



Health (Tobacco, Nicotine etc. and Care) (Scotland) Act 2016

2016 asp 14

PART 3

ILL-TREATMENT AND WILFUL NEGLECT

Offences by care workers and care providers

26 Care worker offence

- (1) An individual commits an offence if the individual—
- (a) has the care of another individual by virtue of being a care worker, and
 - (b) ill-treats or wilfully neglects that individual.
- (2) An individual who commits an offence under subsection (1) is liable—
- (a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both),
 - (b) on conviction on indictment, to imprisonment for a term not exceeding 5 years or a fine (or both).

27 Care provider offence

- (1) A care provider commits an offence if—
- (a) an individual who has the care of another individual by virtue of being part of the care provider's arrangements ill-treats or wilfully neglects that individual,
 - (b) the care provider's activities are managed or organised in a way which amounts to a gross breach of a relevant duty of care owed by the care provider to the individual who is ill-treated or neglected, and
 - (c) in the absence of the breach, the ill-treatment or wilful neglect would not have occurred or would have been less likely to occur.
- (2) An individual is "part of a care provider's arrangements" where the individual—
- (a) is not the care provider, but

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(b) provides adult health care or adult social care as part of the adult health care or adult social care provided or arranged for by the care provider, including where the individual is not the care provider but supervises or manages individuals providing adult health care or adult social care as described in paragraph (b) or is a director or similar officer of an organisation which provides adult health care or adult social care as described there.

(3) In this section—

- (a) 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,
- (b) 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.

(4) A care provider who commits an offence under subsection (1) is liable—

- (a) on summary conviction, to a fine not exceeding the statutory maximum,
- (b) on conviction on indictment, to a fine.

28 Meaning of “care worker” and “care provider” etc.

(1) In this Part, “care worker” means—

- (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.

(2) For the purposes of subsection (1)—

- (a) “employee” means an individual in paid employment, whether under a contract of service or apprenticeship or under a contract for services,
- (b) “volunteer” means a volunteer for a body, other than a public or local authority, the activities of which are not carried on for profit.

(3) In this Part, “care provider” means—

- (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.

(4) In this section—

- (a) references to a person providing adult health care or adult social care do not include a person whose provision of that care is merely incidental to the carrying out of other activities by the person, and
- (b) references to a person arranging for the provision of that care do not include a person who makes arrangements under which the provision of care is merely incidental to the carrying out of other activities.

(5) In this Part—

“adult health care” means a service for or in connection with the prevention, diagnosis or treatment of illness provided to an individual aged 18 or over—

- (a) under the health service continued under section 1 of the National Health Service (Scotland) Act 1978, or
- (b) by persons providing an independent health care service mentioned in section 10F(1) of that Act,

“adult social care” means a service—

- (a) in section 47(1)(a), (b), (d) or (m) of the Public Services Reform (Scotland) Act 2010 to the extent that the service is provided to an individual aged 18 or over, or
- (b) in section 47(1)(g) or (j) of that Act to the extent that the service is provided to an individual aged 16 or over.

29 Disclosure of conviction for offence under section 26

In schedule 8A of the Police Act 1997 (offences which must always be disclosed), after paragraph 55 insert—

“55A An offence under section 26 of the Health (Tobacco, Nicotine etc. and Care) (Scotland) Act 2016 (care worker offence).”.

Remedial orders and publicity orders

30 Power to order offence to be remedied or publicised

- (1) This section applies where a care provider is convicted by a court of an offence under section 27(1).
- (2) The court may, instead of or in addition to dealing with the care provider in any other way, make either or both of the following orders—
 - (a) a remedial order,
 - (b) a publicity order.
- (3) A “remedial order” is an order requiring the care provider to take specified steps to remedy one or more of the following—
 - (a) the breach mentioned in section 27(1)(b) (the “relevant breach”),
 - (b) any matter that appears to the court to have resulted from the relevant breach and to be connected with the ill-treatment or neglect,
 - (c) any deficiency in the care provider’s policies, systems or practices of which the relevant breach appears to the court to be an indication.
- (4) A “publicity order” is an 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.
- (5) An order made under subsection (2) is to be taken to be a sentence for the purposes of an appeal.
- (6) The court may make an order under subsection (2)—

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- (a) at its own instance, or
 - (b) on the motion of the prosecutor.
- (7) An order made under subsection (2) must specify a period (the “compliance period”) within which the requirements specified in the order must be complied with.
- (8) On an application by the care provider in respect of whom the order under subsection (2) was made, the court may—
- (a) extend the compliance period,
 - (b) vary the steps specified in a remedial order.
- (9) An application under subsection (8) must be made before the end of the compliance period.
- (10) A care provider who fails to comply with an order made under subsection (2) commits an offence.
- (11) A care provider who commits an offence under subsection (10) is liable—
- (a) on summary conviction, to a fine not exceeding the statutory maximum,
 - (b) on conviction on indictment, to a fine.

31 Remedial and publicity orders: prosecutor’s right of appeal

- (1) The Criminal Procedure (Scotland) Act 1995 is amended in accordance with this section.
- (2) In section 108 (Lord Advocate’s right of appeal against disposal)—
- (a) in subsection (1), after paragraph (cd) insert—
 - “(ce) a decision under section 30(2) of the Health (Tobacco, Nicotine etc. and Care) (Scotland) Act 2016 not to make a remedial order,
 - (cf) a decision under section 30(2) of that Act not to make a publicity order,”
 - (b) in subsection (2)(b)(ii), for the words “or (cd)” substitute “, (cd), (ce) or (cf)”.
- (3) In section 175 (right of appeal from summary proceedings)—
- (a) in subsection (4), after paragraph (cd) insert—
 - “(ce) a decision under section 30(2) of the Health (Tobacco, Nicotine etc. and Care) (Scotland) Act 2016 not to make a remedial order,
 - (cf) a decision under section 30(2) of that Act not to make a publicity order,”
 - (b) in subsection (4A)(b)(ii), for “or (cd)” substitute “, (cd), (ce) or (cf)”.

Ill-treatment and wilful neglect of mentally disordered person

32 Penalty for ill-treatment and wilful neglect of mentally disordered person

- In section 315 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (ill-treatment and wilful neglect of mentally disordered person)—
- (a) in subsection (3)(b), for “2” substitute “5”,
 - (b) for subsection (4), substitute—

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- “(4) In subsection 1(c), “provides care services” means anything done—
- (a) by a care service,
 - (b) by an employee of a care service, or
 - (c) in the course of a service provided or supplied by a care service,
- whether by virtue of a contract of employment or any other contract or in circumstances as may be prescribed by regulations.”,
- (c) after subsection (4), insert—
- “(5) For the purposes of subsection (4), “care service” means a service mentioned in section 47(1)(a), (b), (d), (f), (g), (j) or (m) of the Public Services Reform (Scotland) Act 2010.”.