



Review of s. 12 Children and Young Person’s (Scotland) Act 1937 (“cruelty to persons under 16”) – Covering Note

1. This paper outlines the recommendations emerging from an internal review of the law relating to child cruelty and neglect and draws attention to the emerging recommendation that there should be a further consultation on the issues identified.

Background

2. The launch of the Child Protection Improvement Programme (CPIP) included a number of specific commitments in relation to child neglect. In addition to commissioning delivery partners to undertake: a review of what neglect toolkits work; an updated neglect survey and a pilot programme of neglect improvement activity with selected local authority areas in Scotland, the Scottish Government (SG) undertook to review the existing criminal legislation in respect of cruelty to children and young people. We are aware that a number of stakeholders feel that the existing legislation frames abuse and harm too narrowly, by focussing predominantly on its physical effects. In addition, we have consulted with the Crown Office and Procurator Fiscal Service (COPFS) and Police Scotland, who have both communicated to us that they experience difficulties in prosecuting the offence, owing to its narrow scope. Further considerations arise from a review of the provisions, including the basis on which the offence is prosecuted, the relationship between child cruelty and exposure to domestic violence and the age limits specified within the offence. These issues are briefly outlined below; a copy of the report is also available on the Child Protection website.

Scope of the Existing Offence

3. Concerns about the scope of the existing legislation on child cruelty emerged publicly following the publication of the Hoyano Report by Action for Children in 2013. Action for Children had launched a campaign seeking revision of the English and Welsh legislation on child cruelty. The corresponding provision (s. 1 Children and Young Person’s Act 1933) was at that time framed in almost identical terms to s. 12 of the Children and Young Person’s (Scotland) Act 1937 (“the 1937 Act”). Section 12 specifies the following:

“(1) If any person who has attained the age of sixteen years and who has parental responsibilities in relation to a child or young person under that age, or has charge or care of a child or such young person, wilfully assaults, ill-treats, neglects, abandons or exposes him, or causes or procures him to be assaulted, ill-treated, neglected, abandoned or exposed, in a manner likely to cause him unnecessary suffering, or injury to health (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...”

4. The Hoyano Report examined the case law on the provision and found that in the leading case of *R v Sheppard*¹ the scope of the offence was restricted to a child’s physical needs, rather than for instance their emotional needs.. In order to remedy this, the report recommended that the provision be reframed, making it an offence to subject a child to ‘maltreatment’, with maltreatment being so defined as to include: (i)

¹ [1981] AC 394 HL, per Lord Diplock. Please note that this was an English appeal, but the decision has been influential on the interpretation of the Scottish provision.



neglect (including abandonment); (ii) physical abuse; (iii) sexual abuse; (iv) emotional abuse; (v) exploitation. It is argued that refining the provision in this way would reflect contemporary understandings of the scope and impact of child cruelty and neglect. In addition, modernising the fairly antiquated language would make it easier for professionals to understand the nature of the provisions. The Hoyano Report's recommendations were not adopted wholesale by the UK government, though s. 1 Children and Young Person's Act 1933 has been amended, via s. 66 Serious Crimes Act 2015, to clarify that harm may be of a psychological nature.

The Basis on Which the Offence is Prosecuted

5. In Scotland, the courts have encountered some difficulties in grappling with the meaning of the phrase “wilfully assaults, ill-treats, neglects, abandons or exposes...” There is competing case law on the interpretation of this provision, which is concerned with the intention of the perpetrator at the time they committed the offence. Broadly speaking, there has been some debate in the case law as to whether this requires the prosecution to prove variously: 1) that the defendant directed their mind to the likely consequences of their actions or inactions and concluded that they would likely result in harm, but nevertheless acted anyhow, or 2) the defendant ought to have foreseen the likely consequences of their actions, but nevertheless acted or failed to act where the reasonable hypothetical parent would not have done so. The difference between these approaches is that in the first, the court is concerned with the defendant's *own* ultimate intention, whereas in the second it is possible to convict on the basis that a reasonable person would not have acted in the same manner as the defendant. There is some debate as to whether the latter is a suitable basis for achieving a criminal conviction.
6. In the recent case of *M v Locality Reporter, Glasgow*,² Lords Carloway, Malcolm and McGhie concluded that this matter would merit **legislative reconsideration of the policy approach underpinning the offence**. Academics at Dundee University have also recently published material on this aspect of the offence, concluding that ordinarily the criminal law should only convict where a court is satisfied of the subjective intentions of the defendant at the time they committed the offence.³ We recommend consulting more broadly on this issue, before making a determination about how to proceed with any revision.

Exposing a Child to Domestic Violence

7. We have received repeated representations from stakeholders about the emotional harm experienced by children exposed to domestic violence in the home. We are aware that Justice colleagues have recently concluded a public consultation on a new offence of domestic violence. They are considering how the Domestic Abuse Bill should acknowledge the impact of domestic abuse on children including considering whether a statutory aggravation may be one route.

Nevertheless, there are arguably circumstances in which exposing a child to violence directed against another within the home should constitute a separate offence, for which COPFS should have discretion to pursue prosecution, depending upon the facts of the instant case. A particular consideration however is to ensure that parents

² [2015] CSIH 58:2015 S.L.T 543

³ P. Ferguson and D. Scullion “The Scottish Law on child cruelty and wilful neglect: time for reform?” (2016) *Juridical Review* 49



who themselves are the victims of domestic abuse are not 'double victimised' by any new child cruelty provisions, specific consideration will have to be given to the circumstances in which this aspect of the offence, could be prosecuted. Again we recommend consulting publicly on this issue.

Age Limits for the Offence

8. Currently the offence can be prosecuted against any individual aged 16 or over. Equally, the offence offers protection to children and young people under 16 years of age. In line with international standards established by the UN Convention on the Rights of the Child (UNCRC), it has been recommended that both of these age limits should be revised to 18, recognising the protections that should be afforded to vulnerable young people who are 16 or 17 years old. The impact of this move would be that younger parents would not be able to be prosecuted under any revised provisions, though in the most serious of cases, involving either a child death or egregious violence, it would be possible for COPFS to prosecute under other statutory or common law provisions. Equally, older children within the home would also be protected by the change. Once again we recommend undertaking public consultation on this issue.

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November 2016