

# HEALTH (TOBACCO, NICOTINE ETC. AND CARE) (SCOTLAND) ACT 2016

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## EXPLANATORY NOTES

### THE ACT – OVERVIEW

#### **Part 3 — Ill-Treatment and Wilful Neglect**

101. **Part 3** of the Act establishes offences relating to the wilful neglect or ill-treatment of adults receiving health care or social care. There are two main offences in this part: an offence that applies to care workers, and an offence that applies to care providers.

#### **Offences by care workers and care providers**

##### *Section 26 – Care worker offence*

102. **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).

##### *Section 27 – Care provider offence*

103. **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. 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 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)
104. **Section 27(3)** defines “relevant duty of care” for the purposes of this offence and provides further detail on what is meant by a “gross” breach of that duty. Section 27(4) provides the penalties for those convicted of the care provider offence: on summary

*These notes relate to the Health (Tobacco, Nicotine etc. and Care) (Scotland) Act 2016 (asp 14) which received Royal Assent on 06 April 2016*

conviction, to a fine not exceeding the statutory maximum; and, on conviction on indictment, to a fine.

### ***Section 28 – Meaning of “care worker” and “care provider”***

105. **Section 28** sets out various definitions.
106. Subsection (5) defines “adult health care” and “adult social 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. “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).

### ***Section 29 – Disclosure of conviction for offence under section 26***

107. **Section 29** amends schedule 8A of the Police Act 1997 to insert the section 26 care worker offence. Schedule 8A 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.

## **Remedial orders and publicity orders**

### ***Section 30 – Power to order offence to be remedied or publicised***

108. **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 (described in paragraph 103 above). 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 either 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.

### ***Section 31 – Remedial and publicity orders: prosecutor’s right of appeal***

109. **Section 31** makes amendments to the Criminal Procedure (Scotland) Act 1995 to enable the prosecutor, in both solemn and summary proceedings, to appeal against a decision of the court not to make a publicity order or a remedial order.

## **Ill-treatment and wilful neglect of mentally disordered person**

### ***Section 32 – Penalty for ill-treatment and wilful neglect of mentally disordered person***

110. **Section 32** makes amendments to the existing offence in section 315 of the Mental Health (Care and Treatment) (Scotland) Act 2003. The amendments change the penalty for an offence under section 315 from a maximum of two years imprisonment on indictment to a maximum of five years imprisonment. This section also amends section 315 to update the definitions of “provides care services” and “care services”. “Care services” are defined by reference to section 47(1) of the Public Services Reform (Scotland) Act 2010 and cover support services, care home services, nurse agencies, secure accommodation services, offender accommodation services, adult placement services and housing support services.