

From: NHSGGC Adult Support & Protection Liaison Group

Re: Briefing note: Offences of Ill Treatment and Wilful Neglect

Date: 21st November 2017

There are no plans by Scottish Government to produce guidance for the new offences. However, they have provided the background below and I have added definitions from the explanatory notes that accompany the legislation which may be helpful.

1. Potential impact

The main areas of potential impact for HSCP, NHS, Third Sector Care Providers, Housing Providers and voluntary organisations that provide care are that:

- Relevant staff/organisations are aware of the new offences and understand that they are *not* dependent on the adult alleged to being ill-treated or wilfully neglected meeting the criteria of an adult at risk of harm as per adult support and protection legislation. In addition relevant staff/organisations are reminded of present offences under existing mental health and adults with incapacity legislation.
- Relevant staff/organisations are reminded that the police must be informed where it is known or believed that a crime has or may have been committed and that the consent of the adult is not required where the situation involves a service provider and other adults may also be at risk of harm.
- NHS, councils, HSCPs are included as providers of care and as employers of care workers and therefore individual employees and the organisation could be subject to police investigation where allegations of ill treatment and wilful neglect arise.
- Where convicted 'care providers' could be subject to 'remedial orders' and 'publicity orders'.
- 'Care worker offences' will be disclosed and will always be disclosed on higher level disclosures.
- All relevant policies and procedures require reviewing and refreshing as appropriate.
- Need to consider any further implications in context of 'Duty of Candour'. This comes into force April 2018.

2. Background

The [Health \(Tobacco, Nicotine etc. and Care\) \(Scotland\) Act](#) was given Royal Assent on 6 April 2016 and includes offences of ill-treatment or wilful neglect. There are two main offences in this part: an offence that applies to care workers and an offence that applies to care providers (see definitions below). These offences will come in to force on 1st October 2017.

The new offences in the Act for ill-treatment or wilful neglect recognise the particular vulnerabilities of those receiving health and social care as well as the level of trust placed in those providing that care. The Act provides penalties which are at an appropriate level proportionate with the breach of trust in such crimes (see definitions below).

Presently, there are offences of wilful neglect and ill-treatment set out in section 315 of the Mental Health (Care and Treatment) (Scotland) Act 2003 and section 83 of the Adults with Incapacity (Scotland) Act 2000. These offences cover the neglect or ill-treatment of mentally disordered people and adults with incapacity.

On investigation, the police may decide that there is sufficient evidence to report the alleged offence to the Procurator Fiscal. In the course of such an investigation, it would be up to the police to question anyone they thought relevant, including former staff.

Section 29 of the Act amends the Police Act 1997 to insert the care worker offence. It contains a list of offences which must always be disclosed on all types of higher level disclosure. The inclusion of this offence on the 'Offences which must always be disclosed' list means that no matter how old the conviction is, it will always be disclosed by Disclosure Scotland on a higher level disclosure.

3. Definitions

a) Care worker definition and care worker offence

Section 26 sets out the care worker offence and the penalty for conviction. "Care worker" is defined in section 28(1) and covers care workers (employees and volunteers), their managers and supervisors, and directors or similar officers of organisations. The offence is committed where a care worker is providing care for another person and ill-treats or wilfully neglects that person. If providing that care is only incidental to the worker's other activities (for example, where the worker is a cleaner) then such a person would not fall within the "care worker" definition (and the same principle applies in relation to care by a "care provider") (section 28(4)). Section 26(2) provides the penalties for those convicted of the care worker offence: on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both); and, on conviction on indictment, to imprisonment for a term not exceeding five years or a fine (or both).

b) Care provider definition and care provider offence

Section 27 sets out the care provider offence that will apply to providers of health or social care services. Care provider is defined in section 28(3) and covers both legal persons (corporate bodies, partnerships and unincorporated associations) and individuals who have others working for them (see below). The care provider offence is committed if a three-stage test is met:

- an individual is ill-treated or wilfully neglected by someone providing health care or social care on behalf of the care provider,
- the care provider's activities are organised in such a way as to be a gross breach of the duty of care (see below) owed to the individual, and
- were it not for that gross breach, the ill-treatment or wilful neglect would not have occurred (or would have been less likely to occur).

Section 27(4) provides the penalties for those convicted of the care provider offence: on summary conviction, to a fine not exceeding the statutory maximum; and on conviction on indictment, to a fine.

c) Adult health care

“Adult health care” is defined as services provided to individuals aged 18 or over and is described by reference to the National Health Service (Scotland) Act 1978 to include services provided under the National Health Service and services from independent providers.

d) Adult social care

“Adult social care” is defined by reference to certain services listed in section 47(1) of the Public Services Reform (Scotland) Act 2010. Those services are support services, care home services, nurse agencies and housing support services (where provided to those aged 18 or over) and offender accommodation services and adult placement services (where provided to those aged 16 or over).

e) Relevant duty of care and ‘gross’ breach of that duty

Section 27(3) a “relevant duty of care” means a duty owed in connection with providing, or arranging for the provision of, adult health care or adult social care, and a breach of a relevant duty of care is a “gross” breach if the conduct alleged to amount to the breach falls far below what can reasonably be expected of the care provider in the circumstances.

f) Power to order offence to be remedied or publicised

Section 30 makes provision for the court to make a ‘remedial order’ or a ‘publicity order’ in respect of a care provider where that care provider has been convicted of an offence under section 27(1) (the “care provider offence”). A remedial order will require the care provider to take steps (specified in the order itself) to remedy matters relating to the ‘gross’ breach. Any order made must specify a compliance period within which requirements made in the order must be complied with. Where a care provider fails to comply with a remedial order or a publicity order, the care provider commits an offence (subsection (10)). Subsection (11) sets out the penalties for non-compliance with an order: on summary conviction, to a fine not exceeding the statutory maximum; and, on conviction on indictment, to a fine.