

# **Proposals for the creation of an Offence of Wilful Neglect or Ill-treatment with regard to services for Children under the age of 18 – Further Engagement:**

**Scottish Government Response and Analysis**

**December 2015**

## **Introduction**

1. The Scottish Government launched a further engagement exercise on proposals for the creation of an offence of wilful neglect or ill-treatment with regard to services for Children under the age of 18, on 16 September 2015. The consultation closed, after a 6 week period, on 28 October 2015.
2. The Health (Tobacco, Nicotine etc. and Care) Bill was introduced to Parliament on 4 June 2015 and confirms the intention to introduce an offence of wilful neglect and ill-treatment for adult health and social care services. The consultation paper outlined proposals for a Stage 2 amendment to be made to the Bill to extend the provisions in relation to wilful neglect and ill-treatment to also cover services for children.
3. The wellbeing and safety of Scotland's children is of paramount importance to the Scottish Government. All young people have the right to be cared for and protected from harm, and to grow up in a safe environment, in which their rights and needs are respected. Everyone working with children has a duty to promote, support and safeguard their wellbeing. Scotland has a broad and extensive framework for child protection, and it is clear that the majority of children in Scotland receive high quality services from a workforce concerned about their wellbeing. There is a commitment to continuous improvement, both from the Scottish Government and our partners; for example through the [Early Years Collaborative](#) and other initiatives, such as [GIRFEC](#).
4. The consultation responses received made it clear that the respondents are equally committed to the principles of offering children the best protection possible from abuse or neglect. However, it is also clear that the respondents had very serious concerns about the proposals outlined in the consultation paper. The Scottish Government values the input and expertise of its partners in this area, and is committed to working collaboratively with them to drive improvement in child protection in Scotland. To that end, we have considered their concerns and acknowledge their validity. For this reason, the Scottish Government no longer considers that including children's services within the scope of Part 3 of the Health (Tobacco, Nicotine etc. and Care) (Scotland) Bill, is the best way to protect children from wilful neglect or ill-treatment, at this time.
5. It should be noted that the Scottish Government's position on the provisions on wilful neglect in adult health and social care has not changed and that these provisions will remain in the Bill. Offences of wilful neglect and ill-treatment in a health and social care context already apply to some people, as a result of s.83 of the Adults with Incapacity (Scotland) Act 2000 and s.315 of the Mental Health (Care and Treatment) (Scotland) Act 2003. It is not the principles behind the provisions which are problematic, but issues in relation to how they can be

coherently implemented in the context of the child protection landscape in Scotland. Furthermore, the provisions in the Bill have already been consulted upon, as part of the wider consultation on wilful neglect and ill-treatment in health and social care services, which was launched by the Scottish Government in October 2014. While the initial consultation showed that respondents to that consultation mostly agreed in principle with the proposal that the provisions should also cover children's services, it did not explore in detail, the issues in relation to implementing the proposals in the context of the Scottish child protection system.

6. Respondents to the consultation highlighted four main areas of concern in relation to these proposals:
  - Rationale
  - Existing legislation
  - Unintended consequences
  - Scope

These are explored in more detail at headings A – D below. Please note that a full question-by-question breakdown of the consultation responses is available at Annex A.

#### **A: Rationale for introducing the offence**

7. Nine out of 47 respondents to the consultation expressly questioned the rationale for introducing the offence. This was a theme throughout the consultation responses, with respondents highlighting the issues detailed at paragraphs 8 – 10 under various different questions.
8. One reason given for questioning the rationale for introducing the offence was that respondents felt that no evidence base had been shown to exist, which demonstrated that additional legislation was needed in order to protect children from neglect and ill-treatment in health and social care settings. The NSPCC response stated that, "*The Scottish Government must demonstrate that children will be safer as a consequence of any proposed changes*" and the joint response submitted by Barnardo's, Children 1<sup>st</sup> and Children in Scotland stated that "*We would urge the Scottish Government to consider what evidence is available to suggest that these proposals are currently needed in Scotland and how they would make children safer*". While events such as the breakdown of care at Mid-Staffordshire NHS Foundation Trust, and at Winterbourne View, can be seen as an evidence base which demonstrates the need for additional protection of adults in health and social care contexts, they do not necessarily demonstrate the need for the introduction of an offence of wilful neglect and ill-treatment to children's services.

9. Some respondents considered that as there is already existing child protection legislation which covers wilful neglect and ill-treatment, there is no rationale for introducing additional legislation. They also highlighted that implementing the proposed offence alongside the existing legislation could have serious unintended consequences. These issues are explored in more detail at headings B and C below.
10. Police Scotland gave a further reason that there did not appear to be a justification for implementing the proposals. They stated that *“Police Scotland is of the view that a single piece of necessary, effective, clear, coherent and accessible legislation which is fit for 21st Century Scotland is created which encompasses all individuals or organisations having parental, charge or care responsibilities as opposed to creating a patchwork of legislation with different essential elements, thresholds and outcomes.”* They, and nine other respondents, including the Scottish Association for Social Work, the Health and Care Professions Council, and the Scottish Independent Advocacy Alliance, suggested that the neglect or ill-treatment of children is unacceptable no matter what setting it occurs in, implying that the Scottish Government should take steps to address the problem of wilful neglect and ill-treatment as a whole across Scotland. Police Scotland said that, *“A possible unintended consequence of the proposal for new legislation to focus solely on this narrow group represents a missed opportunity to include all care providers, issues such as necessity, effectiveness, clarity, coherence, accessibility and fairness, may result in further debate.”*

## **B: Existing Legislation**

11. As mentioned at paragraphs 6 and 7, there is existing legislation under Scots Law, which offers children protection for neglect and ill-treatment in a health and social care setting. The Children and Young Persons (Scotland) Act 1937 (CYPA) s.12 states that *“If any person who has attained the age of sixteen years and who has parental responsibilities in relation to a child or to a young person under that age or has charge or care of a child or such a young person, wilfully... neglects, ...or causes or procures him to be neglected... that person shall be guilty of an offence.”* This offence is not limited to parental and familial relationships and consequently could be used to prosecute a Care Worker who neglected or ill-treated a child in a health or social care setting. Consequently, children would remain protected from wilful neglect or ill-treatment in a health and social care setting, even if the proposed amendment to the Bill is not made, because they would be protected under the s.12 offence.
12. In their consultation response, Police Scotland stated that introducing a new offence of wilful neglect and ill-treatment in children’s services, alongside s.12 of

the CYPA would result in, “a patchwork of legislation with different essential elements, thresholds and outcomes.” Instead, they repeatedly urge the Scottish Government to consider an alternative approach and create “a single piece of necessary, effective, clear, coherent and accessible legislation which is fit for 21st Century Scotland... which encompasses all individuals or organisations having parental, charge or care responsibilities”

13. They also note that “While Section 12 of the Children and Young Persons (Scotland) Act 1937 has been the criminal legislative cornerstone for protecting children and young people for some 78 years, case law over these many years has resulted in questions over its effectiveness in a 21<sup>st</sup> Century Scotland...Section 12 of the Children and Young Persons (Scotland) Act 1937 should be repealed and a new piece of legislation enacted which is fit for a modern Scotland and includes all persons and organisations [sic] who have parental, charge or care responsibilities.” The issues with using a 78 year-old piece of legislation are two-fold: firstly, many different judicial rulings have set different and sometimes conflicting interpretations of how they should be applied, leading to the “patchwork” referred to in the Police Scotland response. The second issue is that societal attitudes in relation to what qualifies as wilful neglect and ill-treatment may have changed over the past 78 years and consequently an Act which was created in 1937 may no longer be suitable to sanction all conduct which is currently widely understood as wilful neglect or ill-treatment.
14. The complexities of applying CYPA s.12 were also noted in the response from the Law Society of Scotland, when they highlighted issues in relation to the judicial interpretation of wilful neglect. The response highlights the recent case of *JM v. Locality Reporter Glasgow* where leading judges could not agree on the legal definition of wilful neglect, as it is articulated in CYPA s,12. Part of the reason for this is that the many different precedents set over 78 years had led to conflicting interpretations, even among the country’s top judges, as to how wilful neglect should be interpreted in Scots law.
15. A common theme in the consultation responses was that additional clarity was needed in relation to the definition of wilful neglect: this was mentioned by 13 organisations at various points throughout their submissions. Respondents were concerned that the proposals did not provide certainty to practitioners that they would not be prosecuted for wilful neglect or ill-treatment, as a result of conduct which they had not been aware could be interpreted as wilful neglect or ill-treatment. However, it is important to note that the provisions in the Bill are very similar to existing offences under the Mental Health (Care and Treatment) (Scotland) Act 2003 and the Adults With Incapacity (Scotland) Act 2000. These offences have been applied for 12 and 15 years, respectively, and there is no evidence to suggest that there has been any difficulty amongst practitioners, the police, or the judiciary in applying these offences. By giving a closer definition of

wilful neglect in the Bill, the Scottish Government would run the risk of throwing doubt on the way that the concept of 'wilful neglect' is interpreted in existing legislation.

16. The Scottish Government acknowledges that the issues outlined at paragraphs 12 – 16 of this paper indicate that there are problems with the existing offences of wilful neglect and ill-treatment under s.12 of the Children and Young Persons (Scotland) Act 1937. We appreciate that this situation is imperfect and cannot be a permanent solution for addressing the problems of children both within and beyond health and social care settings. However, as indicated above, part of the problem with the s.12 offence is that it is complex to apply in practice. Adding a further offence which has limited application, is only going to add to existing complexities in this area. Furthermore, the problems in relation to s.12 are problems in relation to the wider context of the wilful neglect and ill-treatment of children, beyond the health and social care context. For this reason, the Scottish Government does not believe that an amendment to this Bill is the appropriate mechanism to address these issues. These issues clearly highlight the difficulties of implementing these proposals in a child protection context, as opposed to an adult health and social care context.

### **C: Unintended consequences**

17. One of the major unintended consequences which was identified as a risk by respondents to the consultation, was that the proposals may deter care workers and providers from open and transparent practices which would enable learning and help prevent future mistakes. Inverclyde Child Protection Committee and Social Work Scotland both submitted responses which summarised this risk by saying that, *"It should ... be noted... that practitioners are often faced with situations that are complex and the tone of the legislation does not appear to promote a supportive and empowering approach to practice and may contribute to a culture of fear and punishment. This may lead to more risk-averse and defensive practice and decision making."* Eight other respondents also identified this possibility as risk related to implementing the proposals.. The joint response from Barnardo's, Children 1<sup>st</sup> and Children in Scotland gives insight into why the respondents may consider this risk to be significant, when it states that, *"Open and transparent practice is one of the best ways to prevent abuse taking place within institutional settings."*
18. The comments summarised at paragraph 17 should be viewed in light of Scottish Government child protection policy. The National Child Protection Guidance 2014, states that the Scottish Government wants to promote a skilled and confident workforce, which would seem contradictory to the "culture of fear and punishment" described by Inverclyde Child Protection Committee and Social Work Scotland amongst others.

19. Police Scotland also suggested that “*potential unintended consequences of such could be individual workers or organisations providing health and social care services feeling unable to participate in or provide any information when a review is being conducted; whether single agency or multi agency, such as a Significant Case Review, due to the possibility of self-incrimination.*” Again, this is contrary to Scottish Government policy objectives. It is clearly stated in the National Guidance for Significant Case Reviews (SCRs) for Child Protection Committees that the purpose of SCRs is to aid organisational learning, which would be negatively affected if Care Workers and Providers are less willing to actively participate in them due to a fear of criminal prosecution.
20. More defensive learning practices could also prevent effective inter-agency working, as practitioners may be afraid to disclose mistakes in case this leads to a prosecution being brought against them. This could further be exacerbated by the fact that some agencies would be liable for prosecution under these proposals, while others would not. For example, while social workers could be prosecuted under the offence, police could not. Again, this is contrary to existing child protection policy in Scotland, as an important part of the Children and Young People (Scotland) Act 2014, is that it requires a wide range of public bodies to cooperate to support children and families. Any disincentive to share information in the interest of the child would be contrary to achieving this. Furthermore, making the GIRFEC approach effective depends on honest partnership working between practitioners across children’s services.
21. Four respondents also expressed the concern that a further unintended consequence of implementing the proposals would be to deter people from entering Care Worker professions.
22. It should be noted that the proposed offences are already applied to the health care context under the Mental Health (Care and Treatment) (Scotland) Act 2003 and the Adults With Incapacity (Scotland) Act, without creating these unintended consequences and without contradicting Scottish Government policy. Again, it is clear that problems arise when the provisions are applied to the child protection context, and not in relation to adult care. This is partly due to the large volume of existing legislation in the area of child protection. As mentioned at paragraph 16, the Scottish Government recognises that creating this offence alongside s.12 CYPA would add additional complexity to the system which is already in place to protect children from wilful neglect and ill-treatment in a health and social care setting. As many respondents have stated the need for a definition of the conduct encompassed by wilful neglect and ill-treatment, it seems that one of the implications of this complexity would be to create confusion in relation to what conduct would lead to liability under the proposed offence. As a result of this confusion, Care Workers working in a child care capacity may feel less certainty

as to whether they would be prosecuted, than Care Workers providing services to adults. Consequently, it is understandable that these unintended consequences may occur in relation to children's health and social care services but not in relation to adult services.

#### **D: Scope**

23. 17 respondents stated that if these proposals were to be implemented, then they should be applied to educational services in some capacity. This had not previously been considered, as there is no equivalent, in relation to adults, to the care provided to children within an educational setting. The fact that, overall, 36% of the total respondents suggested that educational settings should be included, suggests that the Scottish Government should not apply a wilful neglect and ill-treatment in relation to children, to health and social care services in isolation.
24. It was highlighted by five consultation respondents, that workers within educational settings do deliver a level of care to children; particularly vulnerable children, who receive social care across a range of settings. Similarly, two consultation responses noted that teachers are the people who, apart from parents or carers, have the most access to children's lives.
25. Six responses highlighted the fact that there are some services which are delivered within educational settings which could be categorised as health or social care services. For example, health care which is delivered at school; such as where disabled children who need health care receive treatment from specialists at school, or where they receive support from a learning assistant.
26. The Scottish Government acknowledges that teachers and educational establishments are an important part of children's services, which have an important role to play in child protection. This is an issue which clearly is limited to children's services in its application, as a similar context to children's education does not exist in adult services.
27. Another issue in relation to the coverage of the proposals relates to the line between formal and informal care. The lines between formal and informal care are much more blurred in relation to the care of children than in relation to the care of adults. Respondents gave several examples as to where it would be unclear whether a care arrangement was formal or informal.
28. One such example, as mentioned by five different respondents, would be foster care, where the arrangement is contractual in nature and can be between either the parent of the child and the foster carer, or the local authority and the foster carer. Another example would be where the parent of



the child takes on the role of a Self-Directed Support (SDS) Personal Assistant: four responses raised this issue. If other SDS workers would be covered by the scheme, then it seems that a parent, despite having an informal caring duty, would be covered by the offence by virtue of being paid. The distinction between formal kinship care as opposed to informal kinship care could also be problematic, as was highlighted in three responses. This would mean that a kinship carer who performed the exact same role, but whose care arrangement was classified as “informal”, would be less liable for neglecting the child in their care. From the examples detailed in this paragraph, we can see that the language of formal and informal care do not translate to child protection.

29. Again the response of Police Scotland, that any new wilful neglect offence should be applicable to all settings, should be considered. A further five responses, including Royal Blind, and the Scottish Independent Advocacy Alliance, stated that with respect to children, both formal and informal care arrangements should be covered.

## **Conclusions**

30. Like many of the respondents to this engagement exercise, the Scottish Government is strongly committed to the general principle of the need to protect children from neglect. We continue to believe that no measure of neglect or ill-treatment is acceptable. This consultation was undertaken in order to explore how the proposed offence would apply to children’s services. During the course of the consultation, it has become clear that implementing this offence in the context of the Scottish child protection system would be very complex and could have adverse consequences, as described under headings A – D of this paper.

31. The Scottish Government acknowledges that a highly similar offence is already applicable to health services under the Mental Health (Care and Treatment) (Scotland) Act 2003 and the Adults With Incapacity (Scotland) Act 2000. However, given the issues detailed at headings A – D above, we also acknowledge that it may not be possible to incorporate this offence into the Scottish child protection system in a coherent and usable way. For that reason, we have concluded that, at this time, the amendment proposed in the consultation paper is not the correct way to offer additional protection against wilful neglect or ill-treatment to children.

**Proposals for the creation of an Offence of Wilful Neglect or Ill-treatment with regard to services for Children under the age of 18- Further Engagement Analysis of Responses to Questions**

**Respondent Information**

1. In total, the Consultation received 47 responses; the majority of which (25) were received by email, with 2 responses being received by post and the other 20 being submitted via the online survey on the Citizen Space consultation platform.
2. The responses received were mostly submitted by organisations, with a significant minority being submitted by individuals.

Type of respondent	Number of responses	Percentage
Individual	9	19%
Organisation	38	81%
<b>Total</b>	<b>47</b>	<b>100%</b>

3. Of the organisations who responded, these could be categorised into eight broad types – however responses were received from a wide range of organisations, with no one type of organisation demonstrating prevalence in terms of the number responses submitted. Please note that the percentages have been rounded.

Type of Organisation	Number of Responses	Percentage
Local Government Bodies	6	15.7
Child Protection Committees	6	15.7
Statutory Regulators	3	7.8
Third Sector	6	15.7
Health Boards	5	13.1
Other Public Bodies	4	10.5
Other	4	10.5
Professional Regulatory Bodies	5	13.1
<b>Total</b>	<b>38</b>	<b>100</b>

4. It should be noted that different respondents answered different questions, which will explain why there are differing numbers of responses for each question.

**Question 1: Do you agree that the definition of a child set out at paragraph 9 should be used to determine who is a victim of the new offence?**

5. A clear majority of respondents who answered this question agreed that a child should be defined as a person under the age of 18. However, many respondents used this question to highlight issues which call into question the compatibility of the proposed offence with existing child protection law. 29 of 33 respondents to this question stated that they agreed with the definition of a child as being under the age of 18, with only 4 answering 'no'.
6. However, while agreeing in principle with this proposal, many respondents also highlighted potential issues with this approach. 5 respondents noted that under Scots law, people gain additional rights and responsibilities from the age of 16. 5 respondents also noted that there was conflicting legislation in relation to the definition of a child under Scottish legislation, with definitions ranging from under 16 years-old in the Adults With Incapacity (Scotland) Act 2000 to under 26 years-old in the Children and Young People (Scotland) Act 2014.
7. 7 respondents highlighted that using this definition would offer additional protection to 16 – 18 year-olds, who are not currently protected by any existing wilful neglect provisions. However, 3 respondents also noted that this additional protection could be achieved by extending the adult provisions to cover people from age 16 and older, without impacting on the wider Child Protection context.
8. Other single respondents raised issues such as the large volume of existing child protection legislation, which they believed offered sufficient protection to people under the age of 18; the issues in relation to members of the armed forces who were aged 16 – 17 years-old; and issues where children's services continued to provide services to people over the age of 18.
9. 2 respondents stated that they did not think that people under the age of 16 needed additional legislative protection, and that additional protection should be offered to people aged 16 – 18 by extending the provisions of the Bill to cover people from the age of 16, leaving existing legislation to cover people under the age of 16. The same respondent also noted that many Care Workers will be subject to existing professional regulation as well as an existing legislative framework.

**Question 2: Do you agree with the definition of Care Worker, as outlined in the provisions of the Bill, as per paragraph 15? Please explain your view.**

10. The majority of respondents (21/33) who answered this question agreed with this proposal. However, a significant minority (12/33) also disagreed with the definition.
11. Again, in spite of the general agreement with the proposal, a wide range of concerns were highlighted in relation to defining the people who are liable for the offence.
12. Two responses directly stated that there needed to be greater clarity in relation to who the offence would apply to; that the Bill should expressly name certain professions.
13. Two further responses suggested that in order to fit more coherently with existing legislation, the offence could simply be applied to people who work in professions which are currently regulated by the Care Inspectorate under the Protection of Vulnerable Groups (Scotland) Act 2007. This would extend the offence to teachers and, indeed, to anyone who has sole care of, or unsupervised contact with, children. One respondent suggested that it would be confusing to have some of the professions regulated by PVGA within the scope of the offence, while some would not be within the scope of the offence. However, the one respondent did acknowledge that the offence could be used to better regulate professions which were not covered by the PVGA – for example, teaching assistants.
14. 4 responses stated that the proposals should take account of the position of a person within the organisation when deciding whether the offence should apply to them. 2 responses stated that volunteers should be excluded from the scope of the offence to avoid deterring people from volunteering. 2 responses expressed concern about how Line Managers and Directors could be found guilty of the offence, and requested additional clarity.
15. 2 responses raised the issue of Self-Directed Support (SDS) and how this would work in relation to children. Another response also questioned whether parents could be held liable as a supervisor if they engaged a SDS Personal Assistant for their child, or if they engaged a private support worker.
16. One response stated that it was unclear whether foster carers would be considered within the scope of the offence. 2 further responses also highlighted that Care Workers as defined in the Bill could be designated as Named Persons under the Children and Young People (Scotland) Act 2014. Given this, it would have to be explored how a Care Worker's Named Person responsibilities would interact with the proposed offence. The issue of how the proposals would affect independent contractors and members of the armed forces were also raised in single and separate responses.

17. The respondents who did not agree with the proposal gave a mixture of reasons for this. 3 responses stated that the definition would need more clarity around the professions brought into its scope. 3 responses stated that the definition given was too narrow, with 1 stating that the definition should be extended to all people in care professions currently regulated by the Care Inspectorate. A further respondent indicated that using a new definition of Care Worker was effectively reinventing the wheel, and that it should just be defined through reference to the PVGA. Another respondent stated that the Bill should also include foster carers. Another respondent stated that their organisation believed that Care Workers, as defined by the Bill, were already sufficiently regulated by existing legislation.
18. One respondent indicated that the Scottish Government should consider applying the offence to people beyond Care Workers.
19. Again, it can be concluded that there was clear general agreement with the general principles of the proposals, but a very wide range of concern in relation to their implementation.

**Question 3: Do you think there are any workers missing from the definition at paragraph 15 who should be included? Please provide a list**

20. Of the 18 respondents who answered this question, 4 stated that there were no workers missing from the definition in the Bill. 5 responses stated that teachers and education workers should be covered by the offence. This is covered in more detail at paragraphs 40 and 41. A single response stated that Care Workers who delivered health care in an educational setting should also be covered by this offence. Other respondents stated this at different points in the consultation: see paragraph 40 and 41 for more details on this. 2 responses mentioned that other professions which are regulated by the Care Inspectorate should be brought into the scope of the offence. 2 responses stated that the Police should be included within the scope of the offence. 2 separate responses stated that the Named Person and SDS workers should also be included in the scope of the offence, each in one response. 2 responses stated that foster care should also be included.
21. Other responses indicated that it was unclear which professions and services the offence would apply to. Single responses stated that social workers, care home workers and health visitors should be covered by the offence. The professions listed at this paragraph there were all intended to be covered by the offence, pointing to a lack of clarity about the policy intention.

**Question 4: Do you agree that the offence should apply not only to individuals, but also to organisations providing services for children?**

22. Of the 37 respondents who answered this question, the vast majority (34) of these agreed that the offence should be applied to organisations as well as individuals. Only 3 respondents disagreed with this proposal. 2 respondents stated that organisations could already be held liable for this, either through existing legislation, or through other existing means of regulation.
23. As with previous questions, while there was support for the general principles behind this proposal, many respondents raised concern in relation to the implementation of it. 9 respondents stated that they believed that organisational accountability for wilful neglect was needed, with 5 respondents stating that any organisational offence should have the aim of creating a culture which was not conducive to wilful neglect taking place.
24. Of the 35 respondents who answered this question, 9 stated that there were questions which needed to be answered in relation to the proposed thresholds for organisational liability. Some examples of the questions which were posed include: how close does the proximity between Care Worker and Care Provider have to be for there to be organisational liability? Does the Care Provider have to have understood the likely consequences of the way their affairs were arranged in order to give rise to liability? Would an organisation be liable if wilful neglect had taken place as the result of a resources shortage?
25. 2 respondents also noted that the balance between individual liability and organisational liability must be correct. However, those two respondents had different ideas about what that balance should be. One respondent stated that the organisation should be tested in the first instance, before considering the guilt of the individual, whereas the other thought that the actions of an individual should not necessarily give rise to the liability of the organisation, if the individual had had a certain level of autonomy. Both responses were clear that there needed to be more clarity about how the Scottish Government envisaged this balance being struck.

**Question 5: Do you agree that the new offence should concentrate on the act of wilfully neglecting, or ill-treating a child rather than any harm suffered as a result of that behaviour?**

26. Again, the vast majority of the respondents who answered this question agreed with the proposal in principle. 33 out of 36 respondents said that they did agree with this proposal, for reasons such as; harm may not be immediately apparent, or that prosecutions should aim to prevent harm and therefore it should be possible to prosecute when the risk of harm is caused, but before the actual harm has occurred.

27. However, 2 respondents also noted the difficulty of proving that neglect has occurred without proving harm, which may make this an unusable offence if it was implemented. Another respondent stated that a proportionality requirement would need to be put on the face of the Bill to allow it to be used effectively. One further respondent stated that they were unsure how this would work in practice. It should be noted that 15 respondents agreed with this proposal but made no comments. A further respondent commented that while they agreed that no measure of wilful neglect was acceptable, they felt that further legislation was unnecessary to prevent this.

**Question 6 - Do you have a view on how 'wilful neglect' should be defined?**

28. 38 respondents expressed views on this matter. Only 2 of those responses stated that the definition given in the consultation and the Bill as introduced was sufficient. The most prevalent view was that additional clarity was needed as to the kind of conduct which would fall into the category of wilful neglect, both from an individual and organisational perspective – 11 respondents stated this in their responses.

29. 5 respondents highlighted that there were existing statutory and common law offences which would defined wilful neglect, or which covered the conduct of the type outlined in the consultation paper. 2 of these responses referred to directly to the Children and Young People (Scotland) Act 1937 s.12. One respondent highlighted several existing common law offences which could be used to prosecute similar conduct. A further respondent stated that they believed that no further legislation was needed.

30. 2 responses stated that the offence should be applied to all instances of wilful neglect and ill-treatment, including the ones taking place out with a health and social care setting.

31. 2 responses questioned whether this definition of wilful neglect would lead to a duty being imposed on organisations to refer incidents to the police. 4 responses to this question stated that guidance would be necessary to ensure that professionals and organisations understood where the line between professional disciplinary procedures and criminal prosecution was drawn.

32. 2 responses stated that the impact on the victim should be taken into consideration when deciding whether the offence of wilful neglect would apply. However, both of these respondents also responded to question 5, saying that the offence should not be defined by reference to a harm threshold.

33. There were some points of agreement between respondents – 9 of the 35 respondents who answered the question stated that wilful neglect should be

deliberate. 6 of those respondents agreed that wilful neglect should be defined as a failure to provide care or a failure to protect children from abuse.

**Question 7 - Do you agree that the offence should include all services which are delivered within a social care setting for children?**

34. Again, the responses to this question demonstrate quite clearly that the respondents generally agree in principle with the proposal, with 33 answering 'yes'. However, similarly to the foregoing questions, many had concerns about how it would be implemented. A further 3 respondents stated that they did not agree with this proposal, with 11 respondents not answering this question.
35. Many respondents felt that the offence needed to apply to a broader category of people. 1 response stated that the offence should apply to everyone, including people in a position of parental care and people delivering care as part of an informal arrangement. Another response stated that the offence should apply to any setting where workers were employed in a child care capacity. A third response highlighted that organisational neglect of children can occur across many agencies, and not only those which would fall into the health and social care category. These 3 responses suggested that it would not be appropriate to introduce measures which would be limited in terms of their application. Another response offered the opinion that the Scottish Government has policies in place which would suggest that it intends to take a multi-agency approach to child protection structures, GIRFEC was given as an example of this. It was stated that if this is the case, wilful neglect and ill-treatment provisions should be extended to anyone working with children and young people.

**Question 8 - Are there any services listed at paragraph 19 which you believe should be excluded from the scope of the offence? Please provide a list below.**

**Question 9 - Why do you think these services should not be covered by the offence?**

36. Of the 15 answers to Question 9, 13 responses agreed that all services listed should be included. This should not be confused with the statement that these are the only services which should be included within the scope of the offence.
37. One respondent stated that the Scottish Government should not seek to use an exhaustive list. In answer to Question 9, they stated that, as social care practice is constantly changing and being updated; provisions would be needed which have an equally flexible and adaptable application.



38. One respondent stated that they had serious reservations about the offence being applied to Social workers. In answer to Question 9, they stated that they believed it would have the unintended consequences of scapegoating social workers, deterring people from entering Care Worker professions and disincentivising open and transparent learning practices

**Question 10 - Are there any additional services which are not listed at paragraph 19 which you think should be included in the scope of the offence? Please provide a list below.**

**Question 11: Why do you think these services should be covered by the offence?**

39. A very wide range of opinions were expressed in the answers given to this question. 20 additional services were suggested by 22 respondents.

40. The area where there was most consensus on which services should be added into the scope of the provisions was in relation to education. 10 responses stated that educational settings should also be considered in relation to the wilful neglect and ill-treatment of children, these suggested that education in a broad sense should be covered, so this would mean covering teachers and classroom assistants. 5 respondents mentioned services which were delivered in schools, or educational settings, but which were not directly related to education. For example, trained staff who provide specialised health care treatment in schools, to pupils with severe disabilities. 3 responses referred to School Care Accommodation, where the organisation has a high level of responsibility for the wider wellbeing of the child, outside of their educational progression. 2 further responses which made no other reference to any other service delivered within an educational setting, referred to the need for Out Of School Care services to be covered. These responses, coupled with references to education workers and teachers at question 3, which were made in 4 additional responses to the ones which called for it at question 10, demonstrate a clear feeling, among 17 out of the 45 respondents who responded to the consultation in total; or in 36% of the total consultation responses; that educational settings should be involved in the provisions in some way.

41. Out of the 13 respondents who referred to services within an educational setting in question 10, 5 stated that the provision of these services involved the provision of a level of care to children. 2 of these responses stated that there is a high level of care given at Boarding Schools. 2 responses stated that education workers have a high level of access to children's lives, especially vulnerable children who may not be exposed to health or social care workers.

42. 4 responses referred to the need to include services in relation to foster care. 1 response stated that emergency short-term fostering services should be covered, as these are different to situations where children are placed in a familial situation. 1 respondent stated that private fostering was a formal private care arrangement, and should fall within the scope of the provisions. 1 response listed an additional two services to the ones already covered in paragraphs 39 – 42, stating that consideration should be given to the inclusion of kinship carers and SDS personal assistants, where they were also a member of the family of the child they were assisting.

**Question 12 - Do you agree that the proposed offence should cover all children’s healthcare services, including those which are specific to children’s healthcare?**

43. 32 out of 35 respondents who answered this question agreed that the offence should apply to all health care services. Two respondents stated that there were sufficient existing statutory and regulatory measures in place to protect children from this kind of conduct. There were no major issues raised here, which were specifically in relation to health care services being included within the scope of the Bill.

**Question 13 - Do you agree that the scope of the offence should not extend to informal care arrangements?**

44. The respondents to this question were much more divided on this question in comparison to the others. Of the 33 respondents who answered this question, 18 said yes, while 15 said no. 4 respondents acknowledged the difficulty of applying the offence to informal care arrangements as defined by the consultation paper. However, 6 respondents also noted that informal carers would be governed by existing laws, such as CYPA 1937, s.12.

45. 2 responses mentioned that it was not straightforward to categorise foster care as formal or informal care. 2 responses stated that it was complex to categorise SDS workers in this way. 3 responses said that there could be difficulties in defining formal and informal kinship carers in this way.

46. 3 responses stated that both informal and formal care should be covered by the provisions. 1 respondent noted that this could prevent informal carers who had neglected a child from working as a formal carer in the future. 2 responses noted that a child is at risk from wilful neglect and ill-treatment in any setting where they receive care - not just formal ones.

**Question 14 - Do you agree that the penalties for individuals laid out at paragraph 24 should be applied to the new offence? Please explain your view.**

47. Again, a clear majority of respondents to this question agreed with this proposal in principle. 23 out of 29 respondents answered 'yes', with 6 answering 'no'. 7 respondents noted that consistency between adult and child-related offences was important, however, 2 respondents noted that the proposed penalties were not comparable with existing child protection legislation.

**Question 15 - Do you agree that the penalties for organisations laid out at paragraph 25 should be applied to the new offence? Please explain your view.**

48. Of the respondents who answered this question, 19 responded 'yes', while 6 responded 'no'. It should be noted that 19 respondents also did not answer this question. 10 of the 19 respondents who answered 'yes' did not make any comments. 1 respondent stated that organisations should be de-registered if they were found guilty of the offence, while another stated that they should be closed. 2 respondents suggested that the penalty should be dependent on the circumstances of the case. 2 respondents suggested that managers and directors should be penalised separately, although in some instances, this may have been addressed by the Care Worker offence.

**Question 16 - Do you think that extending the adult provision on wilful neglect and ill –treatment in the Bill to children will interface effectively with existing legislation? Please explain your view.**

49. Similarly to question 13, the respondents to this question were quite divided on the issue. 16 respondents said 'yes', compared to 12 who said 'no', with 20 respondents not answering the question.

50. 5 respondents stated that existing legislation effectively covered wilful neglect and ill-treatment in these contexts. However, another respondent, whilst acknowledging this interaction and overlap, also stated that the 1937 Act is no longer fit for purpose and that it should be repealed. 2 further respondents highlighted the large amount of recent and forthcoming change in relation to Child Protection legislation in Scotland, they suggested that it would be preferable to let these changes bed in before making big decisions in relation to Child Protection Law. 2 respondents stated that the proposals would be in direct contradiction of some Scottish Government policies, such as GIRFEC – as it would undermine interagency working and promote a blame culture on both an organisational and individual level.

51. It should be noted that there here were also some contradictory views, as 1 respondent said that they felt that this would complement GIRFEC.

**Question 17 - Do you have any other comments which you wish to make ?**

52. 15 out of 47 respondents did not make any further comments. Of the 32 who did, one of the most commonly expressed views, stated by 11 respondents, was that they did not see the rationale or evidence base for the introduction of the offence.
53. 11 respondents stated their concern that the introduction of the new offence may deter care workers and care providers from adhering to a culture of learning, openness and transparency, due to fear of criminal prosecution. These respondents shared the view that this would be the main driver for positive change and ensuring that care workers and care providers learned lessons when mistakes were made. 6 respondents also stated that the offence could deter people from entering Care Worker professions, due to the increased likelihood of prosecution.
54. 9 respondents drew attention to the fact that existing professional sanctions could be used instead of the introduction of a new offence, two of which highlighted the fact that the professional sanctions had a lower threshold than the proposed new offence, which could mean that fewer examples of neglectful conduct would be encompassed by the proposed offence, than are currently encompassed by the proposed offence. Four respondents highlighted the current existence of criminal sanctions. 1 further respondent suggested that adapting the role of the Care Inspectorate to tackle neglect in these services could be used as an alternative to introducing this offence. A single respondent stated that these proposals could specifically deter small third sector organisations from undertaking challenging work in this context, due to fear of being prosecuted and possible fined.
55. 3 respondents stated a concern that the consultation period had been so short, given the complexity of the issues raised.
56. It should be noted that these concerns were underpinned by an express reiteration of support for the general principles of the amendment, by 7 respondents.



© Crown copyright 2015

**OGL**

This publication is licensed under the terms of the Open Government Licence v3.0 except where otherwise stated. To view this licence, visit [nationalarchives.gov.uk/doc/open-government-licence/version/3](http://nationalarchives.gov.uk/doc/open-government-licence/version/3) or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: [psi@nationalarchives.gsi.gov.uk](mailto:psi@nationalarchives.gsi.gov.uk).

Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

This publication is available at [www.gov.scot](http://www.gov.scot)

Any enquiries regarding this publication should be sent to us at  
The Scottish Government  
St Andrew's House  
Edinburgh  
EH1 3DG

ISBN: 978-1-78544-874-4 (web only)

Published by The Scottish Government, December 2015

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA  
PPDAS60792 (12/15)

W W W . G O V . S C O T