
- National Pharmacy Association
- Scottish Care

- Scottish Independent Advocacy Alliance
- Scottish Independent Hospitals Association (SIHA)
- Self Directed Support Scotland (SDSS)
- United Kingdom Homecare Association

*Law organisations (3)*

- BLM
- Law Society of Scotland
- Simpson & Marwick

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