

## **Barnardo's Scotland, Children 1<sup>st</sup> and Children in Scotland, consultation response to proposals for the creation of an offence of wilful neglect or ill treatment with regard to services for children under the age of 18- further engagement**

*October 2015*

### **Introduction**

Barnardo's Scotland, Children 1<sup>st</sup>, and Children in Scotland, are submitting a joint response to this consultation due to our similar positioning on this important issue, bringing together our collective knowledge and expertise.

Our organisations welcome the decision of the Scottish Government to undertake further consultation on proposals to extend the offence of wilful neglect or ill treatment to services for children. We recognise that the integration of health and social care services and the passage of the Health (Tobacco, Nicotine etc. and Care) (Scotland) Bill through Scottish Parliament offers an opportunity to explore how children are protected when they access services in the context of the protections offered to adults, and to consider how those who 'wilfully neglect and ill-treat' children in a similar manner to adults, are punished.

Our organisations, however, are concerned that the introduction of a wilful neglect offence to children services has not been given adequate time to allow for the extensive debate that is required about the impact of introducing an offence that might potentially lead to practitioners (or directors of organisations) imprisoned in Scotland for failing in their duties- wilfully, or otherwise. We are disappointed that there has been no clarity given as to what would constitute wilful neglect within the consultation document and we believe that there is already legislation within criminal law in Scotland that means that the perpetrators of child abuse, in any setting, can be prosecuted. Before new legislation is considered we think there should be further thought as to where the gaps are—if any—in existing legislation. It is also not clear how these proposals will 'fit' with the other changes happening within children's services.

We wish to highlight at this point that our organisations firmly believe that those who abuse children in any setting should be prosecuted and brought to justice. Our concerns relate to the unintended consequences for children and young people in terms of services and the impact on their rights if practitioners and organisations take decisions based on fear of prosecution rather than in the best interests of children. We detail below the areas where we believe further thought is required in advance of any additional legislation. We would also welcome the undertaking of a Child Rights and Wellbeing Impact Assessment with regard to the proposals.

### **Definition of wilful neglect**

*Is abuse the same as wilful neglect or ill-treatment?*

Children can become at risk of, or suffer, abuse in the course of their involvement with services that are designed to care for and protect them. Our organisations believe that those who abuse children, in any setting, should be prosecuted by the criminal justice system and that there is appropriate legislation in place to do this. If someone, including a practitioner, abuses a child in Scotland, whether through neglect, or a physical or sexual assault, they are punishable by imprisonment under current legislation that is already in place. Legislation is also in place that recognises the particular gravity of an offence against a child where it has been committed by a person in a 'position of trust' (e.g. Section 43, Sexual Offences (Scotland) Act 2009).

We feel that the proposals do not make the distinction between abuse and wilful neglect/ill-treatment clearly enough, nor do they outline how this new proposed offence would sit alongside the already existing legislative framework.

Section 12, Children and Young Person (Scotland) Act 1937, "cruelty to persons under sixteen", is applicable to: "*any person who has attained the age of sixteen years and who has parental responsibilities in relation to a child (under 16) or has charge or care of a child, and wilfully assaults, ill-treats, neglects, abandons, or exposes him, or causes or procures him to be assaulted, ill-treated, neglected, abandoned, or exposed, in a manner likely to cause him unnecessary suffering or injury to health...*"

This offence should tackle abuse, neglect and ill treatment where harm has taken place, in any setting. We would welcome further discussion on the usefulness of this offence and if it needs to be amended to make it more effective, for example, by bringing the age up to "having not attained the age of 18" to be in line with the Children and Young People (Scotland) Act 2014, and the UNCRC.

#### *What constitutes wilful neglect or ill treatment?*

We are concerned that there is a lack of clarity around what constitutes wilful neglect, to what scenarios (real life examples) the proposed offence would and should apply, and a lack evidence as to why this approach would better protect children in Scotland. Additionally we are unclear as to whether the definition of wilful neglect would be the same as the one set out for adult services or whether there would be a specific definition for children's services.

Why, and in what circumstances, would an offence of wilful neglect be libelled against an individual or an organisation? The consultation document states that, 'the offence that we are proposing to create is not intended to cover instances of genuine error or accident' (para. 7). Responses to the first consultation on a Wilful Neglect offence sought further clarification as to what would constitute wilful neglect or ill-treatment. Many stated that poor practice was not the same as wilful neglect. The consultation document has not provided any clarification or scenarios as to what would constitute wilful neglect or ill treatment. By way of an example, we wonder if the serious errors in child protection identified in the death of Caleb Ness in 2001 would be an example of wilful neglect or ill treatment by either individuals or organisations. Arguably, the mistakes made in the care of Caleb Ness amounted to much more than instances of 'genuine error or accident'. However, it is not clear if the wilful neglect or ill treatment offence proposed would have been at all appropriate, even in light of the most

serious consequences of the failures by individuals and organisations. The Inquiry into the death of Caleb Ness found:

*"The Inquiry has reached the conclusion that this was an avoidable child death. Having reviewed all the evidence, we believe that neither parent should have had unsupervised care of Caleb. No single individual should be held responsible. We identified fault at almost every level in every agency involved."*<sup>1</sup>

No one individual was thought to be responsible and crucially, failings were found among all agencies- not only health and social care. As most decisions made about child protection are done so jointly, by a number of agencies, we would question if the proposals are the right ones for addressing institutional failures in children's services in Scotland.

If the threshold for what constitutes wilful neglect is not defined, there is a risk that practitioners will be criminalised for conduct that should be addressed through disciplinary procedures and not in the Scottish Courts.

### **Consultation timescales and current context**

We are concerned that there has not been adequate time for discussion about the consequences of this proposed offence, punishable by imprisonment, for individuals working with children in health and social care settings, and if this more punitive approach is necessary; or, that in fact, there may currently be no evidence available as to why the offence is needed.

We are also concerned as to whether the introduction of a wilful neglect offence, in light of the child protection safeguards already in place in health and social care settings, is proportionate; and, that this more punitive approach might lead to defensive and risk averse practice among the vast majority of professionals who are in caring professions to protect children and not to abuse them. If a punitive approach is used to try and drive up standards within health and social care, we would envisage that increased levels of anxiety around criminalisation among practitioners may either deter practitioners from entering or remaining within these fields.

The proposals do not appear to take account of the numerous positive changes that are happening within child protection in Scotland, including recent refreshes of the Child Protection guidance and the measures to be implemented through the Children and Young People (Scotland) Act 2014. These changes have not yet been embedded in practice but if implemented properly, should serve to mitigate against the risk of abuse to children within health and social care settings. They include earlier identification of vulnerable children and proportionate and relevant information sharing amongst agencies in order to ensure that children and families are given help and support when they need it, for as long as they need it. We are concerned that these wilful neglect proposals would overwhelm a workforce that is trying to come to terms with significant change and restructuring and would detract from the type of culture change that we should see within organisations through GIRFEC. Furthermore, we believe that the introduction of this offence to health and social care settings will not promote effective inter-agency working, a cornerstone of GIRFEC, but may likely encourage a 'blame culture' within multi-agency partnerships.

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<sup>1</sup> <http://www.nhslothian.scot.nhs.uk/publichealth/2005/ar2003/caleb/cnr.pdf>, p.6.

Rather than look at these issues now within the context of the Health (Scotland) Bill and a restricted Bill timetable, we would think it more appropriate that this debate should take place within the Cabinet Secretary for Education and Lifelong Learning's plans to announced a programme of action for child protection in February 2016, in partnership with those working within children's services to ensure that whatever measures which might be thought to be needed will strengthen the support for vulnerable children and young people in Scotland.

### **Scotland's Historical Abuse Inquiry**

In assessing whether or not there is a need for a wilful neglect offence in Scotland, we would seek to ask the Scottish Government why legislative changes are being proposed in advance of the work and recommendations of the Historical Abuse Inquiry. The Terms of Reference for the Inquiry include the following:

*2) To consider the extent to which institutions and bodies with legal responsibility for the care of children failed in their duty to protect children in care in Scotland (or children whose care was arranged in Scotland) from abuse, and in particular to identify any systemic failures in fulfilling that duty.*

*7) To consider whether further changes in practice, policy or legislation are necessary in order to protect children in care in Scotland from such abuse in future.<sup>2</sup>*

The Terms of Reference for the Inquiry include the identification of any systemic failures in protecting children in care in Scotland, and to consider if changes to legislation are needed. We would imagine that the Inquiry will, in due course, be best placed to identify gaps in legislation. Moreover, 'closed' institutions, such as state, private and independent boarding schools, which do come under the terms of reference for the Inquiry would appear not to be covered by proposals despite concerns about historical abuse in these settings. As the proposals do not include institutions that come under the terms of the Inquiry we could envisage that should this offence be introduced, it may need to be amended soon after its enactment.

### **Prevention of abuse in institutional settings**

Our organisations want children to be protected and safe from those who would abuse them within all settings. Tackling child abuse, however, in institutional settings is multifaceted and requires more than just legislation. Open and transparent practice is one of the best ways to prevent abuse taking place within institutional settings; for practitioners, the threat of criminalisation is not conducive to open and transparent practice.

### **Formal and informal settings**

While it would appear logical that a wilful neglect offence should only be applicable in 'formal' care settings, the lines between 'formal' and 'informal' in

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<sup>2</sup> <http://www.gov.scot/Topics/People/Young-People/protecting/child-protection/historical-child-abuse/terms-of-reference>

children's services are unclear. Increasing numbers of children and young people who are unable to remain at home are growing up with kinship carers. Kinship carers could be caring for children on a completely informal basis; through a private law arrangement such as a Kinship Care Order; or in a formal way through a decision made by a Children's Hearing. Depending on their location and arrangement some carers will receive allowances, others will not.

We are concerned that the terms 'informal', 'paid' and 'legal obligation' have not been considered carefully enough. Foster care is another example whereby care is paid for but the locus is within a private home. Under such circumstances where neglect of a child in foster care takes place, to whom would a wilful neglect charge be libelled, the individual carer or the local authority or organisation responsible for the contract, or all of them?

The lack of clarity around 'formal' and 'informal' settings applies also to Self Directed Support (SDS), where care can be commissioned and funded through public funding but managed by an individual in their own home.

This is problematic where direct payments are being utilised to provide personal assistants for children and young people. If personal assistants were not to come under the wilful neglect offence, children and young people receiving care in these settings would not be afforded the same protection, despite funding coming directly from a local authority. Given the protection the proposed offence may offer children who are cared for in other settings, we feel that this is unsatisfactory. We note that previous consultation responses have highlighted the need for clarification with regard to SDS and we would urge the Scottish Government to give this some careful consideration.

### **Role of the Care Inspectorate**

We believe that the Care Inspectorate could play a pivotal role in examining possible gaps in protection of children relating to neglect and ill treatment within organisations. There may also be a role for the Care Inspectorate in terms of their powers relating to serious concerns about the quality of a service, whereby they can issue improvement orders and take enforcement action, which may lead to closure of a service subject to the decision of the courts. Although the Care Inspectorate's Triennial Review states that overall, the numbers of enforcement actions taken were low, there may be potential for further and more effective use of these powers, if necessary, which would certainly fit within the wider improvement agenda. The Review also noted the number of additional measures that are in place to regulate and scrutinise service provision:

*"The Care Inspectorate's regulation of services is now complemented by the daycare of children workforce being regulated by the Scottish Social Services Council, meaning that scrutiny of service provision is supported by structures to ensure that managers and staff are qualified, accountable as approved practitioners, and receive the support of a professional network. The protection of children attending registered services has also been enhanced by the introduction of the vetting and barring scheme under the Protection of Vulnerable Groups Act. The Care Inspectorate has made a number of referrals of childcare providers registered with us to Disclosure Scotland for consideration for listing as unsuitable to care for children."*

We think that discussions relating to the potential role of the Care Inspectorate could again fall under the terms of the Cabinet Secretary's, to be announced, programme of action.

## **Conclusion**

We would urge the Scottish Government to consider what evidence is available to suggest that these proposals are currently needed in Scotland and how they would make children safer. We are concerned that the proposals will increase anxiety within already highly regulated children's services and will lead only to defensive and risk averse practices that will not be child centred. Children's services also need time to embed the recent legislative changes seen in the Children and Young People (Scotland) Act 2014. Furthermore, these changes, and the embedding of the policy framework of GIRFEC, accompanied by an open, fair and transparent culture within health and social care settings should help to mitigate against the risk of abuse, neglect and ill-treatment of children.

We would support further discussion of all of these issues, not within the restricted timetable of the Health (Tobacco, Nicotine etc. and Care) (Scotland) Bill. We think that this discussion would be much better placed within the programme of action for Child Protection that the Cabinet Secretary for Education and Lifelong Learning plans to take forward in early 2016.

Please do not hesitate to contact us should you wish to discuss any of our comments further.

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