

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

September 2015

Introduction and Background

1. This consultation outlines and invites views on the Scottish Government's proposals for a new criminal offence of ill-treatment or wilful neglect with regard to services for children. It also seeks views on what services should be included. These proposals have been developed within the context of Scottish Ministers' commitment to promoting and fulfilling the requirements of the United Nations Convention on the Rights of the Child (UNCRC).
2. In 2014 the UK Government carried out a review of patient safety in England following the publication of the Francis Report into the breakdown of care at Mid-Staffordshire hospitals. One of the report's recommendations was to create an offence to place wilful neglect or mistreatment of all NHS patients on a par with the offence that currently applies to mental health patients under the Mental Capacity Act 2005. An equivalent offence of wilful neglect or ill treatment of mental health patients exists in Scotland by virtue of the Mental Health (Care and Treatment) (Scotland) Act 2003. This legislation also covers children who are mental health patients.
3. In October 2014¹ the Scottish Government consulted on proposals to create a new criminal offence of wilful neglect or ill-treatment of people receiving care or treatment in adult health and social care services. That consultation also asked about whether a similar offence should apply in children's social care services. The analysis of that consultation can be found here <http://www.gov.scot/Publications/2015/05/9655>.
4. The Health (Tobacco, Nicotine etc. and Care) (Scotland) Bill was introduced to Parliament on 4 June 2015 and confirms the intention to introduce an offence of wilful neglect for adult health and social care services. Provisions on the wilful neglect of children were not initially included in the Bill as the consultation which was undertaken in relation to the wilful neglect of adults², indicated that there were further issues which needed to be explored.
5. We are grateful to those who have already provided comments through that earlier consultation. We are now seeking to explore some of these issues further with regard to services for children.
6. It is clear that, generally speaking, children in Scotland receive high quality services from a workforce concerned about their wellbeing. There is a commitment to constant improvement; for example through the [Early Years Collaborative](#) and other initiatives, such as [GIRFEC](#).

¹ <http://www.gov.scot/Publications/2014/10/6637/0>

² See paragraph 3

7. However, on the rare occasions when wilful neglect or ill treatment of children happens, we want to be sure that there is effective legislation to deal with it. In addition, given the proposals being taken forward with regard to adult services, it would seem sensible and consistent to ensure that children are also protected from wilful neglect and ill-treatment in the context of services delivered in a health or social care setting. The offence that we are proposing to create is not intended to cover instances of genuine error or accident.
8. The provisions in the Health (Tobacco, Nicotine etc. and Care) (Scotland) Bill, as introduced, cover care workers and care providers in adult health care services and adult social care services. **For the purposes of this particular legislation**, the terms ‘care worker’, ‘care provider’, ‘adult health care’ and ‘adult social care’ are defined in the provisions in the Bill. Further information on the Bill as introduced can be found via the link below.

<http://www.scottish.parliament.uk/parliamentarybusiness/Bills/89934.aspx>.

1. Defining the Offence

(A) Definition of child

9. We propose that a ‘child’ should be defined as an individual below the age of 18, and that the new offence should seek to protect anyone in this category from wilful neglect and ill-treatment. The definition above is the definition used by the UNCRC. The provisions in the Bill currently protect individuals over the age of 18.

Question:

Do you agree that this definition should be used to determine who is a victim of the new offence?

(B) Defining Wilful Neglect/III Treatment

10. The Bill defines the offence as taking place in the context of adult health or social care services. We would propose that the new offence should also be defined as occurring where health and social care services are delivered to children.
11. Following the pattern set out in the current Bill, we believe that the 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 arguments for this in the original consultation paper are set out below.

12. No measure of deliberate neglect or mistreatment is acceptable and we feel that the criminal law should reflect this. If a threshold of harm was set out in legislation then this could give rise to a situation where two children were subjected to the same ill-treatment or neglect by the same care 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. Furthermore, setting a harm threshold may give rise to uncertainty about when the offence would apply.

13. We therefore propose that the offence should apply where someone has wilfully neglected or ill-treated a child in specified services, regardless of the harm caused by that neglect or ill-treatment.

Questions:

Do you agree that the new offence should be defined as occurring where health or social care is delivered to children?

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?

(C) Defining Workers

(ii) defining care workers

14. The provisions in the Health Bill, referred to above, define the offence as applying to people who deliver health or social care. The Bill considers that care can either be delivered by care workers or care providers.

15. 'Care worker' is currently defined **in section 28 of that Bill** as;

a) An employee who provides adult health care or adult social care

b) A volunteer who provides adult health care or adult social care

c) An individual who supervises or manages employees or volunteers providing adult health care or adult social care

d) A director or similar officer of an organisation whose employees or volunteers provide adult health care or adult social care

('employee' and 'volunteer' are further defined for the purposes of this particular piece of legislation)

16. When considering the issue of those who work with children, a similar approach could be used to define those individuals and organisations who care for children.

Questions:

Do you agree with the definition of Care Worker, as outlined in the provisions of the Bill? Please explain your view.

Do you think there are any workers missing from the definition above who should be included? Please provide a list.

(iii) the application of the offence to individuals and organisations

17. The Bill as introduced (dealing with adult services) applies the offence of ill treatment or wilful neglect to organisations as well as individuals.

‘Care provider’ is currently defined in the Health Bill as;

a) A body corporate, a partnership or an unincorporated association which provides or arranges for the provision of

i. adult health care or

ii. adult social care or

b) An individual who provides that care and employs or has otherwise made arrangements with other persons to assist with the provision of that care

18. We propose that a similar approach should be adopted in relation to wilful neglect in services for children.

Questions:

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

Do you think there are any care providers missing from the definition above who should be included? Please provide a list.

(D) Defining which services would be covered by the offence

(i) services to be included

19. We believe that the new offence should cover all services which directly provide health and social care for children. Our proposal is that it should cover those who provide social care services, as defined in the Public Services Reform (Scotland) Act 2010, in the following settings in the public, private and third sectors:

- Care Homes providing:
 - Respite care
 - Short breaks
 - Medium and long term care
- Secure accommodation services
- Childminding
- Child care agencies
- Support Services, including;
 - Services delivered at the home of a child
 - Nurse agencies

- Children and Family social work services
- Youth work services

Questions:

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

Are there any services listed above which you believe should be excluded from the scope of the offence? Please provide a list.

Why do you think these services should be excluded?

Are there any additional services which are not listed above which you think should be included in the scope of the offence? Please provide a list.

Why do you think these services should be included?

(ii) children's healthcare services

20. We believe that the proposed offence should also cover all formal situations where health care is provided for children, for example; where services are provided in NHS hospitals and independent hospitals; primary care and community settings. The services in the existing Bill could be extended to cover children as well as adults. However there are additional healthcare services which are specifically provided for children, for example neonatal care and health visiting.

Question:

Do you agree that the proposed offence should cover all children's healthcare services, including those which are specific to children's healthcare?

(iii) informal care services

21. In addition to some of the services listed, there are also a number of informal arrangements for care of children where that care is provided on the basis of a family relationship, or friendship – for example, private fostering or babysitting.

22. Given the nature of unpaid caring, where it is not carried out by virtue of a contract of employment or other contract or as a volunteer, we do not feel that it would be appropriate for the offence to cover the types of care situation where there is no legal obligation or contract in place.

Question: Do you agree that the scope of the offence should not extend to informal care arrangements for children?

2. Penalties

23. The original consultation asked for respondents' views on whether penalties should reflect those already in place for existing offences for individuals 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.

24. The existing penalties for individuals are:

- 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. It should be noted that provisions in the Bill, if enacted, will extend the maximum term of imprisonment to 5 years.

25. For organisations, the penalties proposed in the Bill are:

- On summary conviction: a fine not exceeding the statutory maximum (currently £10,000).
- On conviction on indictment: an unlimited fine.
- The court may also make:
 - A remedial order: ordering the organisation to remedy any result of the breach of care, or ordering the organisation to remedy any failing in policy, systems or practices which led to the breach.
 - A publicity order: requiring the care provider to publicise in a specified manner:
 - (a) the fact that the care provider has been convicted of the offence,
 - (b) specified particulars of the offence,
 - (c) the amount of any fine imposed,
 - (d) the terms of any remedial order made.

26. As outlined above, we believe that the offence should be based on the conduct of the individual or organisation, rather than on any other factors. We propose that the penalties for the new offence should be the same as the penalties proposed in the Bill, to ensure that the offence remains dependent on the conduct of the perpetrator and not on the age of the victim.

Questions:

Do you agree that the penalties for individuals laid out above should be applied to the new offence? Please explain your view.

Do you agree that the penalties for organisations which are laid out above should be applied to the new offence? Please explain your view.

3. Interface with existing legislation:

27. Most respondents to the original consultation agreed that children's services should be included in the Bill. The list of services at paragraph 19 above is based on these responses.

28. Some raised the issue of existing legislation, such as the *Children and Young People (Scotland) Act 2014* and the *Children and Young Persons (Scotland) Act 1937*, covering child protection and how any new offence would interface with that.

Questions:

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.

4. Other comments:

Do you have any other comments you wish to make?

Responding to this consultation paper

We are inviting written responses to this consultation paper by **Wednesday 28 October 2015**

You can respond using the Scottish Government's online consultation system at <https://consult.scotland.gov.uk/child-protection/wilful-neglect>

Please send your response with the completed Respondent Information Form (see "Handling your Response" below) to:

childprotection@gov.scot

or by post to:

*Child Protection Team
Scottish Government
Child Protection
Area 2-A North
Victoria Quay
EDINBURGH
EH6 6QQ*

We would be grateful if you would use the consultation questionnaire provided or could clearly indicate in your response which questions or parts of the consultation paper you are responding to as this will aid our analysis of the responses received.

This consultation, and all other Scottish Government consultation exercises, can be viewed online on the consultation web pages of the Scottish Government website at <http://www.gov.scot/Consultations/Current>.

The Scottish Government has an email alert system for consultations, <http://register.scotland.gov.uk> This system allows stakeholder individuals and organisations to register and receive a weekly email containing details of all new consultations (including web links). It complements, but in no way replaces SG distribution lists, and is designed to allow stakeholders to keep up to date with all SG consultation activity, and therefore be alerted at the earliest opportunity to those of most interest. We would encourage you to register.

Handling your response

We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. Please complete and return the Respondent Information Form enclosed with this consultation paper as this will ensure that we treat your response appropriately. If you ask for your response not to be published we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government are subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

Next steps in the process

Responses to this consultation can be found at <https://consult.scotland.gov.uk/child-protection/wilful-neglect>

What happens next?

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us reach a decision on creating an offence of wilful neglect/ill-treatment. We aim to issue a report on this consultation process by **Friday 18 December 2015**

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to the address given in the section 'Responding to this consultation paper'.

The Scottish Government Consultation Process

Consultation is an essential and important aspect of Scottish Government working methods. Given the wide-ranging areas of work of the Scottish Government, there are many varied types of consultation. However, in general, Scottish Government consultation exercises aim to provide opportunities for all those who wish to express their opinions on a proposed area of work to do so in ways which will inform and enhance that work.

The Scottish Government encourages consultation that is thorough, effective and appropriate to the issue under consideration and the nature of the target audience. Consultation exercises take account of a wide range of factors, and no two exercises are the same.

Typically Scottish Government consultations involve a written paper inviting answers to specific questions or more general views about the material presented. Written papers are distributed to organisations and individuals with an interest in the issue, and they are also placed on the Scottish Government website enabling a wider audience to access the paper and submit their responses. Consultation exercises may also involve seeking views in a number of different ways, such as through public meetings, focus groups or questionnaire exercises. The views and suggestions detailed in consultation responses are analysed and used as part of the decision making process, along with a range of other available information and evidence. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

Final decisions on the issues under consideration will also take account of a range of other factors, including other available information and research evidence.

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

SUMMARY OF CONSULTATION QUESTIONS

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?

Yes No

Comments

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.

Yes No

Comments

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

Comments

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

Yes No

Comments

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?

Yes No

Comments

Do you have a view on how 'wilful neglect' should be defined?

Comments

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

Yes No

Comments

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.

Comments

Why do you think these services should not be covered by the offence?

Comments

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.

Comments

Why do you think these services should be covered by the offence?

Comments

Do you agree that the proposed offence should cover all children's healthcare services, including those which are specific to children's healthcare?

Yes No

Comments

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

Yes No

Comments

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

Yes No

Comments

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

Yes No

Comments

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.

Yes No

Comments

Do you have any other comments which you wish to make ?

Comments



The Scottish Government
Riaghaltas na h-Alba

RESPONDENT INFORMATION FORM

Please Note this form **must** be returned with your response to ensure that we handle your response appropriately

1. Name/Organisation

Organisation Name

Title Mr Ms Mrs Miss Dr *Please tick as appropriate*

Surname

Forename

2. Postal Address

Postcode

Phone

Email

3. Permissions - I am responding as...

Individual

/

Group/Organisation

Please tick as appropriate

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate Yes No

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

Yes, make my response, name and address all available

or

Yes, make my response available, but not my name and address

or

Yes, make my response and name available, but not my address

(c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your **response** to be made available?

Please tick as appropriate Yes No

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate

 Yes



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