

## Protecting Children Consultation

### Response of the Children and Young People's Commissioner Scotland

Despite being over 80 years old, s12 of the Children and Young Persons (Scotland) Act 1937 remains the primary legislation through which criminal neglect and abuse of children is prosecuted in Scotland. Not surprisingly, the Act is in many ways not compatible with our understanding of children's lives in 2018. Its language and values are embedded in another century and it fails to fully protect children from all forms of harm. However, we are aware of widespread concerns amongst third sector organisations who support children and families about unintended consequences arising from the current Act and their concern that any extension of its scope could exacerbate this.

In light of the Scottish Government's commitment to incorporating the principles of the United Nations Convention of the Rights of the Child, government should be using the UNCRC as the benchmark when reviewing all policy and legislation. We agree that the 1937 Act is in need of review, but we feel that the direction taken in the current consultation is not one that takes full account of children's human rights.

### Human Rights Framework

UNCRC, in article 19, states that:

1. *States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury of 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, as well as 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.*

Articles of the UNCRC should not, however, be read in isolation. They are all equally important and several other articles have significant relevance to this issue. Article 18 establishes the principle that parents have the primary responsibility for the upbringing and development of the child. It goes further to state:

...2 *For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.*

Children have a right, under article 9 of the UNCRC, not to be separated from their parents against their will unless it is necessary for the best interests of the child. Removal of a child from their parents when the State has failed to provide parents with the support they need to care for their children is likely to be breach of article 9.

One of the four general principles of the UNCRC, article 12, is the right of all children who are capable of forming their own views to express those views freely in all matters affecting them and for those views to be given due weight in accordance with their age and maturity. In General Comment 12<sup>1</sup>, the UN Committee on the Rights of the Child makes it clear that a broad definition of “all matters” should be taken, meaning that children have a right to have their views heard not just in decisions about their individual lives but also when decisions are made about policy and law.

Children are also entitled to the protection of rights contained in other human rights treaties. Article 8 of the European Convention of Human Rights (ECHR), which was incorporated in to UK law by the Human Rights Act 1998, gives children a right to respect for private and family life and places limits on when the state may interfere with this right. As with article 9 of the UNCRC, the involuntary removal of a child from parents, who have not received the necessary support they are entitled to, may be a breach of Article 8 of the ECHR.

Specific obligations exist to support particular groups of disadvantaged or vulnerable parents. Article 23 of the UN Convention on the Rights of Disabled People (UNCRPD) states that children should not be removed from their parents on the basis of either the parent or child’s disability. The UN Committee on the Rights of People with Disabilities’ General Comment 5<sup>2</sup> on Article 19 of the UNCRPD, the right to live independently and be included in the community, draws links to the rights of the child under Article 9 of the UNCRC and affirms the rights of disabled parents to support from the State.

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## **Context**

The consultation document helpfully outlines the child protection framework in Scotland and how that sits within the Children's Hearings system, the wider GIRFEC principles and is complemented by the various family support programmes occurring across Scotland. Notably absent, however, is any significant information about the ongoing Child Protection Improvement Programme (including the work of the 'Our Hearings: Our Voice's Children and Young People's Board for the Children's Hearings System), the work of the 'Justice and Care' group in the Independent Care Review or the current review of child protection national guidance<sup>3</sup>. Criminal prosecution should be understood as the last resort in a welfare system focussed on the welfare of children and on ensuring families receive the support they need. It should be an important, but rarely used, part of Scotland's child welfare and protection systems. Yet this review appears to be taking place in isolation from these reviews and at too early a stage to reflect their findings.

We would therefore suggest that any review of the 1937 Act takes account of all of these and other significant processes, before making any legislative proposals.

## **Need for modernisation**

The 1937 Act dates from a time in which the role of the state in supporting parents was very different. In particular, society's conceptions of how to deal with children in poverty has changed enormously. Section 12(2) criminalises parents for a failure to procure "food, clothing, medical aid or lodging"<sup>4</sup> for their child. It largely predates the welfare state and there was little support for parents who were struggling to meet the needs of the child. This is not the world we now live in. Children have a right, under Article 18 of the UNCRC, for their parents to be provided with support to enable them to fulfil their obligations to their children. This can take many forms, depending on the particular needs of the family, however it explicitly includes support where a parent is unable to provide or procure food, clothing, medical aid or lodging. Our understanding of what constitutes wilful neglect has very much changed over the last 80 years and the recognition that the State has an obligation to materially support parents who are unable to meet these needs, including the provision of housing and financial support.

## **Current Legislation**

A number of concerns have been raised about the ways in which the current legislation is used and the disproportionate, in some instances discriminatory, impact it can have on some groups of children and their parents. During our discussions with government during the passage through parliament of the Domestic Abuse (Scotland) Act 2017, we highlighted that s12 can be used to prosecute victims of

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<sup>3</sup> [National Guidance for Child Protection in Scotland 2014](#)

<sup>4</sup> Act

domestic abuse for failing to protect their child or for a failure to meet their needs as a result of abuse. The Scottish Commission for Learning Disability (SCLD) have highlighted the particular impact of the neglect provisions being used to prosecute parents with learning disabilities. Article 18(2) firmly places duties on the State to support to provide parents and it is not in the interests of children for their parents to be prosecuted for the failure of the State to fulfil its duties to children. Similarly, a section 12 offence is one of the 'Schedule 1 offences' parents can be deemed to have committed as it is a section 67 ground for referral under the Children's Hearings (Scotland) Act 2011, even if they have not been convicted in a criminal court. This is because of the different standards of proof required in the criminal justice and Children's Hearings systems. The issue of 'proof' and the evidential requirements regarding *mens rea* and corroboration are important elements of this review and consultation. In our view, any proposed amendment to the 1937 Act requires further deliberation and clarification on the evidential issues.

### **Definitions of concepts**

We are of the view that the terms need to be carefully defined, in statute, with guidance providing additional context for those definitions. Many of the terms in the 1937 Act are, as a result of its antiquity, unfamiliar to children, young people and their families and, in some cases, even to professionals. Whilst a review of the terms used in the legislation would, we believe, be beneficial this must be done carefully and with a consultation process that is far broader and more participative than the current consultation. It should be informed not just by the views of professionals but also by the way children, young people and their families understand abuse and neglect.

We are also concerned about the impact of the reasonableness as a test when relating to parents who require additional support or protection. We note that Scottish Government do not intend for the review to result in increased prosecution of vulnerable parents, however in the context of children's rights to remain in the care of their parents, with appropriate support, as long as it is safe for them to do so we are not sure an appropriate balance has been struck. There remain the possibility of this concept becoming culturally or socio-economically situated in a way that may replicate the unintended consequences of the existing legislation by inadvertently criminalising good parents who require additional support. The SCLD provides an excellent discussion of the concept of the "good enough parent" and how it relates to parents with learning disabilities. In addition to their children's rights under Article 18 of the UNCRC, these parents have rights to support under Articles 19 and 23 of the UNCRPD. SCLD recommends a rights based 'Whole Family Approach' to assessment, intervention and support by public services.<sup>5</sup> We believe that other groups, including cultural and religious minorities, those experiencing domestic abuse and those living in extreme poverty (including parents with no

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<sup>5</sup> <https://www.sclد.org.uk/wp-content/uploads/2016/11/Parenting-key-findings.pdf>

recourse to public funds) could be found to have failed a “reasonable steps” test because they were unable to take what others might view to be “all reasonable steps to access the support of relevant services”.

### **Emotional abuse and harm**

Amongst the proposals put forward by government is clarifying the existing provision to include emotional or psychological harm. Article 19 of the UNCRC, cited above, clearly places “mental violence” within the definition of abuse or neglect that children must be protected from and although this has been interpreted as including psychological or emotional abuse, this is not explicit in law. We feel it is important that this harm is recognised within the criminal justice system. Although it is not a new concept to Scots law, it is important to ensure that any new provision is well defined on the face of the legislation. The consultation document draws on the definition of abuse contained within the Domestic Abuse (Scotland) Act 2017, but we would caution against extrapolating this definition to children. The relationship between adult partners is very different from that between a parent and a child. Whilst our recommendation is that the government undertake further consultation and research in relation to all proposals in this consultation, the conceptualisation of emotional abuse requires a far more detail exploration than has taken place so far.

### **Domestic abuse**

During the passage of the Domestic Abuse (Scotland) Act 2017, we argued strongly for the inclusion of a parallel offence in relation to the harm done to children to be included in the Act. At the time, Scottish Government proposed reform of s12 of the 1937 Act as a potential way of addressing this. We were opposed to this at that time and remain of the view that the 1937 Act or any replacement is not the appropriate place to address this. Domestic abuse is recognised as distinct from other forms of child abuse. The harm done by perpetrators of domestic abuse is best addressed in a context in which the focus is on the behaviour of the perpetrator. Addressing this through a different context, even within the same proceedings, risks moving the focus away from the particular nature of domestic abuse. It also moves the focus away from the fact that the non-abusing parent is also a victim of the abuse and we remain concerned that, historically, the 1937 Act has been used to prosecute parents who were experiencing domestic abuse.

### **Conclusion**

In light of our concerns, we believe that the current proposals are not compatible with the Scottish Government’s commitment to incorporation of the principles of the UNCRC into Scots law and their wider commitments to human rights. We ask Scottish Government to consider a more thorough review, taking into account responses from this consultation and the views of children, young people and their families in addition to the professionals who support them. It should acknowledge

the role of criminal prosecution as the last resort of a child protection system grounded in children's human rights.

November 2018