Analysis of Consultation Responses to 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

Final Report

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Contents

Introduction

Background

In August 2018, the Scottish Government launched a public consultation on 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.

The consultation sought views on potential changes to two criminal offences related to child protection, namely: the offence of child cruelty currently legislated for in section 12 of the Children and Young Persons (Scotland) Act 1937; and the offence of abuse of trust currently set out in section 42 of the Sexual Offences (Scotland) Act 2009.

The consultation came about as a consequence of recommendations made by the Child Protection Improvement Programme (CPIP) in its final report from March 2017. As part of CPIP, a review was carried out of the current criminal law regarding neglect and abuse of children. It concluded that there was sufficient evidence to explore the merits of updating and modernising the section 12 offence, and that this exploration should be done in consultation with partners and stakeholders across Scotland.

Based on a separate report on Child Protection in Sport by the Health and Sport Committee of the Scottish Parliament which was published in April 2017, and earlier indications from Ministers that consideration would be given to extending the current scope of the abuse of trust offence as a part of the Scottish Government's review of the law concerning abuse of children, a need to consult on reforming the offence of 'sexual abuse of trust' at section 42 of the Sexual Offences (Scotland) Act 2009 was also identified. This provides that a person who looks after children under the age of 18 in a range of institutional settings, including schools, hospitals, care homes and young offenders' institutions, commits a criminal offence if they engage in sexual activity with a child whom they look after in that institution, irrespective of whether the child has attained the age of consent.

The consultation was open to individuals and organisations and the Scottish Government actively encouraged responses from public bodies, local government, third sector charities and other organisations, as well as those representing the legal profession, and those working in academia. The consultation contained 20 substantive questions - 18 relating to section 12 of the Children and Young Persons (Scotland) Act 1937 and two relating to section 42 of the Sexual Offences (Scotland) Act 2009. It also invited views on any equalities and financial impacts that might result from any proposed changes to the existing child cruelty offence or definition of 'position of trust' and 'abuse of trust'.

The consultation opened on 23 August 2018 and closed on 14 November 2018.

Responses Received

A total of 220 responses were received - 161 from individuals (73%) and 59 from organisations (27%). Among the 59 organisations that responded, there was a reasonable spread across the public sector (including several local authorities, Child Protection Committees (CPCs) and Health and Social Care Partnerships (HSCPs)). Twenty-three of the 59 organisational responses (i.e. 39%) came from the third sector, with strong representation from children/young people's charities and religious organisations.

	Number	Percentage
Individuals	161	73%
Public Sector	26	12%
Third Sector	24	11%
Legal Profession	4	2%
Academia	3	1%
Sports Organisations	2	1%
Total	**220**	**100%**

Although three-quarters of responses were received from individuals, the content of a large number of those responses was the same, indicating that they may have been generated from an organised campaign. Many of these responses answered only a small number of questions in the consultation. Given some minor variations in the text that was submitted, it is impossible to say definitively that these responses resulted from a campaign, however, based on independent analysis, it is estimated that around 132 (82%) of the individual responses that were received could reliably be classified as such. Given that each response originated from a different source, each was included in the analysis as a valid response and given equal weight in considering the views expressed in relation to each question.

Approach to Analysis

Most responses (n=130; 59%) were submitted directly via Citizen Space, the Scottish Government's online consultation portal, and a further 63 (28%) were received by post and 27 (13%) by email.

All who contributed written responses were asked to submit a Respondent Information Form (RIF) alongside their consultation response, indicating if they were willing for their response to be published (or not). Just over half of respondents (n=124; 56%) indicated that they were content for their response to be published without their name, a third (n=79; 36%) were content for their response to be published alongside their name and the remainder (n=17; 8%) indicted that they did not wish their response to be published.

Of the 20 substantive questions, most contained both a closed response option (i.e. respondents were asked to indicate if they agreed or disagreed with the proposal using a 'yes' or 'no' option) as well as an open-ended component inviting respondents to explain their response in more detail. Nine questions contained an open-ended response option only. Open-ended responses were also invited for the questions relating to impacts or issues not identified elsewhere in the consultation. All questions were answered by at least one respondent. All responses were read and logged into a database, and all were screened to ensure that they were appropriate/valid. None were removed for analysis purposes, except one duplicate that had been submitted in error. Although some responses to individual questions did not directly address the questions being asked, all feedback was analysed and is presented under the appropriate sections below.

Closed question responses were quantified and the number of respondents who agreed/disagreed with each proposal is reported below. The percentage of respondents who said 'yes' or 'no' and who provided 'no response' to each question is shown, as well as the 'valid percent', i.e. the proportion who said 'yes' or 'no' once the non-responses were removed. This was necessary given the large number of potential campaign responses and which answered only a small number of the questions asked. Comments given at each open question were examined and, where questions elicited a positive or negative response, they were categorised as such. The main reasons presented by respondents both for and against the content included in the consultation were reviewed, alongside specific examples or explanations, alternative suggestions, caveats to support and other related comments. Verbatim quotes were extracted in some cases to highlight the main themes that emerged. Only extracts where the respondent indicated that they were content for their response to be published were used and a decision was made to anonymise all responses as part of the reporting process.

Report Presentation and Research Caveats

Findings are presented as they relate to each question in the consultation. Where people provided no response, this is noted separately from cases where respondents indicated that they had no further comments or were unsure.

The tables below show the difference in views expressed by the respondent group as a whole. Where there was a difference in view expressed by respondent type (e.g. individuals or organisations), this is picked up narratively in the report. As a guide, where reference is made in the report to 'few' respondents, this relates to three or less respondents. The term 'several' refers to more than three, but typically less than ten. Any views expressed by large numbers of respondents (i.e. ten or more) are highlighted throughout, including campaign responses.

Finally, although a large number of responses were received overall, it is worth stressing that the views presented here should not be taken as representative of the wide range of stakeholders invited to respond to this consultation, nor should they be generalised too broadly. They simply reflect the views of those individuals and organisations who chose to respond.

Identified Issues with the Current Offence

Offences of cruelty to persons under the age of 16 are prosecuted under section 12 of the Children and Young Persons (Scotland) Act 1937 ("the Act"). It provides that an offence is committed where a person who has parental responsibilities in relation to a child or young person, or has charge or care of a child or young person:

> *"wilfully ill-treats, neglects, abandons or exposes him, or causes or procures him to be ill-treated, neglected, abandoned, or exposed, in a manner likely to cause him unnecessary suffering, or injury to health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement)."*

The legislation stipulates that the offence can only be committed by a person who is aged 16 or over and who either has parental responsibilities in relation to the child, or has charge or care of them. Neglect or ill-treatment must also be committed wilfully for it to be an offence and only children or young people under the age of 16 can be victims of the offence.

The main issues identified with the existing Act, which prompted consultation on whether there was a need for reform, were that the language in the Act is outdated, it is unclear if the current offence covers emotional harm and that there can be difficulty in prosecuting cases under the Act given ambiguity around the notion of wilful activity. The need to differentiate between risk of harm and harm actually occurring is also unclear in the legislation. The age at which a person can be a victim of the offence also differs from other legal age limits and the current definition of who can commit the offence has historically been seen by some as too loose.

The first part of the consultation sought views on whether the existing offence would, therefore, benefit from reform and modernisation.

Q1. Do you think that the offence in section 12 of The Children and Young Persons (Scotland) Act 1937 would benefit from reform and modernisation?

	Number	Percentage	Valid Percent
Yes	111	50%	93%
No	9	4%	7%
No response	100	46%	-
Total	**220**	**100%**	**100%**

Note: Six respondents (2%) who did not provide a closed question response gave a qualitative comment

Roughly half of all respondents provided an answer to this question (54%).

Among those who provided a response, 93% indicated that they felt that the offence would benefit from reform and modernisation, with only a small number (7%) indicating that it would not.

Many of those who offered support did so on the basis that they found the language to be outdated, and not reflective of cultural, social and technological changes:

> *"We consider that the wording used in the 1937 Act is archaic, a product of its time. We consider that modernisation is overdue in order to bring the offence into line with modern thinking and modern understanding of child abuse and child neglect. Reformulation of the offence would also allow for increased use of statutory definitions which would assist in removing some of the doubt and uncertainty that surrounds the legislation at this time." [Legal Profession]*

Words that were seen as particularly obscure and outdated were wilfulness, ill-treatment and mental derangement, and many urged that none of these terms had a place in any revised offence.

A large number of other respondents agreed with the need to reform simply on the basis that they viewed it as a positive step towards further protecting children. Others commented that they supported reform for all of the reasons set out in the consultation document itself.

Changes that respondents particularly welcomed or felt should be included in the reformed offence included:

- emotional or psychological harm;
- consideration of persistence;
- assaults on, as well as neglect of children; and
- the notion of a 'reasonable person'.

Most respondents acknowledged that it would be difficult to clearly define many of the core concerns at hand, especially the notion of emotional or psychological harm. Indeed, many urged that caution be taken in any definition of emotional harm that was introduced so as not to widen potential for criminality excessively.

Vicarious harm could be caused to children, it was stressed, by unnecessarily getting some families and children involved in the criminal justice system where other non-criminal routes of addressing neglect may be more appropriate.

Indeed, a common theme was that, while broadening the offence to include emotional harm was welcomed, people did not wish to see it defined so broadly that it might open up 'reasonable' parenting to unwarranted scrutiny.

One organisation stressed that this was a particularly acute issue for parents with learning disabilities and that care needed to be taken to ensure that vulnerable parents did not find themselves at risk of prosecution (discussed in more detail later

in the report). Similarly, on the theme of criminalising vulnerable parents and carers, it was stressed by some that particular care would need to be taken that, in widening the terms of the offence, victims of domestic abuse were not penalised as a result of the actions of their partners (again discussed more below). Responses to neglect and emotional abuse must support both parents and children simultaneously, it was felt.

One CPC commented that getting the definition of emotional harm right was essential, as the change to this legislation, as well as other planned or existing legislation could otherwise negatively (and wrongly) impact some parents:

> *"[Organisation] would like to note that while supportive of the review of section 12 we have some concerns that changes in the legislation along with the introduction of other legislation such as the Equal Protection Action may result in more criminal actions against parents. This is counter to some of the wider policy direction regarding early intervention and a focus on addressing inequalities such as poverty and the links to neglect." [Public Sector Organisation]*

Other respondents urged that while they supported 'modernising' section 12, clarity was also required on the anticipated impact of these changes on statutory services and the families that they work with. Similar concerns were raised by some religious organisations, who felt that any new terminology needed to be very carefully considered so as not to discriminate against different religious or cultural practices. Others commented more generally that any criminal justice intervention needed to be proportionate once the offence was redrafted and that penalties for the new offence needed to be carefully considered (with reference to both the victim, offender and impact of neglect).

Although also seen as difficult to operationalise, there was support for the offence to be extended to explicitly cover individuals without Parental Responsibilities and Rights (PRRs). There was also support that the offence should be capable of being committed by a person of any age (including parents under 16), and that the new offence should apply to victims aged 18 and under (rather than 16) although both of these issues were mentioned less at this question than the need to revisit language and to include emotional harm in the revised offence. Dedicated questions on the age of the offender and age of victim were, however, included later in the consultation and attracted a strong response.

Several respondents expressed that they would support retaining core components of the current legislation, especially around failure to provide adequate care:

> *"We are content that the offence will continue to deem a failure to provide adequate food, clothing, medical aid or lodging as wilful neglect likely to cause harm, including a child suffocating in a bed where the child is in bed with a person under the influence of alcohol and that it should now be extended to cover persons who are under the influence of illicit drugs." [Third Sector Organisation]*

Another main reason for support was that it provided an opportunity for legislation to reflect society's more nuanced understanding of the impact of neglect. Much research/evidence was available, it was suggested, which would allow legislation to be more informed than when it was first developed and this should be harnessed.

Other reasons given in support, included that it would clarify the statutory basis for social work intervention, support legal processes and give victims more confidence to come forward/report offences.

There was a strong sense across responses that the legislation needed to be accessible to practitioners, and that reform would assist this:

> *"Reformation of the legislation presents an opportunity to better reflect the multi-agency responsibility for recognising and responding to neglect and contribute to a collective response. It would also help if legislative reform is accompanied by detailed guidance on issues associated with neglect and the application of law." [Public Sector Organisation]*

A few respondents urged ongoing review of any updated offence to ensure that it remained fit for purpose and others suggested that any changes must be at least as precise as the original definition, and that no ambiguities should be introduced.

Among those who did not support the need for reform and modernisation (all individuals), the main reason given was that the existing laws were already adequate to protect and safeguard children. Updating of the Act may simply entail introducing new terminology which could be equally difficult to understand:

> *"The items identified as requiring reform are difficult to prove and are clearly difficult to define. As with other attempts to "reform" law - there will be a lack of clear definition of the terms and therefore people will be open to mis-application of the law." [Individual]*

Six respondents that gave no 'closed' response to Question 1 did give some qualitative comments. These included two organisations who urged that the criminal law was not the only means of protecting children:

> *"[Organisation] understand that in some cases, there is without doubt need for criminal prosecution of parents for their treatment of children. However, in our experience, this is not where change is most urgently required to fulfil children's right to be safe from abuse and neglect." [Third Sector Organisation]*

Organisations also commented that the policy intention behind the change to law was obtuse and required more debate and discussion with relevant stakeholders. Consideration of other relevant ongoing policy initiatives which may impact on the section 12 review may also be prudent, it was felt. Overall, however, most respondents supported retaining, updating and strengthening the law subject to changes in language, since they perceived that it offered a vital tool in protecting children and ensuring that neglect was met with criminal charges.

Language and Emotional Harm

The offence of child neglect currently legislated for in section 12 of the Children and Young Persons (Scotland) Act 1937 is defined with reference to terminology which may no longer be used or understood in modern language. In particular, there is a lack of clarity around terms such as 'mental derangement' and 'ill-treats' and, most centrally, the term used in section 12 to describe the type of behaviour which constitutes an offence is 'cruelty to children'. Section 12 does not use the term child 'abuse', but in effect section 12 (by covering ill-treatment, neglect, exposure to risk and abandonment) covers many forms of abuse.

Updating and Clarifying Language

The consultation sought views on whether clear statutory definitions of the terms "ill-treatment" and "neglect" should be included as part of a revised offence as well as whether the language of the offence could be simplified, for example by removing the terms "abandonment" and "exposure". Any updating of language would correspond to that currently understood in Scots law.

Q2. Do you think that existing concepts of "neglect", "ill-treatment", "abandonment" and "exposure" should be defined in the legislation?

	Number	Percentage	Valid Percent
Yes, the terms should be defined in legislation	56	25%	71%
No, the terms should be defined in guidance	19	9%	24%
No, the terms should not be defined	4	2%	5%
No response	141	64%	-
Total	**220**	**100%**	**100%**

Note: Nine respondents (4%) who did not provide a closed question response gave a qualitative comment

Almost two thirds of respondents did not answer this question. Among those who did, a large proportion (71%) supported the statement that the terms should be defined in legislation. A quarter (24%) felt that they should be defined in guidance and a small number of respondents (5%) felt that the terms should not be defined.

Among the 56 who felt the terms should be **defined in legislation**, 25 were responding on behalf of organisations and 31 were individuals. The main views of this group were that this option would be stronger/more robust than providing definitions within guidance only and that this would remove ambiguity/dubiety and ensure nothing is left open to interpretation, creating a stronger legal position:

> *"An Act of Parliament which is not sufficiently tightly-worded, and where the terms to which it refers are not clearly defined, will subsequently be subject to*

interpretations in practice which may not be the current focus or purpose of the revisions of the Act. Moreover, a poorly defined offence may lead to a waste of police time pursuing cases which are insufficiently attested." [Individual]

It would also provide a consistent reference point or baseline for criminal justice intervention and intervention by other practitioners working in this field:

"Defining terms in guidance might expedite the process but when behaviour that amounts to neglect is defined in the legislation, it might be clearer to professionals when children can be removed."

One public sector organisation also stressed that it was important for the legislation to be clear to avoid some cases being unnecessarily diverted into the criminal justice system, if they could be better dealt with via civil routes:

"[Organisation] would like to stress that cases which reach the criminal threshold of a section 12 offence do not all require to be prosecuted through the criminal courts. Many of those cases could and rightly should be pursued through the civil Children's Hearings process, with a court looking at the establishment of fact if there is dispute about that or if a child is too young to understand the proceedings. Clarity in relation to the legal definition of the offence and the threshold test to be applied would benefit the Children's Hearings System and those children and families involved in it." [Public Sector Organisation]

Concerns were raised, however, that defining such terms would be particularly challenging and may result in legislation which is too tight and has the unintended consequence of making it more difficult to evidence neglect:

"It would be helpful for the terms to reflect and correspond to what is currently understood. However, overly prescriptive definitions carry the risk of excluding undefined concepts or behaviours to the detriment of neglected children." [Public Sector Organisation]

Neglect, in particular, was seen as particularly hard to define and some suggested that the existing National Child Protection Guidance (2014), which defines neglect as a persistent failure to meet a child's needs was a useful starting point for developing a new definition. Others said that this definition was too lengthy to be included in legislation while yet others felt it may be too narrow as it excludes single instances of culpable, neglectful behaviour by a person in a position of responsibility that may be significantly harmful. Having a tight definition would be both useful for removing ambiguity but unhelpful if it creates legislation that excludes cases which might otherwise be included if discretion were permitted:

"…there are pros and cons in defining concepts within legislation. On one hand, defining neglect in section 12 would provide absolute clarity that it includes a failure to provide emotionally to a child, as well as physically. On the other, it might imply an ultimate, exhaustive definition of the extremely complex experience of neglect. It is also hard to imagine how a comprehensive definition

would be achieved; not least, the complexity of the concept would necessitate a lengthy definition which may not be easily contained within the criminal law." [Third Sector Organisation]

There was consensus, however, that any new legislative definition would need to be consistent with existing national guidance in order to ensure that all practitioners were working within the same frameworks:

"Legislative definitions for the basis of each element of the offence would be the clearest way to establish the baseline for the behaviours, for both criminal justice intervention and intervention by other practitioners." [Public Sector Organisation]

A definition of neglect would also need to cover emotional as well as physical neglect as this was an area of particularly ambiguity:

"There is an acknowledged lack of clarity in terms of whether emotional abuse is covered by the offence currently. To clarify that emotional abuse is covered in future, there is a need for different meaning from that of current interpretations in relation to this. Rather than being introduced as a separate concept, this could be achieved through the recognition of emotional harm as part of neglect and ill-treatment more broadly." [Academia]

There were concerns that emotional abuse or harm were subjective terms. What some may consider within a suitable threshold of harm or risk (i.e. making young people resilient/giving life skills), others would define as emotional harm or abuse:

"In particular the term "emotional abuse" is a very vague term which is potentially subject to very variable interpretation and indeed 'abuse'. I would wish to see this defined very carefully and indeed would prefer "psychological abuse" or similar as this could be more carefully defined." [Individual]

There were fewer responses that related to ill-treatment (compared to 'neglect') but among those who did provide a comment, similar concerns were put forward that it would be difficult to define and that the consultation could have been clearer in suggesting what the changes to this definition may look like:

"Concerning a legal definition of 'ill-treatment', the lack of detail in the proposal makes it difficult to offer a definitive response. The intention is presumably to define ill-treatment in relation to acts as opposed to omissions, encompassing 'acts' causing or likely to cause both physical and emotional harm. As above in relation to neglect, we would be wary of including an 'exhaustive' definition of 'emotional abuse' in the law, given the complexity of this concept, and would welcome a concrete proposal before commenting further." [Third Sector Organisation]

One respondent sought clarification on how ill-treatment would overlap with the common law on assault.

Given the complexity and range of behaviours that the legislation would need to cover, several respondents commented that guidance to accompany the legislative change would also be required and that such guidance would usefully include some examples of the different terms being used:

> *"It would be clearer if defined in legislation, however, it may need to be expanded on in guidance. Guidance can also be updated more easily than legislation." [Public Sector Organisation]*

> *"Legislative definitions for the basis of each element of the offence would be the clearest way to establish the baseline for the behaviours, for both criminal justice intervention and intervention by other practitioners." [Public Sector Organisation]*

Other suggestions (put forward by just one or two respondents) included:

- replacing the term "ill-treatment" with "maltreatment" to standardise the language already used by some child protection professionals;
- ensuring that the definitions mirror guidance from professional associations and reflect Getting it Right for Every Child (GIRFEC) principles; and
- cross-referencing the consultation to earlier research which proposed a new 'Child Maltreatment' offence in England and Wales.

Some suggested that examples of neglect and ill-treatment could be provided in accompanying guidance. Several others stressed the need to avoid legal jargon, wherever possible, to ensure that both victims and perpetrators were clear on what constitutes illegal activity (i.e. congruence between legal and operational language).

Finally, two respondents who supported the proposed change felt that care would be needed to ensure longevity of the new definition i.e. to make it "future proof" and *"avoid requirements to modernise it again in the foreseeable future." [Academia]*

Overall, those who supported an emotional neglect definition being contained in the law seemed to indicate that it would need to be non-exhaustive and allow some scope for flexibility, while being sufficiently robust to allow practitioners, victims and perpetrators a shared understanding of criminal thresholds.

Among the 19 who indicated that they felt the terms should be **defined in guidance**, 5 were organisations and 14 were individuals. The main views of this group were that it was easier to update guidance than legislation, that guidance was more amenable to allowing examples to be given and that legislation may be overly prescriptive and difficult to implement. Defining the terms in guidance was also less likely to result in criminalising the behaviour of some parents whose behaviour might be more appropriately addressed via non-criminal justice routes.

Again, it was stressed by one respondent that any guidance would need to be compliant with GIRFEC and have cognisance of current risk management agendas:

"Legislative frameworks should be child centred and based on outcomes or potential outcomes for child rather than specific behaviour of the adult. The language within the Act should reflect this." [Public Sector Organisation]

All four who said that the terms should **not be defined** were individuals. The main reasons given were that it should be left for Judges and the courts to decide, that common sense should suffice and that there was a need to avoid 'over-definition':

"These terms are clear in a common sense understanding and would need to be proved in a court of law. Seeking to define the terms in guidance and/or legislation will have two effects. Over definition - creating interpretation difficulties which lead to mis-application and loophole creation where badly defined terminology leads to escape from prosecution because the actual event was not defined. Leave the definitions open - and let the courts decide on a case by case basis." [Individual]

Overall, there were fewer comments related to **abandonment and exposure to risk** and there seemed to be a reasonable split in views as to whether the terms should be retained. Some commented that they would not wish to see the terms 'abandonment' and 'exposure' completely removed, as they felt they were still relevant, but felt they should be incorporated within the definition as they relate to neglect. Others felt that they were more specific behaviours than neglect or ill-treatment and should not, therefore, be subsumed under the broader category.

A smaller number suggested they could be dropped to aid simplification and to avoid any confusion, since they were not included in Child Protection or GIRFEC practice and were perceived to be unhelpful, outdated, not well utilised or understood and too subjective.

More specific comments included that there may be a need for clearer definitions. One individual, for example, indicated that there may be scope to differentiate between 'open' abandonment and 'secret' abandonment and that consideration should be given to Article 7 of the UN convention (UNCRC) which states that every child has the right to know and be cared for by his or her parents. They perceived that, when a child is abandoned, this right is violated. Others suggested that abandonment needed to be defined with reference to a clear timeframe.

Similarly, exposure to risk, if retained, should be clearly defined with reference to acceptable limits, as it was considered to be "open wide" at present. Indeed, more comments were made in support of retaining exposure to risk than abandonment, the main reason being that it covered cases that resulted in no actual harm, as well as it being a term already widely used by agencies (although, again, if covered under the term 'neglect' or 'ill-treatment', it could be removed with no perceived impact).

A small number of respondents indicated that, if a new definition of neglect came into force, then it may not be necessary to include these terms in legislation, but rather include them in guidance alone:

"If the definitions of neglect and ill-treatment are robust, the retention of these terms is unnecessary, and their removal would simplify the legislation. However, through our networks, we are aware that such terms are at times helpful to practitioners, and are used when articulating concerns in order to address neglect within families. The acknowledgement that these concepts remain relevant and continue to constitute neglect and ill-treatment could therefore be explicitly stated in any accompanying guidance." [Academia]

Another suggested it would be best to keep the terms until/unless strong evidence for their removal could be provided:

"We would counsel against removing terms from any modernised or reworked legislation unless and until the new legislation could be shown to satisfactorily cover situations which, under the present legislation, would be best covered by the "abandonment" and/or "expose to risk" provisions." [Legal Profession]

Most others made no comment on whether 'abandonment' or 'exposure' should be defined in law and their responses focused instead on neglect and emotional harm.

Divergence Between Legal and Social Work Definitions

The consultation recognised that social workers and frontline professionals who work with instances of child abuse and neglect can face difficulties in knowing at what point something becomes a criminal matter. Although guidance exists in the National Guidance for Child Protection in Scotland (2014)[1], legal definitions are not currently set out in legislation but are instead found in caselaw. It also recognised that not all neglect which required practitioner or social work involvement would necessarily be serious enough to lead to criminal prosecution and there may be a need to support professionals in identifying which cases reach a criminal threshold and which do not. Views were sought on this proposal.

Q3. Do you have any thoughts on how professionals dealing with children and families can be supported to identify when cases reach a criminal threshold?

The main suggestions put forward included:

- greater clarity provided around key terms, e.g. persistent failure, significant harm, emotional abuse, etc.;
- clear, concise guidance that avoids jargon;
- sharing of practitioner experience, multi-agency working and peer review;
- adopting a standard approach to interagency discussion;
- more training for professionals, including training around equalities issues;
- greater use of risk assessments and cross-checking of risk assessments;

[1] Available at: https://www.gov.scot/publications/national-guidance-child-protection-scotland/

- public education/awareness raising to support professional awareness; and
- allowing discretion, where appropriate, and not jeopardising practitioner-client relationships by creating barriers (including reducing need for paperwork).

Several respondents again commented that greater clarity around the definitions of abuse and neglect would be the main way of supporting professionals, although again it was recognised that workable definitions would be hard to achieve, especially around such things as 'wilful' or 'persistent' behaviours:

> *"Clarity on definitions and thresholds will be vital if professionals are to identify when a case reaches a criminal threshold.…Professionals are…often coming from different starting points, so it will be important that clear, simple information is available to them on the relevant criminal thresholds." [Third Sector Organisation]*

> *"In our opinion the preferable approach, albeit we acknowledge the difficulties inherent in it, is to draft legislation which in itself identifies a criminal threshold, ensuring that the criminal threshold can be understood by as many people as possible by reference to the legislation itself. This saves leaving the judgement in a particular case as to whether the criminal threshold has been reached to a particular individual's knowledge, understanding, experience, and common sense, all of which will, of course, vary from individual to individual." [Legal Profession]*

Practitioner experience was, however, considered key to decision making by others and should not be overridden by legislation, especially when familiarity of the practitioner to the individual situation may indicate that criminal intervention was not in the best interests of the family concerned:

> *"In our opinion this is a very difficult question to answer. Knowledge, understanding, experience, and common sense all have parts to play in appropriately identifying the criminal threshold. It may also be the case that a consistent line cannot be drawn, because what happens in one household in particular circumstances may be seen to reach the criminal threshold, while the same act or omission in a different household may not, perhaps because of particular mitigatory factors present in that household." [Legal Profession]*

Although not directly answering the question, some respondents commented that the assumption that social workers were those making judgements about criminal thresholds was flawed and that most referrals to social work teams for suspected neglect or abuse originated from the police. The focus should, therefore, perhaps be on working with the police to more clearly define criminal thresholds in this regard. One third sector respondent highlighted that the main issues for social workers were the perceived inadequacy of some assessment processes, the lack of a robust standardised tool at national level and the problem of bias within even robust assessment tools.

Clear guidance (which could be locally tailored) was mentioned by several respondents as a necessary means of supporting professionals, and some suggested that a national neglect toolkit may be helpful[2]:

> *"We consider it imperative that practice guidance contains comprehensive definitions of neglect, which are reflected (if not replicated) in the law, to support practitioners in this very difficult area. Guidance could helpfully link to robustly evaluated assessment tools, where these exist." [Third Sector Organisation]*

In addition to greater clarity around definitions, and provision of guidance, training and supervision was a frequently cited suggestion for support:

> *"Further consultation needs to be undertaken with relevant organisations and stakeholders to ensure that informed, high quality and accessible training can be provided to professionals dealing with children and families in order to identify cases and ideally work to identify risks and support families before they reach a criminal threshold." [Third Sector Organisation]*

Training would need to be consistent across professions and offered on a multi-agency basis, it was suggested:

> *"This needs to be underpinned by multi-agency collaboration and opportunities for professionals to gain a solid understanding of the legal frameworks underpinning their practice. Knowing the powers available to you and your partner agencies, when working with children and families, will help support identifying cases that reach a criminal threshold. This can be achieved through multiagency training, shadowing opportunities, reflective practice sessions, accessing legal advice at certain points of the process and effective supervision, both individual and group/peer." [Public Sector Organisation]*

Some respondents put forward suggestions for specific areas to be explored as part of training to help people make decisions around legal thresholds, including:

- parenting capacity;
- capacity for change;
- disguised compliance;
- accumulation of concern;
- threshold of significant harm;
- role of initial referral discussions; and
- risk assessment.

The training would also need to include essential components of equalities awareness to ensure that professionals work appropriately with 'at risk' and marginalised groups, to ensure that they are not negatively and disproportionately

[2] Some respondents mentioned the Graded Care Profile 2 (GCP2) toolkit which is currently being piloted within Scotland and mentioned this as an example of something which may assist in supporting professionals.

affected by the legislation (including, for example, awareness of the particular challenges faced by parents with learning disabilities and those living in poverty):

> *"The approach to identifying and responding to serious cases of neglect should not perpetuate existing societal inequalities." [Academia]*

Several others suggested that continuous self-evaluation and reflective practice sessions would be important to complement any training delivered, as well as peer review or sharing of experience:

> *"Multi-agency training needs to be complemented with other things which support improved multi-agency working such as multi-agency guidance, networking and group reflection/peer support opportunities." [Public Sector Organisation]*

Guidance and training should go hand-in-hand, it was suggested, to support professionals:

> *"Professionals would need to consider a range of factors, such as the intent of the person as well as their capacity and understanding. It may be necessary to expand on such factors in the guidance in order to support practitioners' decision making. It may also be helpful for professionals to have more enhanced supervision support for such cases to allow them to reflect on their assessment and to test their thoughts out with a line manager or possible peers (group supervision)." [Public Sector Organisation]*

Multi-agency discussion and decision making was also mentioned by several respondents as being important to assist professionals in decision making, including national standardised Inter-Agency Referral Discussions (IRD).

Other comments included that professionals should be trained and encouraged to collect and to retain more/better/appropriate evidence, with additional training for non-police witnesses being developed around the identification and recording of facts, and how these are distinguished from concerns or opinions. Some commented that more manageable workloads and increased resources per se, would help to support professionals. One legal organisation also commented that the term 'professional' in the context of this and other questions in the consultation was rather wide and should be operationalised.

It should be noted that several respondents (of different types) used the question to comment on what they perceived to be an incorrect focus of the consultation, i.e. on identifying criminal thresholds, rather than supporting families away from abuse and neglect. The social work ethos (and that employed by other third sector support workers too) was not a punitive one but, rather, one of support and the Scottish Government was encouraged instead to focus on how this role could be nurtured to protect families rather than penalise (where relevant):

> *"Rather than the identification of criminal thresholds, the focus of professionals working with children and families should be on three areas in particular. Namely,*

working in partnership with families and communities to prevent neglect; early and effective intervention where neglect is present (or there is risk of neglect); and provision of high-quality family supports which are accessible, attend to the holistic needs of families, and recognise and mitigate against the structural factors which compound and exacerbate family stress." [Academia]

"…we would urge the government to consider undertaking a wider examination of how the law deals with issues of neglect that considers child protection as well as criminal processes." [Third Sector Organisation]

Several stressed that, where appropriate, they would like to see cases addressed (possibly in a staged way) without the need to criminalise behaviours within the family and to work in a preventative way with families. The language of 'identifying criminal thresholds' contrasted starkly to this approach, one suggested.

Understanding Impacts

Recognising the many challenges faced by practitioners working in this field, the consultation also sought views on how, if at all, the Scottish Government could support legal professionals to further understand the impact of neglect and emotional harm on children and young people.

Q4. 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?

Most respondents who expressed a view gave views that applied to the wider range of professionals who may work with children and young victims of neglect and emotional harm, rather than focusing exclusively on legal professionals.

Again, the main suggestions were:

- that clearer definitions of key terms should be provided to help professionals;
- clear guidance for practitioners (not only legal professionals) should be in place; and
- Continuous Professional Development (CPD)/training (including practitioner led training and multi- or inter-agency training) should be made available, with both online and face-to-face training options being provided. Opportunities for shadowing practitioners could also be used.

The need for clear definitions and guidance to accompany the legislation were again stressed (including use of case studies) to allow legal professionals (and others) the opportunity to better understand what was considered to be a highly complex area and to ensure consistency in the way that it is handled:

"This is fundamental that the legal profession understand the impact of neglect both physical and emotional upon children and young people. This is an insidious form of harm requiring a highly developed professional understanding of its

nature and the legal profession should commit itself to promote its understanding of this offence and harm visited on children. This may be by committing to training or working with professionals in disciplines experienced in this field." [Public Sector Organisation]

Focusing any guidance or training on emotional abuse was seen as key to moving away from a perceived bias in attitudes among some professionals that neglect and abuse were predominantly physical in nature (especially since physical, sexual and emotional harm or abuse were often intertwined, it was suggested):

"I think by providing consistent training across the legal professions it would help to create a common understanding of the impact of neglect and emotional harm and cement a move away from the view 'no bruise means no harm'." [Individual]

Where respondents suggested training (including online training), it was commonly felt that this should be multi-agency, and include legal professionals working with other practitioners, such as social workers, to share experiences and learning:

"Again, multi-agency guidance, multi-agency training, networking and shared reflective spaces are all critical to support legal professionals to further understand the impact of neglect and emotional harm on children including the long-term consequences for children and young people… Opportunities for professionals to network and hear about each other's roles can help bring the perspective of the child to the forefront." [Public Sector Organisation]

Several respondents encouraged training being delivered widely across the legal profession to include, for example, solicitors, the Judiciary (Sheriffs and Judges), court staff, Procurators Fiscal and other COPFS staff, legal services, safeguarders, court welfare reporters, *curators ad litem*, etc. to better ensure the best possible protection of children's rights. Those working in the legal profession but who are not legally qualified should also be aware, it was suggested.

Local joint working (as well as joint training), workplace shadowing as well as wider opportunities to build relationships between social work and legal professionals would also be helpful. This would allow the skills and experience of those working with children and young people to be harnessed to maximum effect:

"Encourage interaction with third sector agencies who can supply information, case studies and training, as needed. Invite…to team meetings and vice versa. Build up strong working relationships and, when needed, remove their legal head and look at the situation in a none legal manner to better understand the thought processes involved." [Individual]

A suggestion was made that training could be delivered by local Child Protection Committees (CPCs), with legal professionals being encouraged to have an active input into CPC training too, as well as CPCs leading or contributing to guidance for legal professionals (although one respondent did also point out that additional

funding for training may need to be provided as those best placed to deliver the training may already be operating within tight budgets).

Learning among professionals could also be greatly enhanced from hearing victims' voices, it was suggested, as well as giving professionals access to syntheses of research in the area:

> *"There is a vast range of research-based evidence around the impact of ACES which is becoming very popular at present. Educational psychology services, CAMHS and other organisations would be well able to provide information (evidence based and anecdotal) regarding the immediate and current impacts to young people experiencing neglect and emotional harm, as well as the medium-term impact (e.g. supporting an adolescent who was neglected as a toddler). There is also a vast range of evidence on the impact on a range of outcomes which could be drawn upon. Perhaps this could be pulled together into a documentary or similar." [Individual]*

Encouraging legal professionals to think about circumstances within a children's rights framework was also encouraged, as well as embedding SHANARRI well-being indicators into everyday practice. One organisation also suggested that there would be merit in legal professionals being familiar with and understanding the principles of 'Safe and Together'[3] when dealing with cases of domestic abuse.

Several respondents commented more generally that more could be done to raise awareness of ACEs, not only within the legal profession, but among members of the public and wider professional community:

> *"The far-reaching consequences of ACEs and trauma need to be better understood by the justice system to consider how they can develop a more trauma informed approach to practice and policy." [Third Sector Organisation]*

> *"Increased understanding across all partners of the long- and short-term impact of neglect, trauma informed practice, equality and ACES…This would require commitment both through leadership and resources from both the Scottish Government and national bodies in order to evoke cultural change and embed change." [Public Sector Organisation]*

Two organisations commented that they felt that legal professionals already probably had appropriate awareness of the impact of neglect and emotional harm on children and young people and that the key issue at hand was more how to overcome the complex challenges inherent in proving or pursuing these cases under the current legislation:

> *"We are aware of difficulties experienced in practice in terms of proving emotional harm in a court setting, irrespective of the understanding of the impact*

[3] A suite of tools and interventions designed to help child welfare professionals become domestic violence-informed. See: https://safeandtogetherinstitute.com/about-us/about-the-model/

of such harm. Acknowledging this, and exploring solutions is arguably more crucial." [Academia]

Finally, while not answering the question directly, one organisation stressed that there was also a need for legal professionals, and police officers, to be aware of potential implications of section 12 charges on ongoing child protection work. Specifically, it was felt that more awareness was needed around the barriers to engagement that can be created when cases are taken into a criminal justice forum which can cause delays to social workers managing to put in place essential interventions to protect vulnerable children.

Overall, there was evidence of a strong desire to see sharing of good practice, joint learning and support from different sectors in ensuring that all working in the field could achieve outcomes that were in the best interests of the child:

"Professionals within the legal setting for child protection cases should receive additional bespoke training/awareness to enhance their overall knowledge of child protection including neglect and emotional harm. By sharing understanding of how to apply relevant national guidance to the legislation, taking cognisance of child welfare, professionals can ensure that any actions taken will result in outcomes that are in the best interests of the child." [Public Sector Organisation]

Emotional Abuse and Harm

One of the key concerns with the current section 12 offence is that it is unclear whether it covers emotional abuse and harm. The consultation sought views on whether this ambiguity should be removed by making it explicit in the legislation that "neglect" includes emotional neglect and "harm" includes emotional harm.

Q5. Do you think that children in Scotland should have clear legislative protection from emotional abuse?

	Number	Percentage	Valid Percent
Yes	186	85%	95%
No	10	4%	5%
No response	24	11%	-
Total	**220**	**100%**	**100%**

Note: Ten respondents (5%) who did not provide a closed question response gave a qualitative comment

This question generated one of the largest volumes of qualitative response across the consultation, with almost all individuals (97%) providing a response, and 66% of organisations. Many of the responses from individuals were very similar in nature and this question may arguably be one which received a large response as a result of an organised campaign.

A large majority of those who provided a response (95%) supported clear legislative protection from emotional abuse. The main reasons given in support included that emotional harm was as damaging as physical harm, has been shown to have devastating short and long-term effects and that having it defined clearly in legislation would send both deterrent messages to potential perpetrators and allow practitioners to protect children further:

> *"The long-term impact from emotional abuse is huge for the victim affecting them not just through childhood but throughout their adult lives. Legislative protection if enforced would show children [and] adults that it will not be tolerated and that there are serious consequences for not caring for children both physically and emotionally". [Public Sector Organisation]*

Understanding of the complexities of abuse and neglect, including emotional harm, was much more advanced and sophisticated than when the legislation was first developed, it was suggested, and so the updated legislation should reflect advancements in research and evidence.

Bringing Scotland in line with other jurisdictions that already recognise emotional abuse was also seen as important by some, as well as ensuring that the legislation reflects Article 19 of the UN Convention on the Rights of the Child (UNCRC).

Despite a strong expressed desire for including emotional abuse in the legislation, there were also some strong caveats to support. The main concern (expressed by a large number of individuals, in particular) was that reassurances and a clear and explicit definition would need to be in place so that religious organisations as well as parents would not be penalised for exposing their children to instruction and training or any teaching which may be considered counter to the mainstream:

> *"There must be safeguards to stop families being targeted just because children are being raised in a way that does not conform with today's culture." [Individual]*

Indeed, many individuals expressed concern that 'emotional' was a subjective term and that they would not wish to see legislation which would allow people with different social or religious philosophies being targeted, penalised or criminalised because of it, nor the government trying to define how families should conform to what is seen to be 'the norm':

> *"It seems to me there must be safeguards to prevent families being 'targeted' just because their children are being raised by loving parents in a way that differs from the cultural norms of today - norms with which the parents, for well-established reasons, may not completely agree." [Individual]*

> *"We accept that it is important to tackle serious emotional abuse. However, it is important that in doing so a clear and proportionate definition of emotional abuse is used. In particular, it is important that basic rights such [as] the right to freedom of thought, conscience and religion and the right to manifest religious belief are not inappropriately curtailed." [Third Sector Organisation]*

"Children should always be protected from abuse, but problems could arise if the definition of abuse is not clear and precise. For example, there are people who regard it as abusive to bring up a child in a minority faith with views that go against the public consensus. Parents should not have to live in fear, otherwise they may be reluctant to seek help for their child." [Individual]

Avoiding creating a "climate of fear" through very carefully managing the legislative change was central to several of the comments received.

Several respondents spoke about the need to avoid state interference in parenting and teaching of religious beliefs *per se*, as well as avoiding legislation which may be misused by pressure groups to impose their own preferred parenting style.

Some also commented that a clear definition of what would constitute emotional abuse was needed to protect against children who may not be content with 'reasonable' parenting decisions trying to use the legislation inappropriately:

"Any form of abuse of children is wrong and should be prevented, it is however crucial to have a clear and well-defined way of assessing emotional abuse as good parenting involves making decisions that a child will often find distressing. Loving parents will at times make decisions that are unpopular with their children, this is not emotional abuse it is an important part of a parent's role." [Individual]

In this respect, there may be merit in including a 'reasonable person' test for emotional harm, it was suggested:

"In our opinion the legislation should be framed such that acts or omissions which the 'reasonable parent' may employ which may upset the child (such as grounding the child or taking away a mobile telephone or games console after poor behaviour) are not even potentially criminalised…In our opinion there should be a broad but precise legal definition put in place to assist understanding... incorporating a 'reasonable person' test as to the likelihood of, in this case, the suffering of some level of emotional harm. It may be that some particular level of emotional harm should be specified, to ensure that otherwise normal parenting is not criminalised." [Legal Profession]

Other caveats mainly centred on a preference among some to use the term 'psychological' instead of 'emotional' since it was perceived that this was a more established term in legislation and was less subjective.

Some comments were made that the National Guidance for Child Protection in Scotland (2014) contained a workable definition which could be used as a baseline or adopted and improved upon to inform the legislative change. Specific comments were also made, however, that emotional harm may require an assessment of resilience, as compared to psychological harm, since emotions were responses to acts, and would be differentially variable between people:

"Emotional is too broad a term and open to too wide an interpretation. How does one determine a threshold for emotional harm? What may harm one person emotionally may not harm another and it may be that different children respond differently to interventions which are not in themselves harmful but which they may respond to negatively emotionally. A negative emotional response is not in itself evidence of harm. This is particularly true with regard to different parenting styles. It is quite conceivable that emotional harm might be read into a parental action merely due to the subjective preferences of the observer when there is no emotional harm to the child whatsoever. There must be a clear threshold as to what is considered harm and there must be an objective quality to the assessment of any harm that may or may not have taken place." [Individual]

As such, one organisation indicated that further scoping work on the extent of the definition was required which included taking into account research in respect of resilience and the presentation of a child or young person to authorities. Another suggested that the interface with domestic abuse, including coercive control, also needed to be considered. One organisation suggested that other factors to be taken into account included whether the harm was ongoing or a one-off act, the intention of the perpetrator, and any cultural sensitivity.

Other organisations indicated more generally that more work would need to be done to finalise a workable definition and that it may be inappropriate to comment further until this was presented.

Others (who supported the change) commented on the problems that may be involved in proving or evidencing emotional harm:

"Yes, we agree that children should have the same protection as adults…However, we acknowledge the complexity of defining emotional abuse and the difficulties in the collection of evidence to support prosecution where appropriate. This requires a sophisticated understanding of emotional abuse and the nature of persistence and intent." [Public Sector Organisation]

"It is a term that requires work to define. It is obvious to see but very hard to prove. Emotional abuse is seen as being very vague by lawyers so they are reluctant to try to prove it." [Public Sector Organisation]

Several comments were also made that a very clear definition of emotional harm would be needed to avoid wrongful (either intentional or unintentional) accusations which could potentially waste police time, use of social work service resources, etc.:

"A broad law would also have considerable potential to waste police time. The Government must therefore take care that it does not undermine its attempts to improve the law, either by creating greater uncertainty in this area or by leaving children at real risk of abuse in danger, as a result of misdirected child protection resources." [Third Sector Organisation]

One specific concern was also raised about how malicious accusations would be identified and two individuals commented that they were concerned that excessive legislation in this area could contribute to increasing the cost of policing, health services, legal and other public services.

It is worth noting that, while a large number of responses to this question focused on not penalising or criminalising what might be considered by some as reasonable parenting, there were also views (mainly from organisations) that, where parenting practices do go beyond what might be considered acceptable, a punitive response may not always be best for tackling or resolving the neglect:

> *"Again, it is vital to reiterate that whilst we support ensuring robust legislative protection is in place for children from emotional harm, the criminal prosecution of parents or carers for this offence should be pursued only in the most serious cases. The response from practitioners who work with children and their families experiencing neglect wherever possible (and in the vast majority of cases) should be supportive as opposed to punitive or criminalising." [Academia]*

> *"The themes of deliberate intent, wilfulness and understanding are prominent throughout much of the consultation, and we feel should be considered here. For a variety of reasons including, for example, learning disability and care experience, many parents do not have an understanding of what care is required or is developmentally appropriate. It is important that parents are provided with adequate support and guidance and do not fall through the net while also ensuring that children are safe." [Third Sector Organisation]*

> *"It is our opinion that the best approach to protecting children is through early identification, early intervention and the provision of needs-led family support, which can in many circumstances mitigate the likelihood of risk of harm occurring or the emergence of neglectful or abusive behaviours…it is our experience, from working with vulnerable families every day, that if you identify and address such concerns early through preventative measures and needs-led support, then it is likely that the risk of emotional abuse or neglect will diminish." [Third Sector Organisation]*

There may be scope for considering breaking generations of abuse or harm through better education with new (especially younger) parents to ensure that historic abuse does not manifest itself in future generations, it was noted:

> *"…since troubling numbers of parents were themselves treated in exactly this manner during their childhood, surely support, education and training for parents should precede criminalisation. I have long been distressed that despite all our investment in education there seems to be little or no preparation or training for parenthood!" [Individual]*

Q6. 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?

Respondents were invited to put forward examples of the sorts of behaviours and their effect on children that should or should not be captured by any revised offence. This again attracted a large response (176 comments, representing 80% of the total respondent group, with many again coming from individuals, with some likely generated from a campaign).

In line with responses to the preceding question, many individual respondents highlighted that they **would not** like to see parenting practices which run counter to the mainstream being captured by the legislation, including religious or moral education which runs counter to the dominant cultural views at any point in time. This did not constitute emotional abuse, it was felt:

> *"Parents must have the right to teach their children the tenets of their own moral code, even when this moral code is contrary to what the state promotes as normative…The state has no right on the basis of its own ethic alone to pass judgement on the harmfulness of another moral or religious ethic upon children." [Individual]*

Indeed, a large number of individuals expressed again that they felt the legislation should not cover traditional, religious upbringings. Several references were made to the Supreme Court declaration that "Within limits, families must be left to bring up their children in their own way" and indicated that this should be applied to section 12 (recognising the diversity of modern family life and the plurality of different parenting styles that exist). Without reassurances that 'reasonable parenting' would be excluded from the legislation (as determined by a 'reasonable person' test), there was concern that many parents may live a life in fear of being criminalised and that reasonable liberty would be taken away from parents.

While this was the dominant view expressed in response to this question, other more specific factors that respondents felt **should not** be covered by the legislation (mentioned by just one or two respondents each) included:

- parents withholding their children from sex education classes (including preventing education around sexual orientation/gender identification), something mentioned again with reference to freedom of religious beliefs;
- parents' authority to prevent their children from watching certain television/online content/use of social media, etc. as well as control over what written material/books children can read;
- preventing children from taking part in various religious or pagan festivals that run counter to the parents' beliefs;
- parents preventing children socialising at certain types of event/at certain hours/with certain people;
- temporary grounding of children;
- monitoring of a child's computer or mobile phone use;
- removal of a child's property as a punishment;

- making children put other's interests before their own, if; appropriate: and
- mild chastising language.

Several respondents commented that they did not agree with the consultation document that indicated that 'corrupting' may be an example of behaviour that was commonly accepted as constituting emotional abuse. Specifically, the reference that it would be wrong for an adult to reward the child for bigotry was questioned:

> *"One man's bigotry is another man's common sense." [Individual]*

> *"I have been troubled by the reference in the consultation document to 'rewarding a child for bigotry' as being emotional abuse. Does this mean that if I encourage my grandchildren, with the approval of their parents, to have strong religious beliefs which may clash with the prevailing culture norms, I will be guilty of emotional abuse? Is it an offence to regard some lifestyles as morally wrong or is it the intention of the Government, through this legislation, to insist that 'anything goes', that there are no moral absolutes? Where will this take us?" [Individual]*

While several respondents stressed that they did not support those who stir up hatred or express prejudice against particular minority groups, there was a perception that some religious beliefs were being labelled as bigotry which may be creating a climate within the public sector whereby disagreement with 'free thinking' was being taken as *prima facie* evidence of bigotry.

Again, religious teaching was beyond the scope of the legislation, it was felt, although some did acknowledge that while it was important that freedom remained for people to teach their children according to their own faith, inciting hatred of different religious views should not be tolerated:

> *"As a safeguard, such parental beliefs and convictions should obviously not teach hatred towards those with opposing views." [Individual]*

A wider range of suggestions for factors that **should** be covered by the legislation were put forward (mentioned by just one or two respondents each), including:

- verbal abuse, such as shouting, using threatening or using abusive language, derogatory or belittling language or undermining a child (including invoking alarm, fear and embarrassment for the child);
- exposure to harmful online/internet behaviours;
- subjecting a child to witness abusive acts and exposing a child to sexually abusive or inappropriate content (including emotional harm caused by seeing or hearing harm to another e.g. domestic abuse);
- coercion (including forcing a child to commit an offence) and using blame, shame, judgment or guilt to condemn a child for the behaviour of others;
- intentionally creating conflict between a child and the other parent (used as a form of domestic abuse against the other parent but also emotional abuse of the child) including intentional parental alienation;

- bullying, including cyber-bullying or scapegoating a child in a family group;
- nutritional neglect (covering faltering growth and obesity as forms of neglect);
- preventing a child from socialising and playing, as well as exclusion, separation, seclusion or lack of stimulation (contrary to others who viewed that this should rightfully be curtailed by parents, if they deemed it appropriate, especially in the case of older/teenage children);
- threatening or harming pets;
- not setting boundaries/children left to own devices;
- providing or enabling a young person to use or abuse tobacco, alcohol, illegal substances, or substances which they do not have a prescription for;
- having expectations beyond the developmental stage of the child/placing unreasonable expectations on children (e.g. to perform well at school or to take on caring responsibilities beyond their capacity); and
- failure to engage with relevant services e.g. education and health (including not facilitating the young person to attend health care appointments).

Other suggestions included risk and fear caused by exposure to dangerous animals/aggressive dogs, etc., unequal opportunity and parents leading by bad example, including lying to professionals in front of children. One organisation also suggested that 'exploiting' as a broader theme should be included in the legislation.

Several comments were made that individuals' acts alone should not be the only factor considered to constitute emotional harm, since often emotional abuse occurs over the long term, and is cumulative, sometimes emanating as a response to physical or other abusive behaviours that are repeated over time:

> *"It will be important to provide guidance that not only deals with these aspects but that deals with the cumulative impact of factors that may lead to neglect and how the impact may not always be immediately apparent. It is a fact that some children are more resilient than others and may learn how to deal with and accommodate to the neglect and in these instances the impact is much harder to identify. It is also important to stress that the navigation of all of these factors will require professional judgement to be applied so it would not be a good fit with prescriptive factors laid out in legislation." [Public Sector Organisation]*

Several other respondents felt that a 'list' of behaviours was not appropriate and may be too prescriptive and that the legislation should instead be accompanied by guidance which would allow all cases to be considered on their individual merits:

> *"A clearer definition of neglect in legislation with supporting guidance would be more helpful than having a specific list as this could be limiting for practitioners, however examples in guidance may be helpful…The focus should be on how the behaviours impact on the individual child." [Public Sector Organisation]*

In particular, all acts needed to be considered 'in context' it was felt in order for their appropriateness to be understood and assessed. This may include consideration

of levels of vulnerability, thresholds, shifting contexts and gradation of effect. Examples may be better placed in guidance than in the legislation, it was felt.

A small number of comments were again also made that, given the subjective nature of emotional abuse, it would be important that children's subjective views did not carry a disproportionate weight in some cases, where a reasonable adult may consider the behaviours appropriate:

> *"Too much emphasis is placed on children's rights. Children's thinking isn't the same as adults and often they think things aren't fair when in fact it could be harmful for them." [Individual]*

> *"…harm must not be measured by the subjective response of the child to a parental intervention which is intended to safeguard their emotional well-being and their healthy development…Any legislation must be framed in such a way as to respect the normal range of parenting decision that parents have had the liberty to practice without state intervention for millennia." [Individual]*

Although not offering specific example of what should/should not be included, more general comments were made that the legislation on emotional harm would need to be accompanied by clear guidelines or strategies for working with parents facing mental health challenges and those with learning disabilities (where understanding of emotions and emotional responses may be impaired). Similarly, the challenges faced by families with children who have learning disabilities or mental health challenges would need to be carefully considered:

> *"We recognise that emotional abuse may take place unwittingly for a number of reasons and may be best responded to through education and support as opposed to criminalisation. We would want to ensure that parents who are vulnerable as a consequence of mental health or learning disability are protected from criminalisation." [Public Sector Organisation]*

Ensuring effective and accessible support for parents and carers to understand the impact of emotional abuse, and what constitutes emotional abuse, was also seen as critical. More research and evidence may be required before a full understanding of the types of behaviours that should be included could be posited.

Overall, the impact on individual children should be considered on a case-by-case basis, and in context, it was stressed:

> *"There could be a list in the guidance rather than in legislation but it should be clear that this is not exhaustive and the impact or potential impact of behaviour on the child is of more importance." [Public Sector Organisation]*

Revision of Section 12(2)

The current offence includes two deeming provisions, namely:

- 12(2)(a) - where there has been a failure to provide or procure “adequate food, clothing, medical aid, or lodging” for a child; and
- 12(2)(b) - where the death of a child under 3 is caused by suffocation (not caused by disease or the presence of a foreign body) while the child was in bed with an adult who was under the influence of alcohol.

A section 12 offence is committed whenever it can be evidenced that the conduct was ‘wilful’ in the sense of being deliberate in relation to either of the above.

Failure to Provide

In relation to the first of these provisions, views were sought on whether it should remain unchanged, and remain within the legislation, as written.

Q7. Do you think the provision in section 12(2)(a) concerning failure to provide adequate food, clothing, medication, or lodging should be changed?

	Number	Percentage	Valid Percent
Yes	36	16%	54%
No	31	14%	46%
No response	153	70%	-
Total	**220**	**100%**	**100%**

Note: Nine respondents (4%) who did not provide a closed question response gave a qualitative comment

A large proportion of respondents (70%) did not answer this question and, among those who did, there was perhaps some misinterpretation of the question, with some answering in response to the change proposed to section 12(2)b instead of in relation to not changing 12(2)a.

Among those who gave a response, an almost equal number supported the proposal as opposed it. Reasons given in support of change included:

- the existing provision was too narrow;
- there was a need to update the language/use more modern terms;
- there was a need to change reference to ‘medication’ and ‘lodging’ in particular, to make the legislation clearer and provide objective definitions;
- what constitutes ‘deliberate’ failure to provide may be unclear; and
- broadening the provision would allow more cases to be prosecuted.

The term ‘lodging’ in particular attracted comments for being not commonly understood, as well as being outdated. It could be replaced with the term ‘accommodation’ or ‘shelter’, it was suggested. Reference to ‘medical aid’ could also be broadened or changed to ‘failure to meet a child’s health needs’, it was suggested.

Some caveats were presented to change, including that consideration would always need to be given to individual cases, especially where poverty was a contributing factor to a parent’s inability to provide food, clothing, etc. Where poverty, rather than parental intent to neglect is a cause for the failure to provide, a different response may be needed, it was suggested (again, supporting rather than criminalising the most vulnerable families):

> *“This also needs to be considered around the impact of poverty and whether parents would be criminalised for lack of finances and resources.” [Public Sector Organisation]*

Views were also expressed that the wilful and repeated nature of failure to provide would be key to evidence neglect, since one-off instances may be justifiable, in some cases:

> *“The word "wilful" qualifies the parent's failure before the act becomes criminal but that might protect only those who are wholly free from fault... If the word is to remain (or something similar) then the concept of wilfulness should perhaps be tightened - in this context only - to mean an act of deliberately withholding shelter as opposed to actions that lead to an inability to provide shelter.” [Individual]*

> *“[Organisation] believe that every effort must be taken to ensure that parents are not unfairly prosecuted. A failure to adequately provide for their child could be as a result of issues that are out-with their control, such as poverty, homelessness or the impact of trauma and abuse. Only in the event that such failure to provide food, clothing, medication or lodging is ‘reckless’, or ‘deliberate’, for example, a parent deliberately withholding medication or food from their child as a way of punishing them, should a conviction be considered, and this must be clearly stated within the provision. The risk of keeping the provision as is, is that parents may become subject to unfair convictions.” [Public Sector Organisation]*

The focus of the legislation (as currently worded) on provision of material goods, was seen as inappropriate in times of austerity and increasing levels of material poverty and there was a strong sense that vulnerable parents needed to be protected (consistent with other areas of the consultation). There was a need to delineate physical privation of material poverty from privation of emotional poverty, it was felt (and one respondent suggested adding ‘failure to nurture’ to the provision). This included not only those living in poverty, but also those with learning disabilities or mental health challenges which may impact on their failure to materially provide:

"Parents with learning disabilities should not be penalised when lack of support is misread as neglect. There needs to be clarification that if information is not provided in an accessible format and/or parents are not provided with the right support they should not be seen as criminally guilty." [Third Sector Organisation]

Among those who felt that the legislation should remain unchanged, the main reason given was the legislation was important to ensure that all children had their basic needs met. The existing provisions were sufficiently clear, it was felt, and failure to provide adequate food, clothing, medication, or lodging should remain a key part of legislation on neglect as well as to protect children's human rights.

The other main reason, similar to those given by respondents who said that the legislation *should* change, included that overly prescriptive changes may bring a risk of criminalising poverty/parents living in poverty (and who are unable to provide food, clothing, etc.):

"There are families that can't subsist on the money they have. This results in there being not enough food in the house and such poverty should not be conflated with neglect. We cannot criminalise and risk further ostracising families in poverty that might be trying without success but are not neglectful. The "wilful" part of neglect is very important. If parents do not have adequate food because of debt and poverty, they are not neglectful or doing anything "wilful" that would harm the child." [Public Sector Organisation]

Finally, some organisations that did not provide a closed response to this question also raised the possibility that the legislation should recognise in some way that failure to provide could be used by a perpetrator of domestic abuse as a way of exerting control over the family. Partners may be victims in this case and therefore care would need to be taken in considering if/how parents subject to the controlling behaviour of a partner in this regard should/would be held accountable:

"Due to domestic abuse, a parent or carer may be unable (practically or emotionally) to undertake the necessary tasks (such as access money to purchase food, or leave the house to collect medicines/attend health services) to avoid failing to provide what is necessary under these provisions. If the court is not required to establish that such behaviour amounted to neglect, but this is automatically held as the deeming provisions have been breached, this could lead to victims of domestic abuse being inappropriately held criminally responsible." [Academia]

Suffocation of a Child

With regard to the deeming provision in section 12(2)(b), which sets out that the suffocation of a child under 3 while in bed with an adult under the influence of alcohol to be child neglect, the consultation proposed two changes. Firstly, that this should be extended to apply to persons under the influence of illicit drugs, as well as those under the influence of alcohol. Secondly, that it should include situations

where the adult and child are lying on any kind of furniture or surface being used for the purpose of sleeping, not just beds. Views were again sought on this proposal.

Q8. Do you think the provision in section 12(2)(b) concerning the suffocation of a child while in bed should be changed?

	Number	Percentage	Valid Percent
Yes	54	24%	81%
No	13	6%	19%
No response	153	70%	-
Total	**220**	**100%**	**100%**

Note: Seven respondents (3%) who did not provide a closed question response gave a qualitative comment

Again, a large number of respondents did not answer this question (70%).

Among those who did provide a response, most (81%) agreed that the provision should be changed in line with the proposals.

A large number of respondents agreed specifically that it was important to widen the provision to include illicit drugs as well as alcohol as this would mirror more closely the substance misuse trends of modern society. Several suggested that 'intoxication' of any kind should be captured:

> *"An extended provision should include suffocation in any circumstances where the parent/carer is 'intoxicated', whether through drink or other substances." [Third Sector Organisation]*

Some wanted to see the provision broadened to include prescription medication, which they perceived could be equally as damaging if used irresponsibly.

Several others also explicitly welcomed the inclusion of co-sleeping on surfaces other than beds in the proposed change, again reflecting modern practices in some families (especially those living in poverty). While welcomed, however, two organisations suggested that this may be difficult to prove and another indicated that it would be difficult to balance culpability against what was in the best interests of the bereaved family and the interests of the public:

> *"There are questions of parental capacity and public interest, which may determine prosecution in these tragic circumstances, that may well cause total disintegration in the lives of those that are culpable, and in the ecology of their family circumstances." [Public Sector Organisation]*

Importantly, some organisations again stressed that families experiencing these types of challenges may need to be supported, rather than criminalised, especially

as it was unlikely that suffocation in this way would ever be intentional (and loss of a child would be punishment enough):

> *"Whilst there may be cases where it is considered appropriate to prosecute parents or carers in these circumstances, for many it is likely that those individuals (and their families) in such tragic circumstances will require support. Such prosecutions should progress only if they are genuinely in the public's interest, and supports to the family (including other children in the household) are paramount." [Academia]*

Other more disparate comments included three respondents who questioned why the age was set at 3, and did not cover other vulnerable children including, for example, those with disabilities of an older age. One organisation suggested that the changes would reflect current research and evidence and so was welcomed while another suggested that all cases should be considered individually on their own merit. One respondent also commented that this change may benefit from further discussion with health professionals such as midwives and health visitors in relation to the advice given to parents on co-sleeping. One respondent welcomed updating the legislation for all of the reasons above:

> *"It is too limited in its definition and is of its time. This section requires to reflect current social habits which are potentially harmful to children so as to take account of alcohol and drug misuse, domestic violence, coercive control and carers' mental ill health, etc." [Public Sector Organisation]*

Others expressed that the proposed changes would add clarity more generally and one suggested that consideration be given to providing two offences, i.e.:

> *"Sleeping when under the influence of alcohol or any other substance which effects physical or mental control where suffocation is proven"; and*
>
> *"Where there has been co-sleeping and no other reasons for death has been established, however significant intoxication of alcohol or any other substance which effects physical or mental control is established." [Public Sector Organisation]*

Among the 13 who did not support the proposal, no explanations were given except one individual who commented that personal experience meant they would like to see the provision retained (although they made no comment regarding the proposed changes). One organisation also commented that the provision may not be required, as it was covered elsewhere in the section 12 offence.

For the most part, responses to this question were supportive of the need to broadening the offence to cover any person who is under the influence of alcohol or any other substance which effects physical or mental control and to broaden the reference from simply a bed to any place where sleep or rest was taking place.

Risk of Harm

The consultation highlighted that it can be difficult to prove a section 12 offence in cases where no actual harm has resulted but where actions of the accused have put a child in a position of significant risk. It also recognised that these difficulties may be compounded if emotional harm was to be included in any revised legislation.

Proving a Likelihood of Harm

The current offence requires the court to establish that unnecessary suffering, or injury to health was "likely", but does not require the court to establish that actual harm has occurred. To strengthen the legislation, it was proposed that the revised offence could include a requirement that a "reasonable person" would consider the accused's behaviour to be likely to cause the child physical or psychological harm, before the offence is committed. The phrase "reasonable person" refers to a hypothetical person in society who exercises average care, skill, and judgment in their behaviour.

Q9. 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?

	Number	Percentage	Valid Percent
Yes	62	28%	84%
No	12	6%	16%
No response	146	66%	-
Total	**220**	**100%**	**100%**

Note: Fourteen respondents (6%) who did not provide a closed question response gave a qualitative comment

Two thirds of respondents did not answer this question (66%).

Among those who did, the majority agreed that the test should include the reasonable person requirement (84%). The main reasons given in support were that this test was an objective requirement that was well established in law, that it would make the legislation clearer (especially if accompanied by guidance) and would remove subjective bias, as well as removing the burden of responsibility on victims to evidence that an offence has occurred:

> *"The reasonable person test provides a basis/ 'benchmark' on which to support decision making in individual cases. It is also well understood in law and would provide valuable clarity for PF, Sheriffs and Judges who would also be able to*

explain this concept to Jury members where required." [Public Sector Organisation]

"The movement of the legal test to consider the accused behaviour as likely to cause physical or psychological harm before the offence, is welcomed and will reduce the burden on victims providing evidence." [Third Sector Organisation]

One organisation indicated that this change may simplify the approach that COPFS and the Children's Reporter require to take in establishing these cases.

One respondent stressed that they felt this test would also remove any ambiguity which might otherwise be introduced by the context of the offence:

"In keeping this test, it removes any mitigating factors that the parent may feel are appropriate, and looks at the context that the offence or risks arose. This then removes the influence that the circumstances that the parent was raised in which may influence their actions (or lack of) and looks at what is reasonable for the young person if they were in a more typical or usual environment. I think that this must remain in place." [Individual]

Another offered support primarily on the basis that a need to prove actual harm was insufficiently protective or preventative:

"It would be unacceptable to have legislation which could only be pursued after a child was harmed. Although it would not mean that children would be left at risk, as there are other means of protecting the child, it could potentially mean that other children could be at risk of harm in the future." [Public Sector Organisation]

While several respondents supported the change on the basis that it would add clarity and help to reduce risks to children and young people, several caveated their support by stressing a need for the reasonable person test to be clearly defined, for it to be evidence-based (and not based on societal assumptions) and for it to be clearly understood by members of the general public as well as professionals:

"It must be so that a parent or someone else would reasonably see this as a risk not someone who is an expert in this type of thing which could not reasonably be foreseen by the averagely educated lay person." [Individual]

"While we recognise this is an established phrase in law already, we note some reservations in relation to how robust a 'reasonable person' test is in capturing cultural diversity." [Public Sector Organisation]

"We consider that the introduction of a 'reasonable person' test would increase understanding and the predictability of the application of the law, given that the 'reasonable person' is well known to the courts and a concept easily understood by the wider public." [Legal Profession]

In line with comments made earlier in the consultation regarding 'reasonable parenting' and emotional abuse, several respondents again stressed that the definition would need to be unbiased against religious or minority groups, in particular and would also need to protect against different forms of parenting:

> *"Possibly provided the reasonable person is acceptable to the parents and understands and respects the parents' views and, if appropriate, religion." [Individual]*

> *"Parents know their children best. If a parent behaves towards their child in a way that they believed would cause no harm, and which in fact does not cause any harm, the law must be cautious about criminalising the parent on the basis of a reasonable person's assessment that harm was likely." [Third Sector Organisation]*

Vulnerable parents, including those with learning disabilities (where capacity may be an issue), and those living in situations of domestic abuse, would also need to be carefully considered, it was stressed:

> *"We also query how the "reasonable person" test relates when the person to whom the behaviour applies is particularly vulnerable, such as a parent with learning difficulties, or in a situation where coercion is involved, such as a relationship characterised by domestic abuse." [Public Sector Organisation]*

> *"Whilst we understand the intent behind, and largely support this, it is with a clear need for robust guidance, including thresholds, accountability and dissent and escalation. The risks in developing this model without a clear legislative and accountable framework would see additional risk for vulnerable groups and the potential of inconsistency geographically." [Public Sector Organisation]*

Others again stressed the need to consider the complex interplay between neglect, structural inequalities and trauma and suggested that the introduction of a 'reasonable person' test may result in some parents being prosecuted in circumstances where it would not be in the child's best interest.

Overall, some further guidance on how a reasonable person would be defined was seen as necessary, including detail on how cultural differences, learning difficulties and other vulnerabilities would be taken into account.

Among those who did not support the requirement, the main reasons were that:

- the notion of a 'reasonable person' was too subjective;
- the reasonable person test needed to reflect vulnerability of the victim; and
- that it would risk bringing more vulnerable parents into the criminal justice system/leaving them unsupported within that system.

A small number of respondents also stressed that, while they welcomed the introduction of the 'reasonable person' test, thresholds for establishing abuse and neglect would also still need to be clearly evidenced and wilfulness was also still a key consideration:

> *"The 'reasonable person' requirement would be a key element of the test. It is well established in law and provides an appropriate level of objectivity in the assessment. However, it is still critical that appropriate thresholds are established for the offence. The definitions of neglect and ill-treatment, or whatever other terms are used, must be clear and sufficiently serious to warrant the intervention of the criminal law." [Third Sector Organisation]*

Some respondents expressed a preference for professional judgement over a reasonable person test since they felt that the area of child abuse and neglect was complex, and the subtleties and nuances of the offence were unlikely to be well understood by non-professionals or those not au fait with the evidence base:

> *"As we as professionals start to learn more about the long-term impact of neglect and emotional abuse, including the increased risks to physical and mental health as identified in the ACEs study, and the increased risk of additional vulnerabilities that we see daily in our work, we are aware that public understanding of this area is not likely to be widespread. We are therefore not sure that the 'reasonable person' test would fully cover what we understand to be the risk of harm from neglect and emotional abuse." [Third Sector Organisation]*

Another organisation also suggested that the introduction of the reasonable person test could complicate existing professional practice and that they too felt that professionals would be best placed to decide where prosecution was appropriate:

> *"Professionals require clear thresholds and standards by which they can assess their clients, justify actions taken to keep children safe (including accommodation), and explain how their parenting did not meet the required standard. A 'reasonable person' test is not well-enough defined and could complicate the process." [Public Sector Organisation]*

The same respondent suggested that reference to clear standards, for example those in the Adverse Childhood Experiences (ACEs) toolkit, would be more reliable.

Again, it was felt that the focus should be on supporting rather than criminalising families. The reasonable person test may negatively impact vulnerable adults:

> *"We think the use of 'reasonable person' is problematic. We need to focus on supporting families and children, taking into account any social, cultural and economic challenges or for that matter, additional support needs they may be experiencing. It is the duty of the state to support families and families should not be criminalised if due to a failure of the state, they are unable to access services and/or support." [Third Sector Organisation]*

Obviated Harm

Section 12(3) provides that a person may be convicted of an offence even where actual suffering or injury to health was prevented by the action of another person and in cases where a child has died. Given that there have been no problems with this part of the legislation historically, it was proposed that this element of section 12 remain unchanged. Views were sought on the appropriateness of this position.

Q10. Do you think a provision equivalent to section 12(3) should be included in any revised offence, either in its current form or amended?

	Number	Percentage	Valid Percent
Yes	46	21%	78%
No	13	6%	22%
No response	161	73%	-
Total	**220**	**100%**	**100%**

Note: There were no respondents who did not provide a closed question response who went on to give a qualitative comment

Nearly three quarters of respondents did not answer the question (73%).

Among those who did, a large majority (78%) agreed that the provision should be retained and the main reason given in support was that prevention of harm should not diminish culpability:

> *"A person who intended to neglect a child should be convicted of wilful neglect even if actual suffering or injury to health, or the likelihood of such suffering or injury, was avoided due to the action of another person, and the death of that child should not be a bar to conviction." [Individual]*

Existing provision was seen to be largely non-problematic but the terminology could, perhaps, be modernised to ensure clarity and include reference to emotional abuse/harm. One respondent suggested amending the term 'obviated' to something more commonly understood, such as 'prevented' and one respondent suggested that this provision could be further explained in guidance relating to the sort of circumstances that it could be applied to. Overall, however, the position of 'no change' was accepted.

Indeed, many who answered 'no' to this question offered similar sentiments (i.e. existing legislation was considered appropriate), and so it seems that they may have misinterpreted the question. That is, they commented that 'no' changes were required and they supported inclusion of the provision in its current form. One organisation suggested that the provision was otiose.

Mental State of the Perpetrator

Historically, there is evidence that the terms “wilfully” in the phrase “wilfully ill-treats, neglects, abandons or exposes…” has caused problems in the courts. Specifically, there has been ambiguity around whether the offence just requires that the act of neglect or ill-treatment is committed “wilfully”, or whether the accused must also have been “wilful” about likelihood of their action causing unnecessary suffering or injury to the child. The question has been whether a person commits an offence if they committed the act of neglect or ill-treatment intentionally, even if they were unaware that those actions could cause the child any harm. The mental state, or *mens rea*, is an essential ingredient in most offences.

Wilful and Deliberate Actions

At present, in Scotland, for an offence to be committed under section 12, it must be proved that the accused’s acts or omissions were committed “wilfully” (i.e. intentionally, rather than by accident or inadvertently). It is not necessary, in Scots law, to show that any harm caused as a consequence of the act was also intentional. As a result, a person could potentially be prosecuted in Scotland for wilfully neglecting a child in circumstances where they were unaware that their actions were likely to cause any harm.

In the consultation, the Scottish Government proposed to reaffirm the existing test of intent which already applies in Scotland, outlined above. They also proposed to introduce a requirement that a “reasonable person” would consider the ill-treatment or neglect to be likely to cause the child physical or psychological harm (see ‘Risk of Harm’ above). This will clarify that the likely consequences of the neglect or ill-treatment are assessed objectively.

Q11a. 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?

	Number	Percentage	Valid Percent
Yes	49	22%	74%
No	17	8%	26%
No response	154	70%	-
Total	**220**	**100%**	**100%**

Note: Thirteen respondents (6%) who did not provide a closed question response gave a qualitative comment

Seventy per cent of all respondents did not answer this question. Among those who did, most (74%) supported the proposal and 26% did not.

The main reason given in support was that this would add clarity and reinforce what was already established practice although a clear definition of wilful activity would be needed, it was felt:

> *"…it would be helpful if statute could further clarify the mens rea requirement to put the matter beyond argument or doubt." [Public Sector Organisation]*

Including and clarifying the reasonable person test would also mean that minor acts of indiscretion or accidental injury would not wrongly end up in court, it was felt (although one respondent questioned how effective the test was):

> *"In general, with a reasonable person test of the risk of harm, it should be sufficient for the mens rea to attach to the behaviour and not its consequences. However, the law must tread carefully where harm was neither intended nor occurred." [Third Sector Organisation]*

Other comments included that a requirement to intend to do actual harm may create a loophole which would not be in the best interests of children or victims and that a need to prove intent may also exclude cases which were cumulative over time, i.e. repeated acts of wilful behaviour which over time result in neglect.

Two respondents commented that they perceived that if the intent to harm was a requirement of an offence then such acts would constitute physical or emotional abuse rather than neglect and one other commented that the proposed approach was consistent with the wider intervention ethos, i.e. harm need not have occurred for intervention (criminal justice or otherwise) to still be relevant.

Several respondents commented that it was important that capacity of the perpetrator was always taken into account, to protect the most vulnerable, i.e. it should only apply if it can be proven that the person has the capacity to understand. Some flexibility for atypical cases should also be built in, one suggested:

> *"We believe that the concept of wilfulness should continue to be a major consideration in determining level of intent and criminality. However, there will inevitably be exceptions which, we feel, should be responded to with additional provision of support and guidance. National guidance on this matter would be welcome." [Public Sector Organisation]*

Similarly, several respondents commented that, while they supported the proposed change, it was also important that some discretion remained in cases where it could clearly be evidenced that parents had not deliberately set out to harm their children:

> *"We know that the majority of parents do not deliberately set out to harm their children, especially when circumstances are neglectful. The parents own lived experiences and level of understanding needs to be taken into consideration along with their ability to act on advice and guidance provided." [Public Sector Organisation]*

Again, safeguarding and mitigating against risk were highlighted by some as key considerations to avoid cases reaching the stage of criminal prosecution and some comments in support of the proposal focused on how it would be important to always ensure that the child's bests interests were upheld.

Among those who answered 'no' to this question, the main reason given against the proposal was that intention to cause harm should be evident. One respondent stressed that they felt the offence should only apply in the case of advertent recklessness:

> *"The offence should apply only to those who intend to cause harm to a child by their action or inaction, or who are subjectively reckless as to whether harm is caused - that is, the recklessness must be advertent. Advertent recklessness occurs where the accused is aware of a risk of harm, but nevertheless takes that risk by failing to act in circumstances in which a reasonable person would have acted to avoid it. Inadvertent recklessness applies where the accused fails to act to avoid a risk which a reasonable person would have recognised, even though the accused may not even have considered the possibility of there being such a risk." [Individual]*

One response from the legal profession highlighted that they felt it was more appropriate that a more subjective test be introduced (as set out in the consultation document, whereby the court must be satisfied that the accused must have intended to cause harm, or been reckless as to whether such harm was caused):

> *"We would understand that option as requiring proof of three elements: proof of the act or omission; satisfaction of the 'reasonable person' test that such act or omission would objectively cause harm; and either an intent to cause harm or recklessness as to whether harm was caused…In our opinion that is because proof of intent or recklessness can often reasonably be inferred from the proven acts or omissions of the accused and from the overall circumstances disclosed in the evidence of any given case." [Legal Profession]*

This organisation noted that, while the consultation favoured a 'lower test', this would potentially leave the legislation open to failure.

Another view put forward by several respondents was that the law needed to protect parents with serious mental health problems or learning disabilities where accidental/inadvertent actions may occur, which fall within criminal thresholds:

> *"We are therefore concerned that these parents might be criminalised and might be in danger of losing their children not because they have intentionally abused or neglected their children but because they haven't been able to access the right support to enable them to parent their children and effectively meet the needs of their children." [Legal Profession]*

Indeed, there was some strong reservation with regard to this proposal from some, and views that this proposal required significantly more consideration before being

implemented, with due regard given to wider structural influences on behaviour. In particular, it was felt that some vulnerable adults may face prosecution for failing to take reasonable steps to protect their children against a backdrop of not being able to access the services that they needed:

> *"[Organisation] is particularly concerned that the proposal to clearly define in law an objective test of liability for neglect, without regard to the mens rea of the offence is at odds with the Scottish Government's broader understanding of the relationship between structural inequalities; the potential lifelong impact of unresolved childhood adversity and trauma; and neglect…." [Third Sector Organisation]*

Comments were made that the proposals could result in increasing prosecutions of parents who are trying their best to look after their children in the face of structural inequalities and while struggling with their own unaddressed experiences of childhood adversity. Several organisations, in particular, suggested that this part of the proposed legislative change be given much more consideration.

Intention to Cause Harm

Q11b. 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? - intend or are reckless as to whether harm is caused?

Those who did not agree were asked who they felt the offence should apply to. While only 17 people provided a negative response to the preceding question, 23 answered the follow-up question. Of these, there was an even split between those who felt it should only apply to those who intend to cause harm to a child by their action or inaction (n=11, 48%) and those who felt it should only apply to those who intend or are reckless as to whether harm is caused (n=12; 52%).

Among those who felt that the offence should only apply to those who **intend to cause harm to a child by their action or inaction**, there was only one further comment given:

> *"The point here should be the specifics of the case and the court/judge/jury - given the freedom to do their job and assess the situation/case on its facts. Creating a one or the other definition - results in limitation of the scope of the testing of the case. The requirement of 'reasonable' behaviour is required." [Individual]*

Among those who felt that the offence should only apply to those who **intend or are reckless as to whether harm is caused**, specific comments included that intention to cause harm infers a reasonable responsible attitude and that the effect on the child/young person in question should be the key element of the offence,

rather than a person's specific action or actions; or their failure to act; not whether the harm caused was intentional.

Three respondents who did not answer the closed component of this question went on to provide further relevant comments, including that:

- in situations where there is inaction, there needs to be further exploration regarding the situation of the parents (to explore, for example, if learning disabilities or mental health issues have been contributing factors);
- that further considerations are necessary where harm is not intended; and
- it may be sensible to consider recklessness in establishing an offence where it refers to a parent or carer who foresees the risk of harm of particular actions (or inaction), yet acts unreasonably regardless of the risk (again, ensuring that criminalisation of vulnerable groups is avoided).

Finally, one respondent commented that they felt it was important to engage families directly in determining intent:

> *"We support the idea of considering the support offered to families in determining recklessness and intent. The assessments of practitioners working alongside families to support changes in behaviour are a valuable source of information about a parent/carer's capacity to understand the need for change, their ability to make the changes required, and their motivation to do so." [Academia]*

Committing the Offence and Penalties

Two questions were included in the consultation to gather views on who should be capable of committing section 12 offences, specifically in terms of the perpetrator's relationship to the child and the perpetrator's age. One question also explored who should/could be classed as a victim. Views on penalties for the offence were also sought.

Relationship to the Child

Section 27 of the 1937 Act provides that "any person to whose charge a child or young person is committed by any person who has parental responsibilities in relation to him shall be presumed to have charge of the child or young person" and "any other person having actual possession or control of a child or young person shall be presumed to have the care of him". As such, it includes people temporarily responsible for looking after children, (such as babysitters), as well as professionals with temporary "charge or care". There is, however, some concern that it could potentially exclude a non-resident partner of a parent who was not left in sole charge of a child and who does not have parental responsibilities.

Q12. Who should be capable of committing the offence?

There were 57 responses to this question. Comments mainly focused on broadening of the criteria to include anyone with the care of children, not only people who hold parental rights and responsibilities, including wider family members, professionals and anyone left to care for or in charge of a child:

> *"We think the offence should be extended to include anyone who is caring for a child, sharing care of a child, in a position of trust or in loco parentis. This should apply regardless of the degree of responsibility the adult has. All adults have a responsibility to protect children and if a child is harmed by acts of commission or omission by a person with capacity to care for them then that person may have committed an offence. This should include professional staff such as teachers, social workers and police." [Public Sector Organisation]*

A large number of respondents also commented that they felt the offence should apply to 'any' or 'all' adults more generally.

Some caveated their views that adults should only be held accountable if they had capacity to have been left in charge of a child, and some commented that specific relationships in individual cases would need to be carefully considered:

> *"However, we believe that the individual relationship should be taken into account (e.g. siblings) as it is vital that individual circumstances are considered..." [Third Sector Organisation]*

> *"A possible exception would be in the case of parents who are children themselves. Young parents who are still developing themselves and qualify as*

children shouldn't necessarily be punished the same way as adults." [Public Sector Organisation]

Several comments were also made that 'care', 'caring responsibilities' or 'caring roles' would need to be carefully and clearly defined (and made clear to the public):

"We think that the offence should be extended to people who are in a caring role in respect of the child at the time of the offence occurring - and that the detail of the 'caring role' should be fully defined." [Public Sector Organisation]

"Clear guidance around what constitutes care and control is required. E.g. should a friend or older sibling who agrees to 'keep an eye on the children' while the parent goes for a bath, makes dinner, etc. be considered to have care and control of the child? We believe that the implications of providing clarity around this should be communicated widely to the general public to be clear regarding the responsibilities of being around children." [Public Sector Organisation]

Some agreed that only minor change was needed to the definition, to close the identified loophole regarding non-resident partners or parents, and this was seen as particularly important in domestic abuse cases.

A small number of respondents indicated that they felt that the legislation should remain as it was, primarily because it was felt that other parties would be dealt with by existing and alternative criminal law. The other reasons given were that:

- the Act was designed to replicate common law which was limited to those with pre-existing duties to the child (and others would be covered under the criminal law of assault);
- basing the change on the one type of individual identified i.e. non-resident partner of a parent, seemed like insufficient justification for change (and, again, these people may be captured under other legislation/criminal law); and
- extending the definition too far would unnecessarily make too many people subject to legislation which was primarily and correctly designed for those with specific duties.

"It is designed to apply to this narrow range of people, as they have particular responsibilities to the child, and it is the neglect of these responsibilities which constitutes an offence. Whilst we see the benefit of ensuring the inclusion of non-resident partners who are jointly responsible for the care of a child within this narrow range, care should be taken not to unintentionally extend this range beyond its intended scope." [Academia]

Age of the Perpetrator

Existing legislation specifies that the offence can only be committed by a person aged 16 or over. The Scottish Government sought views on whether the age of the perpetrator should be removed from the definition in legislation to allow discretion to be applied by the Procurator Fiscal in bringing cases forward.

Q13. Do you think the legislation should set out the age of a perpetrator? If yes, what should the age limit be?

	Number	Percentage	Valid Percent
Yes	30	14%	50%
No	30	14%	50%
No response	160	72%	-
Total	**220**	**100%**	100%

Note: Seven respondents (3%) who did not provide a closed question response gave a qualitative comment

A large proportion of respondents did not answer this question (73%). Among those who did, there was an equal split in opinion as to whether the legislation should set out the age of a perpetrator.

For those who felt the age should be set out, the suggested minimum age ranged from the age of criminal responsibility or capacity in Scotland (age 8) up to 18 and above. The small number who suggested the lower age of 8 did so on the basis that the legal age of responsibility was already established in Scots Law and one respondent who suggested age 12 did so because they perceived that, by the age of 12, reasonable people are clear on the impact that they can have on others in a criminal sense.

Roughly half who agreed that an age should be specified felt that the current age of 16 was appropriate but some caveated this view that it was essential that other measures remained in place to respond to equivalent acts of harm, abuse or neglect committed by those under 16 (e.g. CIVIL HEARINGS or Children's Hearings):

> *"The current age limit of 16 years would seem appropriate in relation to responsibility. If absolutely necessary there are other legal options for prosecution of and other constructive responses to young people involved in harmful or potentially harmful behaviours." [Public Sector Organisation]*

For those who felt that an older age should be specified, this was typically because they felt that those under 18 may be in need of additional support themselves and that a rehabilitative response may be more appropriate for responding to acts of abuse or neglect committed by this age group:

"A child (under-18) who has parental responsibility can be neglectful. Their neglect could reach a criminal threshold but as a child they still require support themselves. Legislation should not necessarily criminalise them if parenting support is preferable after an assessment of parent and child's needs. The wider good is not served by charging a 15-, 16- or 17- year-old with neglect when they are vulnerable themselves. Therefore, the threshold should be 18 years of age below which a child cannot be charged with neglect." [Public Sector Organisation]

Indeed, one of the main concerns among respondents who felt that the specified age should remain, and be either 16 or 18, was the need to avoid criminalising young people unnecessarily, especially those such as siblings left in charge of younger peers, etc. Removing the age specification may make this less clear, it was felt, and leave some young carers more vulnerable to prosecution:

"We would be concerned about the example of an incident between a sibling babysitting a younger sibling and the possibility of a criminal charge accruing from that. We are particularly concerned about the possibility of children who are young carers, through no fault of their own, becoming the focus of a criminal charge…To avoid this we would want the relationship between child and perpetrator to be robust and clear in respect of liability." [Public Sector Organisation]

Other reasons given for supporting an age limit of 18 included that:

- the age limit of 18 was consistent with the Children and Young People (Scotland) Act 2014;
- it was important to align the age of the perpetrator with the age of the victim (*"to avoid situations of a younger young person being held criminally responsible for the neglect of an older young person they have been charged with care of" [Academia]*); and
- it was difficult to envisage any circumstance in which it would be helpful to prosecute a young person, rather than supporting them.

Finally, one respondent stressed that the legislation needed to take into account parents' responsibility to ensure that their child is not placed at risk by who they allow to have sole care and responsibility and another expressed a view that children aged 14 or younger should not be placed in a position of such responsibility or charge of care. Others made more general comments that the age specification should remain since they would feel uncomfortable with charges relying on the discretion of the Procurator Fiscal (although this was mentioned by only a few respondents):

"We suggest that a higher risk of wrongful prosecution of (potentially vulnerable) young people would occur if there is no age limit specified in law and that decisions are left to local PFs." [Third Sector Organisation]

Among those who felt that the age should not be specified, the main reasons given were that anyone should be held responsible, subject to the specific context being considered, that in some cases in may be more appropriate to charge the parents of the perpetrator instead (e.g. if older siblings are left in charge of younger siblings who come to harm), and that level of maturity may be a better indicator than chronological age.

Two organisations stressed that the relationship between the perpetrator and the victim was of more importance in considering liability than age:

> *"…the age of the perpetrator does not need to be determined in statute. Instead there should be a strong definition of nature of the relationship which requires to be in place between the child and the alleged perpetrator at the time of the offence. This will mean that parents under the age of 16 could be responsible for the offence." [Public Sector Organisation]*

Another third sector youth organisation commented that there should not be a definitive age, as this black and white approach would not allow for a full and proper consideration of the specific circumstances of each individual case.

Again, some respondents who felt the age should be removed also did so on the basis that they did not wish children to be unnecessarily criminalised:

> *"We would also like to see safeguards to avoid the unintended consequence of potentially prosecuting a young person who has been left to look after their younger siblings or other children in the absence of a parent and where the young person does not have the understanding or capability to provide safe care for the younger children." [Public Sector Organisation]*

One respondent specifically stated that, while in principle they did not agree with criminalising children, they broadly agreed with the Scottish Government's proposal that the age limit should not be defined to allow for discretion when required and others commented more generally that removing the age would allow Procurators Fiscal flexibility to make the best decisions in individual cases, based on whether it was in the public interest to prosecute. One legal organisation commented that no change was needed as there was no evidence to suggest that COPFS were not already exercising their discretion appropriately.

Given the wide mix of views expressed in response to this question, it was difficult to infer any dominant theme, except, perhaps, that most respondents wanted to avoid unnecessary criminalisation in cases where young carers may have been left in positions of responsibility that were beyond their capacity.

Age of the Victim

The current offence can be committed in relation to any "child" or young person under the age of 16 years but, as part of the consultation, views were sought on whether this be changed so that the offence should apply to a child or young

person up to the age of 18 (i.e. if any child or young person under the age of 18 could be considered a victim of the offence).

Q14. Do you think that a child should be defined as aged 18 or younger in relation to the offence? Please explain your answer.

	Number	Percentage	Valid Percent
Yes	41	19%	67%
No	20	9%	33%
No response	159	72%	-
Total	**220**	**100%**	**100%**

Note: Thirteen respondents (6%) who did not provide a closed question response gave a qualitative comment

Again, a large proportion (72%) of respondents did not answer this question. Among those who did, two thirds agreed that a child should be defined as aged 18 or younger in relation to the offence, and one third did not.

Reasons given in support of increasing the age included that this would be consistent with other legislation regarding children, that the definition would accord with the UN Convention on the Rights of the Child (UNCRC) and that all those under 18 might be considered 'vulnerable' and so in need of legislative protection. Some aged 16-18 (and even older) may still be in school, and so were likely to be under the care/control of others (potentially leaving them vulnerable).

Two organisations that agreed in principle to raising the age to 18 suggested that this may be difficult to implement in practice, not least given the age limitations currently on the jurisdiction of the Children's Hearings system. Further thought by the Scottish Government may be needed, it was suggested, on how support and protection would be offered in real terms, and by whom, for those aged 16 to 18.

Similarly, one other organisation expressed a view that this change would fundamentally alter the nature of the offence, or at least its congruence with other law and, although this respondent was generally supportive of raising the age, it would need to be carefully handled to ensure it was still congruent with other legislation. Addressing the more widespread inconsistencies was, however, seen as beyond the scope of this consultation.

Some also expressed concerns that individual circumstances may need to be taken into account for 'older' children (e.g. those aged 17) where their activity may be outwith the control of the parents but where parents may still be considered to be neglectful if the legislation was changed (e.g. should the parent of a 17-year-old who intentionally takes illicit drugs in the knowledge of the parents be considered as neglectful?) Similarly, more thought would be needed as to whether younger siblings or carers could be held accountable for neglecting children older than

themselves, e.g. could a 16-year-old be prosecuted for neglecting a 17-year-old? Although such anomalies and challenges may occur, one respondent stressed that they thought the number of such cases was likely to be small. Another organisation that believed the legislation should be for persons 17 years and under also recognised that some of the provisions may be more relevant to younger children.

Other considerations raised included:

- whether a young person's view on whether or not they perceive the experience as harmful would be taken into account;
- if left at 16, would guidance be put in place to deal with children over 16 who have other factors that may increase their vulnerability;
- if/how increasing the age would ensure greater protection for children transitioning between children and adult services; and
- if the change would mean that it would be possible for the offence to be committed by a spouse, in cases where children aged 16 were married.

One organisation suggested that the age of protection should be raised to 21 for care experienced young people, recognising their uniquely vulnerable experiences.

Reasons given for *not* changing the age included that age 16 seemed to work well in current practice and was the age at which responsibilities of adults are conferred on children in Scotland (including ability to marry and to hold parental responsibilities and rights) and that children of this age were able to know right from wrong and be sufficiently mature.

Another concern was that changing the age would fundamentally alter the legislation (similar to views expressed above), since it would no longer relate only to those people (i.e. children) who are under the scope of special duties of care (which is presently 16). It should therefore remain unchanged, it was felt:

> *"…we need to ask, not when a child becomes an adult, but when a child no longer comes within the scope of special duties of care. And that age is, at present, 16. Most parental responsibilities and parental rights (and all the crucial and substantive ones) come to an end when the child reaches 16 and so all the pre-existing duties of care end then…If the age of the victim is raised to 18 then the whole nature of the offence in s. 12 changes from one of neglect of existing duties, to causing harm to persons under 18." [Individual]*

The same respondent perceived that the proposed change would also make the issue of relationship between perpetrator and victim irrelevant and they felt that the possible rationale for such a fundamental change to the legislation had not been sufficiently justified in the consultation. As such, they suggested that the legislation should remain unchanged.

One organisation also stressed that the law should remain unchanged on the basis that the change was too fundamental and had wide-reaching implications for other

areas of the law. The law regarding the age of a child would need to be completely reviewed in a more holistic approach, they suggested.

One respondent also suggested that those aged over 16 may be old enough to take preventative and abortive actions against neglect which may mean that they should be considered potential 'victims' (e.g. being able to source food, shelter, safety for themselves, etc.). Two others said that they felt the age should be 16 but apply to those under 18 who have significant care needs or are at increased risk of harm, as they may be functioning at a level below their chronological age:

> *"15, 16 or 17 is arbitrary and it may be only in teenage years the neglect could come to light. Trying to legislate for every possible set of circumstances is near impossible. Therefore, childhood should be assessed on a case-by-case basis." [Public Sector Organisation]*

Overall, among both those who agreed and disagreed with this proposal, there were views that the definition needed to be cross-referenced/consistent with other legislation to avoid any ambiguity and to aid the work of professionals and practitioners working in this field:

> *"…having varying definitions of what constitutes a child in Scotland causes confusion and tensions amongst practitioners and eligibility to access services can be impacted upon where legislation and policy/guidance contradict one another. It would be extremely beneficial to have one definition of a child to work from." [Public Sector Organisation]*

Penalties

The current penalty for the offence on indictment is an unlimited fine and/or a maximum term of 10 years imprisonment. On summary conviction, a person is liable to a fine not exceeding the prescribed sum (£10,000) and/or 12 months' imprisonment. The consultation welcomed stakeholders' views on whether the current penalties should be revised.

Q15. Do you think the current penalties for a section 12 offence should be amended? If yes, what do you believe the appropriate penalties would be?

	Number	Percentage	Valid Percent
Yes	30	14%	57%
No	23	10%	43%
No response	167	76%	-
Total	**220**	**100%**	**100%**

Note: Nine respondents (4%) who did not provide a closed question response gave a qualitative comment

Again, a large proportion of respondents did not answer the question (76%).

Among those who provided a substantive response, just over half (57%) agreed that the penalties should be amended and just under half did not (43%).

Most of the individuals who indicated that the penalties should be amended expressed a desire to see them increased or made harsher as they perceived current penalties were too lenient, especially for serious offences. Views included that prison was more appropriate than financial penalties since the severity of this measure was more proportionate to the severity of the likely impacts of abuse or neglect on children:

> *"Neglect should have penalties equivalent to a serious offence because of the serious, debilitating and life-long impacts on the children who suffer them. As it stands, the maximum sentence is not enough for cases where children suffer permanent injuries, including brain damage, and/or the lifetime of psychological suffering that results from serious neglect." [Public Sector Organisation]*

One respondent suggested that higher fines could be introduced which could be diverted to the child (victim) to support restoration/rehabilitation. Another suggested that, although tougher penalties would not lessen the impact on victims, they may provide victims with a sense of justice and help them to 'move on'.

Others (especially organisations) wanted to see a wider range of community disposals considered, especially for lower level offences. Concerns were voiced that vulnerable families, in particular, may benefit from staged interventions which could address the root causes of harm and prevent future offending. Financial penalties and imprisonment may not be in the best interests of some children living in vulnerable families, it was stressed:

> *"…further consideration needs to be given to the impact of large financial fines on families already living in poverty, as well as the loss of income by incarcerating a parent who was the main breadwinner." [Public Sector Organisation]*

> *"In general terms, we believe that penalties should be proportionate in relation to the offence, however acknowledge that imposing a fine may have the unintended consequence of adversely impacting on the child. We would therefore suggest that a suite of penalties is introduced, for example court enforced attendance of parenting classes; community payback orders and custodial sentences when the severity of the offence merits it." [Public Sector Organisation]*

Indeed, for the most vulnerable families, restorative, educative and rehabilitative responses were seen by some as being more appropriate than criminal responses and could, in some cases, be in the better interests of the child, i.e. avoiding secondary harmful effects for children and helping to prevent re-occurrence of neglect.

Some who supported a review of penalties simply commented that they would like to see a range of disposals available which could be used flexibly to address the circumstances of individual cases:

> *"Courts require sufficient flexibility to ensure any penalties fully reflect the range of potential seriousness of offences and issues of intentionality and culpability, etc." [Public Sector Organisation]*

For those who indicated that the penalties need not be revised, the main reasons given were that the current maxima seemed appropriate for most cases, and that there was already sufficient flexibility to accommodate variances in the degree of seriousness of the crime (although one respondent expressed a view that, in the most serious cases, the penalties for murder might seem appropriate).

Other more general comments (made by just one respondent each) included that:

- consideration needed to be given to a child's understanding of the punishment for the adult;
- court decision making should always be informed by a Criminal Justice Social Work Court Report as this would include relevant contextual, aggravating or mitigating factors which courts need to consider;
- the person convicted should be prevented from having more children, from adopting or fostering children, and as far as possible from working with or having contact with children for a defined period, if not forever; and
- there should be due assessment of the person and circumstances to assist judicial discretion.

One organisation also sought clarity around the requirement to disclose the acceptance or establishment in the Children's Hearings System of a (b) ground for referral in respect of a Disclosure Scotland application or Protection of Vulnerable Groups (PVG) check.

Overall, across responses, there was a strong feeling that any penalties needed to be flexible and proportionate, reflecting the severity of the case at hand while also supporting vulnerable families.

Impact of Domestic Abuse and Vulnerable Parents

The consultation highlighted the devastating and long-term impact of domestic abuse on children. This includes harm to children as direct victims as well as the harm caused by living in an environment where domestic abuse is taking place, i.e. directly witnessing the abuse or indirectly where a child is impacted by the effect it has on their parent.

Impact of Domestic Abuse

Views were sought on 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.

Q16. 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?

This question was open-ended in nature and attracted 55 substantive responses - 22 from individuals and 33 from organisations. Several respondents interpreted the question quite broadly and offered more general observations on whether they felt it was appropriate to penalise victims of domestic abuse.

One of the dominant themes to emerge (from both individuals and organisations) was that evidence gathering in such cases needed to be detailed and robust and take into account the specific circumstances of the abuse and any control being exerted by one adult over another, and which may have influenced the victim's behaviour toward the child. Offending history of the victim who perpetrates against the child should also be considered, it was suggested.

Some suggested that they would like to see greater social work involvement in such cases, earlier intervention and, when a case is investigated, all victims being identified and supported. Indeed, several again commented that parent victims may need to be supported, rather than criminalised:

> *"Each of us [is] responsible for our own actions but this should not be incompatible with the recognition that some people need help and support rather than simply punishment." [Individual]*

This was not a unanimous view, however, and several individuals in particular felt that being a victim of domestic abuse should not be a defence to a criminal charge under section 12 unless there were clear extenuating circumstances, including coercion or impeded capacity:

> *"Context is important. If the person who has been a victim of domestic abuse has taken adequate steps to engage with services for protection of themselves*

and their children then I do not think they should be criminalised. Where they have not, this suggests to me a lack of capacity to prioritise their child's needs. Whilst this is understandable, it is not good enough to prevent harm to the child/ren, nor to prevent the cycle repeating." [Individual]

"…establishing a causal link between domestic abuse and the subsequent abusive behaviour of a victim of domestic abuse is very difficult. Whilst the experience of domestic abuse can be pervasive and have unseen consequences the safety and security of a child remains the responsibility of the adults who have the care of them, in whatever context that care occurs…Domestic abuse could, therefore, be seen as a mitigating factor - but not one which automatically and in isolation would absolve someone of any responsibility for abusive behaviours." [Public Sector Organisation]

Indeed, ten individuals and four organisations put forward views to suggest that domestic abuse in itself did not legitimise subsequent abuse of a child by the victim, and one individual expressed that this was a decision best left to the courts who had access to all available facts.

One respondent highlighted what they believed to be the difference between cases where the victim felt unable to protect the child and cases where they had failed in their duty of care for other reasons:

"If the child is harmed as a consequence of that parental abuse (e.g. withholding money, controlling movement and contact etc.) then I believe that the abused parent should not be held accountable for that as they are not fully in control of their actions. In these cases, protection and support should be given to the abused party. If the harm comes as a result of the abused parent "passing on" their own abuse to a child then, whilst I can sympathise with them in their position, this is not an excuse: assuming that they have had opportunity to leave or report the abusive relationship then they are in control of their actions and should be prosecuted." [Individual]

Similar views were expressed by organisations; however, among this group there was greater focus on the need for legislation to recognise victims of domestic abuse as victims and to take their trauma into consideration. Supporting adult victims of domestic abuse to help break the cycle of abuse or offending was emphasised, especially when their behaviour may not have been intentional or carried out under duress:

"It is wholly unacceptable that victims of domestic abuse who have committed a section 12 offence as a consequence of this domestic abuse should be criminalised. This could certainly be avoided, and the responsibility recognised where it belongs, if the law were changed to involve consideration of intent to harm the child, and recklessness. Even if this change is not made, Procurator Fiscals must take the content of domestic abuse into account in their consideration of the public interests of pursuing prosecutions." [Academia]

Diversion from prosecution, family therapy and parenting classes were again all suggested as possible supports for victims in this case. One organisation also noted what they perceived to be a deficit in the current system that allowed access to suitable educative programmes for perpetrators only after an offence had been proven:

> *"There is a clear deficit in current arrangements in that perpetrators can usually only access programmes to counter incidences of domestic abuse once they have been convicted of such an offence. We would welcome the introduction of relationship programmes and anger management for perpetrators prior to conviction which would help support a reduction in domestic abuse." [Public Sector Organisation]*

Several commented that it would be most appropriate for all cases to be handled on their individual merit, and that it was difficult to put in place a 'standard' response to domestic abuse cases:

> *"We think that it is important for professionals to be very clear about their assessment of situations and that it is important for them to be very clear about where responsibility for concerning behaviour and responsibility for addressing that behaviour, lies, on a case by case basis." [Public Sector Organisation]*

There was agreement, however, that where a non-criminal route was pursued, this should only be for cases where to do so would not place the child at further risk:

> *"The decision not to prosecute where it is not in the public interest should not prevent or discourage other agencies (SCRA, Social Work, etc.) from taking appropriate action to protect the child - the child should be kept at the centre at all times." [Public Sector Organisation]*

Two organisations indicated that they considered that it would be worth exploring the possibility of creating a statutory defence in such circumstances. Others commented that they welcomed that this issue may also be addressed by the new Domestic Abuse Act and one organisation indicated that they would welcome *"further in-depth consideration and discussion around how a 'subjective recklessness' approach may help to ensure that vulnerable parents, including parents who are victims of domestic abuse, are not unfairly prosecuted."*

In contrast, some organisations noted that they felt it would be impossible to frame such a partial or complete defence in this piece of legislation but that this may be covered more appropriately under other offences.

Indeed, some strong views were put forward that there was a need for more focused attention on this issue as a specific concern. Several organisations considered that the current consultation was not the correct vehicle or engagement medium for such a potentially wide ranging, difficult, and sensitive topic to be discussed.

"…the 1937 Act or any replacement is not the appropriate place to address this. Domestic abuse is recognised as distinct from other forms of child abuse. The harm done by perpetrators of domestic abuse is best addressed in a context in which the focus is on the behaviour of the perpetrator. Addressing this through a different context, even within the same proceedings, risks moving the focus away from the particular nature of domestic abuse. It also moves the focus away from the fact that the non-abusing parent is also a victim of the abuse and we remain concerned that, historically, the 1937 Act has been used to prosecute parents who were experiencing domestic abuse." [Third Sector Organisation]

"While the offence in the Domestic Abuse (Scotland) Act 2018 admirably creates new protection for women, and partially reflects the harm done to children by a sentencing aggravator it does not make provision for offences targeted specifically at children… There is a risk that dealing with the impact of domestic abuse on children in child protection legislation completely separates out women's and children's interlinked experiences and will perpetuate the focus within the law being solely on the adult victim." [Third Sector Organisation]

Consequently, several organisations recommended further consultation with relevant stakeholders on this point, including Scottish Women's Aid, among others.

One individual and one organisation indicated that they felt it would be more appropriate to charge the perpetrators of domestic abuse with section offences where either their own or the victim's behaviour negatively impacted on the child (and where the abusive or harmful behaviour was a direct consequence of a parent being a victim of domestic abuse). This may be a deterrent but may also overcome challenges faced by the police with victims not wishing to report abuse carried out against the child for fear of personal repercussions:

"Victims of domestic abuse must not be considered to have committed a section 12 offence as a result of the controls put upon them by the abusing partner. The abusing partner could and should be charged with both coercive control and a section 12 offence." [Third Sector Organisation]

Another third sector organisation suggested that it may also be helpful to have a multi-agency response as standard, in cases where child neglect is considered to be presenting a significant risk of harm, in order that concerns about domestic abuse are considered at the very earliest stages of a response. The same organisation, as well as others, strongly supported the 'Safer Together' approach to domestic abuse, where children are involved, being embedded across social work and police practice in Scotland. Other approaches that could be considered included Signs of Safety and the Caledonian system and wider use of the ACEs toolkit to help protect vulnerable adults and children.

Organisations recognised that there would be difficulties in implementing this change in practice and there were some concerns about how the change may impact on the Children's Hearing System, in particular.

Organisations also focused more on the need for investment in training and awareness raising to improve understanding amongst all agencies and professionals (including legal professionals and the judiciary) on the impact of domestic abuse, including the emotional and psychological harm to victims, the concept of coercive control and the potential impact on victims' parenting. One respondent suggested that professionals should also be trained to be 'trauma aware' in line with the National Trauma Framework.

Others (both individuals and organisations) called for more widespread public awareness raising on the issue of domestic abuse, including media campaigns, as well as parenting classes for parents at risk of offending:

> *"Continuing to increase awareness of domestic abuse and its impact on children remains important. Particularly in relation to more hidden forms of domestic abuse such as coercive control." [Public Sector Organisation]*

Overall, responses to this question supported specific reference in the legislation to domestic abuse and its impact on children, and on the parenting capacity of the victim. The overall intention to ensure legislation captures emotional abuse was also seen as making it easier to prosecute this abuse including where it occurs against a background of domestic violence.

Q17. 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?

The consultation also sought views on additional ways in which courts could be assisted to be aware of abuse within a domestic abuse setting, affecting both partners and children. There were 44 substantive responses to the question - 13 from individuals and 31 from organisations. Again, some responses did not directly answer the question and commented more generally on the need for greater understanding *per se* of the impacts on children of living with domestic abuse.

Specific suggestions included:

- multi-agency training for all professionals, including, but not limited to the judiciary (including training on coercive control). Training and professional development should be ongoing/continuous, it was felt[4];
- creation of specialist family courts or development of a cadre of prosecutors who specialise in domestic abuse to deal with incidents of this nature;
- specialist assessments/social work reports for the court to help inform decision making (including, for example, a retrospective review of the lifestyle of the child/perpetrator to give the courts a better understanding of the environment in which the neglect took place, as well as the mind-set and

[4] One legal organisation pointed out that this already forms part of judicial training which is undertaken by the Judicial Institute for Scotland.

background of the perpetrator). Victim impact statements could also be included, it was suggested, as well as reports from professionals/experts working in the field (for example, Woman's Aid);

- appointment/availability of independent advocacy support to speak on behalf of families (including independent children's advocates/children's rights workers being introduced when such cases are going to court to help children's voices be heard);
- ensuring that the child's experience and voice in relation to the alleged offender/offence is integrated within relevant reports;
- talking to survivors to understand the impact domestic abuse has had on their lives, including children; and
- the development of evidence-based guidance for those working in the courts (with guidance possibly being more accessible for members of the judiciary, instead of attending training, it was suggested).

Although multi-agency training was again stressed as being important, perceived barriers included availability/willingness of the judiciary to attend or take part, and costs of providing relevant training (which would need to be endorsed/promoted by the Scottish Government, it was suggested):

> *"Increased understanding across all partners of the long and short-term impact…would require commitment both through leadership and resources from both the Scottish Government and national bodies in order to evoke cultural change and embed change." [Public Sector Organisation]*

Again, alternatives to prosecution were seen as preferential among some respondents and encouraging courts to be aware of these was seen as important:

> *"All legal professionals should be made aware of the effects of poverty. Poverty and parents' own Adverse Childhood Experiences (circumstances), should be considered against criminal neglect charges. When parents replicate the poor parenting they experienced, including domestic abuse behaviour, they can be helped by experienced professionals to recognise what they went through, what the negative behaviour is and how they can be helped. This can be done while still managing the harm and risk towards the child. Courts should be made aware that engaging in such work will often be more productive than pursuing criminal charges against parents." [Public Sector Organisation]*

Others commented that courts/legal professionals may already be sufficiently aware.

Finally, one organisation expressed a view that changing the legislation to try and more effectively cover emotional abuse of children and make it easier to prosecute this kind of abuse, (including where it occurs against a background of domestic abuse), was not the best means of tackling domestic abuse and its impacts:

"[This] will continue to undermine recognition of the distinct nature of domestic abuse as an offence against children, as opposed to other forms of child abuse. An offence of domestic abuse which sits within child protection legislation and identifies domestic abuse of children generally as emotional abuse, will not sufficiently fulfil the core purpose of creating awareness of the impact of domestic abuse on children, nor highlighting that children are equally victims of domestic abuse…We maintain that there should continue to be a focus on recognising a specific offence of domestic abuse on children to address this particular issue." [Third Sector Organisation]

Vulnerable Parents

The consultation noted the concern of some that widening the offence may risk an increase in prosecutions against vulnerable parents, including parents with learning disabilities, which was not the intention. It also acknowledged that the decision as to whether to prosecute is for the Procurator Fiscal. Prosecutions will only be pursued where there is a public interest in doing so, in line with the COPFS' Prosecution Code. Views were sought on what further steps, if any, could be taken to ensure that in changing section 12, vulnerable parents were not unfairly criminalised.

Q18. What further steps could be taken to ensure vulnerable parents are not unfairly criminalised?

A total of 56 substantive comments were received - 21 from individuals and 35 from organisations. Most of the comments received echoed comments made in response to earlier consultation questions, and offered unreserved support for ensuring that vulnerable parents were not criminalised:

"For all parents, criminalisation should be a last resort, only pursued when all other options have failed to achieve change necessary, and the purpose of prosecution is clear. In particular, if parents have limited capacity, then whole family approaches, and joint working across services should be used to avoid financial penalties or custodial sentences. It should be clear that putting in place arrangements to keep children safe and prosecuting parents are separate issues, and separate processes." [Public Sector Organisation]

Among specific suggestions for steps which could be taken, the main ideas were:

- putting in place a multi-disciplinary team to help and support affected families in both the short and longer term and extending services (especially social work services) available to support vulnerable parents;
- trying to gather a better understanding of vulnerable parents' experiences, i.e. professionals learning from those with 'lived experience';
- sensitive questioning/investigate approaches appropriate for this group (ensuring that parents' needs and capacities are assessed by a multi-agency team, as part of the investigation);

- making professionals aware of the specific challenges faced, including training on supporting parents with learning disabilities being offered as a part of qualifying programmes and continuing professional development;
- more parenting training being made available for vulnerable parents (as well as early intervention to prevent neglect occurring). Education programmes should be aimed at developing skills in responding appropriately to challenging behaviour, and 'parenting champions' could be made available to support parents on an ongoing basis; and
- provision/availability of independent advocacy for vulnerable parents during investigations/court proceedings.

> *"As discussed throughout this response, the focus of collective efforts to protect children from neglect should be on addressing the societal and structural factors (such as poverty) which impact on families' capacity to meet the need of their children; and the provision of high quality, accessible, holistic family support; not criminalisation." [Academia]*

Another common theme (also raised earlier in the consultation) was ensuring that terms such as 'wilfulness' and 'recklessness' were clearly defined and require to be advertent rather than inadvertent - this would help to protect vulnerable parents from unfair criminalisation, it was felt. Developing a clear definition of 'vulnerable' was also suggested as well as clarifying the definitions of learning disability/learning difficulty, given the impact of this on determining the level/provision of services made to adults in these categories (i.e. ensuring that eligibility for support remains suitably wide).

One organisation also suggested that there may be merit in exploring the concept of 'good enough parenting' to ensure parents are not too afraid to seek help or assistance for fear of prosecution.

More general comments included reviewing each case on an individual basis, obtaining the views of the child in decision making procedures, ensuring access to suitable financial resources for vulnerable parents and keeping guidance (including the COPFS Code) up to date and evidence-based:

> *"Again, the use of an evidence-based approach is critical to intervening effectively with families, to ensure vulnerable parents are not unfairly criminalised for behaviour. This would help form the basis for a comprehensive assessment which would take into account the context and vulnerabilities faced by the parent(s) i.e. mental health, learning difficulties, and their ability and willingness to engage with the services on offer." [Public Sector Organisation]*

Specific reference was made to ensuring that guidance to the revised offence details the relevant legislation, research and policy specific to the needs of parents with learning disabilities so that professionals do not mistake a lack of support for criminal neglect. One organisation indicated that guidance should include:

- part 12 Children and Young Persons Act 2014;
- reference to Human Rights provisions in the UN Convention on the Rights of Persons with Disabilities (article 23) and the UN Convention on the Rights of the Child (article 18); and
- relevant research as detailed in the report Supporting Parents with Learning Disabilities in Scotland: Challenges and Opportunities (2015)[5].

The same organisation urged that work should begin urgently on the plan to implement the recommendations in the report Supporting Parents with Learning Disabilities in Scotland: Challenges and Opportunities (2015) as agreed by the Parenting Task Group.

One organisation also suggested that were there to be a national adoption of 'care experience' as a protected characteristic under equalities legislation, this would mean that parents whose vulnerability derives from their own upbringing/experience of the care system would be granted additional protections. Another suggested that young carers had been overlooked, as well as refugees and asylum seekers, and people who have additions or are suffering from substance abuse. Young people who have left home could also still be subject to emotional abuse, it was stressed.

Several respondents again used this question to stress that the child's best interest should always be protected:

> *"… while support is being offered to parents, it is important that appropriate support and protection are offered to the child. Processes of supporting parents to understand the risks of their behaviours and to change can take an extended period of time, and it is important that children are not left at undue risk during this time." [Third Sector Organisation]*

This may include taking children (temporarily) into care where parental vulnerability was evidenced, but this was seen as something which should be a last resort: keeping families together (via diversion from prosecution or supporting them to cope) was seen as the preferred approach wherever possible.

Only a very small number expressed views that, if a parent was deemed competent overall, then section 12 should apply in any case, and vulnerability was not a reasonable excuse. A small number also suggested that sufficient processes/steps were already in place. One organisation stressed that the Children's Hearings System and the Criminal Justice System in particular already worked well together to ensure the protection of children and prosecution of parents only where relevant, ensuring that protection of children is the paramount concern.

Finally, one respondent recommended seeking further consultation on this point from relevant stakeholders, including third sector organisations working with vulnerable adults and children.

[5] Available at: https://www.scld.org.uk/wp-content/uploads/2016/11/Parenting-key-findings.pdf

Sexual Abuse of Trust

Part 5 of the consultation document focused exclusively on the criminal law in relation to sexual abuse of trust.

At present, it is a criminal offence for any adult to engage in sexual activity with a child under the age of 16. In addition, sections 42-45 of the Sexual Offences (Scotland) Act 2009 ('the 2009 Act') provide that an adult who engages in sexual activity with a child under the age of 18 in respect of whom they are in a 'position of trust' also commits an offence. This reflects that adults in a position of trust may have particular power, influence or control over those in their care, and that it would be a breach of authority and trust to engage in sexual activity with that child, irrespective of whether they have attained the age of consent.

Defining Position of Trust

The 2009 Act defines a 'position of trust' for the purposes of the offence as including those who look after children in a range of institutional settings, including schools, hospitals and residential establishments such as care homes or young offenders' institutions. It also provides that a 'position of trust' exists if a person lives with a child and has or had any parental responsibilities or rights in respect of that child, or treats the child as a child of their family.

Historically, views have been expressed that the existing definition of a 'position of trust' may be seen as too narrow as it does not include all the roles in which an adult may have particular power, influence or control over a child (including those carrying out regulated work with children and young people[6], and including those who work with children on both a formal and informal basis). This may include, for example, sports coaches, music tutors or people providing religious instruction, except where they are performing such a role while looking after children in an institution such as a school (which is already covered by the offence).

As part of the consultation, views were sought on whether the law should extend the scope of the 'abuse of trust' offence, ensuring that it is sufficiently clearly framed that it does not create uncertainty as to the circumstances in which a person is or is not in a position of trust in relation to a child.

[6] Regulated work is defined under the Protection of Vulnerable Groups (Scotland) Act 2007 ("the 2007 Act") and covers a very wide range of positions, including anyone who has unsupervised contact with children by arrangement with a responsible person, anyone who teaches, instructs, trains or supervises children and anyone who provides advice or guidance to children which relates to physical or emotional well-being, education or training.

Q19. 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?

This question attracted a large number of responses (172) with the majority coming from individuals (137 individuals compared to 35 organisations). The organisations that responded were mainly third sector support organisations or public bodies (including Child Protection Committees).

A number of responses from individuals were largely the same in their content, suggesting they may have been generated from a campaign. All, however, were included in the analysis and counted as individual responses in their own right.

Among those who offered support for this proposal, and agreed that the 'position of trust' should be extended to a wider range of people working with children, most also commented that it should extend beyond the definition of those doing 'regulated work'. The main suggestions for who it should include were:

- sports coaches;
- music tutors and tutors in theatre and arts;
- church leaders;
- youth workers; and
- tutors or instructors (paid and unpaid).

Other groups that were mentioned by just one or two respondents each (including some who are already covered by existing law) were college/university staff, teachers, child care workers, advocacy workers, scout leaders, babysitters, medical professionals, charity workers, befrienders, social workers, teachers, kinship and foster carers, civil servants, the police, celebrities, politicians and other 'officials'.

The vast majority of respondents (individuals and organisations) felt that the definition should be very broad:

> *"We believe that all children and young people have the right to be safe and protected across all aspects of their life, a belief which is firmly in keeping with Getting It Right for Every Child (GIRFEC), the Scottish Government's national approach to child well-being. This means that a child or young person's right to protection should not be restricted to roles held by adults within statutory or institutional settings. The same level of protection must be provided to ensure that children and young people can safely fulfil their right to participate in leisure and recreational activities. (UNCRC Article 31). We therefore strongly believe that in order to better protect young people from abuse this loophole must be closed - it is not enough to simply make the loophole smaller." [Third Sector Organisation]*

Many of those who supported the proposal made reference to recent high profile media cases of abuse of trust and suggested that this provided evidence of a need for change (especially the need to cover sports coaches and religious leaders in the offence).

Among those who supported extension, it was recognised that there would be challenges in providing a definition which allowed for situations where there is a consensual sexual relationship between peers of a similar age (over 16) but where there may also be an informal support, mentoring or coaching element to the relationship. Others also commented that the notion of influence may be subjective:

> *"I support widening the definition of a person in a position of trust in principle certainly covering having power and responsibility. Defining 'having influence' could be rather difficult to pin down." [Individual]*

Some noted that using the regulated work definition was too restrictive and would not effectively capture what is meant by a 'position of trust':

> *"I am not convinced that the "regulated work" approach is appropriate, for regulation of work is based on different principles from those underpinning the "position of trust" offence. But I do accept that the offence could usefully be expanded to include those whose position gives them the power to exploit their control of or authority over the young person." [Individual]*

One third sector organisation stressed that they felt it would be inappropriate to create a pre-determined list of roles or jobs to which this offence would apply, as this could result in checks being missed, which would potentially increase the risk of harm to children:

> *"If a role is not on the pre-determined list, an organisation may assume they do not need to consider whether a PVG check should take place rather than considering how and when the person in that specific role in their organisation may have contact with children. A pre-determined list of roles may also cause confusion where organisations use different or interchangeable names for different roles." [Third Sector Organisation]*

An extension to the 'abuse of trust' offence needed to be considered in conjunction with the proposal to replace the definition of 'regulated work' in the Protection of Vulnerable Groups (Scotland) Act 2007 with a list of 'protected roles, it was suggested.

Several respondents also commented that a 'position of trust' needed to be defined with reference to the child's perception and understanding of the relationship at hand:

> *"It is important that the concept of position of trust encapsulates a general understanding of that role and the child's view of that position - based on issues*

such as habity [sic] expectation, purpose of contact and considering whether the person has regular contact with a child in relation to a role or task; and/or whether a child knows the person as someone with whom they are in regular contact and in whom they have developed a trust, meaning that the person is perceived as predictably safe within this contact." [Public Sector Organisation]

Very few comments were put forward against this proposal. Some individuals commented that they perceived the Scottish Government should not interfere with family life unnecessarily or unless criminality could be proved (although these comments may have been in reference to earlier parts of the consultation), and one respondent perceived that sufficient legislation and safeguards were already in place.

One respondent indicated that they felt the change may be a "complex process" and lead to "a potentially litigious environment" and that this would reduce the positive impact of a wide range of "informal' roles":

"We would question the need to extend this specific section with regard to proportionate impact it may have. Whilst acknowledging that this requires the risk to by managed out with section 12, we are not convinced of the benefit in extending this section compared to the risk." [Public Sector Organisation]

Two respondents suggested that there was also a need to ensure that those working with children were protected from any potentially false or malicious allegations made by children.

One final organisation expressed disappointment that Section 42 of the Sexual Offences (Scotland) Act 2009 had not been given more weight or focus in the current consultation document.

Other Comments

Q20. Do you have any other comments on the 'sexual abuse of trust' offence at sections 42-45 of the Sexual Offences (Scotland) Act 2009?

Only 15 respondents provided substantive responses to this question. One of these (an individual) simply commented that they had no experience in this regard and another said that they felt the existing offence was 'valid' and should remain.

Among the other 12, (10 organisations and 3 individuals), the main comments were that caution needed to be taken not to criminalise young people inappropriately, especially those working in the sports sector as volunteers and who may be particularly vulnerable to any proposed changes:

"Our members would request caution and careful consideration in progressing any widening of this definition, to ensure that any legislative amendments are fit for purpose and do not result in unintended consequences for young people,

including those both participating and/or volunteering, or for Scottish sport." [Sports Organisation]

"There is clearly a need to ensure that any widening of the legislation to sport effectively encapsulates roles that are in a position of trust, but without being unnecessarily broad or leaving uncertainty as to which roles are covered." [Sports Organisation]

Others, including one of the sports organisations quoted above, highlighted the importance of how the new offence was communicated, if adopted, including awareness raising in the professional and public spheres:

"Any amendment should be supported by an education and awareness programme which alerts those in such positions (especially where these previously would not have been captured by the legislation)." [Sports Organisation]

Organisations working in the sports field expressed a desire to assist with any ongoing engagement in updating sections 42-45 and in raising awareness of the changes, if introduced. Three organisations commented that they were content with the existing offence but welcomed that new guidance would assist with interpreting the law in practice:

"…section 43(7) of the Sexual Offences Act 2009 is probably enough of a 'catch all' already in relation to the sexual abuse of trust - but that new guidance on the application of the relevant sections (42-45) would help clarify and determine matters." [Public Sector Organisation]

"Given the wide variety of roles that are covered by 'regulated work' with children and young people, including formal and informal volunteer roles, it is important that information and guidance for people in 'regulated work,' goes hand in hand with the legislative change, to ensure that everybody understands their roles and responsibilities to children and young people." [Third Sector Organisation]

One third sector organisation viewed that it was important that there were concessions made to ensure that these measures would apply only to people in a 'position of trust', and not to consensual relationships.

One respondent commented that there may be financial implications of a change to the law and one individual used this question to comment that the consultation had been *"difficult to understand, too lengthy and time consuming"*.

Finally, a minority view was expressed that the Review of Section 42 of the Sexual Offences (Scotland) Act 2009 had perhaps not received sufficient attention within the consultation overall and there was a call for this to be consulted upon separately, rather than subsumed alongside the section 12 offence review.

Impact Assessment and Other Comments

The final part of the consultation sought views on any perceived impacts of the proposed legislative changes. Space was also afforded for respondents to comment on if there were any behaviours not criminalised elsewhere that they felt should/could be included within a revised offence, as well as if they had any 'other comments' on the consultation as a whole.

Equalities Impacts

Several respondents again commented that they would not wish to see emotional abuse adversely impact on families who teach faith or moral principles, and who hold strong religious beliefs:

> *"Unless carefully drafted, the proposals could have an inappropriate impact on people who hold to certain beliefs or moral standards which may not necessarily be held by a majority in society, or by those responsible for applying the law." [Individual]*

> *"[There is a] need to protect parents in the exercise of their religion and belief, including the manner in which that religion and belief may direct their parenting. It is imperative that loving parents are not stigmatised or criminalised for good-faith decisions which they make out of love for their children, just because others disagree with them." [Individual]*

The other main comments related to adults with learning disabilities and mental health problems, also discussed earlier in the consultation, with strong views that vulnerable adults should be protected. One specific concern was raised that *"the proposition of an objective test of the reasonable person to determine culpability would impact negatively on learning-disabled or emotionally vulnerable parents." [Third Sector Organisation]* Indeed, some suggested that the proposals, as set out, may be discriminatory against this group:

> *"[Organisation] views measuring individuals with learning disabilities against a notional 'reasonable person' as discriminatory. This can potentially perpetuate the idea of people with learning disabilities as separate from the morally superior 'reasonable person' and instead view them as 'deviant' or as society's 'other.'" [Third Sector Organisation]*

Others commented more generally that they had concerns that the idea of 'reasonable steps' having been taken by parents to guard against neglect was ambiguous and could be problematic, especially when set against barriers to accessing support services, among this group:

> *"The consultation paper states that it does "not think it is likely" a vulnerable parent or carer who has taken all "reasonable steps to access the support of relevant services to help overcome difficulties" will be considered to have committed wilful ill-treatment or neglect under the proposed changes…What*

qualifies as "reasonable steps?" Will this take into account the difficulties many parents have accessing the supports they need? Social work and third sector support services have been the victims of austerity over the last ten years, often leading to no or wholly inadequate services and long waiting lists for even the most urgent cases. It cannot be denied that sometimes the state fails in its duties to support those who need it: are these parents to be criminalised for the state's failure?" [Third Sector Organisation]

Ensuring that adults with learning disabilities fully understood the legislation was key, it was stressed (i.e. making the law accessible and easy to understand). The perceived risk, otherwise, was that there could be a particular impact on parents with learning disabilities who may not be able to understand what is required of them, or how to respond in unexpected situations.

One organisation put forward a response that focused mainly on the need to provide adequate support for disabled parents in Scotland, but also highlighted negative stereotyping and assumptions surrounding disabled parents' abilities to parent as being a wider issue to be addressed (in the legislation and more generally). Disabled and learning-disabled parents may need different kinds and levels of support, and the ability of the law to recognise individual circumstances was vital for its success:

"[Organisation] believes that the current proposals to reform the criminal law on child neglect have not fully considered the unintended consequences for vulnerable parents including disabled parents. While we recognise that there is a need to update the law in this area, we would wish to see the government's stated intention that vulnerable parents not face unnecessary criminalisation properly integrated into the proposals for legislative reform." [Third Sector Organisation]

Any revisions to section 12 should recognise the government's obligation to provide parents with the necessary help to raise their children, it was stressed, as set out in Article 18 of the UN Convention on the Rights of the Child and Article 23 of the UN Convention on the Rights of Persons with Disabilities. Proposals for providing more individualistic and proactive support for this group would also be welcomed.

Special consideration was considered necessary for how children living with disabilities were treated under this legislation. This group of children were likely to be 'hidden' and more at risk of harm in some cases. One other comment was received that reference to children throughout the legislation should give consideration to a child's stage of development not just their chronological age.

Women were also seen as potentially being more likely to be impacted by the legislation as well as young parents, those living in poverty and parents with adverse childhood experiences:

"…it is important to recognise that society is more likely to presume that women are the primary caregiver and therefore subject to higher expectations around

their ability to parent. In the context of neglect, this has specific consequences for disabled women, for women experiencing domestic abuse or for women who are experiencing mental health difficulties." [Third Sector Organisation]

"We believe it is essential that an equality impact assessment is carried out with immediate effect as it is likely that the proposal as it currently stands will impact negatively on women, parents with physical and learning disabilities and young parents." [Third Sector Organisation]

While several respondents welcomed the comments in the consultation that the proposed amendments to section 12 would not result in increasing prosecutions against vulnerable parents, there was deemed to be a lack of clarity around exactly how this would be achieved, and any revised text and guidance should reflect this.

More detailed analysis in relation to the interface between neglect and adults involved in substance misuse may also be needed, it was suggested.

More general comments were made that any changes in the legislation should be compliant with equalities and diversity legislation, that any reform must be subject to a robust education equality index (EEI) report but, if implemented correctly, there should be no equalities impacts:

"If the reforms proposed are accepted then the people in all of the groups should be more fairly represented." [Third Sector Organisation]

A suggestion was made that while the legislation, as framed, should not be negatively impactful, it should be monitored if/when implemented to ensure that it has no negative impact on particular groups or lifestyles. If implemented as planned, such legislation should have a positive impact on children, resulting in greater protection from harm.

Only one comment was made that the legislation could, inadvertently, impact negatively on a number of different groups with protected characteristics, as it may bring differing views into sharper focus. One comment was made that it was important not to confuse equality with the present LGBTQI+ agenda and one respondent observed that there was no Easy Read or accessible version of the consultation offered. Overall, however, no new issues were introduced at this question which had not already been covered in relation to defining emotional abuse or protecting vulnerable parents at earlier questions in the consultation.

Financial Impacts

Few comments were made in relation to financial impacts and those that were made related mainly either to:

- the need to increase social work capacity to help work with any increase in identified at risk families which may result from the legislation (as well as additional funding for advocacy to support victims and the accused); or

- the potential for wasted time of social work services and the police (among others) in dealing with an increased volume of cases if the definition of neglect is drawn too widely (i.e. *"wasted time and tax-payers' money chasing up perfectly loving normal parents" [Individual]*).

The costs for training judiciary and other professionals to allow them to work effectively with the legislation could also be high (including capacity for staff cover to release others for training). Increased costs for widening access to parenting programmes and domestic abuse prevention programmes to support perpetrators and victims would also need to be considered. Any increased use of diversion from prosecution may be costly, and police enforcement costs may also increase.

One organisation commented that extended/new offences would also impact on the Scottish Courts and Tribunals Service (SCTS), in particular, including costs associated with court time and relative court programming, associated staff and accommodation resources and costs involved in relevant IT changes.

The consultation document indicated an intention to publish information regarding financial implications at the time of the introduction of the Bill and views were expressed that stakeholders should be kept informed as to the progress of the consultation and be given the opportunity to contribute to the financial memorandum at the appropriate time.

A comment was also made that the current political climate of austerity and welfare reforms was causing increasing numbers of children to live in poverty and that funding to tackle this broader issue was needed:

> *"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." [Third Sector Organisation]*

One respondent suggested that a full financial impact assessment would need to be completed once the full scope of any reforms becomes clear and another suggested that initial increases in costs might be mitigated by lower costs to health and justice service in the longer term if the legislation was effective.

Other Behaviours

Very few comments were made in response to this question and some comments did not answer the question directly. Specific behaviours that were referenced, (some of which are in fact already covered by other legislation), included:

- a parent/other who is aware of neglect/abuse but does nothing to stop it;
- parents wilfully preventing their children from attending school;
- exposing children to dangerous substances or activities;

- risk/harm associated with online neglect and cruelty, including encouraging a child to view online pornography, play violent internet games, etc.; and
- parents/guardians using children for purposes such as prostitution, drug trafficking or online interaction with suspected paedophiles.

Others viewed that any form of action causing harm to a child should be included.

Other Comments

There were also few 'other comments', but those that were given stressed that all efforts should be made to prevent neglect and abuse, which can have a significant negative long-lasting impact on children's lives, as well as that there was a need to focus on supporting and educating parents and carers to provide safe and appropriate parenting rather than increasing potential offences, where appropriate:

> *"The criminal law is a tool which should be used in the most extreme of cases. It must be accompanied by a range of other measures to help prevent neglect and emotional abuse, and support those who experience them, most notably early support for families and children." [Third Sector Organisation]*

> *"There should remain scope to criminalise those whose actions meet a certain threshold of neglect. However, neglect is a much wider issue than just one piece of criminal legislation can fix. There should be efforts made to avoid negating or placing barriers to the ongoing good work with families who need to and are able to improve their parenting." [Public Sector Organisation]*

Some again expressed that they did not feel that legislative change was the correct medium to achieve the Scottish Government's aspirations and some comments were also made that the consultation had not sufficiently considered other ongoing developments that were relevant to the legislative reform:

> *"Notably absent…is any significant information about the ongoing Child Protection Improvement Programme (including the work of the 'Our Hearings: Our Voice's Children and Young People's Board for the Children's Hearings System), the work of the 'Justice and Care' group in the Independent Care Review or the current review of child protection national guidance… We would therefore suggest that any review of the 1937 Act takes account of all of these and other significant processes, before making any legislative proposals." [Third Sector Organisation]*

Others again commented on the general complexity of legislating in this area and encouraged wide, ongoing consultation and stakeholder engagement to make sure that the revised offence was fit for purpose (including a more thorough review which takes into consideration the views of children, young people and their families, in addition to the professionals who support them). Several respondents offered their support to the Scottish Government in achieving this aspiration.

Discussion

The consultation attracted a strong response from a large number of individuals and a wide mix of organisations from across different sectors. Responses were detailed and there was much discussion of the pros and cons of each of the proposals, with many organisations in particular providing comprehensive justifications for their views.

Main Findings

Overall, there was strong support for reform and modernisation of section 12, with almost all endorsing a review. Many of those who offered support did so on the basis that they found the language to be outdated and not appropriate for modern society, stating that it did not reflect cultural diversity, social and technological changes. Including emotional (or psychological harm) in the definition was seen as especially important, as well as providing clarification on key terms within the legislation to ensure consistent practice among professionals.

Updating the Language: A large majority of respondents agreed that there was merit in clearly defining the existing concepts of neglect, ill-treatment, abandonment and exposure, and although most felt that this should be done in the legislation itself, others suggested this would be more appropriate in guidance. Regardless of where the terms were defined, there was consensus that this was needed to remove any ambiguity and bring the legislation up to date. Cross referencing to existing national guidelines and ensuring that the language reflected other provisions in law was seen as important.

Supporting Professionals: Improved multi-agency training and communication were seen as the core requirements for supporting professionals dealing with children and families to identify when cases reach a criminal threshold, although some felt that most legal professionals already had a clear understanding of thresholds and that the current Criminal Justice and Children's Hearings systems worked well together to capture and deal with cases appropriately. That being said, clear, concise guidance that avoids jargon, sharing of practitioner experience, and hearing victims' voices may help to keep practitioner experience informed and evidence-based. Ensuring that definitions are consistent with other existing national guidelines and situated in wider legislation was again seen as key.

Emotional Harm: There was strong support to make it explicit in the legislation that "neglect" includes emotional neglect and "harm" includes emotional harm. A large majority also supported clear legislative protection from emotional abuse. The main reasons given in support included that emotional harm was as damaging as physical harm, has been shown to have devastating short and long-term effects and that having it defined clearly in legislation would send both deterrent messages to potential perpetrators and allow practitioners to protect children further. The main concern, raised by several individuals and religious organisations, in particular, was the need to ensure that the legislation did not encroach inappropriately into parenting and religious teaching or practices. A clear and

explicit definition of emotional harm was required, which many believed would be difficult to achieve.

Section 12(2): There were mixed views around changing the deeming provision in section 12(2)(a) that relates to provision of adequate food, clothing, medication and lodging, with some respondents feeling that the focus of the legislation (as currently worded) on provision of material goods, was inappropriate in times of austerity and increasing levels of material poverty. Although respondents wished to see provision made for children, there was a strong sense that parents living in poverty should not be penalised and that more should be done by local and central government to help support families out of poverty (rather than criminalising them). There was near unanimous support for changing the deeming provision in section 12(2)(b) concerning the suffocation of a child in bed, with agreement that the legislation should reference illicit drugs, as well as alcohol, and reference different types of sleeping surface. Again, however, the most vulnerable parents would need to be supported, it was stressed, if such changes came into force.

Reasonable Person: Most agreed with the introduction of a reasonable person test in cases of risk of harm (but where no actual harm could be proved) but stressed that any application of the term must capture cultural diversity and cultural norms; parental capacity (including parents living with learning difficulties); vulnerability (including those in relationships characterised by domestic abuse); and differing levels of vulnerability of the victim. This was also one area of the consultation where more consultation and professional stakeholder engagement was encouraged, especially around how 'wilfulness' would be evidenced.

Committing the Offence: Comments mainly focused on broadening of the legislation to include anyone with the care of children, not only those who hold parental rights and responsibilities, including wider family members, professionals and anyone left to care for or in charge of a child. There were some mixed views on whether the age of the perpetrator should be specified and, if so, whether the offence should apply to those aged either 16 or 18 and above (very few felt that the age should be younger). The majority of respondents agreed with widening the in-scope age of the victim to include those under age 18 (rather than 16) and among both those who agreed and disagreed, there were views that the age specifications needed to be cross-referenced/consistent with other legislation to avoid any ambiguity.

Penalties: More than half of respondents felt that the current penalties for a section 12 offence should be amended. Suggestions for appropriate penalties were wide ranging and included higher fines, prison sentences, more community sentences, restorative/educational approaches to working with offenders, staged/incremental penalties and a suite of penalties (e.g. court enforced attendance at parenting classes and community payback orders or custodial sentences) for cases of greatest severity. Across responses, there was a strong feeling that any penalties needed to be flexible and proportionate and take into consideration the wider circumstances of each case, including previous offending.

Victims of Domestic Abuse and Other Vulnerable Parents: There were mixed views in relation to raising court awareness of the challenges faced by vulnerable parents. Overall, respondents suggested that they would like to see greater social work involvement in such cases, earlier intervention, diversion from prosecution and, when a case is investigated, all victims being identified and properly supported. While a small number felt that it may be appropriate to create a statutory defence for victims of domestic abuse who harm or neglect children as a result of coercion or under other duress, others felt strongly that the current consultation was not the correct vehicle or engagement medium for such a potentially wide ranging, difficult, and sensitive topic to be discussed. Similarly, there were views that other vulnerable parents, especially adults with learning and physical disabilities, had not been given sufficient consideration within the consultation or proposed legislative changes and there were calls for more engagement on this topic and setting out clear and explicit plans for how vulnerable parents would be identified and supported, rather than criminalised.

Position of Trust: This part of the consultation attracted a large number of responses with most offering support for extending the 'position of trust' offence to a wider range of people working with young people. Most also commented that it should extend beyond the definition of those doing 'regulated work'. There was little resistance to the proposals, but some again expressed that it would be important that the legislation did not interfere in family life and that caution was needed not to criminalise young people inappropriately, especially those working in the sports sector as volunteers and who may be particularly vulnerable to any proposed changes.

Impacts: The main equalities issues identified related to how vulnerable parents (especially those with disabilities, and victims of domestic abuse) would be protected under any changes to ensure that they were not disproportionately and negatively targeted by such changes. The other main issue was ensuring that parents who have strong religious or moral convictions are not penalised for going against mainstream cultural norms (so long as their behaviour was within legal boundaries). Comments were made that the changes could result in financial impacts for organisations who work with victims and the accused if the legislation affected caseloads, and that there may be training costs associated with ensuring that professionals and others working in the field were made aware of the legislative change (enabling them to respond appropriately to the proposed changes).

Next Steps

The independent analysis of consultation responses will feed into ongoing consideration of how the two offences could best be updated to reflect the Scottish Government's aspiration of protecting children and young people from harm. The Scottish Government will publish a response to this consultation, outlining the next steps and any future work that may be necessary in order to progress the consideration of updating section 12 and section 42.

Conclusion

There was consensus across the consultation that all steps possible should be taken to protect children and young people and most welcomed the focus of the Scottish Government on updating and revising the legislation, especially to include emotional harm, recognising how damaging this can be. While some parts of the consultation attracted strong and largely unquestioned support, there was some evidence that more thought should be given to considerations of how emotional harm would be defined, how wilfulness would be established and how already marginalised groups would not find themselves challenged even further by the proposed changes. Several organisations, in particular, welcomed the chance to remain engaged with the Scottish Government in taking forward the proposed changes to ensure that they were fit for purpose, as well as offering support to share their experiences in shaping legislative change.

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