

RESPONSE TO THE SCOTTISH GOVERNMENT'S CONSULTATION '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'

November 2018

We welcome the opportunity provided by the Scottish Government's review of Section 12 of the Children and Young Persons (Scotland) Act 1937 (the 1937 Act) and Section 42 of the Sexual Offences (Scotland) Act 2009. This review enables a focus of attention on emotional abuse and neglect in Scotland, particularly their impact on children; the societal and structural factors which influence and compound them; and consideration of what is required to address these issues, protect children, and increase wellbeing within families and communities. In March 2017, the Scottish Government's Child Protection Improvement Programme (CPIP) concluded that there would be benefit in amending the 1937 Act, given the evolution in the understanding of neglect in recent years.¹ Alongside this conclusion, the complexity of such amendments are recognised by CPIP, and this consultation process provides the opportunity to fully consider them.

Key messages

- Scotland's legislation should recognise the seriousness of all forms of abuse and neglect, and reflect a modern day understanding of these issues.
- Legislative reform is only one small part of the approach required to protect children from neglect and abuse.
- The focus and energy of policy and practice should be on prevention, and providing early and effective supports to families through a Girfec approach, working holistically within the ecological context of children and families' lives.
- Legislative amendments must avoid unintended consequences, particularly the criminalisation of vulnerable parents who require support.

Background

The impact of neglect and emotional abuse is extensive, and differs depending on a child's unique situation and family circumstances. Such impacts may include difficulties in mental and physical health; self-esteem; managing relationships; speech, language and communication; and emotional regulation. In some situations, abuse and neglect can be so serious that they lead to the

death of a child.² The array of factors associated with neglect within families are similarly wide-ranging, including (but not limited to) issues such as poor housing, poverty, parental mental health and drug and alcohol use.³ Multiple factors contribute to child abuse and neglect, as such, consideration of the societal and environmental elements which impact on the abilities of parents to meet the needs of their children is required in any response.⁴ This ecological perspective important to retain, and is reflected in Scotland's national approach to supporting children's wellbeing, [Getting It Right For Every Child](#) (Girfec).

As discussed by Professor Brigid Daniel et al in the [Review of Child Neglect in Scotland](#), published by the Scottish Government in 2012, neglect is one of the most damaging childhood experiences, associated with some of the poorest emotional, behavioural and cognitive outcomes.⁵ As such, it is an issue of significant concern in Scotland. Due to the range of definitions and thresholds used to describe and categorise neglect, it is difficult to confidently assert rates of prevalence, though some evidence suggests as many as one in ten children in the UK experience some form of neglect.⁶ Scottish Government statistics show that of the 2,631 children on the child protection register on 31st July 2017, neglect was a concern in 36% of cases.⁷ This alone is unlikely to be an accurate reflection of the prevalence of neglect in Scotland, official data records only what is known to the authorities, and children who are not subject to formal Child Protection processes will be experiencing neglect.⁸

Emotional abuse is a concern for 38% of children subject to registration on the Child Protection register in Scotland.⁹ All forms of abuse and neglect may include an element of emotional abuse, but it can also be experienced in isolation. In any form, emotional abuse can have serious, harmful long term consequences for children. Whilst the damaging impacts of physical and sexual abuse have been historically recognised, the same cannot be said of emotional abuse until more recent years. Immediate and observable harm from emotional abuse may be less visible, and the impact of emotional abuse has been less well understood.¹⁰ However, with advancements in our understanding of trauma, attachment, and brain development, and the developing societal understanding of the impact of adverse childhood experiences, the pervasive impact of emotional abuse across the lifespan is now widely recognised.

Article 19 of the [United Nations Convention on the Rights of the Child](#) (UNCRC, 1989) sets out children's rights to protection from all forms of violence and abuse. Children themselves recognise that neglect can be physical or emotional, but often feel that emotional neglect is worse. Whilst basic needs like food and clothes are important to children, having a good home, good health and love from their parents are also key things that matter.¹¹ Wherever possible, the approach taken in Scotland to meet needs and improve children's wellbeing is one of partnership with families. Through the Girfec approach, by providing the right help at the right time, families can be supported to meet their children's needs in most circumstances. Where this is not possible, there may be a need for more formal state intervention. In a very small number of the most serious

cases, in order to protect children from abuse and neglect, criminal prosecution may be appropriate. It is important that Scotland's legislation recognises the seriousness of abuse and neglect, and reflects a modern day understanding of these issues.

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?

There are a number of benefits to the reform and modernisation of the offence in section 12 of the 1937 Act. Modernisation provides welcome opportunity to bring archaic language (e.g. the term 'mental derangement') up to date, and reflect a more modern day understanding of neglect. Antiquated language alone is not necessarily reason enough to change the law however, particularly if it is working well in practice. However, there is an apparent lack of clarity over whether the current offence in section 12 covers emotional abuse. Given the developments in our understanding of abuse and neglect over time, and the recognition of the harmful impact of emotional abuse on children, reform and modernisation to reflect this are required to ensure legal protections are in place for children from all forms of abuse and neglect.

This is not a straightforward case however, and considering any reform provides an opportunity to consider complex issues such as the nature of the offence, the age of victims and perpetrators, who can commit the offence, and definitions of neglect. Reform offers the chance to address confusion, in particular to matters of wilfulness/intent on the part of the perpetrator.

Alongside these opportunities, there is a need for care and attention to potential unintended consequences of changes to the legislation. Importantly, criminalisation of vulnerable parents and carers whose needs (and the needs of their children) would be better met through support, must be avoided. This is enshrined in the principles of key legislation such as the Children (Scotland) Act 1995, which requires partnership with families, and the provision of support to enable families to bring up their children.¹² Additionally, care must be taken to avoid negative impacts on the current usefulness of the legislation in protecting children. For example, through our networks, it is our understanding that the use of section 12 currently works well in terms of framing grounds for Children's Hearings, thus ensuring children receive the attention and support they require through this system. Any changes to the legislation must ensure this continues to be enabled.

It is of paramount importance that legislative reform is recognised as only one small part of the overall approach to protecting children from neglect in Scotland. Criminal prosecution should be reserved for the most serious and extreme cases of child neglect, and instead the focus and energy of policy and practice should be on prevention, and providing early and effective supports to families through a Girfec approach. Such an approach recognises and works holistically within the ecological context of children and families' lives,

attempting to address the impact of issues such as stress, poverty and community conditions. Whilst we are clear that abuse and neglect occur in all parts of society, it is established that the prevalence of child abuse and neglect is correlated with poverty and family socio-economic circumstances.¹³ Tackling these issues, and responding early and comprehensively to children's needs, should be the primary focus of all agencies working with children, families and communities, rather than emphasising punitive, criminalising responses which fail to take the context of families lives into account. In addition to the Girfec approach, legislative provisions such as [Part 12 of the Children and Young People \(Scotland\) Act 2014](#), (whereby local authorities must provide relevant services to families where children are at risk of becoming looked after) require a service response commensurate to the levels of need within families, in order to ensure children can continue to be cared for in their families. Families often find it incredibly difficult to ask for help when problems emerge, as such every attempt should be made to minimise the stigma associated with the provision of services and supports to alleviate neglect. Focusing too heavily on 'criminal' neglect is likely only to compound stigma and make it more difficult for families to seek help.¹⁴

Question 2) Do you think that existing concepts of 'neglect', 'ill-treatment', 'abandonment' and 'exposure' should be defined in the legislation?

Currently, there is no definition within the law itself of the concepts listed, however the meanings have become established through case law. We do not disagree with intentions to provide clear statutory definitions, if this removes ambiguity. If these concepts are defined in the law, this should be as succinct as possible in order for the law to be clear, and language should be chosen carefully in order to future-proof legislation and avoid requirements to modernise it again in the foreseeable future.

Defining the concepts is not straightforward, and guidance to provide more detail and further reduce any ambiguity is likely to be extremely useful. There is a need for coherence with existing definitions, as it is argued that the range of definitions for concepts, such as neglect, have led to over complication which impacts the effectiveness of responses to neglected children.¹⁵ Definitions used in the 2014 guidance [National Guidance for Child Protection in Scotland](#) are shared by multi-agency partners, and provide an important framework which should not be ignored. This guidance is soon to be refreshed by the Scottish Government, which should be taken into account in order to ensure alignment with the most up to date definitions in use.

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

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.

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

On balance, no. 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.

Question 3) Do you have any thoughts on how professionals dealing with children and families can be supported to identify when cases reach a criminal threshold?

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. Practitioners strive to work with families in solution focussed ways, within an ethos of partnership and relationship-based practice. Establishing supportive relationships and trust is challenging, yet is vitally important in working effectively with families where children may be experiencing neglect, families who often feel blamed and threatened when statutory services are involved.¹⁶ Language of 'identifying criminal thresholds' contrasts starkly to this approach, and could be unhelpful, particularly in the context of Girfec which aims to provide early support and avoid the escalation of problems into crises. Preoccupation (or even the *perception* of a preoccupation) with concerns about criminal liability could actively undermine trusting, supportive relationships between families and professionals, to the detriment of the effectiveness of the support.

Research evidence, and learning from CELCIS' ['Addressing Neglect and Enhancing Wellbeing'](#) programme, highlights the more pressing need is in supporting professionals (particularly those in universal services and those undertaking the role of Named Person) to identify neglect, on a cumulative basis; and have the skills, knowledge and confidence to intervene earlier to prevent it from escalating.¹⁷ There is limited training, coaching and mentoring for some such professionals, to support their practice and understanding around neglect and unmet need. This is an area on which to focus attention, to ensure professionals working daily with children and families have the knowledge, skills and confidence to intervene at an early stage, or to escalate concerns appropriately (and be met with a helpful response) if required. This also begins to highlight the complexity of the concept of 'thresholds' generally, which are not

straightforward and in practice differ nationally, across agencies, and even locally within areas and teams.

It is clear that other professionals working with children and families have a different role to the police. However, regardless of the approach taken to working with families, we are clear that these professionals must not tolerate persistent, serious neglect, or become blind to it. Reflective practice and high quality supervision are important in this. In Scotland, learning from Significant Case Reviews reminds us that neglect is often an underlying feature in cases resulting in the death or significant harm of a child.¹⁸ Where concerns are serious and significant, or where early intervention, prevention, relationship based practice and partnership with families does not result in improvements for children, escalation of concerns should take place through multi-agency routes, rather than practitioner decisions alone.

The approach to identifying and responding to serious cases of neglect should not perpetuate existing societal inequalities. Evidence shows that a clear social gradient exists in the rates of children subject to formal child welfare interventions (such as becoming looked after, or child protection registration), with children in the most deprived 10% of small neighbourhoods 20 times more likely to be subject to such interventions than those living in the least deprived.¹⁹ Families in deprived neighbourhoods are more likely to receive the attention of services, and whilst we know that children from families living in poverty are more vulnerable to experiencing neglect, as Professor Paul Bywaters (2016) states, "poverty is neither a necessary nor sufficient factor in the occurrence of child abuse and neglect".²⁰ Neglect also occurs in affluent families, and recognising it (and its impact) can be a significant challenge in these cases.²¹

Question 4) Do you have any thoughts on how we can support legal professionals to further understand the impact of neglect and emotional harm on children and young people?

The impact of neglect and emotional harm on children and young people is becoming increasingly better understood in Scotland. For example, recent developments in societal understanding of Adverse Childhood Experiences (ACEs), studies of which recognise the harm that can be caused by certain experiences in childhood with significant impacts throughout the life course. Abuse and neglect (both emotional and physical) are recognised categories of ACEs.²² There is a wealth of accessible, evidence based information available, through which legal professionals can further understand the impact of neglect and emotional harm on children and young people. Shared learning opportunities with multi-agency professionals working with children and families may enhance understanding.

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 of such harm. Acknowledging this, and exploring solutions is arguably more crucial.

Question 5) Do you think that children in Scotland should have clear legislative protection from emotional abuse?

Yes. We agree with the policy intention to establish beyond doubt that in terms of section 12 of the 1937 Act 'neglect' includes emotional neglect, and 'harm' includes emotional harm. The impact of emotional abuse on children can be significant and lifelong, often hidden from view, yet remaining long after any physical wounds have healed.²³ For adults, the seriousness of emotional abuse is recognised and protected against through the [Domestic Abuse \(Scotland\) Act 2018](#). This legal protection must also be afforded to children, as established under Article 19 of the UNCRC. Under [Part 1 of the Children and Young People \(Scotland\) Act 2014](#) there is a requirement for Scottish Ministers (and others) to consider any steps which might further effect UNCRC requirements in Scotland. To realise the ambition for Scotland to be the best place in the world for children to grow up, this legislative protection is necessary.

Establishing clarity that the law in Scotland does protect against emotional abuse requires careful construction of the wording and definitions of the emotional harm covered by the offence. As previously stated, the National Guidance for Child Protection in Scotland will be useful in this process, particularly in relation to considerations of 'significant harm'. Amendments to legislation in England and Wales in 2015 clarified that emotional abuse and emotional neglect are covered by the offence of 'child cruelty'. Definitions used in [Section 66 of The Serious Crime Act 2015](#) may also prove helpful in considering Scotland's definition.

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.

Question 6) Do you have examples of the sorts of behaviours and their effect on children that should or should not be captured by any revised offence?

Attempts to formulate an exhaustive list of such behaviours are unlikely to be successful. Whilst we agree with the examples provided in the consultation document, relying on an entirely prescriptive list will fail to capture the perspectives of individual children. There should be room within the legislation to recognise any behaviour which causes significant emotional harm to a child. This will differ for different children dependent on their unique needs, characteristics and experiences.

Ensuring effective and accessible support for parents and carers to understand the impact of emotional abuse, and what constitutes emotional abuse, is critical. This is true for all parents and carers, and particularly so for those who are additionally vulnerable, for example those who may be experiencing mental

health difficulties or who have learning difficulties. For example, responses to 'rejecting' behaviour where a parent is affected by depression must take into account the particular vulnerabilities of the parent in context, and respond based on the support required by the family to meet the child's needs. Responses which recognise and respond to the needs of children and families, rather than criminalising vulnerable parents, must be the priority.

Question 7) Do you think the deeming provision in section 12(2)(a) concerning failure to provide adequate food, clothing, medication, or lodging should be changed?

Whilst we do not have a strong view that changes are required to the deeming provision in section 12(2)(a) themselves, we do have concerns about the potential for parents or carers who are the victims of domestic abuse to be held criminally responsible under these provisions. 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.

Question 8) Do you think the deeming provision in section 12(2)(b) concerning the suffocation of a child while in bed should be changed?

Yes, if this provision is retained, it would be sensible to update it to include the influence of illicit drugs (as well as alcohol), and to include sleeping on any surface (as opposed to only a bed). Evidence suggests that infants sleeping with parents who have consumed illicit drugs and/or alcohol are at the highest risk from sudden infant death syndrome, and that a parent sleeping with an infant on surfaces such as a sofa or couch is also extremely dangerous.²⁴

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.

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?

The complexity in proving the risk of harm occurred, or that actual harm occurred (especially in cases of emotional harm which may be less immediately visible), is appreciated. However, it is unclear how the introduction of the 'reasonable person' test, whereby, to establish if risk was present, the court considers whether a 'reasonable person' would consider the behaviour to be

likely to cause harm, simplifies matters. It still requires a consideration of the likelihood of harm by the court.

Additionally, the concept of a 'reasonable person' is to some extent subjective, and likely to differ between individuals. The impact of the use of this test on vulnerable individuals and groups should also be considered. For example, if the actions (or inactions) of a parent or carer with learning difficulties were considered through the reasonable person test to be likely to cause harm, does this imply the parent or carer is somehow 'unreasonable'? This is stigmatising, and should be avoided.

Question 10) Do you think a provision equivalent to section 12(3) should be included in any revised offence, either in its current form or amended?

Yes.

Question 11) Do you think that the offence should apply wherever a person wilfully and deliberately acted or neglected to act in a way which caused harm or risk of harm, regardless of whether they intended the resulting harm/risk?

On the one hand, if the offence exists solely to protect children from harm or risk of harm, the intent of the perpetrator is not relevant. The fact of the matter is that where neglect or ill-treatment occur, by omission or commission, the parent or carer has failed in their legal duty to meet their parental or caring responsibilities, and so have committed an offence. Their intent to harm, or recklessness as to whether harm could occur, are not part of the question. The question is solely about whether or not they deliberately acted (or failed to act) in a manner which resulted in harm or risk of harm. This is the current construction and interpretation of the law in Scotland.

This is contrasted to the position in England and Wales, where the court *does* take into account the accused intent to cause harm, or recklessness as to whether harm is caused.²⁵ There are benefits to this approach, given the purpose of pursuing criminal prosecution against parents or carers who have not intended to cause harm is difficult to grasp. Whilst not impinging on the abilities of civil systems and supports to intervene to protect children, taking intent into account provides greater protection from criminal prosecution for vulnerable parents who have not intended harm. There are also drawbacks to consider, such as difficulty for the courts in proving intent to harm, even where it may exist. Additionally, if the decision were taken to require intent in order to pursue criminal convictions, changes would be required to the grounds of referral to the Children's Hearing, to ensure certain cases of neglect could still be referred despite there being no criminal law element.

On balance, and given the arguments made already about the need to prioritise supportive work alongside families to tackle neglect, rather than taking a punitive, criminalising approach, we support the consideration of intent to harm

in determining if an offence has been committed. This will help to ensure that criminalisation only occurs in the most serious cases, avoiding unnecessary criminalisation and the damaging impact of this on individual's lives. It is, of course, vital to protect all children from neglect and abuse. Where abuse and neglect are not intentional however, as long as the right services and supports are in place, this can be achieved through a Girfec approach, robust child protection responses where necessary, and the operation of other civil proceedings such as Children's Hearings in some cases.

Even if the decision is not taken to require a consideration of intent to harm, at the very least there must be clarity in the position and the wording of the law. The use of the word 'wilful' is currently confusing, and leads many to understand intent to harm currently **is** required to establish the offence, when in fact it is not. Rather, the term 'wilful' currently refers only to whether the act which resulted in the neglect was done deliberately, as opposed to inadvertently.

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

- **intend to cause harm to a child by their action or inaction? or**
- **intend or is reckless as to whether harm is caused?**

This depends upon the definition of 'reckless'. It is 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.²⁶ However, without careful definition, the term 'reckless' has the potential for unintended consequences, such as criminalisation of vulnerable groups. If recklessness is determined by an objective test, for example, if it is established to be behaviour which a 'reasonable person' would consider to be reckless, vulnerable parents or carers, such as those with learning difficulties, may be disproportionately and unfairly affected.

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.

Question 12) Who should be capable of committing the offence?

The offence should protect children from abuse and neglect by the adults responsible for caring for them. 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.

Question 13) Do you think the legislation should set out the age of a perpetrator?

Yes. As noted above, the offence exists to protect children from abuse and neglect by the adults responsible for caring for them. It is not intended to enable the criminalisation of young people (such as babysitters or siblings) left with the care of a child, nor should it be. Removing the reference to the age of the perpetrator makes this less clear, and more confused.

If yes, what should the age limit be?

We support an age limit of 18 for a number of reasons. Firstly, to align with our views on the age of the victim. It is logical for the ages to align, 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. Secondly, because we fail to see the circumstances under which it would be helpful to prosecute a young parent, rather than supporting them, and if necessary ensuring the safety of the child through child protection proceedings or via the Children's Hearing System. We note the prosecution statistics for section 12 for people under the age of 18 as being zero since 2013.²⁷

Question 14) Do you think that a child should be defined as aged 18 or younger in relation to the offence?

On balance, yes.

We fully acknowledge arguments which caution against raising the age of both perpetrator and victim from 16, on the grounds that the vast majority of parental responsibilities end when a young person reaches the age of 16, as established in [Section 1 of the Children \(Scotland\) Act 1995](#). Therefore it is argued that neglect of these responsibilities is not possible beyond this age. Thus raising the age may alter the nature of the offence, or at least its congruence with other law. These issues require careful thought, but do not necessarily preclude our support for the evolution of the law where there is the possibility for improvement. Inconsistencies within the law exist already, in terms of ages of childhood and adulthood, particularly with regard to 16 and 17 year olds, for example [Section 199 of the Children's Hearings \(Scotland\) Act 2011](#) states that a child is a person who is under 16 years of age. [Section 97 of the Children and Young Persons \(Scotland\) Act 2014](#) considers a child to be a person who has not yet obtained the age of 18. It is beyond the scope of this consultation to fully explore these inconsistencies, but it is important to acknowledge that they exist already.

The need to recognise and respond to 16 and 17 year olds in need of protection as children first is recognised in CPIP's 2017 report.²⁸ Although it can be conceptualised differently in different stages of childhood, adolescents also experience neglect, and (as with children of any age) this is associated with negative outcomes.²⁹ These young people are often equally vulnerable to younger children, and require equal protection from abuse, neglect and harm. Under [Part 1 of the Children and Young People \(Scotland\) Act 2014](#) there is a

requirement for Scottish Ministers (and others) to consider any steps which might further effect UNCRC requirements in Scotland. Article 1 of the UNCRC recognises a child as any person under the age of 18 years, and the rights and protections under the convention, including Article 19 rights to legislative protection from abuse and neglect. In recognition of the vulnerability of those under 18, and the provisions of the UNCRC, we support a recognition of victims of the offence under section 12 of the 1937 Act as anyone under the age of 18.

Question 15) Do you think the current penalties for a section 12 offence should be amended?

In determining whether financial penalties are appropriate, it should be remembered that there is a strong association between families' socio-economic circumstances and the chances that children will experience child abuse and neglect.³⁰ We need to recognise the heightened risks that families living in poverty face. Compounding existing financial difficulties by imposing a fine is unlikely to be the most suitable option.

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?

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.

With regard to domestic abuse, we are aware of the extensive work of colleagues in the children's sector and beyond (such as Barnardo's Scotland, NSPCC, Children 1st, CYPCS and Scottish Women's Aid) who will address these issues comprehensively in their submissions. We support their position.

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?

Please see Q16 regarding our support of the extensive work of those in the children's sector on this issue.

Question 18) What further steps could be taken to ensure vulnerable parents are not unfairly criminalised?

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. The level of need within families is not always met by

systems and services, parents and carers find it difficult to ask for help, and those best placed to help do not always know how to respond effectively.³¹ In local areas, there may be limited services available to provide the help which families require. This is in spite of clear legislative requirements, such as the provisions under [Part 12 of the Children and Young People \(Scotland\) Act 2014](#), whereby local authorities must provide relevant services to families where children are at risk of becoming looked after. A review of the implementation of Part 12 is currently underway, and attention to its findings is highly relevant to this consultation. We must ensure the right services and support are available to families who require them, before considering criminal responses.

In terms of the law itself, suggestions have been made in this response which could mitigate against the unfair criminalisation of vulnerable parents, such as ensuring considerations of intent, recklessness, and the provision of support services. Procurator Fiscals pursue cases only when they are on the public interest, and this should be informed by consideration of the vulnerability of parents. However, by this stage vulnerable parents will have already been through the stressful and upsetting process of being charged with an offence, so taking account of vulnerabilities at the earliest possible stage is of equal importance.

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?

[Section 43](#) of the [Sexual Offences \(Scotland\) Act 2009](#) establishes the conditions which must be met for a person to be in a 'position of trust'. These include persons looking after those under the age of 18 within institutional settings, such as schools, hospitals and custodial settings including secure accommodation. The conditions also include family relationships, and those who care for children who are looked after away from home (such as residential carers, formal kinship carers, and foster carers).

Given the range of other positions which adults may occupy, which place them in powerful and influential positions in relation to children and young people, we agree that the current definition is overly limited. We support the extension of the definition of a 'position of trust' to include persons undertaking regulated work with children, as determined by the Protection of Vulnerable Groups (Scotland) Act 2007. Attention should be paid to the current review of the disclosure regime in Scotland. Consultation on this review includes proposals to replace the idea of 'regulated work' (which can be open to interpretation) with a list of 'protected roles', to ensure clarity.³² If the extension of the 'position of trust' is taken forward, and aligned with definitions of regulated work, care should be taken to do so in a manner cognisant of the review of the disclosure regime to avoid the need for further changes imminently.

We recognise concerns that an extension of the definition of a 'position of trust' could result in some adults being unaware of their inclusion within the new

definition. It is necessary to ensure suitable levels of public awareness and understanding of any legislative change, and care should be taken to ensure any adult in a potentially powerful or influential position over children and young people is aware of their responsibilities to protect them.

About CELCIS

CELCIS is Scotland's centre for excellence for children's care and protection, based at the University of Strathclyde. We work to ensure the best international evidence is reflected in policy and practice, strengthening the skills and capacities of people who care for children and young people. CELCIS is part of the Institute for Inspiring Children's Futures, working together to build brighter futures for children in need of care and protection around the world.

Thank you for providing us with this opportunity to respond. We hope the feedback is helpful; we would be happy to discuss any aspect in further detail.

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