



Law Society
of Scotland

Consultation Response

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

13 November 2018



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Criminal Law Committee along with our Family Law Sub-committee welcome the opportunity to consider and respond to the Scottish Government's "Protecting Children: Review of section 12 of the Children and Young Persons (Scotland) Act 1937 (section 12 offence) and section 42 of the Sexual Offences (Scotland) Act 2009"¹.

The review of the section 12 offence is timely. There is a need for legislation passed for the 1930's to be reviewed in the light of ever-evolving views and values of our society. It is important to take account of attitudes of society to protect our children which have moved on substantially. The law requires to be flexible to ensure that legislative changes that will be developed consider these changed views and values. For legislation to work, it must be able to accommodate such changes.

Response

Question 1 Do you think that the offence in section 12 of the Children and Young Persons (Scotland) Act 1937 would benefit from reform and modernisation?

Yes.

Specifically, we note the policy objective that "[the section 12 offence] ... does not take account of modern understanding of neglect"² and that it should afford protection of children from harm, including emotional harm. We conclude too that the section 12 offence therefore requires to be updated. The consultation

¹ <http://www.legislation.gov.uk/asp/2009/9/contents>

² Paragraph 1.8 of the consultation

highlights that the impact of neglect on children is much more developed than in the 1930's and has long term and negative effects which last a lifetime³.

A range of legal issues will need to be tackled in relation to both the implementation of that policy objective in ensuring that the legislation is modernised to reflect the views and values of today's society.

In modernising, the relevant law needs to serve two objectives:

- the prosecution of crime (where the accused's actions justify appropriate punishment for the offence, provide a deterrence to others from committing that or similar offence, make them accountable for their actions, denounce their conduct and recognise the harm that the actions caused to the child or affected person and protect the public from the accused), and
- the protection of children, where the intervention of public authorities is called for to prevent children suffering harm.

These two objectives overlap, so where a relevant offence has been committed in circumstances that bear on the care of a child, public authorities can step in to protect the child.

Question 2: Do you think that existing concepts of “neglect”, “ill-treatment”, “abandonment” and “exposure” should be defined in legislation?

Yes.

The terms should be defined in legislation as this provides clarity in relation to the law for:

- the public, so that they are aware of what conduct amounts to an offence,
- Police Scotland and the prosecution authorities in being aware what conduct is set out as being criminal, and
- the courts in determining when there should be a conviction.

We recognise that there can be difficulty in setting specific definitions as the definitions will need to be broad enough to encompass all relevant offending behaviour because of the nature of the offence. It is best defined in legislation as otherwise, as is recognised in the consultation, determination lies with the courts in the development of case-law rather than set out by the legislature which is the preferred practice.

We agree that both “abandonment” and “exposure to risk” should be deleted. These seem somewhat archaic and vague terms which can best be included within the definition of neglect as proposed in the consultation.

³ Paragraph 4.2.4 of the Consultation

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?

The term “professionals” seems rather wide. We assume that this intends to refer to social work, teachers and the medical profession amongst others. Everyone dealing with children and families should be aware and trained in the relevant law. If the law changes as a result of this consultation, they should be aware of the changes and what conduct is termed to be criminal. Training should encompass knowledge of the relevant law. It should include an understanding of what is required from the prosecution perspective. As identified in the consultation⁴, there is scope for the promotion of guidance in due course⁵.

We note the reference to difficulties that the police and front-line practitioners experience⁶; it would be helpful to understand exactly where these problems lie with examples. That would help all including our solicitor members in advising clients from both a civil and criminal law perspective where any misunderstanding arises.

In cases of doubt, professionals can be advised to consult the Police or indeed the prosecution service for advice. For a crime to have been committed and any action to follow, the facts and circumstances of the alleged offending behaviour would need to amount to a crime and there would require to be sufficient admissible and corroborative evidence in accordance with the normal Scottish criminal evidential rules. Any prosecution too would need to be in *the public interest* (our emphasis) as determined by Crown Office and Procurator Fiscal Service (COPFS). Similarly, COPFS would determine which forum was appropriate to the prosecution as such cases could justify. Depending on the seriousness of the case, prosecution would be in either by summary or solemn procedure.

We recognise too in practice, that there are regularly circumstances where children require protection, but there can be no prosecution. There may be a number of reasons for this. There may be insufficient evidence as highlighted above. The circumstances that may not justify prosecution.

In many such cases this may well be the more beneficial result as it allows support and assistance to be given to parents, in ways that may be much more difficult if they are stigmatised as criminals. The effect too of any conviction cannot be underestimated in relation to an accused’s employment and travel.

It will allow respect for family life in terms of article 8 of European Convention on Human Rights by allowing a proportionate response to what may be a difficult situation. This consultation may well change the balance by promoting the more possibility of prosecution. That could be potentially counter-productive as far as the wellbeing of children is concerned as parents are less likely to seek help if they risk prosecution.

⁴ Paragraph 4.2.9 of the consultation

⁶ Paragraph 4.2.9 of the consultation

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 persons?

Again, the reference to “legal professionals” is somewhat unclear. Our members include prosecution, defence, part-time judiciary and civil lawyers so they come into the system at different points. They will be involved with children and their parents, so it is difficult to provide an answer.

Their role is to provide legal advice and where relevant that will inevitably include support.

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

Yes.

As the consultation outlines, abuse includes emotional abuse in Scotland. The Scottish Government are considering amendment to the law which provides an opportunity to remove the current lack of clarity. This opportunity should be seized.

The first issue relates to the proposed extension of criminal activity to include “emotional abuse”. Examples are provided in paragraph 4.2.17 of the consultation that describe activities that are no doubt harmful and distressing. These may be behaviours from which a child may well require protection. When the behaviour reaches a sufficiently secure definition of actions amounting to criminal behaviour and avoids inappropriate criminalisation will be difficult. It is a rare family where an adult never loses their temper or becomes irritated. Creating a criminal offence in these circumstances may risk interference in family life that could be destructive to children and to society generally. We provide examples as follow:

Adopted children: They, in particular, struggle in relationships with their adoptive parents, especially in puberty. It is recognised that:

“.. for a minority of families, the adoption journey can at times be fraught with difficulty and in some instances, this results in the child moving out of their adoptive home prematurely (referred to as adoption disruption)”.⁷

⁷ ⁷ Beyond the Adoption Order: challenges, interventions and adoption disruption April 2014
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/302339/Final_Research_brief_-_3rd_April_2014.pdf

Allegations being made by children of alleged conduct by parents are a recognised phenomenon. Parents undertaking adoptions will likely have been doing their best to cope but may under the changes being proposed face criminal charges (and significant stress) as a result of such allegations, if unfounded, on top of the distress and impact of the family breakdown. This could have the potential further effect of discouraging future potential adopters.

Parents with mental health conditions: They may present as enraged, or indifferent. They would require support just as for any other vulnerable person within the criminal justice system rather than face prosecution.

Family breakdown: In such situations, the availability of prosecution risks “weaponising” parents in disputes over arrangements for their children. Prosecution risks limiting the availability of mediation and compromise, which is in the best interests of children.

Parents with particular religious or philosophical beliefs: They may find themselves criminalised in respect of allegations of “bigotry”. If a parent insisted on a child attending a mosque, temple or church, or disapproved of behaviour that was outside the religious norms of their community, would that be termed “emotional abuse”?

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?

We refer to our answer to Question 5 above. As we highlight there, we would urge the Scottish Government to consider carefully the issue of religious doctrine. There is a danger that we might criminalise a parent giving religious teaching to a child where such teaching is at odds with what the prosecution considers to be reasonable. The example which we would provide relates to a Muslim father who told his sons about the punishment that would be visited on their mother in the next world because of her adultery and the punishment that should be visited on her in this one.

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

No.

We consider that the existing law is adequate and clear as it stands.

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

Yes.

We consider that abuse of illicit drugs is widespread. They are as dangerous as alcohol in this context in relation to those responsible for protecting children. It should constitute criminal offending.

Question 9: Do you think that the test for establishing whether harm or risk of harm occurred should include the requirement that a “reasonable person” must consider that the behaviour likely to cause harm?

Yes.

The consultation proposes to define criminal activity (*actus reus*) by reference to the test of how a “reasonable person” would judge the action.

The “reasonable person” test is frequently used in relation to the civil law concept of negligence. It is not a concept generally employed in the criminal law. In *R v Shepherd*,⁸ Lord Diplock explained that:

“The concept of the reasonable man as providing the standard by which the liability of real persons for their actual conduct is to be determined is a concept of civil law, particularly in relation to the tort of negligence; the obtrusion into criminal law of conformity with the notional conduct of the reasonable man as relevant to criminal liability, though not unknown (e.g., in relation to provocation sufficient to reduce murder to B manslaughter), is exceptional, and should not lightly be extended...”.

This seems to be the extension that is being proposed in this case. It is also proposed in relation to the *actus reus* and not the state of mind of the accused (*mens rea*). The warning as highlighted above from the House of Lords, albeit in an English case, should be considered before this step is taken.

It does have the potential to be a highly material extension of the criminal law, with significant effects on families in the sphere of child protection. It may also be a rather uncertain test when extending the sphere of the criminal law to include cases involving a novel and nebulous concept such as “emotional abuse”.

*JM v Brechin*⁹ considered the *mens rea* of the existing section 12 offences. At paragraph 77, Lord McGhie called for clarity over the issue of intention. The issue was whether the intention to perform the act in question was sufficient, without intention to cause the consequences. The Lord Justice-Clerk and Lord

⁸ [1981] AC 394

⁹ 2016 SC 98.

Malcolm supported the existence of an offence of ill-treatment, without requiring any intent to cause harm, based on the quality of the act involved.¹⁰ The action itself was categorised as “cruelty”.

The less obvious the cruelty involved, the harder it may be to justify the act as criminal, without an appreciation on the part of the offender of the harm being caused. As Lord Malcolm¹¹ explained:

“If one does not give proper weight to the need for ill-treatment (or in another case, neglect) in the sense of cruel conduct towards children in violation of a parental or equivalent duty, there is at least a risk of criminalising deliberate conduct which falls short of ill-treatment (or neglect), if it is foreseeable that harm will be caused.”

While this test of intent works for actions as gross and obvious as cruelty, or neglect, it will be much more difficult to apply the same *mens rea* to “emotional harm”. There may be situations where:

- A parent may shout at a child and cause “emotional harm” without the slightest intent of causing harm, or
- A parent may insist on religious observance with every intent of doing good to the child, but objectively, this could be construed as bigotry.

If the policy intention is the protection of children, then for the reasons explained by Lord Diplock in *R v Shepherd*¹² there is little point in criminalising those who do not intend harm, or do not appreciate (and have no reason to appreciate) that their actions risk causing harm.

The current position on intention in Scotland lowers the standard to be reached by those involved in prosecuting. That is a different matter from those assisting children, where it may be critical to establish whether parents have acted in ignorance and where support and assistance is the appropriate response.

There is a further difficulty established in *JM v Brechin*. The majority in the Inner House in that case declined to interfere with what was perceived as a test established in the High Court in *Clark v HMA*¹³ as to do so could set up a difference in relation to the definition of a criminal offence between the civil and criminal courts.¹⁴

If any proposed new crime is to affect both prosecutions and referrals to the Scottish Children’s Reporters Administration, then parents, or for that matter the Principal Reporter, will not be able to challenge the interpretation of the law in connection with a referral to the children’s hearing. The proposed revised offence does carry an increased risk that this might be a problem. Unless the Inner House of the Court of

¹⁰ At paras [51], [59], [61] and [64].

¹¹ [1981] AC 394.

¹² At 408B – D.

¹³ 1968 JC 53.

¹⁴ see paras [2] and [52].

Session and the Appeal Court are both equally equipped to examine such points, there is a risk of injustice to children and families.

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

No.

If there is no evidence as the consultation indicates to suggest that there is any problem with the current law, they it should not be revised.

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

Yes.

There may well be an opportunity to improve the law.

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

They may be merit in extending the remit of the current offence. It would have to be seen exactly what categories should be included which are currently excluded. Specific examples should be provided so that consideration can be given as to exactly how such a revision might work.

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

No.

There is no evidence to suggest that COPFS are not able to exercise their discretion in relation to the facts and circumstances of any case appropriately.

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

Yes. The COPFS always has discretion to consider the circumstance of any case before prosecuting.

However, considering the age of the child who may be affected, in Scotland children may marry at 16. How is it intended to operate? The offence may be able to be committed by their spouse.

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

No. The penalties seem quite sufficient.

Question 16: What steps if any should be taken to avoid criminalising parent/carers who have been victims of domestic abuse themselves and have committed a section 12 offence as a consequence of this domestic abuse?

An adult must abide by the relevant law. The fact of having been a victim of domestic abuse is a factor that may be considered in sentence when appropriate. We recognise that much work is taking place through the Scottish Government around Adverse Childhood Experience (ACE) which is aimed at “helping to reduce the negative impacts of ACEs where they occur and supporting the resilience of children, families and adults in overcoming adversity”¹⁵. Those involved would be best placed to advise on the impact.

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?

We refer to our answer to Question 16. This forms part of judicial training which is undertaken by the Judicial Institute for Scotland.

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

We have no comment to make.

¹⁵ <https://www.gov.scot/publications/adverse-childhood-experiences/>



Question 19: Do you have any comments on whether the definition of a “position of trust” should be extended to cover any other positions in which a person in a position of trust is in a position of power, responsibility or influence over a child?

We have no comment to make. We understand what is being proposed and we would support that.

Question 20: Do you have any other comment on “sexual abuse of trust” offence at section 42- 45 of the Sexual Offences (Scotland) Act 2009?

No.

Gillian Mawdsley

Policy Executive

Law Society of Scotland

DD:0131 476 8206

gillianmawdsley@lawscot.org.uk