Aberlour's response to the Scottish Government's consultation Protecting Children: Review of section 12 of the Children and Young Persons (Scotland) Act 1937 and section 42 of the Sexual Offences (Scotland) Act 2009

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Introduction

Aberlour works with vulnerable children, young people and families throughout Scotland, providing services and support in over forty locations around the country across a range of settings. We help to overcome significant challenges, like growing up in and leaving care, living with a disability, poor mental health, or the impact of drugs and alcohol on family life. We aim to provide help and support at the earliest opportunity to prevent problems spiraling out of control. Protecting children is a fundamental focus of the work we do across Scotland every day.

We work with families to provide the help and support they need, which in many cases mitigates the most challenging circumstances for families and prevents difficulties developing into crises that otherwise can often lead to risk of harm to the wellbeing and welfare of children. We believe that through working with families at the earliest opportunity we can best protect children from being exposed to the risk of neglect or abuse. Therefore, we welcome the opportunity to respond to the Scottish Government's consultation Protecting Children: Review of section 12 of the Children and Young Persons (Scotland) Act 1937 and section 42 of the Sexual Offences (Scotland) Act 2009.

We have chosen not to respond to this consultation paper in full, but instead have responded to those questions within the paper where we are able to provide comment based on our knowledge and experience, and which are relevant to work we do and the children, young people and families whom we support.

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.

We recognise that there is currently a lack of clarity around some of the language and terminology within the existing legislation and agree that "***the language used in the offence is old-fashioned and does not reflect our modern understanding of neglect***". Therefore, we believe, in that context, reform and modernisation of the legislation by updating out of date language and archaic terms, such as "***mental derangement***", will be beneficial to all those, including children, young people and families, who may require to understand the intention and purpose of the legislation. We also recognise there

may be a need for greater clarity regarding the legal tests which determine the knowledge and intention of those who may have committed an offence in relation to section 12 of the Act. We have commented on this further in response to questions 9, 11 and 18.

However, in relation to the proposal to introduce a new criminal offence of emotional abuse, we are uncertain that the proposals as outlined will further protect or prevent children from the risk of experiencing or being exposed to emotional abuse. It is our experience that emotional abuse is rarely, if ever, identified in isolation or as the presenting issue when children are first in contact with statutory services, but is identified most commonly in combination with other risk factors or child protection concerns, such as domestic abuse or physical abuse[1]. In addition, the prevalence or severity of emotional abuse compared to other types of abuse is often more difficult to determine, as physical signs and indicators are less identifiable and most often can only be determined by subjective criteria[2]. Recognising emotional abuse and its effects on children requires skilled and experienced practitioners and professionals who can make a determination as to whether or not a child has experienced emotional abuse. This is drawn from a nuanced understanding of often complex interacting factors whereby signs of emotional abuse can be differentiated from the effects of developmental issues or the impact of early trauma (on both children and parents), or where parental capacity is limited due to existing vulnerabilities, such as parental learning disability, and where the appropriate help and support is not available to prevent against risk or concerns, through no fault of the parent, which could otherwise be interpreted as indicators of emotional abuse. Therefore, we are concerned that the proposed legislative change and introduction of a criminal offence of emotional abuse does not offer safeguards or protections against exposing parents in such circumstances to the risk of criminal prosecution; nor provides enough recognition of the difficulties both in defining and identifying emotional abuse and differentiating between circumstances where emotional abuse has occurred and those where no emotional abuse is present, but where risk indicators are present that are consistent with emotional abuse or neglect. Again, we offer further comment on this in our answer to questions 9, 11 and 18.

Indeed, the difficulty of defining and identifying emotional abuse appears to be further complicated by the proposal outlined within the consultation paper, where it states "***it is not our intention to equate legal and practitioner definitions***". We believe that in aiming to ensure greater consistency in identifying emotional abuse or neglect, either for establishing grounds for referral to the Children's Hearings System or for the purpose of criminal prosecution by COPFS, it would seem essential to ensure practice definitions of emotional abuse or neglect, which inform decisions made by social workers or other relevant practitioners regarding whether or not to refer to the police, are consistent with the legal definition. Otherwise, we anticipate uncertainty and confusion amongst key agencies and professionals responsible for child welfare and protection as to what does or does not constitute a criminal offence of emotional abuse or neglect.

We know there is a disproportionately higher number of children of parents with learning disabilities referred through the Children's Hearings System than exists within the general population[3]. Research

[1] https://www.jrf.org.uk/file/48920/download?token=2lurHFld&filetype=full-report
[2] https://learning.nspcc.org.uk/media/1042/child-abuse-neglect-uk-today-research-report.pdf
[3] https://www.tandfonline.com/doi/full/10.1080/09649069.2011.626245

has shown that parents with learning disabilities are at least twenty times more likely to have their children placed in care[4], most often as the result of a perceived risk of harm due to an identified lack of capacity for those parents to be able to look after their children safely. However, it is widely recognised that this is a conservative estimate based on the limited available data and that this also represents only the numbers of parents who have a diagnosed learning disability. We believe it is likely that the total number of parents with either a learning disability or learning need who have their children taken into care is far higher. The most common grounds for referral for parents in such circumstances is a "lack of parental care"[5], and often risk indicators identified to justify grounds for referral in such cases include the risk of harm to a child's emotional wellbeing. It is our experience that such indicators of risk to the emotional wellbeing of a child are most often the result of a complex range of factors present in families' circumstances, and not as a result of willful negligence. In addition, it is our experience from working with parents with learning disabilities that often parenting ability can be viewed narrowly through the lens of child protection, with a focus on a perceived deficit in parenting capacity, rather than acknowledging existing strengths or the potential for confident parenting with the appropriate parenting assessments and support in place. Often parents we work with tell us they feel they are held to a higher standard of parenting as a result of their disability. We believe, as a result of such practice, that where practitioners are compelled by law to report a potential criminal offence of emotional abuse they will inevitably err on the side of caution if they encounter what they perceive to be indicators of emotional abuse or neglect. Even where this can ultimately be shown not to be the case due to the existence of mitigating factors, nonetheless we envisage an increase in reporting to the police and referrals to COPFS; and whilst the consultation does acknowledge the potential for such referrals, we find it unsatisfactory that the proposed remedy to this possibility is that "***the decision as to whether to prosecute is one for the Procurator Fiscal…and will only be pursued where there is a public interest in doing so***". We do not believe an increase in the likelihood of being exposed to the processes of the criminal justice system for families in such situations offers any benefit to those already vulnerable parents and their children, nor to the already overstretched criminal justice system.

It is our experience that the intrusion into family life for such families by various agencies of the State, and the associated bureaucracy and systems they will be expected to navigate, will only compound the existing anxiety and stress which families experience. In addition, this punitive approach would appear to be at odds with much of the Scottish Government's policy statements and intentions on understanding the effects of adversity, trauma and adverse childhood experiences (ACEs)(we would draw attention to the comments by Children 1st in this regard in their response to this consultation paper), and their stated commitment to providing the right help at the right time for our most vulnerable families and communities. Therefore, we believe, that by introducing a criminal offence of emotional abuse, there is the possibility of the unintended consequence that parents whose circumstances are emblematic of those outlined could become criminalised; either because an impairment which affects their ability to parent has not been formally diagnosed, and is therefore not known about, and consequently behaviour is recognised as "willfully" emotionally abusive or neglectful when it is not; or because of a lack of appropriate and ongoing support available to parents who do have a diagnosed learning disability, which then results in a level of risk indicative of the

[4] https://www.scld.org.uk/wp-content/uploads/2015/06/Supported_Parenting_web.pdf
[5] https://www.iriss.org.uk/sites/default/files/2017-04/insights-37_0.pdf

currently accepted practice definition of emotional abuse, as outlined in the National Guidance for Child Protection in Scotland, which states: "***emotional abuse is persistent emotional neglect or ill treatment that has severe and persistent adverse effects on a child's emotional development***"[6]. Furthermore, we do not believe it is legally competent to propose, in relation to the question of the mental state, or *mens rea*, or awareness of an individual who may commit an act of emotional abuse or neglect in that context, that "***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 offer further comment on this in answer to questions 9 and 11 of this consultation.

Beyond the implications which we anticipate and have outlined in relation to parents with learning disabilities, we believe that the proposal to include a criminal offence of emotional abuse is inherently discriminatory in its essence, and will also disproportionately affect low income households and, often, vulnerable families who are more likely to have contact with social work services or the police as a result of their circumstances. We do not see how the proposed new criminal offence will effectively support the identification of emotional abuse by parents where more tangible and physical signs of abuse are absent. In circumstances where a child is provided for materially and is in every identifiable way physically healthy, with no visible indicators of neglect of abuse, but whose parents are emotionally distant or fail to meet that child's emotional needs, it is not clear how the revised legislation and proposed criminal offence intends to address such cases. We are uncertain how such instances of emotional abuse will be identified or prosecuted which are consistent with the intentions of the proposal, as set out within the consultation paper. As stated previously, it is our experience that it is only when other risk factors are present that emotional abuse or neglect is identified and, therefore, we believe it is likely that due to their circumstances the focus on identifying and prosecuting instances of emotional abuse will disproportionately impact upon parents from low income households and poorer communities.

One further consideration is the absence within the consultation paper of any reference to emotional abuse or neglect by corporate parents. We find that often decisions made regarding placements and accommodation for children and young people in care can prioritise the availability of resources over a child or young person's emotional needs. Where deliberate and considered decisions are made by local authorities based on resource or financial considerations, it is our experience the consequences of such decisions can be detrimental to a child or young person's emotional wellbeing. It is our opinion that there should be equal consideration given to the effects of emotional abuse or neglect in relation to corporate parents' responsibilities to children and young people in their care, within the reformed and updated legislation.

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

We believe children should always be protected from all forms of abuse and neglect, physical and emotional. It should be the ambition of all legislation and policy pertaining to protecting children that children should be kept safe from all forms of harm. However, as we have already stated, we do not believe that legislating to introduce a criminal offence of emotional abuse will further protect children

[6] https://www.gov.scot/binaries/content/documents/govscot/publications/guidance/2014/05/national-guidance-child-protection-scotland/documents/00450733-pdf/00450733-pdf/govscot%3Adocument

from the risk of experiencing emotional abuse or neglect. Unlike physical abuse or neglect, emotional abuse is more difficult to recognise and is rarely, if ever at all, identified as a risk factor in isolation. It is our opinion that the best approach to protecting children is through early identification, early intervention and the provision of needs-led family support, which can in many circumstances mitigate the likelihood of risk of harm occurring or the emergence of neglectful or abusive behaviours. As the existence of emotional abuse is most commonly detected in combination with other risk indicators or concerns, it is our experience, from working with vulnerable families every day, that if you identify and address such concerns early through preventative measures and needs-led support, then it is likely that the risk of emotional abuse or neglect will diminish. Therefore, we believe the best legislative protection children can have from all forms of harm is to ensure a statutory obligation on the Scottish Government, local authorities and public bodies to provide the appropriate services and support to meet all families' needs – this includes lifting families out of poverty and addressing the associated toxic stress that comes from chronic exposure to insufficient household income.

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.

This legislation was written prior to the development and implementation of the Welfare State, and therefore such a provision does not reflect our modern expectation of universally provided medical care or housing. However, in our experience, families experiencing financial hardship are forced to make difficult decisions every day as the result of the imposed austerity of the economic policies of successive governments over the last decade. Many families find themselves unable to provide basic levels of food and clothing for their children, with the number of people across Scotland reliant on foodbanks for basic essential items at an all-time high[7]. Through our own Aberlour Urgent Assistance Fund we daily receive requests for assistance from families finding it difficult to afford clothes for their children, as well as beds, bedding, furniture and white goods. The stark reality for many families is that an inability to provide such essential and basic items for their children is not as a result of neglect but simply because they cannot afford to. We also see many families experiencing homelessness through financial hardship (with an increasing issue being the number of women and their children fleeing the family home as a result of domestic abuse), with local authorities and housing associations offering accommodation which is below an acceptable standard, but without any alternative. Our understanding of what the State should provide has moved on since 1937, albeit the reality may be different for many families, and therefore identifying a failure "***to provide adequate food, clothing, medical care or lodgings***" as neglectful should be considered outdated and not reflective of the impact of poverty on families throughout Scotland.

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?

Please refer to our answer to question 11.

[7] https://www.trusselltrust.org/news-and-blog/latest-stats/end-year-stats/

11. Do you think that the offence should apply wherever a person willfully 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?

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?

We believe that questions 9 and 11 must be answered together as they address the same issue: whether the offence just requires that the act of neglect or ill-treatment is committed "willfully", in the sense of not accidentally or inadvertently, or whether the accused must also have been "willful" about the fact that their actions were likely to cause unnecessary suffering or injury to the child.

The consultation paper proposes the former, and provides that the requirements for the new offence are 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 do not support the amendment of section 12 in this way. In our submission, such an amendment would be prejudicial to, inter alia, those parents who suffer from a learning disability or some other psychological or emotional vulnerability. If the determinative test of intention is assessed from the point of view of "a reasonable person" and not the actual accused, with, for example, a learning disability, learning need or limitation in understanding, it is entirely possible that intention would be attributed to actions or neglect unjustly. To criminalise a parent in such circumstances would not be helpful to the child or the parent, and accordingly the paper does recognise that "***in many cases it may not be in the best interest of the child or the public interest for the parent to also face criminal prosecution***".

The main concern about including a subjective element to the offence appears to be the additional difficulty this would pose to the authorities in prosecuting offences which are designed to help protect vulnerable children. It is also recognised in the paper, however, that protection of children, as opposed to criminalisation of parents, is primarily achieved through the Children's Hearings System. A child can always be referred on the grounds that is likely to suffer, or the health or development of the child is likely to be impaired, by, for example, emotional abuse or neglect. If necessary, a Sheriff could also determine, for the purposes of a grounds hearing, that a section 12 offence has been committed on the balance of probabilities, even where there has been no prosecution. Accordingly, the protection of children is not compromised, even if a section 12 crime is difficult to prove in the context of a prosecution.

The proposition to assess culpability on the basis of an objective test is also at odds with the concerns raised in those sections of the paper headed "***Vulnerable Parents***" and "***Equal Opportunities***". We believe it is unacceptable that such parents should be required to rely on individual members of COPFS choosing to take a lenient approach to a potential prosecution on the basis of the information they receive about what support such parents sought to access and whether or not the lack of it caused

them to ill-treat or neglect their child. If such an assessment of the subjective culpability is to be made of the vulnerable parent, it would clearly be preferable that this was enshrined in the legislation and be carried out as part of the judicial process during a trial rather than an administrative decision by COPFS. As is accepted in the consultation paper, in Scots law, the mental state, or *mens rea,* is an essential ingredient in most offences. Accordingly, judges and juries commonly make such assessments in determining criminal culpability. As is pointed out in the consultation paper this is the position in England and the judiciary in Scotland have also voiced some concerns about abandoning consideration of the accused's intention[8].

It is our strong submission that removing the element of subjective intent for establishing culpability for a section 12 crime would be unnecessary and likely to increase prosecutions against vulnerable parents – or, at least, put such parents under a greater threat of prosecution which contradicts the stated intention that "***it is not our intention in proposing amendments to section 12 to increase prosecutions against vulnerable parents***".

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

We believe all legislation should be consistent regarding how we recognise or define a child, and that the reform and modernisation of this legislation should include defining a child as a person below the age of 18.

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.

This could be dealt with by the steps suggested in relation to questions 9 and 11.

17. Are there additional ways in which we can assist courts to be aware of the full context of abuse within a domestic abuse setting, affecting both partners and children?

We believe that any provision included within the revised legislation "***to ensure it more effectively covers emotional abuse of children [and] make it easier to prosecute this kind of abuse, including where it occurs against a background of domestic abuse***", will continue to undermine recognition of the distinct nature of domestic abuse as an offence against children, as opposed to other forms of child abuse. An offence of domestic abuse which sits within child protection legislation and identifies domestic abuse of children generally as emotional abuse, will not sufficiently fulfil the core purpose of creating awareness of the impact of domestic abuse on children, nor highlighting that children are equally victims of domestic abuse. We would point to the previous work of the Equally Safe Children's Reference Group around the development of the Equally Safe Strategy[9] and the Domestic Abuse (Scotland) Act 2018[10], which supported the Scottish Government in recognising the distinct effects of domestic abuse on children. We maintain that there should continue to be a focus on recognising a specific offence of domestic abuse on children to address this particular issue.

[8] Lord McGhie in JM v Locality Reporter [2015] CSIH 58

[9] https://www.gov.scot/publications/equally-safe-scotlands-strategy-prevent-eradicate-violence-against-women-girls/

[10] http://www.legislation.gov.uk/asp/2018/5/contents/enacted

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

The most important step would be to ensure that a subjective test, whereby the court must be satisfied that the accused must have intended to cause harm, is included. We have considered this fully in our response to questions 1, 9 and 11.

Equal Opportunities

21. 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)?

The proposition of an objective test of the reasonable person to determine culpability would impact negatively on learning disabled or emotionally vulnerable parents. We have considered this fully in our response to questions 9 and 11.

For any further information please contact Martin Canavan, Policy & Participation Officer Martin.Canavan@aberlour.org.uk