

Protecting Children: Review of section 12 of the *Children and Young Persons (Scotland) Act 1937* and section 42 of the *Sexual Offences (Scotland) Act 2009*

A Consultation

Response from *Article 12 in Scotland*

**Annex B: Consultation Questions
Questionnaire**

Question 1

Do you think that the offence in section 12 of *The Children and Young Persons (Scotland) Act 1937* would benefit from reform and modernisation?

Yes

No

Please explain your answer.

Yes, the current offence is over 80 years old; our understanding of what constitutes neglect has evolved considerably during this time. Legislation must develop alongside our advances in research and comprehension: just as the risks to children and young people diversify, so must our capacity for change. Nonetheless, we must consider whether an over-arching definition is helpful, ensuring that it does not detract from individual assessments of risk and need.

Caring for a child or young person is a privilege and a responsibility; when this care falls below the threshold of what is acceptable in order for a child or young person to thrive and feel loved [and whether or not this is intentional, or as a result of particular circumstances; whether or not the person has PRRs but was in charge of the child or young person's care and their neglect caused *serious* harm], there must be intervention – and where necessary, prosecution. Where the severity of neglect leads to prosecution, the person[s] responsible *should* be prosecuted according to the laws regarding their age and the status of their mental health. Prevention – early intervention, education, support without prejudice and so on – are key to ensuring that cases of neglect do not reach a stage where the outcome is prosecution.

There are several reasons why abuse may not be identified; these include: the inability to gather sufficient evidence; [some] children in home-education not having regular or indeed any contact with external services and professionals; entrenched poverty; a cultural acceptance not only that neglect can be inevitable in certain circumstances, but that it does

not happen in more affluent areas/families; the over-stretching of front-line services; families moving from area to area; the ‘covering up’ of abuse by families and indeed the children and young people themselves; insufficient support for vulnerable parents and the difficulties that currently arise when trying to identify those at risk of emotional abuse.

As stated by the *Scottish Government*, Scotland should be a place hostile to the abuse of children: neglect is abuse. It is widely known, that childhood neglect has far-reaching and serious consequences on a person’s mental health and life-outcomes, and can result in the inability to form positive future relationships. Emotional neglect is one of the most common reasons why children and young people are deemed to be at risk in Scotland today. Indeed, there is a tendency of associating neglect with young children, but the neglect of teenaged children also has far-reaching consequences.

For too long, emotional harm has been ‘hidden’; legislating specifically against this form of abuse cannot come too soon. 2018 is the ‘Year of Young People’, there is no better time to ensure all the rights of every child and young person in Scotland are being upheld:

Article 19 of the *UNCRC*:

1. Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Question 2

Do you think that existing concepts of ‘neglect’, ‘ill-treatment’, ‘abandonment’ and ‘exposure’ should be defined in the legislation?

Yes, the terms should be defined in legislation ✕

No, the terms should be defined in guidance

No, the terms should not be further defined

Do you think the terms should be given a meaning which is different from current interpretations?

Yes, clear and concise definitions are crucial in implementing a solid legal platform from which interventions and prosecutions can be carried forward. The ambiguity in the current legislation allows children and young people experiencing abuse to ‘slip through the net’ and can deter professionals within connected services from taking these cases further, and indeed even investigating them at all, to the detriment of the children and young people involved.

Further, do you think it is necessary to keep the terms ‘abandonment’ and ‘exposure to risk’ in a modernised offence?

These forms of abuse must of course be included in any legislation; however, the terms ‘abandonment’ and [in particular] ‘exposure to risk’ are far too broad. The actions which may lead to these terms being used have evolved hugely, therefore any new definitions of the above must reflect the risks children and young people face in our current society, leaving scope for new issues that will arise in the future. In this fast-paced, constantly evolving society, 80+ years is far too long to wait until this legislation is revised again.

Question 3

Do you have any thoughts on how professionals dealing with children and families can be supported to identify when cases reach a criminal threshold?

While legal and practitioner definitions regarding what exactly equates to child abuse may differ, there is a strong need for a new and up-to-date universal definition of all aspects of abuse a child or young person may experience. Everyone working to protect children and young people should be working from the same, clear and current, guidelines in order to provide direction, alleviate doubt and empower professionals to act when necessary [showing a discernible point at which interventions will require criminal prosecution], particularly in cases where earlier and more effective intervention is required. Cultural differences must also be understood in order for professionals to act in the best interests of the child or young person, without prejudice – this should not be a tokenistic ‘tick-box’ exercise, but a real, studied commitment to learning about different cultural practices.

Due to the ever-evolving nature of the risks faced by children and young people, and in order to protect them fully, the *Scottish Government* should commit to revising the interpretation of abuse on a regular basis in order to provide a current framework for professionals working to protect children and young people from abuse.

A localised, expert approach centred on children and young people – across various service networks - which is accessible and promoted widely to families in a transparent and ‘jargon-free’ way, and in particular for children and young people, should be strengthened; funding should be made available for this. While there is an obvious need to respect the inevitable differences between areas and services [a natural result of different processes and structures being in place to match local need], more consistency across these services would help professionals dealing with children and families to identify when children and young people are at risk – including information about parents accessing services for substance misuse and significant mental health problems. Differing definitions of neglect between agencies such as the police and child protection committees has led to less consistency in local areas. Multi-agency partnership in the planning for, and delivery of, child protection in local areas is becoming practiced more frequently – this practice should be applied in national policy, planning and delivery too; multi-agency training would help to strengthen a ‘shared’ understanding and knowledge across networks; there is need for greater coordination due to the sheer number of different organisations and professionals involved. This should build upon current good practice and help define at which point, the care of a child or young person has reached the threshold of what is deemed to be acceptable.

Nonetheless, a multi-agency approach and sharing information, while good in theory, must be treated carefully when in practice. *GIRFEC* has been helpful in bringing children’s needs

into a wider consciousness; indeed there is requirement for a shared agreement regarding which point further intervention is required, across all areas/services, with different strategic responses to neglect available across all networks. Children and young people, and indeed their families, must be viewed as individuals with individual circumstances and needs; health care workers, education staff, service staff, community workers and police all play a role and early, tracked intervention and support – where possible and when there is a need – is preferable due to its less invasive nature. Differing ‘pathways’ of care and support are not always helpful – family services should be part of the same pathway; further sensitive integration is required.

Question 4

Do you have any thoughts on how we can support legal professionals to further understand the impact of neglect and emotional harm on children and young people?

It is imperative that both physical and emotional neglect are clearly, and separately, defined in current criminal law, and, in serious cases, given a clear route to prosecution in order to alleviate any doubt for legal professionals and protect those suffering from emotional abuse. It is also important to make clear that any definitions are not exhaustive, and that prosecution may still be pursued for any offence that causes emotional harm. Information sessions/resources, led by young people who have experienced emotional neglect and the front-line services who support them, would be beneficial.

Question 5

Do you think that children in Scotland should have clear legislative protection from emotional abuse?

Yes ✕

No

Please explain your answer.

Yes. Physical harm and neglect and emotional [inc. psychological/cognitive] harm and neglect are two different issues – although naturally there will be a crossover of emotional neglect in every form of child abuse. Physical neglect is much clearer and therefore easier to identify, however, both of these types of abuse are extremely damaging and impact on not only the life outcomes and emotional/physical health of the abused, but can contribute to inter-generational cycles of abuse. The *Domestic Abuse [Scotland] 2018 Act* recognises the impact of emotional harm for adults; the emotional abuse of children and young people must be given due weight. Clear, legislative protection for Scotland’s children and young people from emotional abuse is long-overdue.

Question 6

Do you have examples of the sorts of behaviours and their effect on children that should or should not be captured by any revised offence?

Again, it is important that when legislating for the revised offence, any behaviours listed are clarified as non-exhaustive. The spectrum of emotional harm that should be captured is vast

and crosses all social borders: from verbal abuse [belittling, sneering, name-calling, threatening, intimidation, aggressive shouting and so on], to making a child feel rejected and/or unloved/unworthy, playing siblings off against one another/mind games and emotionally neglecting a child so that they either turn to illegal activities, or are encouraged/rewarded to do so by their neglectful care-givers [perhaps perpetuating an intergenerational cycle of abuse and crime]. Discouraging education/betterment, allowing children and young people unmonitored access to the internet, living in an environment with addiction issues, indoctrination of hate speech [towards other races, genders, sexuality, religion and so on] and witnessing domestic abuse of a parent also contribute to emotional harm and should all be covered.

These behaviours, whether being emotionally unavailable [intentionally or otherwise] or actively and deliberately emotionally abusing a child or young person in any way, expose individuals to a large number of risks. These risks can contribute to children and young people becoming more susceptible to abuse in other areas and are likely to contribute to long-ranging negative outcomes for both their mental and physical health – ultimately perpetuating a cycle of abuse.

Care needs to be taken when dealing with the emotional harm of children and young people living with [whether full-time, part-time or occasionally] a care-giver that has mental ill-health, early intervention is key in this instance to ensure that support is in place for both the child and the person with PRRs in order to prevent any emotional harm that may take place. Linking of child and adult services and sharing information may in this instance be beneficial in aiding these families from the outset. Differing parenting styles – whether cultural or otherwise – should also be treated with care. Prejudice and stereotyping can, at times, cloud the judgement of others and where a child is loved, nurtured, happy, safe and encouraged, it is absolutely in their best interests to remain with their families. Families should not live in fear either because of mental ill-health, or because their lifestyle – if providing an emotionally/physically safe and loving environment - may differ from the mainstream.

Question 7

Do you think the deeming provision in section 12(2)(a) concerning failure to provide adequate food, clothing, medication, or lodging should be changed?

Yes

No

Please explain your answer.

The provision of adequate food, clothing, medication and lodging are basic rights which everyone needs to survive, but not necessarily to thrive. If a care-giver is unable to provide these most basic of rights, then measures must be taken to ensure the welfare of the child or young person in question is protected.

Question 8

Do you think the deeming provision in section 12(2)(b) concerning the suffocation of a child while in bed should be changed?

Yes ✕
No

Please explain your answer.

Co-sleeping/bed-sharing with young children can be very beneficial to the family dynamic when the safe co-sleeping/bed-sharing guidelines are closely followed. Nonetheless, a child under the age of 3 is very vulnerable to suffocation where an adult is intoxicated. If an adult is so intoxicated that they are in such a deep sleep/passed out [bearing in mind that mothers, particularly if breastfeeding, are generally very aware of the child/the child's movements in their bed and therefore naturally sleep much more lightly and wake regularly] that they accidentally suffocate their child – this is neglect; this should include those under the influence of illicit drugs. A care-giver should not be this heavily intoxicated at *any* point where they are in charge of the care of young children. Not sleeping with very young children on other furniture such as sofas and armchairs is common sense, regardless of whether or not one is intoxicated.

Question 9

Do you think that the test for establishing whether harm or risk of harm occurred should include a requirement that a 'reasonable person' must consider the behaviour likely to cause harm?

Yes ✕
No

Please explain your answer.

Where there are circumstances to establish whether there is a risk of harm, it is possible that if no actual harm has occurred, it may only be a matter of time. Although this is a bit of a 'grey area' legally, the hypothetical average person should follow a basic level of what is and is not acceptable when caring for a child or young person. If care falls below this threshold it may be neglect. The requirement of a 'reasonable person', should, in theory, also alleviate any personal prejudices that may cloud judgement in certain cases.

Question 10

Do you think a provision equivalent to section 12(3) should be included in any revised offence, either in its current form or amended?

Yes ✕
No

Please explain your answer.

If the actions of a person, whether neglectful or otherwise, cause the serious injury [even where prevented by the actions of another] and/or death of a child or young person, then prosecution should be sought if they have committed a criminal offence. It is unlikely that this provision requires amendment.

Question 11

Do you think that the offence should apply wherever a person wilfully and deliberately acted or neglected to act in a way which caused harm or risk of harm, regardless of whether they intended the resulting harm/risk?

Yes

No

If not, do you think the offence should only apply to those who;

Intend to cause harm to a child by their action or inaction?

Or, intend or is reckless as to whether harm is caused?

Please explain your answer.

Sustained failure to ensure a child's needs – whether these be physical, safety, emotional and/or psychological/cognitive needs – is neglect. The circumstances around those accused of neglect must be closely scrutinised; while harm may not be immediately apparent and prosecutions should aim to prevent harm from taking place, any assessments of intention must be ensured to be objective. While child safety is paramount, there is a significant difference between [for example] accidental injury and deliberate, and we must account for reasonable lapses in human error – to which we are all susceptible. Where the offence is clearly *intentional* or *wilful*, or actions have been reckless and/or the care-giver is unconcerned about the safety of the child or young person, then the offence must apply; the impact upon the victim of the abuse must also be taken into account. In instances where the mental state or awareness of the accused has contributed to the offence, interventions should already have taken place and these factors should be taken into consideration during potential prosecution.

Question 12

Who should be capable of committing the offence?

Anyone who plays a role in the care of the child or young person should be capable of committing the offence. This ranges from care givers – with or without PRRs – to *all* those who have a duty of care: educators, health professionals, those in charge of extra-curricular activities/sports, social workers/care workers, service providers, organisations, school transport providers, extended family/friends, nursery and child care workers and indeed anyone who has the 'charge or care' of the child or young person, at any point, all have a duty to ensure their health, safety and well-being.

Question 13

Do you think the legislation should set out the age of a perpetrator?

Yes

No

If yes, what should the age limit be?

Under the age of 16, the perpetrator is still a child themselves and should therefore not be in a position where the safety and well-being of another child [that is not their own, and where this is the case, additional support should be in place] is their responsibility - this responsibility lies with the care-giver, and anything that should happen when they have willingly left their child in the care of another child should be treated as a result of their own actions. Unless the perpetrator had shown that they intentionally went out of their way to deliberately harm another child they should not be charged with the offense. The age limit should be 16; nonetheless, special consideration [and perhaps legislation] should be provided for those aged 16 and 17. While theoretically, young people in this age group should have a sense of responsibility and be able to recognise appropriate behaviour, allowances may need to be made for differing levels of maturity and understanding.

Question 14

Do you think that a child should be defined as aged 18 or younger in relation to the offence?

Yes

No

Please explain your answer.

Children and young people should be protected as such until the age of 18 [and further where other circumstances may make them particularly vulnerable e.g. young people living with disabilities, care-experienced young people and so on]. However, this may become problematic with regards to the varying legal ages of 'a child' in Scotland; parents cease to have the majority of PRRs when a child turns 16, and a child can leave school, enter a sexual relationship, get married/enter a civil partnership and so on. As previously stated, specific legislation should be in place for those aged 16 and 17 that recognises their increased rights and responsibilities but protects vulnerable young people from harm and provides them with additional protection; indeed when issues regarding abuse and protection arise, 16 and 17 year olds may experience better outcomes if they are treated, by law, as children.

Question 15

Do you think the current penalties for a section 12 offence should be amended?

Yes

No

Please explain your answer.

There should be no maximum term for the offence. The length of imprisonment should reflect the crime/nature and intention of the abuse/impact on the victim, and be considered on a case-by-case basis.

Question 16

What steps, if any, could be taken to avoid criminalising parents/carers who have been victims of domestic abuse themselves, and have committed a section 12 offence as a consequence of this domestic abuse?

Where a parent or carer has been subjected to abuse, they are [alongside their children] victims themselves. Very rarely does abuse begin immediately within a relationship; victims may be ‘ground down’ over a number of years; often to a point when they feel unable to leave. There is a significant difference between unable and unwilling; if a parent or carer has been previously unable to leave an unhealthy and dangerous relationship through fear, sustained psychological/emotional abuse, threats and so on, but manages to leave their abusive situation for the sake of their child(ren), then they should – where possible/ethical - avoid prosecution for the offence. If a parent or carer has rejected all intervention and continues to place themselves and their children at risk, then this is further abuse.

With regards to carrying out a section 12 offence themselves, courts must look at the psychological damage that has been done to the parent/carer accused of the offence and the intention [if any] behind it. Nonetheless, the physical safety and emotional well-being of the child or young person is paramount; living with domestic abuse is one of the most damaging environments a child or young person can grow up in, and it is likely to have life-long negative consequences and can contribute to a further cycle of perpetration/acceptance of abuse. Children and young people growing up in an environment of domestic abuse – whether experiencing it directly or indirectly – will have many additional issues to face, and may [through their own choice, or otherwise] face losing contact with one or both of their parents and/or siblings/wider family network.

Question 17

Are there additional ways in which we can assist courts to be aware of the full context of abuse within a domestic abuse setting, affecting both partners and children?

Setting out new guidelines/resources that courts must follow which provide an up-to-date context of abuse within a domestic abuse setting would be beneficial. Primary evidence/experience and input from those who have been victims of domestic abuse [directly and indirectly] from the perspective of both partners and children/young people, and the knowledge of those working in front-line organisations/support services should lead this.

Question 18

What further steps could be taken to ensure vulnerable parents are not unfairly criminalised?

It is vital to ensure that vulnerable parents, where care for their child(ren) is of a standard accepted by any ‘reasonable person’, are not unfairly criminalised. Looking at where the ‘linking up’ of adult and child services could be strengthened, in order to provide support, guidance and reasonable checks would be a good place to start; ensuring that the parent(s) are adequately supported where needed and that there are no grounds from where neglect and abuse can begin.

‘Community parenting’ should also be encouraged where vulnerable parents are concerned, in order to ensure that relevant services and support are being accessed and utilised within the local community, helping to keep the child or young person visible and safe from any harm, and providing assistance to the parent or carer.

Question 19

Do you have any comments on whether the definition of a ‘position of trust’ should be extended to cover other positions in which a person is in a position of power, responsibility or influence over a child?

A ‘position of trust’ should be extended to cover *all* adults who are formally entrusted with the safety, care and emotional well-being of a child or young person while they are still under 18 and [even if aged 16 or over] within a ‘learning’ setting and over whom they exert power and influence. This may be sports coaches, music tutors, religious figures, academic tutors, transport providers, youth group leaders, driving instructors, organisational staff, administration staff within youth settings, family friends and so on. Any person who engages in sexual activity with a child under the age of 18 [even if over the age of consent, under these circumstances] should not be permitted to continue working with any child or young person.

Question 20

Do you have any other comments on the ‘sexual abuse of trust’ offence at sections 42-45 of the *Sexual Offences (Scotland) Act 2009*?

It should go without saying that engaging in sexual activity with a person under the age of 18 – even if they are over the age of consent – for whom they are in a ‘position of trust’, is a gross abuse of power, responsibility and indeed, trust. It is not something that any ‘reasonable person’ would consider. It is important that there are concessions made to ensure that these measures apply only to people in a ‘position of trust’, and not to consensual relationships where one party is 16/17 and the other is 18.

Equal Opportunities

Do you consider that any of the reforms proposed in this paper will have a particular impact – positive or negative – on a particular equality group (e.g. age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex, sexual orientation)?

Are there any other issues related to equality which you wish to raise in relation to this consultation? We intend to publish final versions of relevant impact assessments at a time of a possible Bill.

While care needs to be taken in order to ensure that vulnerable parents are not unfairly criminalised, and that prejudice and stigma are avoided [children’s lives must be understood within a broader context, taking into account circumstances that are out-with parental control e.g. welfare reform], the reforms proposed will have a particularly positive impact on marginalised children and young people; in particular children and young people living with

disabilities, for whom abuse can often go undetected, and care-experienced children and young people or those on the fringes of the care system [young people who are: looked after at home, in residential and secure care, in kinship care and using through-care and aftercare services].

These vulnerable groups can often become ‘hidden’; whether this be from living a transient lifestyle [which does not necessarily mean they are members of the Gypsy/Traveller community] or are withdrawn from the community and wider society; children and young people in these groups can often ‘disappear’ from society’s view and are therefore much more susceptible to all forms of abuse. Even when they are still living within the mainstream, emotional harm can be hard to spot, and people may question whether or not abuse is actually taking place. Physical neglect and abuse is often, but not always, much more obvious – these reforms will help to empower professionals to ensure that victims of emotional harm are also fully protected. It should be hoped that children and young people who are known to services, but not under any formal protective measures, will also be impacted upon positively; lessening the likelihood that they will be impacted by *Adverse Childhood Experiences*. A stronger connection between services will aid in spotting where children have been/or will be born into an environment that may make them more susceptible to abuse, but should not make assumptions based upon a parent or care giver’s own difficult or abusive history.

Committing to creating a more equal society – across all areas – will help us move forward in eradicating the abuse of children and young people.

Financial implications

Do you have any comments or information on the likely financial implications of the reforms proposed in this paper for the *Scottish Government, Police Scotland, Scottish Courts and Tribunals Service, Scottish Prison Service, COPFS*, local government, or for other bodies, individuals or businesses? We intend to publish information on any financial implications at a time of a possible Bill.

The current political climate of austerity and welfare reforms is causing more and more children to live in poverty. Multi-generational cycles of poverty can lead to an attitude of neglect being ‘normal’; in order for Scotland’s children and young people to live a life free from abuse, significant funding will be required for all services tasked with the protection and nurturing of our children and young people.

Other considerations

Are there behaviours not criminalised elsewhere that you think could be included within a revised offence?

The impact of online abuse/grooming/cyber bullying and so on continues to worsen and expand. Parents and care givers must take action to ensure their child’s safety while using the internet within their own home and on their own devices. Parents who do not take reasonable measures to protect their child(ren) from online dangers are responsible for any harm their child may come to from using the internet while in their care. The use of the internet to explore unsuitable and age-inappropriate materials can have a significantly damaging effect on not only the child or young person in question, but also their peers.

Do you have any other comments?

“People need to feel as if someone cares about them and loves them.”

Young person, *Article 12 in Scotland: UNCRC Concluding Observations Seminar*, Glasgow, March 25th 2017

Every child and young person has the right to be loved, nurtured, encouraged and enjoyed. A loving home, regardless of culture, social status and affluence, is proven to favour positive life outcomes. If a person looking after a child cannot provide these basic rights, then steps must be taken to ensure these needs are met elsewhere; by the correct services, at the right time.

Children and young people must be empowered to know their own rights via the *UNCRC*; advocacy services for children and young people to improve rights and participation must be further developed. The *Scottish Government* should recommend that it is a requirement of all Scottish schools to become *Rights Respecting Schools*. Knowledge is power, and by placing rights at the heart of a school's ethos and curriculum, children and young people will become more empowered and perhaps, increasingly likely to report abuse themselves. Children and young people must be allowed to speak-up and, properly supported, to lead services and tell the government what *they* need; a more strategic approach to involving children and young people with lived experience is required throughout the approach to child protection policy development. Child Protection Committees must ensure children, parents and wider families are part of the decision-making processes. There is also a lack of up to date survey data of young people's experiences and self-report of abuse/neglect.

The protection of our children and young people is a collective responsibility; *Article 12 in Scotland* believes that governments, professionals, practitioners and wider society all have a role to play in building an environment that protects, respects, values and validates *all* of Scotland's children and young people.