

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

Consultation Questions

Question 1

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

Please explain your answer.

Every day Children 1st, see the impact of neglect and emotional abuse on children and families across Scotland. We work with children and families to prevent and protect their children from harm and support them to recover from trauma associated with unresolved adverse childhood experiences (ACEs). We build resilience so that children are safer and families and communities are stronger. Based on our knowledge of children and families and practice expertise we believe there is an urgent need to do more to protect children from the harmful impact of neglect and emotional abuse.

Children's safety and wellbeing must be front and centre across legislation, policy and practice. Ultimately the mechanisms in Scots law for safeguarding children from neglect are the measures the Children's Hearings System can put in place to protect a child from further harm. It is unclear from the consultation document to what extent Section 12, in its current form, is considered a hindrance to the Children's Hearings System, given that safeguarding measures can also be taken on the grounds of 'lack of parental care'.

We believe the first and foremost consideration for any proposals to reform Section 12 should be how the suggested changes would better protect children and uphold and advance their rights. Taking this starting point, we firmly believe children should have clear protection in law from emotional abuse but that it is not in a child's best interests to prosecute their parents where neglect is related to structural inequalities and/or the parents' own childhood adversity and the family's right to access trauma-sensitive and appropriate support at an earlier stage has not been met.

Children 1st 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. Child neglect and abuse occur across all spectrums of society. Neither poverty nor experiencing adversity in childhood are causes of neglect or abuse. Experts such as Dr Morag Treanor however recognise that a significant proportion of families living with unresolved trauma in Scotland also experience poverty and that the two can exacerbate each other.ⁱ Without trauma-sensitive prevention and recovery support many families use strategies to cope with the trauma of poverty or unresolved issues from their own childhoods, which can result in poor mental health, living with domestic abuse and the use of drugs and alcohol. In turn these have lasting impacts on their children. For this reason, we know that many families who are experiencing childhood adversity and who are living in poverty end up involved with social work and/or the protection system.

Some families tell us that issues relating to poverty were ignored by the statutory services involved in their lives. Disturbingly, research by Bywaters et al has identified that children in the most deprived neighbourhoods of Scotland are far more likely to be looked after away from home than their comparators in England, Wales or Northern Irelandⁱⁱ and research from Wales has found links between experiencing childhood adversity and being in prison.ⁱⁱⁱ Delegates at a round table hosted by Children 1st, Social Work Scotland and CELCIS, to consider Scotland's response to Bywater's research, *Addressing Poverty and Child*

Welfare, widely acknowledged that social work assessments do not consider the impact of poverty on neglect and that there are some major gaps in Scotland's understanding, knowledge and analysis of how these intersect.

Moreover the context of child protection and GIRFEC described in the consultation paper does not reflect the reality for children and families in Scotland today. For many families early intervention and family support services simply don't exist. Across Scotland we are not seeing the type of investment into preventative services in the way that the Christie Commission envisaged in 2011 by shifting investment away from crisis management. Early help is unsustainable and uncertain. The Care Inspectorate found that, even where services recognised that investing in new approaches (which often relate to early help), local partnerships were finding it increasingly challenging to identify resources despite recognising that this could produce longer-term savings.^{iv} An Audit Scotland report highlighted the reductions in services and has already flagged that there are risks that reducing costs further could affect the quality of services.^v More recently in November 2018, the UN's special rapporteur on poverty and human rights, Philip Alston highlighted his findings from a visit to all parts of the UK, including Scotland, that policies and drastic cuts to social support are entrenching high levels of poverty.^{vi}

Paragraph 4.9 of the consultation paper expresses the view that, it is not likely that: "a parent or carer who has taken all reasonable steps to access the support of relevant services to help overcome difficulties would be said to subsequently have committed a wilful act of ill-treatment or neglect if harm is solely caused by the lack of such support being provided." Children 1st are concerned that this appears to imply the onus is on families to access services, rather than recognising that services may be neither accessible nor available to many families in Scotland. In the current climate of increasing child poverty and decreasing access to preventative services we are concerned that the proposals in this consultation could result in increasing prosecutions of parents who are trying their best to look after their children in the face of overwhelming structural inequalities and while struggling with their own unaddressed experiences of childhood adversity. Parental imprisonment is recognised as an adverse childhood experience - these proposals could end up unintentionally increasing the levels of adversity experienced by the next generation of children.

Where services are available the proposed changes to Section 12 may create a greater fear of prosecution, with the unintended consequence of preventing families from actively seeking support or engaging with services. Many of the families we support talk about how negative past experiences with services result in them feeling stigmatised and less willing to engage with services. One Mum, who experienced significant trauma and adversity in her own childhood told us:

"My childhood was chaos, and so was that of my kids. I couldn't cope. I tried everything for help but the doctor just said 'It's not our fault you're a bad mother'.

"I was lost but I just had to carry on."

Children 1st share the concerns expressed by People First and Aberlour that parents who have learning difficulties may also be more likely to be prosecuted for neglect as a result of these proposals. We support the comments made by Aberlour in their consultation response with regard to families where parents have learning difficulties and would also draw attention to the statement by People First which Children 1st co-signed.^{vii}

Holding vulnerable parents, or parents with learning difficulties criminally liable for neglect without regard to their broader circumstances or whether they have received the support that is their right under Articles 18 (2) and 19 (2) of the United Nations Convention on the Rights of the Child (UNCRC) will not keep children safer or help children to recover from adversity. Prevention and protection of children from harm and supporting them to recover are all part

of a cycle that includes the whole family. By working with the entire family, and helping to resolve parental trauma caused by their own childhood adversity Children 1st often resolve issues for the child. Having strong attachments and a stable, supportive relationship helps keep a child safe and builds their emotional resilience giving them better protection from harm.

Children 1st is deeply concerned by the potential for unintended negative consequences for children, if the Scottish Government move to draft legislative proposals for amending Section 12 following this consultation. Rather than focus on the detail of the wording of legislative amendments, we would urge the Government to clarify the policy intent behind these proposals, give a more detailed consideration to the impact of the Children's Hearings System and reflect on how legislative and practice change could better uphold and advance the rights of children and families facing adversity and trauma in Scotland today.

To prevent and protect children from neglect, keep them safe and support them to recover, there needs to be investment in trauma-sensitive, family support and recovery services and actions to address structural inequalities must be prioritised. Incorporating the UNCRC into Scottish legislation will provide a stronger foundation for realising and upholding children and families' rights to support, as well as protection and we would urge the Scottish Government to make faster progress on their commitment to this legislation.

Alongside our own consultation response, we are submitting thoughts on the proposals from a Mum, whose family have been supported by Children 1st in the past. These are included in the other comments section. To quote from her response:

“Before the Scottish government passes legislation that could villainise parents for something that is beyond their control, they need to make sure that they have given parents every possible support to lift families out of this situation.”

Question 5

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

Yes. Introducing an offence of emotional abuse would reflect the ever growing understanding across policy and practice of attachment, brain development and the serious long term trauma that emotional abuse causes. Emotional abuse is rarely identified as an individual risk factor for child protection concerns. Clearly establishing an offence in statute would also help professionals to focus on identifying signs of emotional abuse in practice.

For the same reasons set out in our response to Question 1, Children 1st would be concerned if criminal liability for an offence of emotional abuse was based on an objectivity test, without regard to *mens rea*. Children 1st would also echo the points made by the Scottish Children's Reporters Administration (SCRA) that legislation and guidance needs to recognise that children's reactions to emotional abuse may be internalised rather than externalised. The presentation of a child or young person should not have an effect on whether emotional abuse is deemed to have or have not occurred.

Question 9

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

No. Given the complex interplay between neglect, structural inequalities and trauma, we would be extremely concerned that the introduction of a 'reasonable person' requirement

would result in parents being prosecuted in circumstances where it would not be in the child's best interests – as expressed in our answer to Question 1.

Question 11

Do you think 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?

As expressed in our answer to Question 1 we believe the Scottish Government should give further consideration to the policy intent behind these proposals, with particular regard to how they would further children's best interests and rights.

Question 16

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

Children 1st are extremely concerned by the potential for parents/carers who are victims of domestic abuse to be criminalised via section 12. Applying even an updated Section 12 to a victim in a domestic abuse situation wrongly shifts the focus from the perpetrator of the domestic abuse to the victim for failing to protect her child or for lack of parental care. To ensure that perpetrators of domestic abuse are held to account for their actions and the impact of these on children, Children 1st believe that the Domestic Abuse (Scotland) Act 2018 should be amended to include a parallel criminal offence of domestic abuse against children.

In recent years, the Scottish Government, Parliament and public services have made considerable progress in recognising the complex dynamics of domestic abuse and the impact on children across policy and practice. With the exception of the Domestic Abuse (Scotland) Act 2018 it is clearly understood that where children live in an environment where there is domestic abuse, they will be victims of that domestic abuse.

The understanding that women and their children are collective victims of domestic abuse is embedded in the 2014 National Child Protection Guidance to encourage services to respond to women and child victims collectively. The Scottish Government's 'Equally Safe' strategy for eliminating violence against women, girls and children recognises that young survivors of domestic abuse experience domestic abuse as 'coercive control' of the whole family environment, not just the mother.^{viii} This gives a child a better chance of receiving the most appropriate services and the support they need to help them recover from their experiences.

While the adoption of the Domestic Abuse (Scotland) Act 2018 has furthered understanding of the many forms that domestic abuse can take and that the behaviour of a victim of domestic abuse is best looked at in the context of coercive and controlling behaviour by the perpetrator, it does leave a gap in protecting children. During the passage of the Domestic Abuse (Scotland) Bill Children 1st, along with other third sector organisations working with children and women, raised concerns that the lack of recognition of children as victims of coercive and controlling behaviour could make children less visible to services and place them at greater risk of continued abuse by the perpetrator.

In 2011 the recognition that coercive control of mother and child is distinct from other forms of child abuse led to the introduction of domestic abuse as a specific ground for referral in the Children's Hearings System. This change resulted from the understanding that using either Section 12 or lack of parental care as grounds for a hearing could render the impact of domestic abuse on both mother and child invisible and that instead of holding the perpetrator

to account for his actions, the mother could be wrongly perceived as failing to protect her child. Viewed from this perspective, even amending Section 12 would appear to be a retrograde step.

It would also be at odds with the broader understanding of domestic abuse that exists across policy, practice and Scottish society. Scottish policy and practice clearly recognises how strong family relationships can protect children, build their resilience and support them to recover from their experiences. Prosecuting an adult who has been unable to protect or care for her child because they are victims of domestic abuse, will not help either the child or the adult victim to repair their relationships or recover from the abuse they have collectively experienced.

Section 12 does not, at present, recognise the context of domestic abuse as an offence against a mother and child, unrelated to the issue of the perpetrator's parental rights and responsibilities for a child. In the domestic abuse legislation whether a perpetrator is a parent or has caring responsibilities towards that child, is not of relevance. Rather, it is the behaviour of the perpetrator towards the adult victim and the impact of that behaviour on any child involved that is of concern. Section 12 applies only to parents and carers and therefore could not be applied to the specific dynamics of a situation where a child is suffering domestic abuse at the hands of someone who does not have parental rights and responsibilities for that child, for example, a boyfriend, who took no role in caring for the child, but at the same time acted in such a way as to cause emotional or physical harm to that child.

Amending section 12 sufficiently, to fully take account of the specific context of domestic abuse would be complex and time-consuming. There may be serious challenges in using a wider definition of emotional abuse within an updated Children and Young Person's (1937) Act, to cover the specific dynamics of a domestic abuse situation, particularly where the perpetrator is not a parent of a child. We consider that section 12 and the domestic abuse offence are different in nature and purpose and the tests applied are different.

Prosecuting a domestic abuse victim within child protection legislation will not help educate the public, prosecutors and civil courts alike, that domestic abuse is always a crime against a mother and a child, wherever there is a child or children involved.

Ultimately an amendment to the Domestic Abuse (Scotland) Act 2017 which recognises the impact of all forms of domestic abuse on children is the only way to avoid criminalising parents/carers who have been victims of domestic abuse and to ensure the rights of children who have been victims of domestic abuse to justice and recovery are upheld.

Question 17

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

Children 1st are deeply concerned about the current proposals to reform Section 12, as set out in our responses to the questions above. Independent of any changes to Section 12 we believe that additional support to ensure courts better understand the dynamics of domestic abuse is urgently required across the justice system.

We know from our work with children and families who have experienced domestic abuse that it is different to, and distinct from, other forms of abuse. To understand domestic abuse it is necessary to recognise patterns of coercive and controlling behaviour, rather than focusing on individual, violent incidents which do not tell the whole story of an abusive relationship. Families have told us of experiences where a mother and a child have not been believed in court because they each described different incidents that occurred over the ten year period

they were being abused. Domestic abuse is extremely complex and nuanced and in order for cases to receive a fair hearing, it is essential that jurors, judges and court officials understand the nature of coercive control, survivor strategies/ coping mechanisms and how, in many cases, the courts themselves are used by perpetrators to continue to perpetuate abuse.

Expert evidence can help the courts view cases through a 'gendered lens' to understand the ways in which control can be exerted that would normally not be visible. It is acknowledged that the appointment of "expert" witnesses will require some discussion and development of criteria for appointment as it will be essential that expert witnesses are drawn from a range of disciplines in order than victim responses are not pathologised or medicalised.

In addition to the introduction of expert evidence, judges should be better equipped to be able to give the jury clear directions. Justice professionals should receive training to understand not only domestic abuse but also the effects of trauma so that they understand the risks of re-traumatisation and are able to make decisions that are first and foremost in the best interests of the child

Question 18

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

Children 1st are extremely concerned that the proposals in this consultation could unfairly criminalise vulnerable parents, as set out in Question 1. We therefore strongly advise the Scottish Government to give further consideration to the issues raised by us and other respondents to the consultation, before drafting legislative proposals.

Question 19

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

Children 1st support the NSPCC's position that the 'abuse of trust' offence should be extended to cover other adults who have power, influence or responsibility over a child- such as sports coaches or tutors. Extending the offence to cover all persons in 'regulated work' will provide the strongest level of protection for children and young people. We recognise the scope of 'regulated work' is wide and believe that developing a separate, more narrow definition than that used in the Protection of Vulnerable Groups (Scotland) Act 2007 would continue to leave a loophole in the legislation, albeit smaller, exposing children and young people to greater risk.

An extension to the 'abuse of trust' offence needs to be considered in conjunction with the proposal to replace the definition of 'regulated work' in Protection of Vulnerable Groups (Scotland) Act 2007 with a list of 'protected roles'. Children 1st repeat here our concerns that a pre-determined list of roles or jobs 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. Through our Safeguarding in Sport service, which supports sports governing bodies and clubs to enhance children's wellbeing and keep them safe in sport, we are aware that sports use different and interchangeable names for different roles (for example: coach, mentor, trainer) and that this could cause confusion about which roles should be checked.

Question 20

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

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. Through Safeguarding in Sport, Children 1st are aware that while many sports and educational coaching organisations, for example those that are regulated by sports governing bodies, have policies, procedures and training for raising awareness and understanding of adults' responsibilities to children; individuals or small private businesses who coach or tutor may be less likely to have these in place. Education is particularly important given that section 45 (1b) of the Sexual Offences Act includes a defence that an adult (over the age of 18) did not reasonably believe that they were in a position of trust.

Guidance for the police and prosecution is also important. Children 1st fully support the widening of the offence and recognise that in some sports and other tutoring arenas young people may move into assistant coaching positions, from about the age of 16 onwards. Ensuring young people are fully aware of their responsibilities in coaching positions is crucial.

Children 1st are aware that Sportscotland only recently became aware of the consultation about extending the position of trust and are currently still formulating their response. Through our Safeguarding in Sport service, which we deliver in partnership with Sportscotland, we will be supporting them to consult with sporting organisations about these proposals and would like to reflect their thoughts in discussion with the Scottish Government as these proposals are further developed.

Do you have any other comments?

We include here a response from the Mum of a family that Children 1st have previously supported giving her thoughts on the consultation proposals.

"As always the idea behind this legislation is great but as often happens the ideas get lost when trying to work out how to word things or to put them into practice.

"What the legislators have to remember is that just making a new law or amending a law is not enough. You also have to make sure that the new law works in reality, and when you look at today's reality it doesn't work well.

"Today so many parents are faced with the overwhelming facts that they can't provide everything their child needs anymore and this is thanks to changes brought in by the UK government.

"When a parent is being faced with not having enough money to pay their rent and feed their children then there are big issues in the system. Parents have gone from being comfortable enough to meet their child's basic needs and whatever their child wants to being put in a position where they can be easily accused of neglecting their children because they have been stripped of supportive money while facing increasing bills. More than one in four (260,000) of Scotland's children are officially recognised as living in poverty and a large portion of them will be being neglected not because of their parents' choices but because of a failing government that are stripping them of the ability to meet their children's most basic rights.

“Before the Scottish government passes legislation that could villainise parents for something that is beyond their control, they need to make sure that they have given parents every possible support to lift these families out of this situation.

“As someone who was both emotionally abused and physically neglected I think that the legislators also need to look at whether people like me should be able to hold those who caused us harm to account. Because those who caused us this harm have then caused some of the neglect that is being discussed to be carried on to the next generation, not by choice but because we don’t have the necessary tools in place to do otherwise. There is no community to support us and the services that are left don’t have the funding or the man power to help us make sure that the same issues don’t occur for our children.

“It is important that the legislation is watertight, with no ifs, ands, or buts, so that nobody can say it’s open to interpretation.

“Unfortunately a proportion of parents who are seen to be putting their children at risk of emotional neglect or abuse are having this done to them due to lack of clarity in GIRFEC and named person. For me personally I was held on GIRFEC for my children, continually told that this was due to my expectations of my children being too high but not once was anybody able to tell me what these expectations were. After a year and a half of fighting for my eldest son to be supported by his school over the systematic bullying he was experiencing, I was left with no option but to pull him out and home educate him. Because of this decision, I was referred to social work, due to those in a position of power disagreeing with my position. Social work were completely happy that I provided a healthy, happy environment and made the best decision for my children.

“I do believe that the wording of the legislation needs to be brought up to date but I think that this needs to be done in a very careful way that gives professionals clarity and doesn’t allow for misinterpretation by those in a position to be able to make a positive change for children.

“The new legislation that is brought forward needs to be very clear that neglect is not providing the basic needs of a child such as food clothing healthcare and a house over their head and not a child’s wants because if it doesn’t stick to the basic needs then we feed more into a nation of belief that we need to provide all the latest fashion and tech in order to be bringing our children up properly which is not the case. We currently have a nation of children that would rather sit indoors and play on technology than go outside and interact with others and that is not going to provide well for these children when they are adults.

“We also have to make sure that there is adequate support available for families to be able to provide those basic needs and not have a situation where a parent has to decide between feeding their child and putting a roof over their heads which is one of the choices more and more families are facing on a daily basis even those who have two working parents.

“Before we try and change old legislation let’s put in new legislation and invest in support that will rebuild a crumbling society.”

For more information about this policy response please contact Harriet Hall, Children 1st Communications and Engagement Manager: harriet.hall@children1st.org.uk

ⁱ Morag, T. (2018) [Poverty and ACEs](#)

ⁱⁱ Bywaters, P. et al. (2017) [Identifying and Understanding Inequalities in Child Welfare Intervention Rates: comparative studies in four UK countries. Briefing Paper 4: Scotland](#)

ⁱⁱⁱ Couper, S. and Mackie, P. (2016) [‘Polishing the Diamonds’ Addressing Adverse Childhood Experiences in Scotland](#)

^{iv} Care Inspectorate (2016) [Joint inspections of services for children and young people 2014-16](#)

^v Accounts Commission (2016) *Social Work in Scotland* available at: http://www.audit-scotland.gov.uk/uploads/docs/report/2016/nr_160922_social_work.pdf

^{vi} Independent (2018) <https://www.independent.co.uk/news/uk/home-news/un-report-uk-poverty-austerity-government-cuts-special-rapporteur-benefits-callous-a8636901.html>

^{vii} People First (2018) [Statement on strengthening the law on neglect](http://peoplefirstscotland.org/files/2018/05/Statement-on-Neglect.compressed-4.pdf)
<http://peoplefirstscotland.org/files/2018/05/Statement-on-Neglect.compressed-4.pdf>

^{viii} Scottish Government (2016) [Equally Safe: national strategy](https://www.gov.scot/publications/equally-safe/) <https://www.gov.scot/publications/equally-safe/>