

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



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

Section 12 covers a variety of circumstances, which can occur in different ways as demonstrated in the consultation document – for example, neglect is usually by an omission to provide care; ill-treatment is usually the accused behaving in a definite way. Having a number of different legal concepts within the one offence is confusing and difficult to explain to children and families.

The offence requires the behaviour of an offender to be ‘wilful’ - intentional / deliberate / regardless of consequences and there continues to be confusion about whether this decision making of the offender extends to the consequences of their behaviour as well as to the behaviour itself. This *mens rea* debate has not been helped by the adoption of a different interpretation in the English courts, making the Scottish approach more open to challenge and making the application of the legal test in Scotland and its development through case law more problematic.

There are certain circumstances where behaviours are spelt out definitively (section 12(2) (a) and (b) and section 12(3) and there are also elements of the section 12 offence(s) which are unclear and require to be further tested through case law – for example, whether ‘suffering or injury to health’ applies to physical and emotional health (or not).

In addition, the speculative test in relation to the ‘risk’ – ‘in a manner likely to cause’ – is a difficult test to navigate in pursuing the charge. The inclusion of numerous scenarios within the one offence means that any specific focus of the detailed concern about the offending behaviour can be diluted.

The final point SCRA would like to make is in relation to the ‘assault’ element of the section 12 offence. This was removed from section 12 when the Criminal Justice (Scotland) Act 2003 redefined justifiable assault in relation to the physical punishment of children (section 51) and is going to be subject to further change in the proposed Children (Equal Protection from Assault ((Scotland) Bill.

However, the removal of assault from section 12 has had implications for the Children’s Hearings System as a result of the offences currently detailed in Schedule 1. An assault on a child can no longer be categorised as a Schedule 1 offence as a result of the changes to section 12, unless it is an assault causing bodily injury - an assault which does not cause bodily injury does not fit into Schedule 1.

SCRA would ask that that some remedy to this situation is found, and the simplest solution would be to alter Schedule 1 so that it includes any assault against a child. SCRA’s position is that some remedy is required in order to provide the most robust protection to children in Scotland.





The language of the 1937 Act is of its time, and the conceptual basis of the offence as narrated in statute is also of its time. Both the language and the conceptual basis of the offence require to be of our time – in order for it to be understood by the people affected by the charge / offence and also for the pursuit of the offence through the criminal court or the civil court in the Children’s Hearing to be successful. A clear statement of the baseline tests for the separate elements of the section 12 offence as well as clearly stated threshold tests for the criminal law will all help bring the offence into the 21st Century.

Question 2

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

Yes

No – defined in guidance

No – no need for further definition

If so, do you think they should have a meaning which is different from current interpretations?

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

Legislative definitions for the basis of each element of the offence would be the clearest way to establish the baseline for the behaviours, for both criminal justice intervention and intervention by other practitioners. Any legislative definition would require to be accompanied by clear guidelines as well.

The difficulty in developing a legislative definition which will work and which will be future proof is the complexity of the behaviours the definition will require to capture.

The National Guidance for Child Protection (2014) definition of neglect is the best example of this – in that the length of this definition alone would preclude it from becoming the legislative definition, and there is a real danger of creating ongoing confusion if the legislative definition created is not the same – or at least in the same terms - as the working practitioner definition.

The Children’s Hearings System deals with many cases under the section 67 (2) (a) ground for referral in the Children’s Hearings (Scotland) Act 2011 - lack of parental care – in 2017/2018 4623 children and young people were referred to the Reporter on this ground, when 1544 children and young people were referred as the victim of a schedule 1 offence, a section 67(2) (b) ground for referral. Currently section 12 of the 1937 Act is one of the schedule 1 offences which comprise the (b) ground. A key element of the decision making of Children’s Reporters is the selection of the ground for referral which most accurately depicts the particular circumstances of a child and their family. If the baseline for the section 12 offences was reworked it may be that some of the cases currently captured as (a) lack of care would more properly fit within the definition of (b) victim of a schedule 1 offence.



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

SCRA thinks that 'abandonment' and 'exposure to risk' are perhaps more specific behaviours that neglect or ill treatment, and that rather than subsuming the behaviours within a broader category it might be simpler to spell out the specific requirements for an offence in respect of both.

SCRA also agrees that 'emotional' abuse needs to be included as an element of the new offence(s). The impact of emotional / psychological abuse is becoming ever clearer and as a result requires to have a clear prosecution route.

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?

This is very difficult. At the moment, anecdotally, SCRA would suggest that cases reach a criminal threshold as a result of the involvement of Police Scotland – and that Police Scotland involvement is not often the result of professional concerns, rather it happens as a result of an anonymous phone call or an intervention in a breach of the peace or alcohol or other substance related incident. Professional interventions intended to ameliorate a situation do not sit easily with a punitive criminal justice response.

However, in order for a Children's Hearing to be able to intervene successfully in a situation of neglect there has to be a collection and presentation of sufficient evidence in relation to neglect for the intervention to succeed, in the same way that there requires to be a collection and presentation of evidence in a criminal trial.

Professional should be trained and encouraged to collect and to retain this evidence, especially as many neglect cases develop over time and shift from being something that can be remedied by a one off focussed resource intensive response to a situation which is chronic and cannot be fixed. Additional training for non-police witnesses could be developed around the identification and recording of facts, and how these are distinguished from concerns or opinions.

Assessment of the current situation of these cases fits well within the GIRFEC approach and pre-referral screening discussions of cases which local authorities / Police Scotland think may need a compulsory measure of supervision. Cases of neglect / section 12 concerns could be cases which are discussed at that (or another multi-agency) group – where decisions could be made about how to progress matters, based on the welfare of the children concerned. This discussion could have a statutory basis, but does not need





one. Instead, the approach to be taken could be covered in guidance and could be adopted according to local need and the current multi-agency decision making which already occurs locally.

In addition, ensuring that possible offences are subject to a criminal investigation does create a tension for professionals whose focus is on providing ongoing support to children and families through proportionate intervention. Many situations which meet the evidence requirements for section 12 offences are currently appropriately addressed within and out with the hearing system without the behaviour involved being characterised as criminal by way of prosecution or use of grounds for referral to a children's hearing alleging that a schedule 1 offence has been committed. This is especially true for courses of neglectful conduct which are less likely to come to police attention than one-off incidents. If there is reform or new guidance on section 12, SCRA would hope that family situations can continue to be addressed in many cases, without the need to criminalise the behaviours within the family.

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?

SCRA thinks that legal professionals are aware of the impact of neglect and emotional harm on children and young people – but that they are also aware of the difficulties inherent in pursuing these cases under the current legislation and as a result, have a number of ways to defend such cases which can have a negative effect on the child or young person at the centre of the case.

In addition, legal professionals are aware of the potential impact for parents / carers of children on their requirement to disclose to potential employers / university courses if a section 12 offence is proven in court or indeed established in a Children's Hearing. The disclosure requirements of the offence mean that people are less likely to agree the circumstances of a case in the Children's Hearings System and are more likely to defend their position with vigour, resulting in extended complex court proceedings and in a delay to any long term interventions intended to improve the situation for children. This is in no-ones interest, apart from perhaps the professionals who are paid per appearance.

SCRA thinks that clearer offences, with a clear definition, clear thresholds and clear guidance, coupled with improved professional awareness and interagency discussion, will result in a simpler process in order for those offences to be established.

Question 5

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

Yes

No



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Please explain your answer.

SCRA thinks that emotionally abusive behaviour towards children from those with parental rights and responsibilities should be specified in the same way that the Domestic Abuse (Scotland) Act section (2) defines abusive behaviour. SCRA thinks that further scoping work on the extent of this definition requires to be done and that the seriousness of such behaviours and the long term impact of them on children requires that this further work is robust and fully evidenced.

Further work is required, not least because of the current statute – which requires Children’s Reporters to satisfy a prospective test in respect of (a) lack of parental care – that a child “is likely to suffer unnecessarily, or the health or development of the child is likely to be seriously impaired, due to a lack of parental care”. ‘Emotional abuse’ is often captured by Reporters under this ground for referral at the moment. In practice this has meant that ‘resilient’ children who are not displaying anything which demonstrates that they have been affected by the actions of their parents may not get the ground for referral established.

SCRA thinks that it is crucial that this definition takes into account research in respect of resilience and that the presentation of a child or young person should not have an effect on whether we can determine if emotional abuse has occurred or not.

Question 6

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

SCRA thinks that further robust research is required in order for the detail of these behaviours / the effects of these behaviours and the presenting face of children who have been affected by the behaviours to be really understood. At the moment the evidence base is not established particularly in relation to the overlap between our understanding of neglect and our understanding of resilience – and this needs to change.

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?

Yes

No



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Please explain your answer

The language of this section is archaic and needs to be modernised.

In addition, if the working legal (and by inference practical) definitions of neglect are to be developed to be fit for our 21st century understand then, whilst this definition of aspects of physical neglect is not disputed, it does require to be presented within the wider, developed understanding of neglect in the broadest sense. As a result it may require to be changed.

In addition, the descriptors may require development as well – in the welfare state there are certain obligations on the state to provide for children and families which were not obligations in 1937. The specific obligations on parents and carers are now different - and should properly focus on the ability of the parent / carer to maintain the property they inhabit; to provide a balanced nutritionally appropriate diet etc. etc.

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

No

Please explain your answer

This provision should be altered to also cover intoxication by means other than alcohol, and should include illicit drug use but should also include the misuse of prescribed medication. The effects of misusing prescribed medication can be as dangerous as other substances.

SCRA agree that the provision should be extended to include other situations where an adult and child are sleeping - not just beds – as it is the action of falling asleep whilst under the influence which is the concern, not where specifically that occurs.

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?

Yes

No



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Please explain your answer

SCRA agree that there are procedural difficulties at the moment in relation to the question of risk – and that the speculative element is too open to provide adequate protection to children in all cases. SCRA also agrees that the ‘reasonable person’ approach is one which will fit the circumstances of the proposed changes to section 12 as outlined in this consultation. It will also simplify the approach that COPFS and the Children’s Reporter require to take in establishing these cases.

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

No

Please explain your answer

The language of the section requires to be updated, however, the purpose of the section remains relevant and should be continued.

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?

Yes

No

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 are reckless as whether harm is caused.**

Please explain your answer

In respect of *mens rea* the Inner House decision in JM & Mathieson¹ is authority for an objective interpretation of *mens rea* which effectively covers the inadvertent consequences of intentional actions. However, SCRA thinks that it would be helpful if statute could further clarify the *mens rea* requirement to put the matter beyond argument or doubt.

¹ <https://www.scotcourts.gov.uk/search-judgments/judgment?id=53bee1a6-8980-69d2-b500-ff000d74aa7>





The *mens rea* of a section 12 offence could be helped by the addition of a ‘reasonable person’ test – but would not, in our view, be completely clarified. In many of these cases the *mens rea* has to be inferred by the *actus reus* and the events which follow that - and it is open for any defence case to question these inferences and indeed to discount them entirely.

We are not entirely clear about how successful the reasonable person test would be in addressing the problems of proving the offence in some cases. At present (absent any evidence of actual harm) there would still require to be some non-speculative basis on which a likelihood of harm can be considered to be presented by the reasonable person. If the intention is to put the test for likelihood used in *M v Aitken* - that a reasonable person would conclude that there was a risk and the risk was real - on a statutory footing then it will hopefully be useful to some extent. However, it wouldn't remove the need for some basis for a finding of likelihood.

SCRA holds that restricting who the offence should apply to through intention is not in the interest of the children affected by behaviours which would be currently dealt with under section 12 of the 1937 Act. It would also not be in the interests of children in any reformed offence(s) which originate in section 12 of the 1937 Act.

SCRA's view is that it is the effect on the child or the young person of a person's specific action or actions; or their failure to act; which is / should be the key element of the offence, not whether the harm caused was intentional.

Question 12

Who should be capable of committing the offence?

SCRA agrees that this needs to be altered, and that the focus on parental responsibilities does not provide enough protection. We think that the offence should be extended to people who are in a caring role in respect of the child at the time of the offence occurring – and that the detail of the ‘caring role’ should be fully defined.

Question 13

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

Yes

No

If yes, what should the age limit be?

In line with our response to Q12 SCRA agrees that the age of the perpetrator does not need to be determined in statute. Instead there should be a strong definition of nature of the relationship which



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requires to be in place between the child and the alleged perpetrator at the time of the offence. This will mean that parents under the age of 16 could be responsible for the offence.

We are concerned about the example of an incident between a sibling babysitting a younger sibling and the possibility of a criminal charge accruing from that. We are particularly concerned about the possibility of children who are young carers, through no fault of their own, becoming the focus of a criminal charge – for example, the older sibling trying to get her younger sibling to school on time, but getting the time wrong and leaving a child outside a school at 05:30am when there is no-one around. To avoid this we would want the relationship between child and perpetrator to be robust and clear in respect of liability.

Question 14

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

Yes

No

Please explain your answer

In theory SCRA agrees that the definition of a child in respect of this offence (as amended) should be anyone under the age of 18.

In practice however, this would be very difficult to follow through effectively – given the limitations currently on the jurisdiction of the Children’s Hearings System – and the inability of the Hearing to intervene effectively for a child aged 17+. Thought would need to be given to the practical nature of the support and protection the Scottish Government intends to provide for these children.

Question 15

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

Yes

No

Please explain your answer. If yes, what do you believe the appropriate penalties should be?

SCRA does not see how the current financial penalty or the maximum term of imprisonment can work to heal a family who has been affected by such an offence. Instead, community based disposals which can build or rebuild family relationships and provide prosocial modelling of behaviour and attitudes could make a real and lasting difference. Indeed, many of these ‘offences’ are dealt with through the Children’s Hearing, where there is no punitive response and the focus is on the best interest of the child.

However, SCRA would welcome clarity around the requirement to disclose the acceptance or





establishment of a (b) ground for referral in respect of a Disclosure Scotland application or Protection of Vulnerable Groups (PVG) check. We are aware that this information can appear on documents for prospective employers as ORI (other relevant information) and indeed, for some offences under section 12, for some employment, this is absolutely proper. At the moment, SCRA are able to say that accepting a ground for referral is not accepting a criminal charge and that the ground is not the same as an established offence. However, we cannot say that the detail of what has occurred will not be used at a later date.

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 result of this domestic abuse?

SCRA holds that establishing a causal link between domestic abuse and the subsequent abusive behaviour of a victim of domestic abuse is very difficult. Whilst the experience of domestic abuse can be pervasive and have unseen consequences the safety and security of a child remains the responsibility of the adults who have the care of them, in whatever context that care occurs. Domestic abuse could, therefore, be seen as a mitigating factor – but not one which automatically and in isolation would absolve someone of any responsibility for abusive behaviours. It could (and should) form part of the argument – but is not the argument in its entirety.

We are clear that if a child is in a household where domestic abuse is perpetrated by one or other parent then this, on its own, would be sufficient to establish a ground for referral under section 67 (2) (f) of the Children’s Hearings (Scotland) Act - ‘the child has, or is likely to have, a close connection with a person who has carried out domestic abuse’.

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

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?

SCRA are not clear how this is relevant to the proposed changes to the section 12 offence(s). However, allowing domestic abuse to be a mitigating factor could result in a ‘domestic abuse’ statement being available to the court (in the same way perhaps as a victim statement is available) and could be considered prior to any sentencing decision.

However, the detail of such a domestic abuse statement would depend very much on the evidence available to substantiate any claims made - and would, we think, need to focus very much on previous





offence convictions for domestic abuse or with a domestic abuse aggravator which were relevant – and which had been established to the criminal standard of proof – beyond reasonable doubt. In addition, perhaps the statement could derive from established domestic abuse grounds for referral to the Children’s Hearing (which would, of course, depend on whether evidence had been led and whether a Sheriff had made a decision on that) – but this would be to the civil standard of proof, on the balance of probability. There are also, potentially, some moral and some data protection issues inherent in using proceedings which were essentially focussed on another perpetrator in order to absolve someone else of total responsibility for an offence.

Question 18

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

SCRA thinks that a national adoption of ‘care experience’ as a protected characteristic under equalities legislation would mean that parents whose vulnerability derives from their own upbringing / experience of the care system which be granted additional protections.

We think that stronger definitions of offence(s) and thresholds will allow for a simpler test of the capacity of people to understand those offences and thresholds, and that this should provide some support to parents with learning difficulties who do not have the capacity to understand the offence they are said to have committed.

SCRA would like to stress that conviction in a criminal court is not the most likely route to a parent with a vulnerability losing the care of their child. This is much more likely to occur as a result of a Children’s Hearing decision. Shifting the onus of the amended section 12 offence to a ‘reasonable person’ test may mean that more parents with learning or other difficulties may be responsible for behaviours which are effectively captured by the new offence(s) as a result of this test.

The Children’s Hearings System and the Criminal Justice System do work together. There are strong links between Children’s Reporters and the Crown Office and Procurator Fiscal Service. Procurator Fiscal decision making in relation to prosecution is often informed by knowledge of what the Reporter is doing.

The protection of children and the prosecution of parents are not easily allied. For SCRA the protection of children is the paramount concern.

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?

SCRA agrees that defining the terms in order to extend the current offence is difficult; that using the





regulated work roles is too broad and does not effectively capture what is meant by the 'position of trust'. SCRA also thinks any extension of this definition will have consequences in terms of child protection, for any children of the person in the 'position of trust'.

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?

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

SCRA Practice and Policy 2018

