RESPONSE OF THE FACULTY OF ADVOCATES to the consultation on the offences of child cruelty and sexual abuse of trust

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Q1. Do you think that the offence in section 12 of The Children and Young Persons (Scotland) Act 1937 would benefit from reform and modernisation?

Please explain your answer.

Yes.

We consider that the wording used in the 1937 Act is archaic, a product of its time. We consider that modernisation is overdue in order to bring the offence into line with modern thinking and modern understanding of child abuse and child neglect. Reformulation of the offence would also allow for increased use of statutory definitions which would assist in removing some of the doubt and uncertainty that surrounds the legislation at this time. As we discuss below, reforming the legislation allows for including express reference to emotional harm and abuse if that is thought appropriate.

Q2. Do you think that existing concepts of "neglect", "ill-treatment", "abandonment", and "exposure" should be defined in the legislation?

If so, do you think that 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?

Yes, the terms should be defined in legislation.

One of the primary issues with the 1937 Act offence is that it is difficult to parse and to understand. The lack of definitions of the key terms of the legislation makes it difficult to know if any particular act or omission is or is not outlawed by the legislation.

In terms of "abandonment" and "exposure to risk" one can imagine scenarios where those terms are the most apt to describe an act or omission which may be thought to justify criminal proceedings. We would counsel against removing terms from any modernised or reworked legislation unless and until the new legislation could be shown to satisfactorily cover situations which, under the present legislation, would be best covered by the "abandonment" and/or "expose to risk" provisions.

Q3. Do you have any thoughts on how professionals dealing with children and families can be supported to identify when cases reach a criminal threshold?

In our opinion this is a very difficult question to answer. Knowledge, understanding, experience, and common sense all have parts to play in appropriately identifying the criminal threshold. It may also be the case that a consistent line cannot be drawn, because what happens in one household in particular circumstances may be seen to reach the criminal threshold, while the same act or omission in a different household may not, perhaps because of particular mitigatory factors present in that household. This question, and the difficulty in answering the question properly, would appear to lie at the heart of the entire project of reform of the law in this area.

In our opinion, there would be significant difficulties were legislation to be drafted which potentially criminalised a lot of behaviour but then left the question to the various authorities as to whether or not to prosecute. Amongst the most obvious difficulty with such an approach is the potential criminalisation of a number of parents and carers which may not be, ultimately, in the best interests of children. The Faculty of Advocates would have concerns with legislation which was very broadly drafted but which relied upon a

discriminating approach by the authorities to ensure that only those who required to be prosecuted were so prosecuted.

In our opinion the preferable approach, albeit we acknowledge the difficulties inherent in it, is to draft legislation which in itself identifies a criminal threshold, ensuring that the criminal threshold can be understood by as many people as possible by reference to the legislation itself. This saves leaving the judgement in a particular case as to whether the criminal threshold has been reached to a particular individual's knowledge, understanding, experience, and common sense, all of which will, of course, vary from individual to individual.

Q4. 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?

The easiest way, in our opinion, to raise awareness of such issues through the legal profession is by the provision of appropriate guidance and training, including the provision of CPD.

Q5. Do you think that children in Scotland should have clear legislative protection from emotional abuse?

Please explain your answer.

Yes.

Children in Scotland should have clear legislative protection from emotional abuse. In our opinion, however, this is easier said than done, especially with a view to ensuring conduct which should not be criminalised is not covered by any future legislation. In our opinion the legislation should be framed such that acts or omissions which the 'reasonable parent' may employ which may upset the child (such as grounding the child or taking away a mobile telephone or games console after poor behaviour) are not even potentially criminalised.

In our opinion there should be a broad but precise legal definition put in place to assist understanding. It may be that something akin to the statutory framework of section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 would be appropriate, incorporating a 'reasonable person' test as to the likelihood of, in this case, the suffering of some level of emotional harm. It may be that some particular level of emotional harm should be specified, to ensure that otherwise normal parenting is not criminalised.

Q6. Do you have examples of the sorts of behaviour and their effect on children which should or should not be captured by any revised offence?

As mentioned above, we consider that behaviour which can be and regularly is invoked by parents to discipline children, such as the grounding of the child or the removal of some property temporarily because of bad behaviour should not be criminalised.This is similar to the way in which "chastisement" has traditionally been used in the legal context to refer to physical discipline.

Q7. Do you think the provision in section 12(2)(a) concerning failure to provide adequate food, clothing, medication, or lodging should be changed?

Please explain your answer.

No.

We consider that this provision is clear and easily understood, assisting in the proper implementation of the legislation.

Q8. Do you think the provision in section 12(2)(b) concerning the suffocation of a child while in bed should be changed?

Please explain your answer.

Yes.

We consider that the observations made within the consultation paper have considerable merit, both in terms of expanding the definition of the person responsible and the circumstances in which they can be held responsible.

We do note, however, that such 'smothering' cases are, thankfully, very rare and that other crimes, not least culpable homicide, exist. We acknowledge, however, that this offence criminalises, appropriately, behaviour which could fall below culpable homicide and so this offence still has a place in our legal system.

Q9. 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 explain your answer.

Yes.

We consider that the introduction of a 'reasonable person' test would increase understanding and the predictability of the application of the law, given that the 'reasonable person' is well known to the courts and a concept easily understood by the wider public.

Q10. Do you think a provision equivalent to section 12(3) should be included in any revised offence, either in its current form or amended?

Please explain your answer.

No.

In our opinion the provision contained in section 12(3) is otiose. If the test was simply that the conduct, applying the standards of the 'reasonable person', was criminal then the fact that actual harm was avoided by the actions of a third party would not be relevant to the consideration of guilt.

Q11. Do you think that the offence should apply wherever a person wilfully and deliberated 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 apply only to those who intend to cause harm to a child by their action or inaction or intended or are reckless as to whether harm is caused?

Please explain your answer.

No.

We think that the offence should apply to those who intend or are reckless as to whether harm is caused.

In our opinion the approach set out in paragraph 4.4.11 of the consultation paper is the preferred option. We would understand that option as requiring proof of three elements: proof of the act or omission; satisfaction of the 'reasonable person' test that such act or omission would objectively cause harm; and either an intent to cause harm or recklessness as to whether harm was caused. This would place this offence on broadly the same evidential position as section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 which is not an offence which proves difficult to prosecute in reality. In our opinion that is because proof of intent or recklessness can often reasonably be inferred from the proven acts or omissions of the accused and from the overall circumstances disclosed in the evidence of any given case.

We note that the consultation paper appears, broadly, to favour a lower test. We note the policy concerns about having an offence which may be more difficult to prove. As against that, however, is the observation that the consultation paper continues thereafter to discuss, for example, mentally disabled parents and a desire not to unduly criminalise individuals who are well meaning. In our opinion the reason that the consultation paper finds those difficulties is because the preferred, lower, statutory test is inappropriate.

We note that recklessness can be assessed by reference to the whole circumstances of a case, and would take account of individual, subjective, weakness on the part of the vulnerable accused. In our opinion, if even one well

meaning but incompetent parent was successfully prosecuted for any revised offence then the new legislation would have failed.

Q12. Who should be capable of committing the offence?

In our opinion, the current definition suffices. The only potential issue which is discussed within the consultation paper is of the non-resident partner of a parent who was not left in sole charge of a child and who does not have parental responsibilities. We would firstly observe that this is a very narrow definition. We would also observe that the legislation at present does not require 'sole charge' but simply "charge or care" which even the fictional, narrowly defined individual, would appear to satisfy. We would further observe that if there is anything actively done by the individual then they may well be guilty of other offences, even if they are not strictly caught by this legislation.

Q13. Do you think the legislation should set out the age of a perpetrator?

If yes, what should the age limit be?

Yes.

We consider that the minimum age of the perpetrator should be 18. We consider that intervention regarding parents or others under the age of 18 in charge or care of children should be matters of civil law rather than criminalisation, with the devastating impact that could potentially have on the perpetrator, the wider family unit, and the child him/herself.

We note, however, that there are certain statutory provisions on parenting which refer to 16 years of age. In our opinion, however, in respect of the criminalisation or potential criminalisation of parents, it is appropriate to have 18 years as the relevant age, with matters below that age being treated civilly.

Q14. Do you think that a child should be defined as aged 18 or younger in relation to the offence?

Please explain your answer.

We note that the UN Convention recognises that one is a child until the age of 18 years. We consider that recognition should be reflected in this legislation. This dovetails with our opinion that the offence should not be capable of being committed by someone who is under the age of 18 as discussed above. We note, however, that it would be possible, to avoid some of the unusual situations highlighted in the discussion paper, to have the legislation specify that the perpetrator has to be older than the child in the offence.

Q15. Do you think the current penalties for a section 12 offence should be amended?

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

No.

We note that, at summary level, the penalties which are available are the sentencing maxima available to the Sheriff Court. In our opinion the penalties available at solemn level are severe. In our opinion it is difficult to conceive of cases where a greater penalty would be required but no common law offence had also been committed. In our opinion the present sentencing powers available are more than adequate for this offence.

Q16. 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?

We consider that it would be almost impossible to frame such a partial or complete defence in this piece of legislation. It may be that a defence of being a victim of domestic abuse might be something that could be legislated for in

respect of a number of offences, rather than solely in respect of this offence, although we consider that this is not the legislation nor the consultation for such a potentially wide ranging, difficult, and sensitive topic.

In our opinion, given the difficulties inherent in attempting to legislate for such a full or partial defence of domestic abuse, the correct approach at this time would be training and guidance within the prosecution and investigating authorities to attempt to identify such cases at as early a stage as possible and provide help and support rather than continuing to prosecution. We note that being a victim of domestic abuse would be powerful mitigation in any event, though one would hope that if such powerful mitigation were available, the prosecution would form the view that prosecution would not be in the public interest.

Q17. 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 consider that training and the provision of guidance and CPD would be the best ways of raising awareness of issues surrounding abuse within a domestic abuse setting.

Q18. What further steps could be taken to ensure vulnerable parents are not unfairly criminalised?

We also refer to our earlier answer relating to the nature of the test to be contained in the legislation as to the required mental state (mens rea) (see answer to Question 11).

Q19. 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?

In our opinion there is no need to change the definitions contained in the present 'position of trust' offence. We note that sex with a child under the age of 16 years is a criminal offence, quite properly. Sex with someone without their consent is the crime of rape, an extremely serious criminal offence. The 'position of trust' offence involves consensual sex with someone over the age of 16 years. In our opinion there are very real difficulties with an extension of the definition of people who are in such a 'position of trust' such that normal sexual relationships would or could be criminalised, as indeed is highlighted in the consultation paper. The 'position of trust' legislation is concerned with consensual sexual relations between adults. In our opinion extending the 'position of trust' definition creates potential difficulties by criminalising normal sexual relationships which are unobjectionable.

Q20. Do you have any other comments on the 'sexual abuse of trust' offence at sections 42-45 of the Sexual Offences (Scotland) Act 2009?

We see that the offence as presently formulated, criminalising sexual relations between, for example, a teacher and a school pupil is entirely appropriate. As discussed above, however, we consider that there are difficulties when one seeks to extend the definition of 'position of trust'.