

# **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**

**A Consultation**

**August 2018**



**Scottish Government**  
Riaghaltas na h-Alba  
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## **Structure**

Ministerial Foreword

- Part 1: Introduction and how to respond to this consultation
- Part 2: Section 12: Background and context
  - 2.1 Background
  - 2.2 Section 12 in the context of Child Protection and GIRFEC
  - 2.3 Children's Hearings
- Part 3: Section 12: The current offence
- Part 4: Section 12: Issues and proposed amendments
  - 4.1 Summary of issues identified
  - 4.2 Language and emotional harm
  - 4.3 Risk of harm
  - 4.4 The mental state of the perpetrator
  - 4.5 Who can commit the offence
  - 4.6 The age at which a person can be a victim of the offence
  - 4.7 Penalties
  - 4.8 The impact on a child of domestic abuse
  - 4.9 Vulnerable parents
  - 4.10 Summary of intentions
- Part 5: Section 42: Criminal law in relation to sexual abuse of trust
- Part 6: Additional Questions on issues concerning equal opportunities, financial implications and other impacts
- Annex A: Respondent Information Form
- Annex B: Consultation questions
- Annex C: Handling of personal data
- Annex D: Legislative framework
- Annex E: Section 12 of the Children and Young Persons (Scotland) Act 1937 (Cruelty to persons under 16)
- Annex F: Article 19 of the United Nations Convention on the Rights of the Child

## Ministerial Foreword

This consultation seeks your view on potential changes to two criminal offences related to child protection, namely: the offence of child neglect currently legislated for in section 12 of the Children and Young Persons (Scotland) Act 1937; and the offence of sexual abuse of trust currently set out in section 42 of the Sexual Offences (Scotland) Act 2009.

Neglect is a problem that requires a multi-dimensional and multi-agency response and this government remains committed to child protection being firmly embedded in our unique, Scottish approach to child wellbeing, '*Getting It Right For Every Child*' (GIRFEC). GIRFEC is based on the principle that child wellbeing and protection is a collective responsibility and our clear commitment to reduce the impact of Early Adverse Childhood Experiences (ACEs) is an integral part of this.

Sadly, promoting early intervention and prevention is not the whole picture and the Child Protection Improvement Programme (CPIP) highlighted the need to examine a revised legislative response to child neglect that corresponds to our modern day understanding of neglect and the impact of emotional harm. We recognise that updating the section 12 offence is complex and involves consideration of a wide range of factors. The knowledge, perspective and views of others is essential in shaping a revised offence of child neglect. This consultation is therefore concerned with exploring the key issues both around the operation of the current offence, and what should be considered in reviewing section 12. It also seeks views on shaping a revised offence into a piece of effective, clear, coherent and accessible legislation to protect children from harm and neglect, fit for 21st century Scotland.

We are also seeking your views on whether to extend the current offence of sexual abuse of trust to cover, not just those who look after children in a range of institutional settings or live with/have parental responsibilities and rights for a child, but also other people undertaking regulated work with children outside an institutional setting, such as sports coaches.

Consultation is an essential part of the policy-making process. We will consider the views expressed in response to this consultation along with other available evidence to help inform the Scottish Government's decisions. We have worked with key partners in developing this consultation, including two large stakeholder sessions. The feedback from those sessions has been reflected in this document.

I welcome the opportunity this consultation offers for public debate on these vital issues and I look forward to hearing your views.



**MAREE TODD**  
**Minister for Children and Young People**

## Part 1. Introduction and how to respond to this consultation

1.1 In February 2016 The Scottish Government initiated CPIP, including asking Catherine Dyer to Chair a review of Child Protection Systems. The Scottish Government's intention in initiating CPIP was to identify where recommendations for sustainable improvement could be made, building upon the recognised strengths of the current systems and practice already in place.

1.2 As part of CPIP, we undertook three pieces of work related to neglect. Firstly, we asked the Centre for Child Wellbeing and Protection (CCWP) at the University of Stirling to review existing policy, legislation and literature on neglect<sup>1</sup>, and to update the 2012 [national survey on neglect](#).

1.3 We also asked the Centre of Excellence for Looked After Children In Scotland (CELCIS) to undertake [a pilot programme](#) of work around approaches to neglect in three local areas. This is looking at how education, health and children's services work together to tackle neglect, and then to influence practice change in a sustainable and scalable way across their local area.

1.4 Finally, we conducted a review of the current criminal law regarding neglect and abuse of children, set out in section 12 of the Children and Young Persons (Scotland) Act 1937 ("section 12") (see Annex E for the full text of the current section 12 wording). In conducting this review, we consulted with the Crown Office and Procurator Fiscal Service (COPFS), Police Scotland, front line practitioners and a wide range of key partners across the children's service sector, including the External Advisory Group of CPIP. We also considered some of the evidence provided in response to the Scottish Government informal consultation on "[Proposals for the creation of an Offence of Wilful Neglect or Ill-treatment with regard to services for Children under the age of 18](#)", conducted in 2015.

1.5 The conclusion to this review is that sufficient evidence exists to suggest that exploring the merits of updating and modernising the section 12 offence is warranted, and this exploration should be done in consultation with partners across the sector.

1.6 In March 2017 both the CPIP and Systems Review reports were published. The [Systems Review report](#) made 12 recommendations and [the CPIP report](#) set out 45 actions, one of which was to hold a formal public consultation on section 12 of the Children and Young Person's (Scotland) Act 1937 to explore the limitations of the current offence and the scope of a reframed offence.

1.7 All actions and recommendations were accepted by Ministers, and the Scottish Government continues to work closely with partners to ensure that the actions and recommendations are implemented. You can read about this on our CPIP [blog](#).

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<sup>1</sup>J. Scott and B. Daniel: '[Background Paper 1: Follow-up survey 2016](#)' (CCWP, April 2018); '[Background Paper 2: Rapid review of the literature on intervention](#)' (CCWP, April 2018); '[Background Paper 3: Rapid review of the legislation and policy](#)' (CCWP, April 2018).

1.8 In his [statement to the Scottish Parliament](#) in March 2017 on the CIP report, the former Minister for Childcare and Early Years confirmed that “[section 12] targets physical neglect and harm of children and young people but does not take account of our modern day understanding of neglect...[N]ew legislation will be brought before this session of Parliament introducing a new definition and criminal offence of abuse and neglect of children. Given that it has taken 80 years as a society to make this change, it is vital that we get it right.”

1.9 The consultation also seeks views on reforming the offence of ‘sexual abuse of trust’ at section 42 of the Sexual Offences (Scotland) Act 2009. This provides that a person who looks after children under the age of 18 in a range of institutional settings, including schools, hospitals, care homes and young offenders’ institutions commits a criminal offence if they engage in sexual activity with a child whom they look after in that institution, irrespective of whether the child has attained the age of consent.

1.10 This follows a report on Child Protection in Sport by the Health and Sport Committee of the Scottish Parliament in April 2017, which highlighted the NSPCC’s recommendation that the offence should be extended to cover other people undertaking regulated work with children outside of an institutional setting, such as sports coaches. In their response to the Committee of 29 June 2017, the former Minister for Childcare and Early Years and the then Minister for Public Health and Sport indicated that consideration would be given to extending the current scope of the abuse of trust offence as a part of the Scottish Government’s review of the law concerning abuse of children.

1.11 In launching this consultation, we do so within the context of Scotland’s commitment to Article 19 of the United Nations Convention on the Rights of the Child, the text of which is contained in Annex F.

## **Responding to this consultation**

1.12 We are inviting responses to this consultation by 14 November 2018.

1.13 Please respond to this consultation using the Scottish Government’s consultation platform, Citizen Space. You can view and respond to this consultation online at:

<https://consult.gov.scot/child-protection/amendments-to-the-law-on-child-cruelty/>

You can save and return to your responses while the consultation is still open. Please ensure that you submit your consultation response before 5pm on 14 November 2018.

1.14 If you are unable to respond online using Citizen Space, please submit your response by post. You must complete and return the Respondent Information Form at Annex A (see “Handling your Response” below) with your response. You can answer the Consultation Questions using Annex B Please Send your response and the completed Respondent Information Form to:

Child Protection Policy Team  
2A South  
Victoria Quay  
Edinburgh  
EH6 6QQ

### **Handling your response**

1.15 If you respond using the consultation hub, you will be directed to the About You page before submitting your response. Please indicate how you wish your response to be handled and, in particular, whether you are content for your response to be published. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.

1.16 All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

1.17 If you are unable to respond via Citizen Space, please complete and return the Respondent Information Form included in this document.

1.18 To find out how we handle your personal data, please see our privacy policy: <https://beta.gov.scot/privacy/>

### **Next steps in the process**

1.19 Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory or offensive materials, or where publication would be contrary to copyright or data protection laws (see annex C for further information on handling of personal data) we will make responses available to the public at <http://consult.scotland.gov.uk>. If you use Citizen Space to respond, you will receive a copy of your response by email.

1.20 Following the closing date, all responses will be analysed and considered along with any other available evidence to help us. Responses will be published where we have been given permission to do so.

1.21 Following this, the Scottish Government will publish a response, outlining the next steps and further work that will be necessary to progress the updating of section 12. We anticipate that this work will involve focused sessions with stakeholders to consider broader issues such as what support will be necessary for practitioners following any changes.

## **Comments and complaints**

1.22 If you have any comments about how this consultation exercise has been conducted, please send them by email to [section12consultation@gov.scot](mailto:section12consultation@gov.scot) or by hard copy to the address at paragraph 1.18 above.

## **Scottish Government consultation process**

1.23 Consultation is an essential part of the policy making process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work. You can find Scottish Government consultations online: <https://consult.gov.uk>. Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post.

1.24 Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented.

1.25 While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

## Part 2. Section 12: Background and Context

### 2.1. Background

2.1.1 Neglect is one of the primary maltreatment issues that children currently face in Scotland. Evidence is clear that neglect is extremely damaging to children in the short and long term. The experience of neglect affects physical, cognitive and emotional development; relationships, behaviour and opportunities. Of all forms of maltreatment, neglect leads to some of the most profound negative and long term effects on brain and other physical development, behaviour, educational achievement and emotional wellbeing<sup>2</sup>.

2.1.2 What happens to us as children shapes who we are and can have a huge impact on us throughout our lives, especially if those experiences are adverse ones involving abuse, neglect, harm, violence or poverty. This is why in September last year we made a number of commitments in the Programme for Government to reduce the impact of Adverse Childhood Experiences (ACEs) and to support the resilience of children and adults affected by ACEs.

2.1.3 For many years the offence of ill-treatment of children was framed in both Scotland, and, England and Wales, in almost identical terms. In 2013, however, an Independent Advisory Committee on Child Maltreatment reviewed the offence in England and Wales and concluded that section 1 of the Children and Young Persons Act 1933 was not fit for purpose, as “it fails to recognise the full range of harms done to neglected children, and creates problems of practice and interpretation for legal professionals”. The 1933 Act has therefore been amended, via section 66 of the Serious Crime Act 2015, to clarify that it is an offence to ill-treat a child “whether physically or otherwise”. The provision further clarifies that the suffering or injury resulting from, or likely to result from the harm, may be of “a psychological nature”.

2.1.4 At 31 July 2017, there were 2,631 children on the [Child Protection Register](#) in Scotland. Emotional abuse is the most common concern that leads to children being placed on the child protection register, accounting for 38% of cases<sup>3</sup>. Parental substance misuse, domestic abuse, and neglect were the next most common concerns which led to children being registered (parental substance misuse in 38%, domestic abuse in 37%, and neglect in 36%).

2.1.5 In addition, that ‘the 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’<sup>4</sup> is the most common reason for referral to the Scottish Children’s Reporter Administration (SCRA), accounting for 6,609 referrals in 2017.

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<sup>2</sup> Review of Child Neglect in Scotland, Daniel, Burgess and Scott (Scottish Government, Edinburgh, 2011)

<sup>3</sup> Since 2012, multiple concerns can be recorded at each case conference (rather than just the main category of abuse). This means that the total number of concerns is larger than the total number of registrations, and that figures on concerns identified from 2012 onwards are not comparable to previous data on category of abuse/risk. For the 2,631 children on the child protection register at 31 July 2017, there were 6,410 concerns at the case conferences at which they were registered – an average of 2.4 concerns per conference.

<sup>4</sup> section 67(2)(a) of the Children’s Hearings (Scotland) 2011 Act.

## **2.2. Section 12 in the context of Child Protection and GIRFEC**

2.2.1 The Scottish Government considers early intervention as the primary approach for working with children and families, supported by the principles of Getting it Right for Every Child (GIRFEC). Early intervention is key to addressing problems in their early stages to prevent them escalating and so to protect vulnerable children from neglect and cruelty.

2.2.2 There is clear recognition across all services that neglect is damaging to children. There are examples across Scotland of considerable efforts going into supporting individual children and their families, as well as into developing more effective frameworks for multi-disciplinary practice and evaluating outcomes. We know that embedding relationship-based empathic protective support for children and families within the context of communities, informed by an understanding of what best protects children and promotes their wellbeing, is critical for tackling neglect.

2.2.3 Our approach is to ensure that the right support is provided by the right people at the right time to ensure that children, young people and their families are supported to avoid crises occurring. Child protection must be seen within the wider context of supporting families and meeting children's needs through GIRFEC.

2.2.4 Over the last 10 years we have undertaken significant investment to support parenting, to better prevent neglect, and to address the issues which give rise to neglect. Examples of these investments include the Early Years Change Fund, Public Social Partnerships, the Partnership Drugs Initiative, the expansion of free childcare, the Universal Health Visitor Pathway, and the Family Nurse Partnerships.

2.2.5 We also acknowledge that, for families where voluntary supports have not been effective, the Children's Hearing system plays a fundamentally important role in providing support to children and families who need it.

2.2.6 We consider that it is in the best interests of children and their families that they are given support at an early stage to overcome difficulties. We will continue to explore and support early intervention and family support approaches that will help parents, carers, families and communities to build better lives for themselves and their children. We will also continue with the work around neglect identified as part of the CPIP.

2.2.7 However, promoting early intervention and prevention is not the whole picture. The Scottish Government considers that it is essential to have the right laws in place for when it is necessary to prosecute cases of neglect, abuse or harm to children.

2.2.8 We have undertaken a number of legislative programmes in recent years to ensure that children's rights and safety are protected in law, and this reflects our developing understanding of those rights. We have comprehensive existing legislation that protects children from physical and sexual harm, and forms of exploitation.

2.2.9 Annex D provides details of the key pieces of legislation that exist to protect children. Child protection agencies work with the law relating to the protection of children. We do not intend that any changes to the criminal offence in section 12 should affect the operation of the Children (Scotland) Act 1995, the Children's Hearings (Scotland) Act 2011, the Children and Young People (Scotland) Act 2014, or any other legislation applying to the protection of children. We will work with legal professionals and others to avoid any unintended consequences of changing the law in this area.

2.2.10 We also launched a consultation on 16 May 2018 on potential changes to [Part 1 of the Children \(Scotland\) Act 1995](#) and on related matters. This consultation seeks views on how the interests of children and their need to form and maintain relationships with key adults in their lives can be at the heart of contact and residence cases. It covers a wide range of issues that affect children including how the court considers the views of the child, support for the child, who a child should have contact with and how contact should happen, how children and victims of domestic abuse can be protected and how we can improve the process for children and young people.

### **2.3. Children's Hearings**

2.3.1 It is important to recognise that the abuse and neglect of children is also addressed through the Children's Hearings System, not just the offence in section 12. It is this system which puts in place measures to protect and care for children who have been neglected or abused. The criminal law plays an important role in ensuring that offenders are brought to justice, but it is separate from the civil measures that are put in place by Children's Hearings to protect a child from any further harm.

2.3.2 The Children's Hearings System consists of a lay tribunal, known as a Children's Hearing, which makes decisions about whether compulsory measures of supervision are required on welfare or offence grounds for children, as set out in the [Children's Hearings \(Scotland\) Act 2011](#).

2.3.3 Where the police, social workers or others suspect that a child is being neglected or abused they are referred in the first instance to the Scottish Children's Reporter Administration (SCRA). The Reporter then gathers more information and determines if the case should go before a Hearing to consider if the grounds of referral are met<sup>5</sup> and if compulsory measures are required. There are a wide range of reasons for referral to the Children's Hearing System ('grounds'), and these grounds are established by a Sheriff using the civil law standard of proof (i.e. on the balance of probabilities), with the exception of grounds relating to criminal offences committed by the child, where the criminal standard of proof applies.

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<sup>5</sup> The grounds of referral are set out at section 67 of the 2011 Act.

2.3.4 A child may be referred to a Children’s Hearing where any offence listed in Schedule 1 of the Criminal Procedure (Scotland) Act 1995 (Offences Against Children Under the Age of 17 Years to which Special Provisions Apply<sup>6</sup>) has been committed in respect of the child, including an offence under section 12<sup>7</sup>. There does not need to have been a prosecution of the perpetrator for a child to be referred on that ground. The sheriff could determine whether or not an offence has been committed on the balance of probabilities for the purpose of the referral, even where there has been no prosecution of the perpetrator.

2.3.5 A child may also be referred to the Children’s Hearings System on the ground that “the 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”. Referral under this ground can be for any number of reasons, including impeded development or health as a result of emotional abuse, neglect, or harm. This ground is the most common reason for referral to SCRA, with 6,609 referrals in 2017.

2.3.6 An offence under section 12 and a referral for ‘lack of parental care’ constitute separate grounds for referring a case to the Children’s Hearings System, so the two are not the same, nor dependent on one another. ‘Lack of parental care’ envisages a broader range of circumstances which may fall short of the standards required for proving an offence under section 12. We know that ‘lack of parental care’ is the most common reason for referral. Children’s Hearings have an invaluable part to play in ensuring that children in need of protection receive the appropriate help, and also in supporting their parents in ways that reduce the potential for harmful behaviours for which they might be charged and convicted.

2.3.7 While the purpose of section 12 is primarily to establish criminal liability in the criminal courts, we recognise that reforms to section 12 need also to be considered in light of the use of the offence to establish grounds of referral in the Children’s Hearings System. We will work with SCRA and others to avoid any unintended consequences in the development of any new legislation.

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6 <https://www.legislation.gov.uk/ukpga/1995/46/schedule/1>

7 Section 67(1)(b) of the 2011 Act (“a schedule 1 offence has been committed in respect of the child”)

### Part 3. Section 12: The current offence

3.1 Section 12 of the Children and Young Persons (Scotland) Act 1937 (“the Act”) is the legislation used to prosecute offences of neglect and cruelty to persons under the age of 16.

3.2 Section 12(1) provides that an offence is committed where a person who has parental responsibilities in relation to a child or young person, or has charge or care of a child or young person:

“wilfully ill-treats, neglects, abandons or exposes him, or causes or procures him to be ill-treated, neglected, abandoned, or exposed, in a manner likely to cause him unnecessary suffering, or injury to health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement)” (the full text of section 12 is at Annex E).

3.3 The offence can only be committed by a person who is aged 16 or over and who either has parental responsibilities in relation to the child, or has charge or care of them. The Act presumes that certain persons have charge or care of a child. These are (a) a person who has been placed in charge of the child by a person with parental responsibilities and (b) any other person who has actual possession or control of a child<sup>8</sup>.

3.4 Only children or young people under the age of 16 can be victims of the offence.

3.5 The neglect or ill-treatment must be committed wilfully for the offence to be committed. This has been held to mean that the act or omission must be deliberate and intentional – not accidental or inadvertent<sup>9</sup>. The term “wilfully” does not mean that a person must also have intended to cause suffering or injury to a child, although this has previously been the subject of some conflicting case law.

3.6 The term “neglect” is not defined in section 12. However, it is generally understood to mean a failure to provide proper care and attention, and is usually committed by omission. In *H v Lees*, Lord Justice General Hope described the appropriate standard as “what a reasonable parent, in all the circumstances, would regard as necessary to provide proper care and attention”<sup>10</sup>.

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<sup>8</sup> Section 27 of the Act.

<sup>9</sup> *R v Senior* [1899] 1 W.B. 283 at 290-291 and *H v Lees*; *D v Orr*, 1993 S.C.C.R. 900

<sup>10</sup> *H v Lees*, 1993 J.C. 238, page 245.

3.7 In addition, section 12(2) itself deems that certain circumstance amount to neglect in a manner likely to cause injury to health. These are:

- (a) where a child or young person's parent or guardian fails to provide (or take steps to procure) adequate food, clothing, medical aid or lodging for the child; and
- (b) where it is proved that a child under 3 died by suffocation (not caused by disease or the presence of a foreign body) while the child was in bed with a person (who is aged 16 or over) who was under the influence of alcohol when they went to bed.

3.8 Whereas neglect is usually committed by an omission to provide care, "ill-treatment" is usually committed by a positive action by the accused.

3.9 Before an act of neglect or ill-treatment etc. can be an offence under section 12, it must be shown that the act or omission was committed in a manner likely to cause suffering or injury to health. It is only necessary to show that such suffering or injury was likely – not that it actually occurred. However, the risks of suffering or injury to health should not be entirely speculative<sup>11</sup> and it can be difficult for the Crown to prove.

3.10 It is unclear whether "suffering or injury to health" includes emotional or psychological harm to a child. In England, the courts held that the phrase was limited to a child's physical needs rather than its emotional needs<sup>12</sup>. In Scotland the position is currently unclear.

3.11 Section 12 makes further provision to clarify that a person may be convicted of an offence even where actual suffering or injury to health was obviated by the action of another person, and in cases where a child has died (section 12(3)).

3.12 The current penalty for the offence on indictment is an unlimited fine and/or a maximum term of 10 years imprisonment. On summary conviction, a person is liable to a fine not exceeding the prescribed sum (£10,000) and/or 12 months' imprisonment.

3.13 There were 657 charges recorded by the police as cruelty to and unnatural treatment of children in 2016/17 (it should be noted that the Scottish Government crime statistics under this category cover not only section 12 offences but also other, lesser used offences classified as unnatural treatment of children). Between 2010/11 and 2016/17, Scotland has seen a 60 percent decrease in charges recorded.

3.14 In 2016/17 COPFS reported that 150 prosecutions were taken forward against persons for offences under section 12. Of these, 106 were found guilty by a court.

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<sup>11</sup> See *H v Lees*, 1993 J.C. 238 where the court stated that "...it cannot be assumed that such neglect will be likely to cause the child unnecessary suffering or injury to health, as this cannot be left to speculation. There must be some evidence to support the inference that this was likely to occur."

<sup>12</sup> *R v Sheppard (James Martin)* [1981] A.C. 394 HL at 404.

## Part 4. Issues with section 12 and proposals for reform

### 4.1. Summary of identified issues

4.1.1 We consider that the following are the key reasons for reform:

- the language used in the offence is old-fashioned and does not reflect our modern understanding of neglect (outlined in 4.2);
- the extent to which the current offence covers emotional harm is unclear at best (outlined in 4.2);
- there can be difficulty in prosecuting where there has been no harm caused, but only a risk of harm (outlined in 4.3);
- there is confusion about whether the perpetrator needs to have intended the consequences of their actions (outlined in 4.4);
- the age at which a person can be a victim of the offence differs from other legal age limits (outlined in 4.6); and
- the current definition of who can commit the offence means it is not possible to prosecute parents younger than 16 and may be difficult to prosecute a parent without Parental Responsibilities and Rights (PRRs) who is not left in sole charge of a child (outlined in 4.5).

4.1.2 There have been a number of cases which demonstrate that there can be difficulties with prosecuting under the current offence, highlighted to us by the police and COPFS. Beyond that, we have also heard from social workers and other professionals who work directly with children and families that a perception of the complexities of bringing cases under section 12 acts as a deterrent from reporting cases in the first place. The responses to this consultation will help us better understand how we best go about addressing some of these difficulties, as well as aid our understanding of what some of the adverse effects of legislative change might be.

#### **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  
 No

**Please explain your answer.**

### 4.2. Language and emotional harm

4.2.1 The current offence is set out in legislation from 1937 and the language is antiquated. In particular, there is a lack of clarity around terminology used in the legislation, such as 'mental derangement' and 'ill-treats'. Most centrally, the term used in section 12 to describe the type of behaviour which constitutes an offence is

‘cruelty to children’. Section 12 does not use the term child ‘abuse’, but in effect section 12 (by covering ill-treatment, neglect, exposure to risk and abandonment) covers many forms of abuse.

4.2.2 Abuse in its widest sense is understood as any form of maltreatment of a child. The National Guidance for Child Protection in Scotland 2014 specifies abuse most commonly as physical, emotional or sexual abuse, and neglect. Section 11(7C) of the Children (Scotland) Act 1995 defines abuse as “violence, harassment, threatening conduct and any other conduct giving rise, or likely to give rise, to physical or mental injury, fear, alarm or distress”. Other forms of abuse, such as sexual abuse or physical abuse, are covered by other parts of the criminal law as outlined in Annex D. It is not intended that section 12 be broadened to cover forms of child abuse already covered elsewhere in law.

4.2.3 Section 12 currently applies to acts of wilful ill-treatment, neglect, abandonment or exposure to harm. Each of these terms is considered below.

- **Abandonment** is largely understood as meaning to leave a child to its fate and has been applied in cases where a parent has left a child alone for an extended period<sup>13</sup>.
- **Exposure** is commonly understood in this context to mean to expose a child to risk. This could cover a wide range of behaviour and does not appear to be commonly used.
- **Ill-treatment** has no statutory definition and is not a term commonly used in child protection practice. “Ill-treatment” is used more frequently where there is a particular action by the accused, such as injury or violence, rather than to describe a lack of care<sup>14</sup>.
- **Neglect** has been described by the courts as a failure to provide “what a reasonable parent, in all the circumstances, would regard as necessary to provide proper care and attention to the child”<sup>15</sup>.

4.2.4 Since the offence was drafted in 1937, our understanding of the impact of neglect has developed significantly. We are clear that neglect leads to some of the most profound negative and long-term effects and can continue to have effect well into, and throughout, adulthood.

4.2.5 It is our intention to provide clear statutory definitions of the terms “ill-treatment” and “neglect” as part of a revised offence. We will do this in language which corresponds to that currently understood in Scots law, as referenced above. We also propose to include specific reference to emotional harm (see 4.2.10). Lastly, we will explore whether the language of the offence can be simplified by removing the terms “abandonment” and “exposure” as these elements of the offence are not

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<sup>13</sup> See Gordon, *Criminal Law*, (vol 2, 3<sup>rd</sup> edn by Michael Christie), paragraph 31.06.

<sup>14</sup> See e.g. *M v Locality Reporter, Glasgow* [2015] CSIH 58. In this case the father had picked the children up using one hand, causing them injury involving a significant degree of force or pressure. In that case Lord Carloway stated that “the court must be able to categorise the conduct as ill-treatment, in the sense of involving what can reasonably be described as cruelty” (para 51)

<sup>15</sup> *H v Lees; D v Orr*, 1933 J.C. 238.

commonly used and we believe the acts they are intended to cover could be effectively covered by the term “neglect”.

### **Question 2**

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

- Yes, the terms should be defined in legislation**
- No, the terms should be defined in guidance**
- No, the terms should not be further defined**

**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?**

### **Divergence between legal and social work definitions**

4.2.6 We know that social workers and other front line professionals who have to define at what point something becomes a criminal matter face difficulty in doing so. This is complicated by the fact that legal definitions are not currently set out in legislation but are instead found in case law.

4.2.7 The definitions used by front line professionals differ from those used in law. Brigid Daniel and Jane Scott’s 2016 [“Child Neglect in Scotland: Follow-up survey”](#) asked Child Protection Committees (CPCs) if a formal definition of neglect was used by practitioners to identify children experiencing neglect. All except one replied that a formal definition was in place and reflected the definition provided in the National Guidance for Child Protection in Scotland (2014)<sup>16</sup>.

4.2.8 The National Guidance defines neglect as follows;

“..[T]he persistent failure to meet a child’s basic physical and/or psychological needs, likely to result in the serious impairment of the child’s health or development. It may involve a parent or carer failing to provide adequate food, shelter and clothing, to protect a child from physical harm or danger, or to ensure access to appropriate medical care or treatment. It may also include neglect of, or failure to respond to, a child’s basic emotional needs. Neglect may also result in the child being diagnosed as suffering from ‘non-organic failure to thrive’, where they have significantly failed to reach normal weight and growth or development milestones and where physical and genetic reasons have been medically eliminated. In its extreme form children can be at serious risk from the effects of malnutrition, lack of nurturing and stimulation. This can

<sup>16</sup> This guidance provides a national framework within which agencies and practitioners at local level - individually and jointly - can understand and agree processes for working together to support, promote and safeguard the wellbeing of all children. It also serves as a resource for practitioners on specific areas of practice and key issues in child protection.

lead to serious long term effects such as greater susceptibility to serious childhood illnesses and reduction in potential stature. With young children in particular, the consequences may be life-threatening within a relatively short period of time.”<sup>17</sup>

4.2.9 Not all neglect which requires practitioner or social work involvement would necessarily also be serious enough to lead to criminal prosecution. As set out in section 2.3 above, the Children’s Hearings System plays an important role in ensuring that measures are taken for children where the referral ground of ‘lack of parental care’ is established. In many cases, it may not be in the best interest of the child or the public interest for the parent/carer to also face criminal prosecution. While we will reconsider the legal definitions in section 12 (see 4.2.5), it is not our intention to equate legal and practitioner definitions. However, it may be appropriate for practitioner definitions to be provided in guidance to make it clearer what constitutes ill-treatment or neglect for the purposes of the criminal law. The difficulties the police and front line practitioners experience in bringing cases for prosecution under section 12 indicates that more can be done to improve how the two tests work together.

### **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?**

### **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?**

### **Emotional abuse and harm**

4.2.10 One of the key concerns with the current section 12 offence is that it is unclear whether it covers emotional abuse and harm. The National Guidance contains the following definition of emotional abuse:

“Emotional abuse is persistent emotional neglect or ill treatment that has severe and persistent adverse effects on a child’s emotional development. It may involve conveying to a child that they are worthless or unloved, inadequate or valued only insofar as they meet the needs of another person. It may involve the imposition of age – or developmentally – inappropriate expectations on a child. It may involve causing children to feel frightened or in danger, or exploiting or corrupting children. Some level of emotional abuse is present in all types of ill treatment of a child; it can also occur independently of other forms of abuse”<sup>18</sup>.

<sup>17</sup> National Guidance for Child Protection in Scotland (Edinburgh, Scottish Government, 2014) p. 37.

<sup>18</sup> Ibid p. 35.

4.2.11 Section 12 defines harm as: “unnecessary suffering, or injury to health (including [...] *mental derangement*)”. The inclusion of this term provides some acknowledgement that neglect and ill-treatment may cause emotional as well as physical harm to children. However, little attention has been paid to the term ‘mental derangement’ in case law, suggesting it has not been frequently used since the Act was introduced in 1937 and it is therefore unclear whether emotional harm is covered by the offence.

4.2.12 In England, a leading case from the House of Lords suggested that neglect only captures a child’s physical needs rather than their emotional needs<sup>19</sup>. As this case has not yet been applied by the Scottish courts it is possible that the offence is wider in Scotland, but at the moment it is unclear.

4.2.13 Notably, there has been one case before the Second Division of the Court of Session where the sheriff considered a case of neglect under section 12 and described the harm caused as “emotional harm”<sup>20</sup>. However, this judgment was in relation to a children’s hearings case and there is no clear criminal case law supporting conviction explicitly on the basis of emotional harm or the effect of the behaviour. Further, there is ambiguity about whether the finding actually rested on the likelihood that the children concerned could have sustained physical injuries rather than the fact they had been subjected to non-physical neglect. The case law therefore remains unclear.

4.2.14 We think it is desirable to put this beyond doubt and make it explicit in the legislation that “neglect” includes emotional neglect and “harm” includes emotional harm.

4.2.15 A study commissioned by Action for Children, encompassing 31 jurisdictions found that in 25 of the jurisdictions surveyed, emotional harm is explicitly criminalised. The study conceded that the position in Scotland is not clear; only in Washington State and in England and Wales did the law not encompass emotional harm (though English and Welsh law has since been amended to explicitly cover psychological harm, see 2.1.3).

4.2.16 The Scottish Government considers that the lack of clarity around emotional abuse in section 12 is not acceptable for a modern country where the safety and wellbeing of children is paramount. As we are clear about the impact of emotional abuse on children and young people, there should be a clear route to prosecution. Further, if we do not take the necessary steps to ensure that emotional abuse is effectively and clearly covered in criminal law for the most serious cases, we risk sending a message that it is somehow less ‘serious’ than physical abuse. This is contrary to our understanding of emotional abuse not only for children, but also in adult relationships. The Domestic Abuse (Scotland) Act 2018 recognises that protection from all forms of harm from partners should be provided for in law; we consider the same protection should be provided for children.

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<sup>19</sup> *R v Sheppard* [1981] AC 394 HL at 404, per Lord Diplock: “To neglect a child is to omit to act, to fail to provide adequately for its needs; and, in the context of section 1 of the Children and Young Persons Act 1933, its physical needs rather than its spiritual, educational, moral or emotional needs.”

<sup>20</sup> *Kennedy v S*, 1986 S.C. 43.

4.2.17 Examples of behaviours that are commonly accepted as constituting emotional abuse follow. This list is not intended to be prescriptive or exhaustive, but is included to illustrate the level of seriousness of the behaviour that we consider should be reflected in any revised offence.

- **Terrifying:** to threaten a child (or someone the child loves) with physical violence, abandonment, or death. The adult may threaten the child verbally; they may yell, scream, or curse or use other tactics to intimidate and terrorise the child. They may swing from rage to warmth to rage, ridicule the child, and/or force the child to watch inhumane acts.
- **Rejection:** to reject a child, to push them away, to make them feel that they are useless or worthless. The adult may seem irritated by the existence of the child, and constantly belittle them. The adult may seem indifferent towards the child's needs, or ignore those needs, or make the child feel that their opinions, views or feelings are worthless.
- **Corrupting:** to tolerate or encourage inappropriate or illegal behaviour; to expose the child to antisocial role-models or violence and anger; and advocate bullying of others. The adult may reward the child for substance abuse or bigotry; promote illegal activities; and/or reward the child for such behaviours as lying, stealing, etc.
- **Conflict with siblings:** This is the deliberate creation of conflict between children. For example, a father will talk to Child A about Child B and say how he is upset with Child B because Child B said some terrible things about Child A. Child A will then be angry with Child B for both hurting her feelings and also for making the father sad. Child A and Child B will rarely discuss the incident because the parent has set up the children to distrust one another. In extreme cases, this could result in a level of emotional harm that may make it suitable for prosecution.

4.2.18 It should be noted that for the purposes of this consultation, we have used the term "emotional" rather than "psychological" to refer to the type of harm we wish to see captured by section 12. This is because it is the terminology already in use among frontline practitioners working with children and their families, and a definition exists within the National Guidance. We do not consider that there is a practicable difference between "emotional" and "psychological" for the purposes of the section 12 offence. However, the term "psychological" is more commonly used within legislation, and this may be reflected in any amended offence.

4.2.19 We consider that section 12 should be amended to address emotional abuse to reflect a contemporary understanding of neglect. This would remove any doubt about whether the emotional abuse of children can be prosecuted. Further, we also intend to remove the term 'mental derangement' from the offence as the term is archaic and not consistent with modern day terminology.

### **Question 5**

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

**Yes**

**No**

**Please explain your answer.**

### **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?**

*Deeming provision (2)(b): death of a child caused by suffocation while in bed with a person under the influence of drink*

4.2.20 As set out in Part 3 above, the current offence includes two deeming provisions, namely:

- where there has been a failure to provide or procure “adequate food, clothing, medical aid, or lodging” for a child; and
- where the death of a child under 3 is caused by suffocation (not caused by disease or the presence of a foreign body) while the child was in bed with an adult who was under the influence of alcohol.

4.2.21 In these two circumstances, the behaviour is deemed to be neglect and an offence is committed under section 12 whenever it can be evidenced that the conduct was ‘wilful’ in the sense of being deliberate (see part 4.4). This differs from all other forms of neglect or abuse because the deeming provisions do not require the court to establish that the behaviour amounted to neglect, or that harm or risk of harm had occurred as a result of a failure of care.

4.2.22 The Scottish Government is not aware of any reason why the first deeming provision 12(2)(a) regarding the failure to provide adequate food, clothing, medical air, or lodging should be amended or removed and therefore we do not intend to propose any amendments to that section.

4.2.23 With regards to the deeming provision in section 12(2)(b), which deems the suffocation of a child under 3 while in bed with an adult under the influence of alcohol to be child neglect, the Scottish Government intends to propose amendments. We agree with the U.K. Government’s 2015 decision to amend section 1 of the Children and Young Persons Act 1933 to also apply to persons under the influence of illicit drugs, as well as those under the influence of alcohol. We intend to change the deeming provision in Scottish legislation to similar effect. We also intend to extend

the deeming provision to include situations where the adult and child are lying on any kind of furniture or surface being used for the purpose of sleeping, not just beds.

4.2.24 Amending section 12(2)(b) to also include persons under the influence of illicit drugs forms part of our wider agenda of modernising section 12 and bringing it in line with our current understanding of what should constitute criminal behaviour.

#### **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

**Please explain your answer.**

#### **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.**

### **4.3 Risk of harm**

#### **Proving a likelihood of harm**

4.3.1 We know from stakeholders that there can be difficulty in proving that the offence has been committed without proving that harm to the child has taken place. It raises questions regarding how effective the legislation is in circumstances where the accused has put a child in a position of significant risk, but no harm has actually come to the child. This is particularly relevant when considering whether the offence should explicitly include emotional abuse, the effect of which is often long-term and may not be immediately demonstrable to the court.

4.3.2 The Law Society of Scotland commented, in response to the Scottish Government's consultation on wilful neglect or ill-treatment with regard to services for children, that "it may not always be clear that neglect or ill-treatment took place without proving that harm resulted"<sup>21</sup>.

4.3.3 COPFS tell us that establishing that the neglect is *likely* to cause the child unnecessary suffering can be potentially problematic when prosecuting cases under section 12 if *actual* harm has not occurred. For example, in a case where the

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<sup>21</sup> The Law Society of Scotland, 'Response to consultation on 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' (2 Nov 2015)

standard of hygiene in the home was considered by the experienced police officer dealing with the case to be the worst he had seen in his career, the court determined that no actual harm had come to the child and the offence was not proven.

4.3.4 The current offence requires the court to establish that unnecessary suffering, or injury to health was “likely”, but does not require the court to establish that actual harm has occurred. Whilst it is not necessary to prove harm has been caused, the risks of suffering or injury to health cannot be entirely speculative<sup>22</sup>. This can cause problems for prosecuting cases, such as in the case of alleged neglect where no physical harm has actually befallen the child, the risks are often speculative in nature. We know that there can be difficulty for the courts in establishing or accepting that the necessary level of risk has been reached.

4.3.5 To provide clarity, we propose that the revised offence could include a requirement that a “reasonable person” would consider the accused’s behaviour to be likely to cause the child physical or psychological harm, before the offence is committed.

4.3.6 The phrase “reasonable person” is frequently used in law. It refers to a hypothetical person in society who exercises average care, skill, and judgment in their behaviour. This test requires the “reasonable person” (in a criminal case the judge or jury) to apply their minds to the behaviour of the accused and decide objectively whether that behaviour would be likely to cause harm to the child. There does not need to have been any actual harm caused; it would be sufficient that a reasonable person considers it likely that the behaviour would result in the victim suffering physical or emotional harm.

4.3.7 This approach is considered appropriate as it ensures that COPFS is not required to prove that the victim did in fact suffer physical or emotional harm, which might in many cases require the victim to provide painful evidence. In line with the approach in section 4 of the Domestic Abuse (Scotland) Act 2018, we propose making it explicit in the legislation that the commission of an offence would not depend on the victim actually suffering any harm. However, it would remain open to COPFS to lead evidence of actual harm caused to a victim if they considered it appropriate to do so in individual cases.

### **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**

**Please explain your answer.**

<sup>22</sup> See *H v Lees*, 1993 J.C. 238 where the court stated that “..it cannot be assumed that such neglect will be likely to cause the child unnecessary suffering or injury to health, as this cannot be left to speculation. There must be some evidence to support the inference that this was likely to occur.”

Subsection (3)(a) and (b): harm obviated by the action of another person or instances where the child dies

4.3.8 Section 12(3) provides that a person may be convicted of an offence even where actual suffering or injury to health was prevented by the action of another person and in cases where a child has died.

4.3.9 The leading Scottish text, *Gordon's Criminal Law*, suggests that this provision has not been the subject of significant case law, causing some difficulties in terms of interpretation – particularly in cases of abandonment<sup>23</sup>.

4.3.10 As we have not been made aware by stakeholders of any difficulties in applying this subsection in practice, we do not currently propose any substantive changes to this element of section 12.

**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.**

#### **4.4 The mental state of the perpetrator**

4.4.1 From consideration of reported cases, it is apparent that the courts have encountered some difficulties in grappling with the meaning of the word “wilfully” in the phrase “wilfully ill-treats, neglects, abandons or exposes...”.

4.4.2 The main issue for the courts has been whether the offence just requires that the act of neglect or ill-treatment is committed “wilfully”, or whether the accused must also have been “wilful” about the fact that their actions were likely to cause unnecessary suffering or injury to the child. The question has been whether a person commits an offence if they committed the act of neglect or ill-treatment intentionally, even if they were unaware that those actions could cause the child any harm. The mental state, or *mens rea*, is an essential ingredient in most offences.

4.4.3 The confusion has largely been caused by the fact that the English courts have adopted a different interpretation of “wilful” to that of the Scottish courts. In England, the court will take into account whether or not the accused intended harm, or was reckless about whether harm was caused<sup>24</sup>. In Scotland, the fact a person did not intend to cause suffering or injury has been held to be irrelevant<sup>25</sup>. While the

<sup>23</sup> G. H. Gordon, *Criminal Law in Scotland*, edited by Michael G.A. Christie, 3<sup>rd</sup> edn (Edinburgh: SULI: W. Green, 2000), para. 31.07. Emphasis added.

<sup>24</sup> *R v Sheppard* [1981] 1 AC 394.

<sup>25</sup> *Clark v HM Advocate*, 1968 J.C. 53.

precedent set by the English courts does not bind Scottish courts, Scottish courts may have regard to English case law – and have in a number of cases. This has led to some uncertainty about whether the English test of wilfulness applied in Scotland or not<sup>26</sup>.

4.4.4 The current position in Scotland is that for an offence to be committed under section 12, it must be proved that the accused's acts or omissions were committed "wilfully". This means that the act must be committed intentionally, rather than by accident or inadvertently<sup>27</sup>. The most recent case law in Scotland<sup>28</sup> confirms that it is not necessary, in Scots law, to show that any harm caused by the act was also intentional. So, for example, in a circumstance where a parent might leave a pot of boiling water in reach of their toddler, who then is scalded as a result, the wilful act is the leaving of the pot of boiling water in reach. It is not necessary to prove that the parent intended to harm the child in doing so.

4.4.5 As a result, a person could potentially be prosecuted in Scotland for wilfully neglecting a child in circumstances where they were unaware that their actions were likely to cause any harm. The test for neglect is therefore principally an objective one in Scotland. It might even be said that the courts have treated this as a strict liability offence. The mental state or level of awareness of the accused is irrelevant if their actions are deliberate and objectively harmful to the child.

4.4.6 The most recent Scottish case to consider the wording of section 12 was *JM v Locality Reporter*<sup>29</sup>. This was an Inner House decision, where the court declined to follow the English approach to wilfulness. Lord Carloway's interpretation was based in part on the fact that the purpose of the legislation and its predecessors was to protect children from cruelty:

"The term 'wilful' necessarily serves to exclude accidental or inadvertent conduct, as opposed to the accidental or inadvertent consequences of deliberate conduct, from the scope of the offence. It is unnecessary, and contrary to the statutory purpose, to restrict the scope of the offence by reference to the subjective awareness of the individual of the harmful nature of the conduct in question."

4.4.7 The other two judges considering the case took slightly different approaches to their interpretation of section 12. In particular, Lord McGhie voiced concerns about the offence operating without consideration of the accused's intentions to cause harm and suggested that the legislature might want to reconsider the policy behind this offence. The Law Society of Scotland commented in their response to the Scottish Government's consultation on wilful neglect that "[t]he recent case of *JM v Locality Reporter* highlighted the problems inherent in deciding whether "wilful"

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<sup>26</sup> See e.g. *S v Authority Reporter* 2012 S.L.T. (Sh Ct) 89, and *Dunn v McDonald* 2013 SLT (Sh Ct) 34, both of which were considered in *JM v Locality Reporter* [2015] CSIH 58.

<sup>27</sup> *Clark v HM Advocate* 1968 JC 53.

<sup>28</sup> *JM v Locality Reporter* [2015] CSIH 58.

<sup>29</sup> [2015] CSIH 58. Concerned injuries sustained by infant twins as a consequence of the father's method of lifting them using only one hand. The Inner House refused the father's appeal and found that the deliberate act of lifting the twins in a manner causing harm was sufficient to establish the harm was "wilful" without needing to establish subjective awareness of the harm caused.

should be directed to the act or neglect and/or to the consequences of the act/neglect and so greater clarity on this would be helpful”<sup>30</sup>.

4.4.8 We think that the *mens rea* (mental element) of the offence should be clarified. We propose clarifying that it is not necessary for the accused to have been “wilful” about the fact that their actions were likely to cause unnecessary suffering or injury to the child. This will reaffirm the existing objective liability test which already applies in Scotland.

4.4.9 As outlined in section 4.3 above, we are also proposing to introduce a requirement that a “reasonable person” would consider the ill-treatment or neglect to be likely to cause the child physical or psychological harm. This will clarify that the likely consequences of the neglect or ill-treatment is assessed objectively, and the accused does not need to have “wilfully” caused the child harm.

4.4.10 We think it should be the case that the subjective mental state or level of awareness of the accused as to the risk of harm is irrelevant to proving the offence, as long as the accused’s *actions* are wilful/deliberate and objectively likely to be harmful to the child. We think it is necessary for actions which are accidental or inadvertent to continue to be excluded from the scope of the offence.

4.4.11 Another approach is to introduce a more subjective test, whereby the court must be satisfied that the accused must have intended to cause harm, or been reckless as to whether such harm was caused. However, introducing such a test would require the court to undertake an assessment of the intentions of the accused and their awareness of risk, which could make the offence more difficult to prove than is currently the case. We do not wish to make it harder to prosecute offences which are designed to help protect vulnerable children.

#### **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 to whether harm is caused?**

**Please explain your answer.**

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<sup>30</sup> *Ibid* fn21.

## **4.5. Who can commit the offence**

### *Relationship to the child*

4.5.1 The offence currently can only be committed by someone who “has parental responsibilities in relation to a child or to a young person under that age [16] or has charge or care of a child or such a young person”. Section 27 of the 1937 Act provides that “any person to whose charge a child or young person is committed by any person who has parental responsibilities in relation to him shall be presumed to have charge of the child or young person” and “any other person having actual possession or control of a child or young person shall be presumed to have the care of him”.

4.5.2 Therefore the current offence can be committed by a parent with parental responsibilities, any other person with parental responsibilities or any person who has “charge or care” of a child, which could cover those people temporarily responsible for looking after children, such as wider family members who might commit an offence while babysitting, as well as professionals such as social workers who would have “charge or care” of a child for temporary periods while transporting them.

4.5.3 This current definition could, however, be difficult to apply to a non-resident partner of a parent who was not left in sole charge of a child and who does not have parental responsibilities. We welcome views on whether it would be helpful to change section 12 in this regard.

### **Question 12**

**Who should be capable of committing the offence?**

### *Age of the person committing the offence*

4.5.4 The current offence further specifies that the offence can only be committed by a person aged 16 or over.

4.5.5 Prosecutions of people under the age of 18 in relation to section 12 offences are very rare. Indeed, Scottish Government statistics show that there have been 3 prosecutions of people under 18 for a section 12 offence since 2010, and none at all since 2013.

4.5.6 Parents under 18 are often in need of significant additional support. The Scottish Government has therefore considered whether to raise the age at which the offence can be committed to 18. However, we consider that there are circumstances in which it would be appropriate for a prosecution to be brought against someone under the age of 18.

4.5.7 Another option would be to remove specific reference to the age of the perpetrator in the offence altogether. In theory, this could raise the possibility of, for example, a child aged 14 who is babysitting their younger siblings being charged with the offence should something happen to the younger sibling. We consider that it would be inappropriate for criminal liability to be conferred on a child placed in that position of responsibility. Rather, liability should remain with the parent/carer who has placed the child/children in that position.

4.5.8 There are also risks in building an age overlap in the offence such that the age at which it could be libelled is lower than the age limit to which it affords protection. This could create the unintended situation where a 16 year old could be charged with an offence in relation to a 17 year old if they are under their care.

4.5.9 As both of the above examples illustrate, if the age limit were removed there are circumstances in which the Procurator Fiscal would require to use professional judgment in assessing whether, in all of the circumstances of the case, it is in the public interest to prosecute. We propose that the age of the perpetrator should not be defined in legislation to allow discretion to be applied by the Procurator Fiscal in bringing cases forward<sup>31</sup>.

### **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?**

## **4.6 The age at which a person can be a victim of the offence**

4.6.1 The current offence can be committed in relation to any “child” or young person under the age of 16 years.

4.6.2 The UN Convention on the Rights of the Child defines a child as everyone under 18 unless, “under the law applicable to the child, majority is attained earlier”<sup>32</sup>. The UK has ratified this Convention.

4.6.3 In Scotland, a child can be defined differently in different legal contexts. For example, 16 is the school leaving age, and the age of marriage/civil partnership. The Children (Scotland) Act 1995 makes it clear that virtually all parental responsibilities – and all parental rights – cease when the child attains the age of 16.

<sup>31</sup> Stakeholders may also wish to note that a Bill [to raise the age of criminal responsibility to 12](#) is currently being considered by the Scottish Parliament.

<sup>32</sup> Article 1, the UN Convention on the Rights of the Child.

4.6.4 Accordingly, different legislative provisions establish different age limits, so that children and young people progressively acquire rights but nevertheless may benefit from specific protections under the law until the age of 18. The priority in the current context is to ensure that a vulnerable young person who is, or may be, at risk of significant harm is offered support and protection.

4.6.5 The Scottish Government's position is that, considering all of the factors outlined above, the offence should apply to a child or young person up to the age of 18. This would mean that a child or young person under the age of 18 could be considered a victim of the offence.

#### **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.**

#### **4.7 Penalties**

4.7.1 The current penalty for the offence on indictment is an unlimited fine and/or a maximum term of 10 years imprisonment. On summary conviction, a person is liable to a fine not exceeding the prescribed sum (£10,000) and/or 12 months' imprisonment.

4.7.2 We welcome stakeholders' views on whether the current penalties should be revised. We know that the impact of childhood abuse and neglect can have long-term, devastating effects on the victim well into and throughout adulthood. We want to ensure that the penalties for this offence are proportionate to the severity of the crime, as well as consistent with penalties for similarly severe offences. Where it is considered by stakeholders that the current penalties are insufficient, we would welcome examples of where this was the case.

#### **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 would be?**

## **4.8. The impact on a child of domestic abuse**

4.8.1 The Scottish Government is clear that domestic abuse of a parent has a devastating and long term impact on children. Children are harmed by living in an environment where domestic abuse is taking place, whether directly from witnessing the abuse or indirectly where a child is affected by the effect it has on their parent.

4.8.2 We know that children suffer from the consequences of abuse of their non-abusing parent or carer, for example where an abuser withholds money from a parent or restricts engagement with friends or relatives, as well as through the impact that the abuse can have on the non-abusing parent or carer's ability to look after the child, and the effect that has on the relationship between that parent and the child. We also know that the effect of witnessing the abuse of a parent can cause great fear, alarm and distress to a child.

4.8.3 The Domestic Abuse (Scotland) Act 2018 addresses some of these issues as part of the creation of a new offence which criminalises conduct between partners, or ex-partners over a cumulative period as a single new offence. It specifically recognises the harm that can be caused to children by the abuse of their parent or carer through the creation of a statutory sentencing aggravation to the offence. This aggravation applies when a perpetrator involves a child in the commission of the abuse, or where a child sees, hears or is present when the abuse is taking place, or where a reasonable person would consider it likely that a child living with the victim or perpetrator would be adversely affected by the abuse. The aggravation requires to be taken into account by the court when sentencing the perpetrator with a view to enhancing the sentence to be imposed. Where the aggravation is proven, this will be formally recorded by the court and be noted on the offender's criminal record.

4.8.4 It is important to recognise that, where their parent or carer is being abused, children of course can also themselves be direct victims of abuse by the perpetrator of the abuse towards their partner or ex-partner. This may include threatening and abusive behaviour or ill-treatment that can be prosecuted using the existing criminal law as well as psychological or emotional abuse which may be difficult to prosecute using the existing criminal law.

4.8.5 The Scottish Government is determined to ensure that children are afforded the proper legal protection from those forms of harm and abuse. Reforming the existing section 12 offence contained in the 1937 Act to ensure it more effectively covers emotional abuse of children will make it easier to prosecute this kind of abuse, including where it occurs against a background of domestic abuse. This consultation provides an opportunity to hear your views on what psychological abuse and coercive and controlling behaviour look like in relation to parent/child relationships. We also want to hear your views on whether amendments could be made to the section 12 offence to capture those behaviours, and how we can reflect the effect they have on children.

### **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?**

### **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?**

## **4.9 Vulnerable parents**

4.9.1 We are aware of concerns by some that widening the offence risks leading to an increase in prosecutions against vulnerable parents, including parents with learning disabilities. It is not our intention in proposing amendments to section 12 to increase prosecutions against vulnerable parents.

4.9.2 We do not think it is likely that a parent or carer who has taken all reasonable steps to access the support of relevant services to help overcome difficulties would be said to subsequently have committed a wilful act of ill-treatment or neglect if harm is solely caused by the lack of such support being provided.

4.9.3 Specifically, stakeholders highlight the prevalence of parents with learning disabilities entitled to support under Part 12 of the Children and Young People (Scotland) Act 2014 having their children taken into care. We do not think that the changes proposed in this consultation would increase the chances a child being taken into care in these circumstances or the chances of the parent being convicted. We are aware of the importance of ensuring that any revised offence does not increase the likelihood of criminalising parents in those specific circumstances.

4.9.4 Further, while we acknowledge concerns related to a revised offence, the decision as to whether to prosecute is one for the Procurator Fiscal. Prosecutions will only be pursued where there is a public interest in doing so. The factors considered in deciding whether to prosecute are outlined in COPFS' [Prosecution Code](#). The Code specifies that consideration must be given to the circumstances of the accused in determining whether there is a public interest in prosecuting.

4.9.5 We must ensure that in changing section 12 we do not unfairly criminalise vulnerable parents. We therefore want to hear your views and specific concerns about the implications of an amended criminal offence, as well as what steps you think the Scottish Government should take to address these.

### **Question 18**

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

## 4.10 Summary of the Scottish Government's position

4.10.1 This consultation has set out the following intentions for a revised section 12 offence:

- We propose to provide clear statutory definitions of the terms “ill-treatment” and “neglect” as part of a revised offence. Definitions will help provide clarity to practitioners and ensure that the offence is capable of covering cases where emotional harm is caused. Further, we will explore whether the language of the offence can be simplified by removing the terms “abandonment” and “exposure” as we believe the behaviours concerned are covered by the term “neglect”.
- We intend to remove archaic terms like ‘mental derangement’ from the offence as we do not consider these to be consistent with modern day terminology.
- The offence would continue to deem a failure to provide adequate food, clothing, medical aid or lodging as wilful neglect likely to cause harm. The deeming provision relating to a child suffocating in a bed where the child is in bed with a person under the influence of alcohol would also remain, but would be extended to cover persons who are under the influence of illicit drugs.
- The new offence could set out requirements that need to be met before the offence is committed. We think those could be that:
  - a) the person wilfully neglects or ill-treats the child, or causes or procures him to be ill-treated or neglected; and
  - b) a reasonable person would consider the ill-treatment or neglect to be likely to cause the child physical or psychological harm.
- We intend to include a provision to clarify that the commission of an offence does not depend on the neglect or ill-treatment actually causing a child to suffer harm.
- We are seeking views on whether the current offence should be extended to explicitly cover parents without Parental Responsibilities and Rights (PRRs). We propose that offence should be capable of being committed by a person of any age.
- The offence would apply in relation to the neglect or ill-treatment of any child under the age of 18, as opposed to 16 as is currently the case.
- We intend to review the penalties to this offence and, if necessary, bring them in line with the penalties of similarly serious criminal offences.
- We are seeking views on what measures can be taken to ensure vulnerable parents and parents who are victims of domestic abuse are not unfairly criminalised.

## **Part 5. Criminal law in relation to sexual abuse of trust**

5.1 It is a criminal offence at Part 5 of the Sexual Offences (Scotland) Act 2009 ('the 2009 Act') for any adult to engage in sexual activity with a child under the age of 16.

5.2 In addition, sections 42-45 of the 2009 Act provide that an adult who engages in sexual activity with a child under the age of 18 in respect of whom they are in a 'position of trust' also commits an offence.

5.3 The position of trust offence reflects the fact that, while the 'age of consent' is 16, adults who are in a position where they have particular power, influence or control over a child should not engage in sexual activity with them, irrespective of whether they have attained the age of consent as doing so amounts to a breach of a position of authority and trust.

5.4 The 2009 Act defines a 'position of trust' for the purposes of the offence as including those who look after children in a range of institutional settings, including schools, hospitals and residential establishments such as care homes or young offenders' institutions. It also provides that a 'position of trust' exists if a person lives with a child and has or had any parental responsibilities or rights in respect of that child, or treats the child as a child of their family.

5.5 There have been views expressed that the existing definition of a 'position of trust' may be seen as too narrow as it does not include all the roles in which an adult may have particular power, influence or control over a child. For example, it does not include sports coaches, music tutors or people providing religious instruction, except where they are performing such a role while looking after children in an institution such as a school (which is covered by the offence).

5.6 There is an argument that people performing such roles are in a position of trust in relation to the children whom they are coaching or tutoring, in the same way that those who look after children in, for example, schools or residential institutions are, and therefore should be included within the scope of the offence of sexual abuse of trust'.

5.7 However, it is also important to recognise that, in contrast with the existing 'positions of trust', coaching or tuition can be provided to children on an informal basis. For example, an eighteen year old may help a seventeen year old friend with school work or provide coaching or training in music or sport, and it is important that any law extending the scope of the 'abuse of trust' offence is sufficiently clearly framed that it does not create uncertainty as to the circumstances in which a person is or is not in a position of trust in relation to a child.

5.8 The Health and Sport Committee of the Scottish Parliament's Report on Child Protection in Sport sought the Scottish Government's views on a recommendation by the NSPCC to extend the 'abuse of trust' offence to cover persons undertaking 'regulated work' with children within the meaning of the Protection of Vulnerable Groups (Scotland) Act 2007 ('the 2007 Act'). 'Regulated work' is defined at

Schedule 2 to that Act and covers a very wide range of positions, including anyone who has unsupervised contact with children by arrangement with a responsible person, anyone who teaches, instructs, trains or supervises children and anyone who provides advice or guidance to children which relates to physical or emotional well-being, education or training.

5.9 It is not clear that all the roles falling within the definition of ‘regulated work’ with children necessarily involves that person being in a position of power, influence or control in respect of a child. Some of the roles covered by “regulated work” are very broad and while a position of trust could easily arise where such a role is performed over a substantial period of time, it might be less clear that a person undertaking some forms of “regulated work” would have a particularly close connection with a child or children. For example, a person driving a bus for a sports team made up of 16 and 17 year old children may be undertaking “regulated work” with children but it is not clear that such a position amounts to a position of trust in the way that the existing roles covered by the offence at section 42 of the 2009 Act are. Similarly, it might also be less clear that any particular power or influence would arise where “regulated work” is performed over a shorter period by someone not far apart from the child in age. The roles also cover positions which may be formal or informal in nature.

5.10 The definition of “regulated work” covers positions which may be formal and or informal in nature, and is quite complex<sup>33</sup> which means that, in some circumstances, people undertaking ‘regulated work’, especially where they are doing so on a voluntary and fairly informal basis, may not always be aware that they are doing so. However, there may be scope to adopt a more focused version of the definition of ‘regulated work’ in considering how the ‘abuse of trust’ offence could be expanded to cover other situations in which a person is in a position of trust.

#### **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?**

#### **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?**

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<sup>33</sup> See the Guidance at <http://www.gov.scot/resource/doc/316712/0100858.pdf> and in particular Chapter 2, concerning ‘regulated work’.

**Part 6. Additional Questions on issues concerning equal opportunities, financial implications and other impacts**

**Equal Opportunities**

6.1 Do you consider that any of the reforms proposed in this paper will have a particular impact – positive or negative – on a particular equality group (e.g. age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex, sexual orientation)?

6.2 Are there any other issues related to equality which you wish to raise in relation to this consultation? We intend to publish final versions of relevant impact assessments at a time of a possible Bill.

**Financial implications**

6.3 Do you have any comments or information on the likely financial implications of the reforms proposed in this paper for the Scottish Government Police Scotland, Scottish Courts and Tribunals Service, Scottish Prison Service, COPFS, local government, or for other bodies, individuals or businesses? We intend to publish information on any financial implications at a time of a possible Bill.

**Other considerations**

6.4 Are there behaviours not criminalised elsewhere that you think could be included within a revised offence?

**Do you have any other comments?**

## 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

### RESPONDENT INFORMATION FORM

**Please Note** this form **must** be completed and returned with your response.

To find out how we handle your personal data, please see our privacy policy:  
<https://beta.gov.scot/privacy/>

Are you responding as an individual or an organisation?

- Individual  
 Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

- Publish response with name  
 Publish response only (without name)  
 Do not publish response

#### Information for organisations:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Yes

No

## Annex B: Consultation Questions

### Questionnaire

#### 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
- No

Please explain your answer.

#### Question 2

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

- Yes, the terms should be defined in legislation
- No, the terms should be defined in guidance
- No, the terms should not be further defined

Do you think the terms should be given 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

#### 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?

#### 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?

**Question 5**

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

Yes

No

Please explain your answer.

**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?

**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?

Yes

No

Please explain your answer.

**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

No

Please explain your answer.

**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 considered the behaviour likely to cause harm?

Yes

No

Please explain your answer.

**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.

**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 is reckless as to whether harm is caused?

Please explain your answer.

**Question 12**

Who should be capable of committing the offence?

**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?

**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.

**Question 15**

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

Yes

No

Please explain your answer.

**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?

**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?

**Question 18**

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

**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?

**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?

### **Equal Opportunities**

Do you consider that any of the reforms proposed in this paper will have a particular impact – positive or negative – on a particular equality group (e.g. age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex, sexual orientation)?

Are there any other issues related to equality which you wish to raise in relation to this consultation? We intend to publish final versions of relevant impact assessments at a time of a possible Bill.

### **Financial implications**

Do you have any comments or information on the likely financial implications of the reforms proposed in this paper for the Scottish Government Police Scotland, Scottish Courts and Tribunals Service, Scottish Prison Service, COPFS, local government, or for other bodies, individuals or businesses? We intend to publish information on any financial implications at a time of a possible Bill.

### **Other considerations**

Are there behaviours not criminalised elsewhere that you think could be included within a revised offence?

### **Do you have any other comments?**

## **Annex C: Handling of personal data**

The data protection legislation has recently changed in the UK with the introduction of the Data Protection Act 2018. It gives you greater powers to protect your own privacy, and places greater responsibility on those processing your data for any purpose. The following is to explain your rights and give you the information you will be entitled to under the new legislation. Please note that this section only refers to your personal data (your name, address and anything that could be used to identify you personally) not the content of your response to the consultation.

### ***The identity of the data controller and contact details of our Data Protection Officer***

The Scottish Government is the data controller. The Data Protection Officer for the Scottish Government can be contacted at [dpa@gov.scot](mailto:dpa@gov.scot).

### ***Why we are collecting the data***

Your personal data is being collected as an essential part of the consultation process, so that we can contact you regarding your response and for statistical purposes. We may also use it to contact you about related matters.

### ***Legal basis for processing the data***

Part 2 of the Data Protection Act provides that as a government department, the Scottish Government may process personal data as necessary for the effective performance of a task carried out in the public interest e.g. a consultation.

### ***With whom we will be sharing the data***

We will not be sharing personal data outside of the Scottish Government.

### ***Your rights, e.g. access, rectification, erasure***

The data we are collecting is your personal data, and you have considerable say over what happens to it. You have the right:

- a) To see what data we have about you
- b) To ask us to stop using your data, but keep it on record
- c) To have all or some of your data deleted or corrected
- d) To lodge a complaint with the independent Information Commissioner (ICO) if you think we are not handling your data fairly or in accordance with the law. You can contact the ICO at <https://ico.org.uk/>, or telephone 0303 123 1113.

The Scottish Government will not send your personal data outwith the European Economic Area. This data will not be used for any automated decision making. This data will be stored in a secure government IT system.

## **Annex D: Current Legal Framework**

Below are key pieces of legislation that provide protection for children and young people in Scotland.

### **Children (Scotland) Act 1995**

- This remains one of the cornerstone pieces of legislation for structuring the range and scope of state intervention in the lives of children and their families. It addresses parental responsibilities and rights, and makes provision for guardianship and looked after children..

### **Children's Hearings (Scotland) Act 2011**

- This Act establishes the framework for the protection of children through compulsory measures of supervision. The Act makes provision for the Children's Hearings System. It sets out when referrals ought to be made to the Children's Reporter, the mechanisms and forms that compulsory measures might take, and emergency measures that may be necessary for the protection of children, including child protection orders and child assessment orders, emergency applications to justices of the peace, and the powers of a police constable to remove a child to a place of safety.

### **Children and Young People (Scotland) Act 2014**

- Broadly speaking, the Act makes provision for: the rights of children and young people; investigations by the Commissioner for Children and Young People in Scotland; the provision of services and support for (and in relation to) children and young people; the provision of Named Person and Child's Plan; extension of early learning and childcare; the role of the corporate parent; the extension of aftercare to support care leavers, up to the age of 25; introducing a right for 16 year olds in foster, kinship or residential care to stay in care until the age of 21; support for kinship care; creation of the adoption register; amendments to children's hearings legislation; appeals against detention in secure accommodation; the provision of free school lunches.

### **Criminal Justice (Scotland) Act 2003**

- Section 51 contains provisions concerning the physical punishment of children.
- NB, a proposed Member's Bill, the Children (Equal Protection from Assault) (Scotland) Bill, may result in amendments or repeal of relevant parts of s.51 in order to achieve its stated aim of prohibiting the physical punishment of children by ending the existing common law position that physical punishment by parents can be defended as reasonable chastisement and therefore be lawful. The Scottish Government's proposed Bill would not create a new criminal offence, as the common law offence of assault would apply (with a modification removing the reasonable chastisement defence).

### **Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005**

- This legislation introduced a number of offences including that of 'grooming' a child under 16 for sexual purposes.
- It also introduced an offence of paying for sexual services from a person under the age of 18, including causing, inciting, controlling, arranging or facilitating the provision of sexual services by children/young people or child pornography.
- Section 2 introduced Risk of Sexual Harm Orders. These court orders are designed to protect a child or young person from a person who has engaged in sexually explicit conduct or communication with a child or children, even where the person has not been convicted of any offence. This is a civil order, sought via the Chief Constable through application to the Sheriff. It is not a substitute for the criminal process, but rather is a means of protecting children at an earlier stage.

### **Sexual Offences (Scotland) Act 2009**

- The Act provides for a statutory framework for sexual offences in Scots law.
- Part 4 of the Act provides for offences which criminalise sexual activity with children under 16 (the age of consent for sexual activity). Further, the Act introduces a number of 'protective offences' which criminalise sexual activity with individuals who, by virtue of their age or capacity, may not be able to consent to sexual activity freely.
- It also creates an offence to coerce a person, or to cause a child under the age of 16, to view a sexual image or receive a sexual communication, where it is done for the purpose of obtaining sexual gratification or causing the recipient fear, alarm or distress.
- Sections 42-45 introduce a new offence of 'abuse of position of trust' in respect of a child, for a person in a position of trust (over a child or person with a mental disorder) to engage in sexual activity with that child or person .

### **Prohibition of Female Genital Mutilation (Scotland) Act 2005**

- The legislation outlaws specified FGM procedures and makes it an offence to aid or abet a person in carrying out such procedures. It also makes it an offence to take or send a girl abroad for the purposes of subjecting her to FGM procedures.

### **Human Trafficking and Exploitation (Scotland) Act 2015**

- Section 6 establishes a statutory aggravation to the offence of human trafficking, where the offence is committed against a child. The statutory aggravation must be recorded upon conviction and is therefore subject to disclosure under the PVG. Evidence that the victim is a child does not require to be corroborated.

### **The Civic Government (Scotland) Act 1982, Sections 52 and 52A**

- Sections 52 and 52A make it an offence to have in your possession or to make, take or distribute indecent images of children

### **The Abusive Behaviour and Sexual Harm (Scotland) Act 2016**

- This Act criminalises the non-consensual sharing of intimate images of another person.
- It also introduces Sexual Risk Orders (SROs) which, once brought into force, will strengthen and replace the current Risk of Sexual Harm Order provisions in the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005. SROs are a civil prevention order which are designed to protect the public from sexual harm. The order may be made in relation to a person without a conviction for a sexual offence (or any offence), but who poses a risk of sexual harm. The SRO may be made by the court on application, by the police, where an individual has done an act of a sexual nature, e.g. engaged in sexually explicit conduct or communication with a child or children.

### **The Domestic Abuse (Scotland) Act 2018**

- The Scottish Government's Domestic Abuse (Scotland) Act 2018, recently passed by the Scottish Parliament, creates a new offence that modernises the criminal law to reflect our understanding of what domestic abuse is.
- The new offence criminalises conduct between partners and ex-partners and will allow the court to consider all of the abuse carried out by the perpetrator towards their partner or ex-partner over a cumulative period as a single offence, rather than requiring each individual incident of abuse to be prosecuted as a separate offence.
- The Act recognises the harm that can be caused to children by the abuse of their parent or carer through the creation of a statutory sentencing aggravation. This aggravation applies when a perpetrator involves a child in the commission of the abuse, or where a child sees, hears or is present when the abuse is taking place, or where a reasonable person would consider it likely that a child living with the victim or perpetrator would be adversely affected by the abuse.
- The aggravation requires to be taken into account by the court when sentencing the perpetrator with a view to enhancing the sentence to be imposed. Where the aggravation is proven, this will be formally recorded by the court and be noted on the offender's criminal record.

**Annex E: Section 12 of the Children and Young Persons (Scotland) Act 1937  
(Cruelty to persons under 16) (as amended)**

**12 Cruelty to persons under sixteen.**

- (1) If any person who has attained the age of sixteen years and who has parental responsibilities in relation to a child or to a young person under that age or has charge or care of a child or such young person, willfully ill-treats, neglects, abandons or exposes him, or causes or procures him to be ill-treated, neglected, abandoned, or exposed, in a manner likely to cause him unnecessary suffering, or injury to health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement), that person shall be guilty of an offence and shall be liable-
- (a) on conviction on indictment, to a fine or alternatively, or in default of payment of such a fine, or in addition thereto, to imprisonment not exceeding ten years;
  - (b) on summary conviction, to a fine not exceeding the prescribed sum<sup>34</sup>, or alternatively, or in default of payment of such a fine, or in addition thereto, to imprisonment for any term not exceeding twelve<sup>35</sup> months.
- (2) For the purposes of this section-
- (a) a parent or other person legally liable to maintain a child or young person or the legal guardian of a child or young person shall be determined to have neglected him in a manner likely to cause injury to his health if he has failed to provide adequate food, clothing, medical aid or lodging for him, or if, having been unable otherwise to provide such food, clothing, medical aid or lodging, he has failed to take steps to procure it to be provided under the enactments applicable in that behalf.
  - (b) where it is provided that the death of a child under three years of age was caused by suffocation (not being suffocation caused by disease or the presence of any foreign body in the throat or air passages of the child) while the child was in bed with some other person who has attained the age of sixteen years, that other person shall, if he was, when he went to bed, under the influence of drink, be deemed to have neglected the child in a manner likely to cause injury to his health.

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<sup>34</sup> The current prescribed sum under the Criminal Procedure (Scotland) Act 1995 is £10,000.

<sup>35</sup> By virtue of the Criminal Proceedings etc. Reform (Scotland) Act 2007 s.45 the maximum period of imprisonment on summary conviction of an offence under this section is to be read as a reference to 12 months rather than 6 months.

- (3) A person may be convicted of an offence under this section—
- (a) notwithstanding that actual suffering or injury to health, or the likelihood of actual suffering or injury to health, was obviated by the action of another person;
  - (b) notwithstanding the death of the child or young person in question.
- (4) Where any person who has attained the age of sixteen years is tried on indictment for the culpable homicide of a child or young person under the age of sixteen years and he had parental responsibilities in relation to, or charge or care, of that child or young person, it shall be lawful for the jury, if they are satisfied that he is guilty of an offence under this section, to find him guilty of that offence.

**Annex F: Article 19 of the UNCRC states:**

1. Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.



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