

CRIMINAL JUSTICE AND COURTS ACT 2015

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1 – Criminal Justice

Offences involving ill-treatment or wilful neglect

Section 20: Ill-treatment or wilful neglect: care worker offence

213. *Section 20* makes it an offence for an individual who has the care of another individual by virtue of being a care worker to ill-treat or wilfully neglect that individual. The offence will apply in England and Wales.
214. *Subsection (2)* establishes the penalties to which an individual found guilty of the offence will be subject. On conviction on indictment, the penalty is imprisonment for a maximum of 5 years, or a fine, or both. On summary conviction (subject to subsection (9)), the penalty is imprisonment for a maximum of 12 months, or a fine, or both.
215. *Subsection (3)* defines “care worker” for the purposes of this section, as an individual who is paid specifically to provide health care for adults or children other than health care that is excluded (see *subsection (5)* and Schedule 4), or to provide adult social care. “Care worker” also includes an individual who is paid specifically to supervise or manage individuals providing such care, and a director or equivalent of an organisation providing such care. The intention is to ensure that the individual offence can apply to any individual perpetrator, not just those on the “front line” of care provision. However, it will only apply where the individual supervisor, director, etc has themselves directly committed ill-treatment or wilful neglect. They will not commit the individual offence by virtue of the acts or omissions of others they supervise or manage.
216. *Subsection (4)* defines “paid work” for the purposes of this section, as work for which an individual is paid, or is entitled to be paid, other than: a) payment in respect of reasonable expenses; b) payments to foster parents in respect of their work as a foster parent; c) a social security benefit; and d) a payment under arrangements under section 2 of the Employment and Training Act 1973 (to assist people to select, train for, obtain and retain employment)
217. The purpose of limiting the offence to those performing ‘paid work’, as defined, is to ensure that informal arrangements, such as unpaid family carers and friends, are not captured by the offence. The intention is also to exclude from the definition situations where an individual works as an unpaid volunteer, but receives, for example, reimbursement of travel costs to get to and from the place where they volunteer. Similarly, this exclusion would also cover an informal family carer who occasionally receives a contribution from the person they care for towards the personal costs they incur in providing that care. Such reimbursement is not to be treated as amounting to paid work. Payments received by foster parents specifically in respect of their work as foster parents, are also to be disregarded for the purposes of this section. The intention is also to exclude from the definition of paid work any social security benefit for which,

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for example, claimants are required to undertake unpaid work as a condition of receiving that benefit. So, for example, an individual working in an adult care home as part of the Department for Work and Pensions' "Work Programme" will not be treated as being in paid work.

218. *Subsection (5)* defines "health care" for the purposes of this offence. The definition includes services provided as part of the protection or improvement of public health, for example smoking cessation support, and is also intended to capture services, such as cosmetic surgery, that are not necessarily directly related to a medical condition. This subsection also introduces Schedule 4, which defines "excluded health care" for the purposes of this section.
219. *Subsection (6)* defines "social care" for the purposes of this offence.
220. *Subsection (7)* specifies that where health care or adult social care is provided incidentally to a person's main duties, this should be disregarded for the purposes of the offence. So, for example, a prison officer who, as a "good Samaritan" act, assists a prisoner in adjusting a hearing aid, could be perceived as providing practical assistance within the definition of social care. However, the intention is that such activity would not fall within the scope of the offence. In this example, the prison officer would have provided the assistance (albeit in the course of performing their duties) incidentally to their custodial duties, not by virtue of being a care worker. The same principles would apply to, for example, police officers and office workers in similar circumstances.
221. *Subsection (8)* defines the terms "adult" and "child" - an individual is to be considered to be an adult once they have attained the age of 18 years. It also defines the phrase "foster parent" for the purposes of *subsection (4)*.
222. *Subsection (9)* makes provision for the maximum permitted sentence which can be imposed under *subsection (2)(b)* to be contingent on whether section 154(1) of the Criminal Justice Act 2003 has come into force at the time an offence under this section is committed. Where an offence under this section has been committed prior to section 154(1) coming into force the maximum sentence on summary conviction will be 6 months. .
223. *Subsection (10)* makes provision for the maximum level of any fine imposed under *subsection (2)(b)* to be contingent on whether section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 has come into force at the time an offence under this section is committed.

Schedule 4: Ill-treatment or wilful neglect by care worker: excluded health care

224. **Schedule 4** sets out a range of children's services and settings in which health care is to be treated as excluded health care for the purposes of section 20 (ill-treatment or wilful neglect: care worker offence). The Government's view is that there already exist sufficient safeguards in respect of children in these services and settings so that adequate protections are in place. For adults in these settings and services, the likelihood of them needing health care from someone who would meet the definition of "care worker" is very small, and the risk of them suffering ill-treatment or wilful neglect from such a care worker smaller still.
225. **Paragraph 1(1)** defines "excluded health care" for the purposes of the offence established in section 20. The scope of the exclusion covers health care provided in:
 - all educational institutions listed in **paragraph 3**, including Academies, free schools, boarding schools, pupil referral units, and sixth form colleges;
 - other premises while they, or a part of them, are being used for an education or childcare purpose described in **paragraph 2**, including early years or later years provision, childminding or day care;

- all children’s homes and residential family centres.
226. *Sub-paragraph (2)* provides that health care provided on part of the premises of an educational institution listed in *paragraph 3* is not to be treated as excluded health care if, at the time it is provided, that part of the premises is being used for purposes other than purposes connected with the operation of the premises or an education or childcare purpose. For example, health care provided in a school hall while the hall is being used for a school assembly would be excluded health care, while health care provided in the hall while it is being used as a venue by a community group, such as a keep fit club or charity event, would not.
227. *Sub-paragraph (3)* provides that health care provided at the premises of a hospital where education is provided is not to be treated as excluded health care.
228. *Paragraph 2* specifies the activities that are to be treated as an education or childcare purpose in respect of *paragraph 1(1)(d) and 1(2)(b)*. For example, where a church hall is used to provide early years care as described in sub-paragraph (d) during the week, but also for parties, wedding receptions, community group meetings etc, in the evenings or at the weekend, only health care provided at the church hall while it is being used for the provision of early years care will be excluded health care. Health care provided at any other time, or on a part of the premises used for something other than the education or childcare purpose, will be subject to the care worker offence.
229. *Paragraph 3* defines the meaning of “educational institutions” in this Schedule. They include
- nursery, primary, and secondary schools, both maintained and independent;
 - Academies and free schools;
 - pupil referral units;
 - sixth form colleges and special post-16 education institutions.
230. *Paragraph 4* defines various words and phrases for the purposes of this Schedule.

Section 21: Ill-treatment or wilful neglect: care provider offence

231. *Subsection (1)* provides for a care provider to commit an offence if:
- an individual employed or otherwise engaged by the care provider ill-treats or wilfully neglects someone to whom they are providing health care or adult social care and to whom the care provider owes a relevant duty of care; and
 - the way in which the care provider manages or organises its activities amounts to a gross breach of that duty of care; and
 - if that breach had not occurred, the ill-treatment or wilful neglect would not have happened, or would have been less likely to happen.
232. The overall approach to this offence is modelled, insofar as is practicable, on that of the offence of corporate manslaughter/homicide established in the Corporate Manslaughter and Corporate Homicide Act 2007 (“CMCHA 2007”). The intention is to resolve the difficulties associated with proving to the required level for a criminal offence the element of wilfulness on the part of an organisation. The CMCHA 2007 removed the necessity of identifying a single individual within the organisation’s senior management structure of sufficient seniority to be acting as the “directing mind” of the organisation, and then proving that this individual behaved wilfully, such that the organisation as a whole can be considered to be guilty of the offence. Instead, the CMCHA 2007 focussed on the way an organisation managed or organised its activities, and on the duty of care that the organisation owed towards the victim. This section takes the same approach in respect of whether an organisation has conducted its affairs in a way that amounts

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to a gross breach of a duty of care owed towards someone who has been a victim of ill-treatment or wilful neglect by the care provider's employee or another individual engaged by it.

233. *Subsection (2)* defines "care provider" for the purposes of this section as a body corporate or unincorporated association which provides or arranges for the provision of health care (other than excluded health care) or adult social care, or an individual who provides such care and employs or otherwise makes arrangements with other persons to assist in providing that care. The intention is to ensure that the definition covers not just provider organisations such as hospitals (whether NHS or privately run) and companies, but also partnerships such as GP practices, and sole traders such as single-handed GP practices.
234. *Subsection (3)* sets out the circumstances in which an individual is to be considered as part of a care provider's arrangements for the purposes of *subsection (1)*, specifying that the individual will be providing, or supervising or managing others providing, health care or social care as part of such care provided or arranged for by the care provider.
235. *Subsection (4)* defines "relevant duty of care" for the purposes of this section, as a duty owed under the law of negligence, or a duty that would be so owed were it not for legislative provisions which impose alternative liability in place of liability owed under the law of negligence. However, the duty will apply for the purposes of this offence only to the extent that it arises in connection with providing or arranging for the provision of health care or social care.
236. *Subsection (5)* makes it clear that the application of the offence, which requires a gross breach of a duty of care by the care provider to be shown, is not affected by common law rules precluding liability in the law of negligence where people are jointly engaged in a criminal enterprise or because a person has accepted a risk of harm. The intention is to avoid the possibility that, if it could be shown that the grounds for the care provider offence could otherwise be made out, a care provider could escape prosecution by relying on some illegality on the part of the victim, or an argument that the victim had somehow consented to the risk of harm when consenting to the care or treatment. For example, this provision ensures that a care home provider could not rely on an argument that a resident, in not objecting to being cared for by a particular care worker who had a history of poor behaviour, was somehow consenting to the risk if that care worker subsequently ill-treated or wilfully neglected them.
237. *Subsection (6)* clarifies the meaning of a "gross" breach of a duty of care by a care provider, as being where the care provider's conduct falls far below what could reasonably be expected in the circumstances.
238. *Subsection (7)* makes provision similar to that in section 20(7). For the purposes of this section, where the provision, or making of arrangements for the provision, of health or social care is incidental to the carrying out of other activities, it is to be disregarded for the purposes of the care provider offence. For example, a prison that makes arrangements for one of its prison officers to accompany a prisoner, who has suddenly fallen ill, to hospital would not be treated as a care provider, because the arrangements made are merely incidental to the organisation's primary custodial activities.
239. *Subsection (8)* excludes from the meaning of providing or making arrangements for the provision of health care, cases where a care provider organisation is merely making direct payments to an individual, under specified legislation, for that individual to use to purchase their own health care or social care services.
240. *Subsection (9)* defines certain words and phrases used in this section.

Section 22: Care provider offence: excluded care providers

241. **Section 22** makes provision for certain types of organisation to be excluded from the meaning of “care provider” for the purposes of section 21.
242. *Subsection (1)* provides for local authorities in England to be excluded care providers when performing certain functions, including when providing health care as part of an integrated package of services in the exercise of its functions in respect of children’s social care and when exercising its social services functions in relation to children.
243. *Subsection (2) and (3)* provides for organisations which have entered into arrangements with a local authority in England to exercise functions similar to those covered by *subsection (1)* to be excluded to the extent that they are carrying out those functions.
244. *Subsection (4) and (5)* makes provision for local authorities in Wales, and organisations that have entered into arrangements with a local authority in Wales to exercise functions on its behalf, to be excluded care providers to the same extent as those in England.
245. *Subsection (6)* makes provision for registered adoptions societies or registered adoption support agencies to be excluded care providers when providing adoption support services.
246. *Subsections (7) and (8)* define “local authority” and “child”, “registered adoption society” and “registered adoption support agency” respectively for the purposes of this section.

Section 23: Care provider offence: penalties

247. **Section 23** makes provision for the penalties that can be imposed by the courts in respect of a care provider that has been convicted of the offence established in section 21. The offence will be triable either way, that is in either a magistrate’s court or the Crown Court.
248. *Subsection (1)* provides for the court to impose a fine, irrespective of which court the case has been tried in.
249. *Subsection (2)* provides for a court to make remedial orders and/or publicity orders, either instead of or as well as imposing a fine. This approach again mirrors that adopted by the CMCHA 2007. There is a precedent for providing for such orders in relation to health and social care in section 93 of the Care Act 2014, which makes provision for both remedial orders and publicity orders as penalties available to the court where an organisation has been convicted of the offence of providing false or misleading information.
250. *Subsection (3)* defines a “remedial order” as an order requiring the care provider to take specific steps to remedy any or all of the following:
- a. the breach of the care provider’s relevant duty of care;
 - b. any matter the court considers to have resulted from the breach and to be connected with the ill-treatment or wilful neglect;
 - c. any deficiencies in the care provider’s management or organisational policies, its systems or its practices of which the breach appears to be an indication.
251. The intention is to make provision to oblige a care provider, against which such an order has been made, to take action to put right the specified management or organisational failures so that the offence cannot be repeated.
252. *Subsection (4)* defines a “publicity order” as an order requiring the care provider to take specific steps to publicise the following:
- a. the fact that the care provider has been convicted of the offence;

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- b. the particulars of the offence, i.e. what the care provider did, or failed to do, that resulted in the conviction;
 - c. the amount of any fine imposed on the care provider by the court;
 - d. the terms of any remedial order made by the court against the care provider.
253. The intention here is to make provision to oblige a care provider to make public the fact that it has been convicted of the offence, and the penalties imposed on it as a result. A publicity order is intended to make it impossible for a care provider to avoid being open and honest about a conviction for this offence.
254. *Subsection (5)* makes further provision about remedial orders, specifying that they can only be made if the prosecuting authorities make a specific application to the court, which must include the terms of the proposed order. In addition, when deciding on the terms of the order, the court must take into account any representations made or evidence submitted to it as to what those terms should be. Finally, any remedial order must include a time period within which the actions specified in the order must be completed. These requirements mean that a remedial order will always be tailored to the particular circumstances of the case, and will ensure that necessary actions to put right the failures identified are completed timeously.
255. *Subsection (6)* provides that a publicity order must include a time period within which the actions specified in the order must be completed. This is to ensure that the care provider complies with the provisions of the publicity order within a reasonable period.
256. *Subsection (7)* provides that failure to comply with the terms of either a remedial order or publicity order is itself an offence, punishable by the imposition of a fine. The objective is to ensure that the care provider complies with any remedial order or publicity order, or risk further legal action against it.
257. *Subsection (8)* provides for the maximum amount of a fine that can be imposed under *subsections (1)* and *(7)* to be contingent on whether section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 has come into force at the time of the offence. If not, the references in those subsections to the sanction of a fine on summary conviction are to be taken as references to a fine not exceeding the statutory maximum.

Section 24: Care provider offence: application to unincorporated associations

258. **Section 24** makes provision to ensure that the offence of ill-treatment or wilful neglect caused by a care provider can be properly applied to unincorporated associations, such as general practice or dentistry partnerships.
259. *Subsection (1)* provides that for the purposes of sections 21 and 23 an unincorporated association is to be taken as owing whatever duties of care it would owe if it were a body corporate.
260. *Subsection (2)* further provides that any prosecution under sections 21 or 23 brought against an unincorporated association must be brought in the name of the association, not in the name of any of its individual members.
261. *Subsection (3)* specifies that in any such prosecution the rules of court concerning the service of documents should be applied in respect of the unincorporated association as if it were a body corporate.
262. *Subsection (4)* provides that in proceedings under sections 21 or 23 against an unincorporated association, the legislative provisions listed in paragraphs (a) and (b) are to be applied as they would be applied to a body corporate.

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263. *Subsection (5)* requires that any fine imposed on an unincorporated association convicted under sections 21 or 23 must be paid from the funds of the association, i.e. not by any individual member of it.

Section 25: Care provider: liability for ancillary and other offences

264. *Subsection (1)* expressly excludes secondary liability for the new ill-treatment or wilful neglect: care provider offence. It means that an individual cannot be convicted of aiding, abetting, counselling or procuring the commission of the care provider offence, or of encouraging or assisting in the commission of that offence. The intention here is to ensure that the care provider offence focuses on the behaviours and actions (or failures to act) by the care provider organisation as a whole, rather than creating a route for the focus to be diverted towards a single individual within the care provider's management hierarchy. This does not though affect an individual's direct liability for the ill-treatment or wilful neglect: care worker offence.
265. *Subsections (2) to (5)* clarify that a conviction for the care provider offence would not preclude a care provider being convicted under legislation creating an offence relating to health care or social care, or a health and safety offence, on the same facts if this were in the interests of justice. It would therefore also be possible to convict an individual on a secondary basis for such an offence under such legislation under provisions such as sections 91 and 92 of the Health and Social Care Act 2008, or section 37 of the Health and Safety at Work etc. Act 1974. This does not impose any new liabilities on individuals but ensures that existing liabilities are not reduced as an unintended consequence of the new care provider offence.