

The criminal law and child neglect:

an independent analysis
and proposal for reform

Foreword

Child neglect is a deep-rooted and extremely damaging form of child abuse. It is a problem which requires a multi-faceted response in policy and practice across a range of agencies. In general, we know that social care responses need to move to earlier intervention with families both to stop and to prevent neglect, but this is not the whole picture. Sadly, there are some cases of child neglect which require victims to be protected by the criminal law. In this regard, the Children and Young Persons Act 1933 is unfit for purpose.

I am pleased to endorse the work of Action for Children and of the independent group of experts and advisors that have drafted and tested the alternative framework of law contained within this report. The current law explicitly fails to recognise the full range of harm done to neglected children, and creates problems of practice and interpretation for legal professionals. This cannot be our best effort as law makers at protecting neglected children, and so I am determined to see through a reform of the law in this area. I invite my fellow parliamentarians to support this as a matter of great importance and urgency.



Baroness Elizabeth Butler-Sloss

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Introduction

In April 2012, Action for Children launched a campaign asking the Government to review the criminal law on child neglect, as contained in the Children and Young Persons Act 1933.

As part of this work, a group of independent experts was convened by Action for Children to provide informed and objective guidance to their campaign. Members were invited from a range of backgrounds and fields of expertise, including legal practice and academia, specialist child psychiatry and social work. Representatives from a number of relevant organisations are also part of the group, including Cafcass, BASPCAN, and the NSPCC.

As Chair of the Advisory Group, I would like to thank my fellow members who have given time and energy this critical subject and important campaign, as well as ensuring that the issues were subject to a robust debate. The contributions of a number of distinguished colleagues have helped form the arguments contained within this report. I also am very grateful to the staff of Action for Children for the strong logistical support they have provided to the Advisory Group.

The Children and Young Persons Act 1933 will be 80 years old in April 2013, with sections of the Act dating back to 1868. The time has come for us to treat child neglect with the same seriousness we afford physical and sexual abuse, and to replace the antiquated, confusing and ultimately inadequate criminal law against the neglect of children.



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Why neglect matters

Child neglect¹ is the most common form of child abuse in the UK today², and the most common reason for a child protection referral across the UK.³ For some children, neglect is so profound that they starve to death or die because of accidents associated with lack of supervision. We know that too many children experience chronic neglect throughout large parts of their childhood and do not get the help they need when they need it.

Neglect is the most common reason that children are made subject to child protection plans. Neglect is identified in 60 per cent of all Serious Case Reviews.⁴ These child protection statistics are just the tip of the iceberg, with empirical studies suggesting up to 10 per cent of children in the UK suffer from neglect.⁵

There is significant evidence about the severe impact of neglect upon children's wellbeing and development.⁶

Neglect can take different forms, ranging from obvious physical signs such as being inadequately clothed to young children being left alone in their home or on the streets for long periods of time. Children may lack parental support to go to school, miss health appointments, and be ignored when distressed.

Of all forms of maltreatment, neglect leads to some of the most profound and long-term negative effects on a child's brain and other physical development, behaviour, educational achievement and emotional wellbeing.⁷ Neglect is also commonly associated with children being looked after by the local authority: recent statistics for England show that 52 per cent of all children who started to be looked after in the year ending 31 March 2010 first engaged with social care services because of abuse or

¹ As defined by HM Government, 'Neglect is the 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.' See HM Government, Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children, (HM Government, London 2010).

² NSPCC Statistics on child neglect June 2012, http://www.nspcc.org.uk/Inform/resourcesforprofessionals/neglect/statistics_wda89685.html.

³ C. Burgess, B. Daniel, J. Scott et al., The state of child neglect in the UK: an annual review by Action for Children in partnership with the University of Stirling (Action for Children, 2013).

⁴ M. Brandon, P. Sidebotham, S. Bailey et al., New learning from serious case reviews: a two year report for 2009-2011, (Department for Education, 2012).

⁵ NSPCC Statistics on child neglect June 2012, http://www.nspcc.org.uk/Inform/resourcesforprofessionals/neglect/statistics_wda89685.html.

⁶ R. Gilbert, C.S. Widom, K. Browne et al., Burden and consequences of child maltreatment in high-income countries, *The Lancet* 373, pp. 68–77. (2009)

⁷ C. Burgess, B. Daniel, J. Scott et al., Child Neglect in 2011: an Annual Review by Action for Children in Partnership with the University of Stirling, (Action for Children, 2012).

neglect – an increase from 47 per cent in 2006.⁸ Neglect is not only damaging in the early years; its effects on teenagers are often overlooked.⁹ There is also a growing body of evidence that many young offenders have suffered from neglect, which impaired their brain development.¹⁰

Neglect tends to attract less public attention than child sexual abuse, physical abuse and online exploitation, at least until a child dies.¹¹ Criminal justice systems in the UK have tended to prioritise the prosecution of sexual and physical abuse, but there is mounting evidence that neglect is at least as harmful to a child's long-term welfare as contact abuse.¹²

Serious Case Reviews (SCR) provide a chronology of how harmful and persistent neglect occurs within the life of a child. Neglect can manifest as emotional and/or physical harm. Its impact, as seen in far too many SCRs, is life-altering and in some

case results in death. Typical examples include: parents knowing that their child had consumed a drug and not seeking timely medical assistance, resulting in death; children in the care of an intoxicated parent who died as a result of an accident, which could have been avoided had they been supervised; and a child with poor attachment to their mother witnessing domestic violence and subsequently going on to commit a serious sexual assault.

⁸ Department for Education, *Children Looked After by Local Authorities in England (including adoption and care leavers)*, <http://www.education.gov.uk/rsgateway/DB/SFR/s000960/index.shtml>. Accessed 5 February 2013.

⁹ M. Stein, G. Rees, L. Hicks and S. Gorin, *Neglected adolescents: literature review*, (Department for Children, Schools and Families, 2009).

¹⁰ N. Hickey, E. Vizard, E. McCrory et al., *Links between juvenile sexually abusive behaviour and emerging severe personality disorder traits in childhood*, (Home Office, Department of Health and National Offender Management Service, 2006); J. Cashmore, 'The link between child maltreatment and adolescent offending: Systems neglect of adolescents' *Family Matters* 89 (Australian Institute of Family Studies, 2011), p. 31–41.

¹¹ C. Burgess, B. Daniel, J. Scott et al., *Child Neglect in 2011: an Annual Review by Action for Children in Partnership with the University of Stirling*, (Action for Children, January 2012).

¹² R. Gilbert, C.S. Widom, K. Browne et al., *Burden and consequences of child maltreatment in high-income countries*, *The Lancet* 373 (2009), pp. 68–77.

The current criminal law

On 13 April 1933, The Children and Young Persons Act 1933 (CYPA) was enacted to punish cruelty to children.¹³

The criminal offence is contained within the Children and Young Person's Act (1933).

Part 1: Prevention of Cruelty and Exposure to Moral and Physical Danger **Section 1: Cruelty to persons under sixteen**

- (1) If any person who has attained the age of sixteen years and has responsibility for any child or young person under that age, 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 a misdemeanour, and shall be liable—
- (a) on conviction on indictment, to a fine... or alternatively,..., or in addition thereto, to imprisonment for any term not exceeding ten years;
 - (b) on summary conviction, to a fine not exceeding £400 pounds, or alternatively, ..., or in addition thereto, to imprisonment for any term not exceeding six 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 deemed 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 proved that the death of an infant 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 infant) while the infant was in bed with some other person who has attained the age of sixteen years, to bed, under the influence of drink, be deemed to have neglected the infant in a manner likely to cause injury to its health.

The current offence requires that the prosecution prove beyond reasonable doubt that a person: who has attained the age of 16 and has responsibility for any child or young person under that age 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 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).

¹³ It also made it illegal to assault, ill-treat, abandon or expose a child, although those terms are not further defined in the 1933 Act.

Problems with the current law

Failure to cover the range of harm done to children

The current offence only applies to physical harm done to a child. Although the obsolete term 'mental derangement' may have been directed at non-physical harm, in 1981 the House of Lords restricted the offence to a child's 'physical needs rather than its spiritual, educational, moral or emotional needs.'¹⁴

In the 80 years since the Children and Young Persons Act 1933 was drafted our understanding of the harm caused by childhood neglect has developed significantly, especially in regard to emotional neglect and the non-physical consequences of neglect. Research has shown that children who are emotionally deprived are more likely than their peers to develop mental health problems, have poor social and relationship skills and are vastly over-represented in the criminal justice system.¹⁵ The current criminal offence does not reflect this knowledge, and so child neglect of a non-physical nature, however harmful it may be to the child and however lasting the consequences, is not a criminal offence in England and Wales.

A Victorian law

The first statutory response to neglect was the section 37 of the Poor Law Amendment Act 1868, which made it an offence for a parent to: "*wilfully neglect to provide adequate food, clothing, medical aid, or lodging for his child... whereby the health of such child shall have been or shall be likely to be seriously injured*", with responsibility on the 'Poor Law guardians' of the day to prosecute offenders. This wording remains today, within section 1(2)(a) of the Children and Young Persons Act 1933.

This part of the Poor Law Amendment Act was passed in response to specific concerns about a sect, the Peculiar People. The Peculiar People believed that the sick should be treated through prayer and anointing, and that seeking or providing medical assistance would be evidence of a lack of faith in God. Members of the Peculiar People, whose ill child had died, had previously been acquitted of manslaughter because they believed that their decisions were in the child's best interests. The phrase 'wilfully neglect' was intended to capture such cases of intentional failure to act, and in this sense creates a criminal offence of the positive act of neglect.

¹⁴ R v Sheppard [1981] AC 394 (HL) 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. "

¹⁵ N. Hickey, E. Vizard, E. McCrory et al., Links between juvenile sexually abusive behaviour and emerging severe personality disorder traits in childhood , (Home Office, Department of Health and National Offender Management Service, 2006)

This is counter to the modern understanding and definition of neglect as the omission or ‘persistent failure to meet a child’s basic physical or psychological needs’,¹⁶ and leaves the current offence ‘replete with obsolete and confusing terminology’¹⁷ that was drafted 145 years ago.

The current offence is further antiquated by the phrase ‘unnecessary suffering’. The Children and Young Persons Act 1933 describes the offence of child cruelty when committed in a manner likely to cause ‘unnecessary suffering or injury to health’. This somehow suggests that the suffering of children may otherwise be necessary, which is at odds with modern views of children and their rights.

‘Wilful’ neglect

Section 1 of the Children and Young Persons Act 1933 provides that cruelty to a child must be ‘wilful’ to be considered a criminal offence. The term ‘wilful’ has been defined in case law to mean advertent recklessness – i.e. that the defendant was aware that some harm might be caused to the child if they did not act, and nevertheless ran that risk when it was unreasonable to do so. However, this differs from the common understanding of the word which has strong connotations of deliberate and intentional actions. As neglect is

typically an omission, a difficulty arises as to how a failure to act can be regarded as a deliberate action.

The term ‘wilful’ has presented numerous difficulties in the context of neglect, particularly for juries and lay magistrates who must ‘conceive how, as a matter of ordinary language, an omission can be wilful but not deliberate’,¹⁸ and is regarded as a term that is ‘beset by lack of clarity’.¹⁹

The five conduct elements

The current offence can be committed in one of five different ways, namely assault, ill-treatment, neglect, abandonment and exposure. In addition to the difficulty that all these forms of conduct must be ‘wilful’, several other problems arise:

1. **Assault** is essentially covered by the offence of ‘common assault’.
2. **Ill-treatment** has no statutory definition or accepted definition within case law (the alternative term ‘maltreatment’ is used widely by those working in child protection).
3. **Neglect** (problems detailed above and below).
4. **Abandonment** is an out-dated term with no reported prosecution since 1957.
5. **Exposure** is an out-dated term that is ignored in the sentencing guidelines, with no reported prosecution since 1910.

¹⁶ HM Government, Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children, (HM Government, London 2010) & Office of the Children’s Commissioner for Wales (2008) All Wales Child Protection Procedures

¹⁷ R. Taylor and L. Hoyano, “Criminal Child Maltreatment: the Case for Reform”, *Criminal Law Review* (2012), pp. 871-882.

¹⁸ *Ibid.*

¹⁹ D. Ormerod, *Criminal Law Review* (2008), p. 280.

Differences between the civil and criminal law

In civil law, which governs local authority child protection and family court proceedings, the following definition of neglect is used in England in statutory guidance under the Children Act 1989:²⁰

*'neglect is the 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 ... [and] may involve a parent or carer failing to provide adequate food, clothing and shelter ..., protect the child from physical and emotional harm or danger, ensure adequate supervision (including the use of inadequate caregivers), ensure access to appropriate medical care or treatment, and neglect of, or unresponsiveness to, a child's basic emotional needs.'*²¹

Emotional abuse is defined as *'the persistent emotional maltreatment of the child such as to cause severe and persistent adverse effects on the child's emotional development'*.²²

These definitions are widely accepted and subject to ongoing review by the Department for Education.²³ This is in stark contrast to the antiquated definitions within the Children and Young Persons Act 1933, as detailed above. The differences between the civil and criminal law regarding child neglect also present real, practical difficulties, as the police are guided by one definition and social care professionals by another.

²⁰ This also applies in Wales. The Welsh definition of neglect is as follows: "Neglect is the 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 care-giver failing to provide adequate food, shelter and clothing, failing to protect a child from physical harm or danger, or the failure to ensure access to appropriate medical care or treatment. It may also include neglect of, or unresponsiveness to, a child's basic emotional needs. In addition, neglect may occur during pregnancy as a result of maternal substance misuse."

²¹ HM Government, Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children, (HM Government, London 2010), para. 1.36.

²² *Ibid.*, para. 1.34.

²³ It is expected that a new version of Working Together will be published in 2013, including a limited further refinement to the definition of neglect.

Our proposed alternative offence

The Advisory Group has sought to draft a succinct, clear and workable alternative offence, and to:

- cover the full range of harm done to neglected children, specifically including non-physical harm;
- replace the widely misunderstood term ‘wilfully’ with the clearer term of ‘recklessness’;
- provide a criminal law counterpart to the civil law (Children Act 1989, sections 17 and 39), facilitating shared practices in collecting and evaluating evidence across agencies by the use of common definitions and information; and
- avoid the criminalisation of vulnerable parents who are in need of guidance rather than punishment for their behaviour.

We believe that the case for reform is overwhelming, and that tinkering with the current provision will not suffice. We are proposing to repeal section 1 of the Children and Young Persons Act 1933 – removing all five conduct elements of the current offence, the term wilfully, antiquated terms such as ‘unnecessary suffering’, ‘mental derangement’, and the entirety of section 1(2)(b) which is an anachronistic statutory example of the offence concerning co-sleeping with an infant in a bed whilst while drunk from alcohol.

A new offence of child maltreatment

“s.1 Child maltreatment

- (1) It is an offence for a person who has attained the age of 16 years with responsibility for a child intentionally or recklessly to subject that child or allow that child to be subjected to maltreatment, whether by act or omission, such that the child suffers, or is likely to suffer, significant harm.
- (2) For the purposes of this section:
 - (a) ‘recklessly’ shall mean that a person with responsibility for a child foresaw a risk that an act or omission regarding that child would be likely to result in significant harm, but nonetheless unreasonably took that risk;
 - (b) ‘responsibility’ shall be as defined in section 17;²⁴
 - (c) ‘maltreatment’ includes:
 - (i) neglect (including abandonment),
 - (ii) physical abuse,
 - (iii) sexual abuse,
 - (iv) exploitation, and
 - (v) emotional abuse;
 - (d) ‘harm’ means the impairment of:²⁵
 - (i) physical or mental health, or
 - (ii) physical, intellectual, emotional, social or behavioural development.
- (3) Where the question of whether harm suffered by a child is significant turns on the child’s health or development, that child’s health or development shall be compared with that which could reasonably be expected of a similar child.”²⁶

²⁴ As amended by the Children Act 1989.

²⁵ Definition drawn from Children Act 1989, s.31(9), but with ‘ill-treatment’ omitted, as being circular and also illogical since ill-treatment is conduct, not a consequence.

²⁶ Section adopted from the Children Act 1989 section 31(10).

Replacing ‘wilfully’ with ‘recklessly’

Given the numerous difficulties with the use of the term ‘wilful’ we are proposing to replace it with the more commonly used and accepted term ‘reckless’.

The introduction of ‘reckless’ is in line with the interpretation in the 1981 *Sheppard* ruling,²⁷ and also with the interpretation of recklessness recently delineated by the House of Lords in *R v G*.²⁸ The term ‘recklessly’ was identified in the *Sheppard* ruling as preferable to ‘wilful’. ‘Wilful’ is considered difficult to interpret, as it is unclear whether it applies to someone’s action or failure to act, or instead, or additionally, to their failure to foresee future consequences of their action or inaction. This causes a particular problem in cases of child neglect which typically involve the failure to provide care, food, supervision, safe environment etc.

Building on *Sheppard*, the new offence takes the term ‘recklessly’ to apply to ‘a person with responsibility for a child [who] foresaw a risk that an act or omission regarding that

child would be likely to result in significant harm, but nonetheless unreasonably ran that risk’. This means parents or carers who make a deliberate decision to act or not to act, or where they simply do not care, will be open to prosecution. At the same time, it will also serve to protect parents and carers where there is any doubt that their action or inaction was due to mental incapacity or excusable ignorance of parenting skills. The use of the term ‘unreasonably’ is adopted from Lord Bingham’s 2003 definition of recklessness in *R v G*; it will confirm the exclusion from liability of, for example, carers agreeing to high-risk medical treatment where there is no better medical option for a gravely ill child.

²⁷ *Sheppard* [1981] AC 394 [418] (Lord Keith): “as a matter of general principle, recklessness is to be equated with deliberation”. Lord Diplock noted that the judicial explanation of the state of mind denoted by “wilfully” in relation to the doing of a positive act was not necessarily wholly apt in relation to a failure to act at all (at 403).

²⁸ *R v G* [2003] UKHL 50 [41] (Lord Bingham): “A person acts recklessly within the meaning of section 1 of the Criminal Damage Act 1971 with respect to -

(i) a circumstance when he is aware of a risk that it exists or will exist;
(ii) a result when he is aware of a risk that it will occur;
and it is, in the circumstances known to him, unreasonable to take the risk.”

Replacing ‘ill-treatment’ with ‘maltreatment’

‘Ill-treatment’ has no statutory definition or accepted definition within case law. ‘Maltreatment’ is used in the proposed new offence. It is the term currently used by child protection professionals and researchers to encompass all forms of what was conventionally described as ‘child abuse and neglect’. It is used throughout the statutory child protection guidance *Working Together to Safeguard Children* as well as 2012 legal aid legislation in the context of the abuse of children and vulnerable adults.²⁹ Finally, the use of ‘maltreatment’ would also satisfy international pressure to standardise terminology and definitions to enhance the comparability of research data.³⁰

Whilst the term maltreatment differs from ‘ill-treatment or the impairment of health or development’ as contained in the Children Act 1989 s.31(9), it is important that the term ‘ill-treatment’ is not included in the proposed offence. Preserving the term ill-treatment, but not the other four conduct elements by

which the current offence can be committed, would create significant difficulties, which we wish to avoid.

Replacing ‘unnecessary suffering’ with ‘significant harm’

By using the term ‘significant harm’ in the offence, the intention is both to remove the antiquated concept of ‘unnecessary suffering’, and to align terminology with the civil law as contained in the Children Act 1989.³¹ This will provide a consistent threshold of when action can be taken across different agencies, particularly during multi-agency child protection conferences, with the different standards of proof maintaining the necessary distinction between criminal and civil proceedings.

²⁹ Legal Aid, Sentencing and Punishment of Offenders Act 2012 Sch.1 Pt 1 paras 3(5), 13(3).

³⁰ The United Nations Committee on the Rights of the Child has called for standardised clear operational legal child welfare-based definitions: General Comment No.13 (2011): The Right of the Child to Freedom from All Forms of Violence, (UNCRC, April 2011), para.18. “Child maltreatment” is the preferred compendious public health terminology of the WHO and the Atlanta Centers for Disease Control (World Health Organisation and International Society for the Prevention of Child Abuse and Neglect, Preventing Child Maltreatment: a Guide to Taking Action and Generating Evidence (2006), pp. 3, 9; R.T. Leeb and others., Child Maltreatment Surveillance: Uniform Definitions for Public Health and Recommended Data Elements, Version 1.0 (Centers for Disease Control and Prevention and National Center for Injury Prevention and Control, 2008), pp.3–5, 11). See also D.A. Wolfe and L. Yuan, Conceptual and Epidemiological Framework for Child Maltreatment (Health Canada, 2001), pp.4–5.

³¹ Children Act 1989, ss.17, 31(9) and (10).

Domestic violence

The alternative offence would, for the first time, criminalise perpetrators of domestic violence who cause significant emotional harm to a child who witnesses their abuse. Safeguards that may be necessary to protect victims of domestic violence from being criminalised are outlined later in the report.

Exploitation

Exploitation is included as part of the proposed offence in order to be consistent with articles 19, 32, 34, 36 and 39 of the UN Convention on the Rights of the Child, article 17(1)(b) of the European Social Charter, and other international guidance on child maltreatment.³²

³² World Health Organisation and International Society for the Prevention of Child Abuse and Neglect, *Preventing Child Maltreatment: a Guide to Taking Action and Generating Evidence* (2006), p.7; E. Krug, *World Report on Violence and Health*, (World Health Organisation, 2002), Ch.3, pp.59–60 (analysing common elements of definitions of abuse from 58 countries); Public Health Agency of Canada, *Canadian Incidence Study of Reported Child Abuse and Neglect 2008*, (HM the Queen in Right of Canada, 2008).

What do police officers and social workers think?

Action for Children held a number of focus group discussions with social workers and police officers to explore front-line understanding and use of the current criminal law on child neglect. The groups also discussed the proposed alternative offence as above.

The current offence

The main concern raised by social workers was that the current offence limits the extent to which police are able to respond in cases of non-physical neglect. They reported that police generally only intervene when there is tangible physical evidence, and that there are obvious different definitions of what constitutes neglect between the two agencies. The involvement of the police in cases of neglect is seen as positive, whether or not a prosecution is pursued, to reinforce the need for changing behaviour.

The police shared the frustrations of social workers about not being able to intervene, and that this is directed by the limitations of the current offence because it does not include non-physical harm. As one officer put it, neglect can only be acted upon when it has led to physical harm 'like an accident or a child burning itself'.³³

The police reported that the term 'wilful' is a significant barrier to prosecuting cases of neglect, being very difficult to prove and creating confusion amongst some officers. None of the police officers taking part in focus groups were aware that 'wilful' had been legally interpreted to mean 'reckless' by the Sheppard ruling (as described above). Instead, one officer described his practical understanding of 'wilfully' in these terms:

'The '33 Act relates to a time when so many children were neglected because of poverty, which is why they needed to include 'wilfully'. It's not relevant today.'

³³ To some extent, the views reported at the focus groups demonstrate a misunderstanding of the current offence, in particular where police officers did not recognise that it covers prospective physical harm.

The proposed offence

Social workers welcomed the inclusion of non-physical abuse, particularly as a means of encouraging the police to see the issue as a legitimate concern. As one person put it:

'Emotional harm has been ignored for too long, so it's good to see it within the proposed law. It may be difficult to measure but has to be in the law.'

Regardless of whether a criminal prosecution is pursued, social workers considered that a unified definition in criminal law, based on the civil law, would help them in two key ways:³⁴

1. being able to warn parents and demonstrate the seriousness of their behaviour; and
2. allowing the police to collect evidence that would be of use in child protection proceedings, helping to improve the quality of evidence and speeding up decisions in care or other proceedings in the family courts.

Social workers welcomed the change to 'reckless' from 'wilful', particularly because this would clearly protect parents with significant learning difficulties from prosecution (as described above).

The police were strongly in favour of the alternative offence, particularly the change to 'reckless', which would provide much needed clarity to officers. The change to encompass emotional harm was also warmly welcomed, responding to current frustrations at not being able to intervene unless and until physical harm occurs. Additionally, police commented that these proposed changes would directly help in the training of new officers regarding child neglect.

³⁴ In addition to the points raised by social workers, a clear view emerged from specialists in the advisory group that a unified definition across criminal and civil law would have the positive impact of speeding up access to specialist therapeutic services for those children who have been identified as suffering a 'criminal' level of psychological and other forms of abuse.

Fit with recent and forthcoming developments

New domestic violence guidance

In September 2012, the Government announced that the definition of domestic violence would be widened, with new guidance to recognise forms of emotional abuse in domestic violence cases, as well as extending the current law to include young people aged 16 and 17.

The new definition recognises that patterns of behaviour and separate instances of control can add up to abuse – including instances of intimidation, isolation, depriving victims of their financial independence or material possessions and regulating their everyday behaviour.³⁵

The prospect of the new guidance is to be strongly welcomed, but further exposes the failure of the Children and Young Persons Act 1933 to protect children under 16 from non-physical harm. Older young people and adults will now be protected from such emotional abuse whereas children under 16 still are not.

The UN Convention on the Rights of the Child (UNCRC)

The UK Government is due to report back on progress towards meeting its obligations under the UNCRC in January 2014. In 2008 the UN Committee on the Rights of the Child identified a range of issues in the UK, including the ‘alarming’ high prevalence of violence, abuse and neglect of children, including in the home, and the lack of a comprehensive nationwide strategy to tackle these problems.³⁶

The new provision would bring the UK into a greater degree of compliance with article 19 of the UNCRC and articles 7(10) and 17 of the European Social Charter.

³⁵ Women’s Aid, Government changes the definition of domestic violence to include coercive control and recognise 16/17 year olds, <http://www.womensaid.org.uk/domestic-violence-press-information.asp?itemid=2914&itemTitle=Government+changes+the+definition+of+domestic+violence+to+include+coercive+control+and+recognise+16%2F17+year+olds§ion=0001000100150001§ionTitle=Press+releases>. Accessed 5 February 2013.

³⁶ UN Committee on the Rights of the Child, Consideration of reports submitted by States parties under article 44 of the Convention: Committee on the Rights of the Child: concluding observations: United Kingdom of Great Britain and Northern Ireland, (UNCRC, 2008).

Education Select Committee recommendation

In the Education Select Committee's report, *Children first: the child protection system in England*,³⁷ the Committee questioned whether the 1933 Act defined neglect too narrowly and caused problems with prosecutions. It recommended that the Government investigate thoroughly whether the narrow scope of the definition contained in the Children and Young Persons Act 1933 is causing problems in bringing criminal prosecutions for neglect. At the time of writing, the Government had not responded to the specific recommendations in the report, but the Secretary of State Michael Gove recently said, "Too many children are left for far too long in homes where they are exposed to appalling neglect and criminal maltreatment".³⁸

³⁷ House of Commons Education Select Committee, *Children first: the child protection system in England*, (House of Commons, 2012), <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmeduc/137/13702.htm>. Accessed 5 February 2013.

³⁸ Michael Gove, "The failure of child protection and the need for a fresh start", speech given on 16 November 2012.

Avoiding criminalising vulnerable parents and carers

It is the view of the Advisory Group that where there are concerns about child neglect the vast majority of parents and carers can be effectively supported to improve their parenting, and that agencies must always strive to work in a child's best interest, which usually will require strenuous efforts to keep families together.

The proposed new offence seeks to protect the most vulnerable children by capturing extreme cases of child neglect. It is not intended to criminalise vulnerable parents and carers, including those who do not have the capacity to change their behaviour. In these cases a social care response is required, which can mean removing children from their homes as a last resort and if necessary, so the criminal law would not be appropriate. It is also important to state that this proposed offence does not aim to prosecute parents who have difficulty physically or financially providing for their children.

Under the current offence, the number of detected criminal cases of neglect almost trebled between 2001 and 2010³⁹, suggesting that the current offence is open to arbitrary and inconsistent interpretation, which cannot be good for children, families or agencies working within child protection.

The alternative offence proposed in this report seeks to create a common understanding by bringing the criminal law definition of neglect in line with the civil law. This will enable professionals to work more effectively together to protect vulnerable children, and will remove barriers to taking effective action. It is not intended to lower the threshold so that many more parents become the subject of criminal proceedings. Whilst definitions will be aligned, it is right that the more stringent standard of proof for criminal justice prosecutions remains.

³⁹ Ministry of Justice, Criminal Justice Statistics :Quarterly Update to December 2010 (London, Ministry of Justice, 2011), Tables A4.4 and A4.5.

What safeguards exist?

In any potential prosecution, using either the current law or our proposed new offence, the Code for Crown Prosecutors requires that every case where there is sufficient evidence to provide a realistic prospect of conviction be subjected to a further test to see whether it is in the public interest to pursue a prosecution. For example, if an individual is suffering from significant mental ill health, this is listed as a factor to be considered against prosecution.⁴⁰ The public interest also provides safeguards for individuals under the age of 18, as a starting point, the younger the suspect, the less likely it is that a prosecution is required.⁴¹ The public interest test also offers the CPS the opportunity to consider whether it is in the best interests of the child to prosecute a parent or carer (often requiring consideration of whether it is best to keep a family together to safeguard the child, and whether strategies can be put in place to improve parenting). We hope that the CPS would develop specific guidance for prosecutors to govern their decisions on cases under the reformed offence.

Alongside these existing safeguards, the proposed new offence also provides protection for vulnerable parents through the use and interpretation of the term 'recklessly'. As explained above, we are using the same interpretation of the term 'recklessly' as identified in the Sheppard and R v G rulings, so where there is any doubt whether the behaviour of parents or carers was attributable to inherent incapacity to understand or change their behaviour, they will not be prosecuted.

Finally, existing sentencing guidance sets out that consideration will be given to whether the sentence is in the child's best interests, as well as any mitigating factors that should be taken into consideration such as:

- mental illness/depression;
- inability to cope with the pressures of parenthood;
- lack of support;
- sleep deprivation;
- extreme behavioural difficulties in the child, often coupled with a lack of support; and
- inability to secure assistance or support services in spite of every effort having been made by the offender.⁴²

⁴⁰ Crown Prosecution Service, "The Full Code Test", http://www.cps.gov.uk/publications/code_for_crown_prosecutors/codetest.html. Accessed 5 February 2013.

⁴¹ Ibid.

⁴² Crown Prosecution Service, "Cruelty to a Child – sentencing manual", http://www.cps.gov.uk/legal/s_to_u/sentencing_manual/cruelty_to_a_child/. Accessed 5 February 2013.

Protecting victims of domestic abuse from criminalisation

The criminal law concerning domestic abuse contains some safeguards against criminalisation. Prosecutors are required to take the rights and interests of children and young people into account at all stages of domestic violence cases,⁴³ with sentencing guidance on personal mitigation including the criterion of an 'offender [being] dominated by an abusive or stronger partner'.⁴⁴

The existing application of the law concerning child protection and domestic abuse has been criticised by those working with survivors of abuse for failing to address the responsibilities of the abusive parent and potentially unfairly penalising the non-abusive parent, particularly if the latter feels unable to leave the relationship.⁴⁵ It is not appropriate to give a form of blanket exemption to victims of domestic violence from responsibility for child maltreatment, because they are not necessarily rendered

incapable of protecting and caring for their children. Moreover, it is possible that a blanket exception for parents or carers attributing their failure to protect their neglect of their children to alleged violence against themselves would open up the possibility of the concoction of a defence.

Under our proposed offence new CPS prosecutorial guidance is required, to provide necessary and adequate safeguards to identify the real perpetrator of the harm to the child, and to protect a vulnerable parent. Further frontline training is also required for police officers and prosecutors to identify and understand the issues involved in these cases, and we welcome the work currently being done by the CPS in this area.

⁴³ Crown Prosecution Service, "Policy for Prosecuting Cases of Domestic Violence", <http://www.cps.gov.uk/publications/prosecution/domestic/domv.html#a12>. Accessed 5 February 2013.

⁴⁴ Crown Prosecution Service, "Cruelty to a Child – sentencing manual", http://www.cps.gov.uk/legal/s_to_u/sentencing_manual/cruelty_to_a_child/. Accessed 5 February 2013.

⁴⁵ L. Radford, R. Aitken, P. Miller, J. Ellis, J. Roberts and A. Firic, Meeting the needs of children living with domestic violence in London, (Refuge/NSPCC, November 2011).

Broader issues to be considered

During discussions about the need for reform of the criminal law on neglect, a number of associated concerns have been raised by Advisory Group members which are outside the scope of our current exercise, yet warrant inclusion here as possible avenues for future consideration. These include:

- **The need for detailed guidance for relevant agencies on the proposed offence.** We recognise that, as in all areas of child protection, professional discretion will have to be exercised in each case, but greater consistency in decision-making can be achieved when that discretion is guided by a set of criteria which encourage the decision-makers to consider the entire circumstances of the family in ascertaining what is in the best interests of the child.
- **Whether criminal offences relating to child maltreatment should apply to parents under the age of 18.** As detailed above, our alternative child maltreatment offence does not seek to change the age of responsibility from the current age of 16. However, concerns were raised about the particular vulnerability of parents and carers between 16 and 18, and the fact that this is reflected in the civil law definition of childhood under the Children Act 1989, extending fully to age 18.
- **The need for a systematic review of evidential rules and procedures applicable in the family and criminal courts.** It is vitally important that practitioners in each court 'look over the wall' to the other court which may be considering the same allegations of child abuse. In particular, issues relating to the sharing of information between the two systems of justice, and third-party disclosure, require urgent consideration.

Conclusion

Child neglect is the most common form of child abuse in the UK. It causes both physical and psychological harm, and can have life-long and life-threatening effects upon children and young people. If unchecked in a particular case, it also risks escalation into very serious physical harm and even death as recent high profile cases such as Connolly and Barker ('Baby P') tragically illustrated.

Tackling the issue of child maltreatment requires not just effective interventions at local level and successful inter-agency working, but also that we get the framework statutory regulation and guidance right, with civil and criminal law that is clear, succinct and helpful to those charged with protecting children. To that end, section 1 of the Children and Young Persons Act 1933 stands out as out-dated and indisputably unhelpful.

The proposed alternative offence of child maltreatment would recognise the full range of harm done to children who are neglected. It would replace the numerous antiquated and obscure terms and definitions that currently exist, and it would also align the criminal law with the current civil law, offering the opportunity for clear, unified and efficient evidence collection and decision-making across the two jurisdictions. We stress that our first and primary objective is to help families, and that we regard criminal prosecution as a last resort where other interventions have failed, or are likely to be futile. We as an independent Advisory Group submit this carefully considered proposal to lawmakers for England and Wales.

This report has been compiled in consultation with a wide range of individual experts. Particular thanks are owed to:

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