



Updating the criminal law on child neglect: protecting children from severe emotional abuse

by Abigail Gill

It has been 81 years since the Children and Young Persons Act 1933 (CYPA) was enacted to punish cruelty to children. Since the Act was passed, social, academic and professional understanding of the impact of neglect and emotional abuse has changed. It is time for the criminal law to be brought up-to-date and aligned with society's understanding of the issue today. This article outlines the urgency for a new criminal law on neglect and considers what a new law should look like.

In her speech on 4 June 2014, the Queen announced that her Government would bring forward a Serious Crime Bill to tackle child neglect, following a three year campaign by children's charity Action for Children¹. At the time of writing the Bill is passing through parliament and the exact content of the Bill is being finalised. It is essential that any change to the law posits children firmly at the centre of criminal justice decisions. It is also essential that changes to the criminal law are thought through in terms of their impact at grass roots level. Government and law makers must take into account how changes to the law would be operationalised by professionals and should ensure that front line staff receive the relevant information and training to ensure that children are effectively safeguarded from all forms of abuse. The impact of an update to the criminal law must filter down to help those directly affected by abuse.

Part I Child neglect and its impact

A child experiences neglect when the adults who look after them fail to meet their needs.² Neglect is a complex and multifaceted form of abuse which can take many different forms. 'It could be a parent allowing their child to suffer serious harm on a one-off occasion or failing to care for them over a long period. It can be emotional as well as physical with children not receiving basic daily care, emotional warmth, stimulation or guidance and boundaries. Neglected children can be left alone in the house or streets for a long time. They can lack proper health care, be ignored when distressed, or even when excited or happy'.³

Subjecting a child to intentional emotional harm, and the effects that this type of abuse causes, has been the subject of significant research over the past 40 years. Since the 1970's, academic research was conducted into 'the elusive" crime" of emotional abuse', arguing that emotional abuse through neglect is 'deliberate behaviour that seriously undermines the [child's]

¹ Founded in 1869, Action for Children is a national charity working in local communities throughout the UK to protect and support the young and vulnerable, as they grow up. With over 650 services, from children's centres to intensive family support, from fostering and adoption to respite care for children with disabilities, the organisation provides support at the earliest possible stage. This is coupled with targeted and intensive intervention. Neglect is one of the most common problems faced by the children who across Action for Children services. Over many years the organisation has developed an evidence base on child neglect, campaigned for change, used knowledge and experience to support practitioners and has developed innovative services to help neglected children. Action for Children is also calling on the Government to produce a national strategy on child neglect in England, which includes an update to the criminal law on child neglect.

² Action for Children *Child neglect: the scandal that never breaks*. (Action for Children, London, 2014)

³ Action for Children *Child neglect: the scandal that never breaks*. (Action for Children, London, 2014)

development'.⁴ Further studies reveal the different effects on children of different developmental ages and stages.⁵

It is important to recognise the difference between emotional neglect and the neglect of physical needs. The impact of emotional neglect can be devastating, continuing long after the child has grown up and any physical signs may have healed. The effect that this form of abuse has on a young person have been identified as including depression, post-traumatic stress disorder, personality disorder, aggression, disassociation, mental illness and suicide.⁶ Such damage to a child's development can be so profound as to shape their future experiences and life chances.

Children who experience rejection or emotional neglect are more likely to develop antisocial traits as they grow up and are more associated with personality disorders and violent behaviour.⁷ Neglected adolescents are estimated to be at least 25 per cent more likely to experience problems such as delinquency, teen pregnancy, low academic achievement, drug use, and mental health problems.⁸ The negative impact on the child's emotional development and wellbeing, can in some cases lead to attachment disorder where the child is unable to form positive relationships long after the abuse has ceased. 80 per cent of neglected children show signs of Reactive Attachment Disorder⁹ due to the destruction of trusted relationships and bonds so early in life. This can have an affect on how they parent in the future. The physical affect of emotional abuse on the child's brain can result in permanent and irreversible damage. Specialists viewing CAT scans of key emotional areas of the brains of abused or neglected children have likened the experience to looking at a 'black hole', where in some extreme cases the abused child's brain is significantly smaller than the norm.¹⁰ This type of abuse is especially detrimental to the emotional and neurological development of a child because the perpetrator is almost always the primary carer of that child and therefore the person responsible for nurturing their emotional and psychological development.¹¹ Abuse by a person in a position of such trust and responsibility is arguably the most destructive form of abuse.¹²

In the UK, neglect is the most prevalent form of child abuse with an estimated one in 10 children suffering neglect.¹³ It is the most common reason for a child to be the subject of a child protection plan or on a child protection register¹⁴ and is the main reason for a child to need the protection of the authorities in the UK.¹⁵ In the most severe cases, neglect can lead to the death of a child. It is a factor in 60 per cent of all reviews into the deaths and serious injuries of a child.¹⁶

⁴ James Garbarino, 'The elusive 'crime' of emotional abuse' [1978] *Child abuse negl* 89-99

⁵ KP O'Hagan, 'Emotional and Psychological Abuse: Problems of Definition' [1995] *Child Abuse negl* 449

⁶ Anne Lazenbatt/ NSPCC, Queen's University Belfast, *The impact of abuse and neglect on the health and mental health of children and young people* [NSPCC, 2010]

⁷ A Schore 'Early relational trauma, disorganized attachment, and the development of a predisposition to violence' in M. F. Solomon and D. J. Siegel (eds), *Healing trauma: Attachment, mind, body, and brain* (Norton, New York 2003)

⁸ Kelley, B. T., Thornberry, T. P., & Smith, C. A *In the wake of childhood maltreatment* (National Institute of Justice, Washington, DC 1997)

⁹ V Abel *Childhood Trauma and Attachment Disorders in Foster Children* (Minnesota University, Minnesota 2009) 19

¹⁰ Graham Allen, *Early intervention: the next steps* (Crown, London 2007)

¹¹ Glaser D 'Emotional abuse and neglect (psychological maltreatment): a conceptual framework' [2002] *Child Abuse Negl* 697

¹² James Garbarino, Guttman E., & Seeley J.W. *The Psychologically Battered Child* (Jossey-Bass, San Francisco 1986)

¹³ NSPCC, 'Statistics on child neglect' (NSPCC 15 April 2014)

http://www.nspcc.org.uk/Inform/resourcesforprofessionals/neglect/statistics_wda89685.html

¹⁴ NSPCC, 'Statistics on child neglect' (NSPCC 15 April 2014)

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¹⁵ Rachel Taylor & Laura Hoyano, Legislative comment – criminal child maltreatment: the case for reform [2012] *Crim LR* 3.

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Case study – “JH”

JH is a four year old boy. When he was 8 months old he was placed on the child protection register under the category of both neglect and emotional abuse.

JH was openly told by his stepfather that he was hated; he was forced to go to bed before his siblings, and regularly wet his bed because his room was not lit, to the extent that maggots were found in the mattress. He was given different food to the rest of the family. He had to get his own breakfast before everyone else. His half brother was ordered not to play with him. He was not invited to his mother and stepfathers wedding, even though his siblings were. The child was not taken on holiday with his family but was instead left with a neighbour. A health visitor reported her concerns at a child protection conference, stating, ‘he was not included in the family circle. He was disciplined differently from the other children. He was persistently criticised. He was socially isolated until he started nursery’.

Following a child protection conference, the parents said that they did not intend to cooperate with the child protection plan and did not attend further conferences or core groups. The Guardian of this case reported that neither the child’s mother nor his step-father had demonstrated that they were willing or able to meet his needs and a social worker noted that the stepfather was bereft of any emotion in his responses to the child.¹⁷

While there is increasing evidence around the impact of neglect and an increasing urgency to intervene, there remain barriers which prevent parents, children and the wider public from seeking help and also barriers which prevent professionals from intervening effectively at an early stage. Research¹⁸ shows that:

- Whilst the public is increasingly aware of neglect, there remains reluctance around reporting concerns, with the public sometimes reluctant to report their concerns as they feel they do not have firm evidence;
- The system within which parents can ask for help is complex and difficult with a lack of information for parents to help them navigate this system;
- Those professionals most qualified to tackle neglect are frustrated that they cannot help;
- There is a lack of data collected by local authorities meaning that they cannot fully understand the extent of child neglect within their area and therefore plan and commission the appropriate services;
- There is not a fully joined-up system which can respond to every level of need. Around one in 10 police officers see weekly cases of suspected child neglect but the out-dated criminal law on child neglect means that they are working to a different framework from social workers.

For the vast majority of families, neglect can be tackled when the right interventions are put in place by professionals at the earliest possible point. Parents can and should be supported to change their behaviour and improve their parenting. However, in the most extreme cases where the most appalling acts of emotional neglect have been committed by parents who do have the capacity to change but choose not to, an updated criminal law would be an essential safety net for some children.

At present, despite wide agreement among social care and healthcare professionals regarding the harm caused by emotional abuse, it is not illegal in England and Wales.

The Government’s own definition of neglect, which shapes civil law and social work practice, encompasses emotional abuse; ‘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

¹⁷ EWHC [2003] 429 (Fam), Family Division – Sumner J – 3 February, 7 March 2003

¹⁸ Action for Children *Child neglect: the scandal that never breaks*. (Action for Children, London, 2014)

development'.¹⁹ However the current criminal law does not support the Government's definition and does not cover the full range of abuse, including emotional neglect.

Part II The current criminal law on child neglect

In current criminal law, the Children and Young Persons Act 1933 (CYPA) serves to punish cruelty to children. The overarching offence of child cruelty in CYPA s.1(1) can be committed in five different ways. A person over 16 who has responsibility for a child under that age commits the offence if he assaults, ill-treats, neglects, abandons, or exposes the child, or causes or procures such treatment. Each form must be committed 'wilfully' and in a manner likely to cause 'unnecessary suffering or injury to health'.²⁰ The prosecution must prove beyond reasonable doubt that the offence has taken place. The current law contains a number of legal and practical problems which stem from an out-dated approach to child protection. This means that in the most severe cases children are left at risk, and child protection agencies are prevented from working together effectively.

The current law stems from an out-dated Victorian Act. Whilst the Act itself is over 80 years old, its origins can be traced as far back as the Poor Law (Amendment) Act 1868. According to this Act, it is 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'.²¹ This notion is based on Victorian ideals and focuses on the parent's responsibility to provide the most basic physical provisions for their children. It does not account for the emotional and developmental harm caused by neglect. The Poor Law (Amendment) Act was passed in response to specific concerns about a sect, the Peculiar People, who believed that the sick should be treated through prayer, and that providing medical assistance would represent a lack of faith in God. Members of the sect whose ill children had died had previously been acquitted of manslaughter and so the new offence "wilfully neglect" was created to prosecute such cases. The phrase 'wilfully neglect' was deployed in order to capture such cases of an intentional refusal to act, sometimes resulting in the death of a child. This wording still exists today in section 1(2)(a) of the Children and Young Persons Act 1933.

There are five conduct elements within the Act; assault, ill-treatment, neglect, abandonment and exposure. All five conduct elements are out of date, including neglect which is insufficient in protecting against the full range of abuse. Assault is essentially covered by the offence of 'common assault'. 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). Abandonment is an out-dated term with no reported prosecution since 1957. Exposure is an out-dated term that is ignored in the sentencing guidelines, with no reported prosecution since 1910.²²

Furthermore, the current law does not cover the full range of harm done to neglected children, specifically with regard to emotional harm. The inclusion of the term 'mental derangement' may have, at the time of the law's conception, been directed at non-physical harm. However, this antiquated term has since been disregarded completely in the case of the Children and Young Persons Act 1933. When debated in the House of Lords in 1981, the case of *Sheppard* provided clarification as to whether emotional neglect is covered within the law. Lord Keith maintained that the offence is limited to the 'physical needs of the child and does not cover other aspects such as the moral and

¹⁹ HM Government, *Working together to safeguard children: a guide to inter-agency working to safeguard and promote the welfare of children* (2013 HM Government, London)

²⁰ Rachel Taylor & Laura Hoyano, Legislative comment – criminal child maltreatment: the case for reform [2012] Crim LR 3.

²¹ Laura Hoyano et al. *The criminal law and child neglect: an independent analysis and proposal for reform* (2013 Action for Children, London)

²² Laura Hoyano et al. *The criminal law and child neglect: an independent analysis and proposal for reform* (2013 Action for Children, London)

educational'. Lord Diplock stated that neglect is the failure to meet the child's 'physical needs rather than its spiritual, educational, moral or emotional needs'.²³ Therefore emotional abuse is simply not deemed a criminal offence within the Act, with the offence being restricted only to physical neglect.²⁴ Due to this emotional abuse is not accorded the legal coverage it necessitates and vulnerable children remain unprotected from this form of abuse.

The inclusion of the term wilful can be confusing within this particular piece of legislation. 'Wilful' may restrict the protection of neglected children afforded by the Act due to the openness of interpretation. Of the five forms of abuse stipulated within the law (assault, ill-treatment, neglect, abandonment and exposure), neglect is typically an omission whilst the other acts are positive acts. However as neglect is framed as 'wilful neglect' it remains confusing for juries presiding over child neglect cases to conceive how, an omission can be wilful but not deliberate.²⁵ Legally the term wilful was, for 92 years, interpreted as a deliberate and intentional act,²⁶ which raised confusion as to whether 'wilful' applied only to acts or omissions or also to the failure to foresee future consequences.²⁷ This was until 1981 when the House of Lords debated the term 'wilful' in *Sheppard*²⁸ and offered a new solution. A new model direction was drafted which decreed that the prosecution must prove that at the time when the child needed assistance (1) the defendant was aware that the child's health might be at risk if it were not provided with medical aid; or (2) that his unawareness of this fact was due to his not caring whether the child's health was at risk or not.²⁹

The result of this is that wilfulness is equated to advertent or subjective recklessness. Therefore, 'a deliberate decision not to act is not required if the prosecution can prove that the parent simply did not care, but the jury must acquit if there is any doubt that the parent failed to act due to personal inadequacy or stupidity, or both'.³⁰ However, confusion remains amongst front line professionals with regard to neglect being framed as 'wilful' and the complexity of whether an omission can be wilful but not deliberate. At ground level, police officers reported confusion with regard to the term wilful; none of the police officers taking part in Action for Children focus groups were aware that wilful had been legally interpreted to mean reckless.³¹

The definition of neglect in criminal law is different to that used by social workers, creating difficulties for multi-agency working. The definition of neglect within criminal law, as laid out in the Children and Young Persons Act 1933 is very different to the definition of neglect within civil law, as outlined in statutory guidance under the Children Act 1989. In civil law, emotional neglect is defined as 'the persistent emotional maltreatment of a child such as to cause severe and persistent adverse effects on the child's emotional development. It may involve conveying to a child that they are worthless or unloved, inadequate, or valued only insofar as they meet the needs of another person. It may include not giving the child opportunities to express their views, deliberately silencing them or 'making fun' of what they say or how they communicate. It may feature age or developmentally inappropriate expectations being imposed on children. These may include interactions that are

²³ Katherine Copperthwaite, *Emotional abuse and the criminal law: an international comparison* (2013 Action for Children, London)

²⁴ Christine Piper, 'Neglect neglected in the Crime and Courts Act' [2013] FLJ 722

²⁵ Rachel Taylor & Laura Hoyano, Legislative comment – criminal child maltreatment: the case for reform [2012] Crim LR 3.

²⁶ In 1989 in *Senior*, Lord Russell of Killowen C.J had considered that "[w]ilfully" means that the act is done deliberately and intentionally, not by accident or inadvertence, but so that the mind of the person who does the act goes with it." (Taylor & Hoyano, 2012).

²⁷ Rachel Taylor & Laura Hoyano, Legislative comment – criminal child maltreatment: the case for reform [2012] Crim LR 3.

²⁸ *R v Sheppard (James Martin)* [1981] AC 394 HL per Lord Diplock at 404

²⁹ Rachel Taylor & Laura Hoyano, Legislative comment – criminal child maltreatment: the case for reform [2012] Crim LR 3.

³⁰ Rachel Taylor & Laura Hoyano, Legislative comment – criminal child maltreatment: the case for reform [2012] Crim LR 3.

³¹ Laura Hoyano et al. *The criminal law and child neglect: an independent analysis and proposal for reform* (2013 Action for Children, London)

beyond a child's developmental capability, as well as overprotection and limitation of exploration and learning, or preventing the child participating in normal social interaction. It may involve seeing or hearing the ill-treatment of another. It may involve serious bullying (including cyber bullying), causing children frequently to feel frightened or in danger, or the exploitation or corruption of children. Some level of emotional abuse is involved in all types of maltreatment of a child, though it alone'.³² This definition is live and subject to review by the Department for Education, in contrast to the criminal law which has been untouched for over eighty years. The definition includes the full range of both physical and emotional harm, and is widely accepted by practitioners.

The difference in definition is of fundamental importance because it is from these definitions that professionals work to protect vulnerable children. The effective protection of children is reliant on a multi-agency approach to child protection and therefore, when the criminal law from which police operate differs from the civil law from which social workers operate, problems with co-operation between agencies arises. In a YouGov survey carried out in November 2013, Action for Children found that nearly 70 per cent of police officers surveyed believe emotional cruelty towards a child should be a criminal offence. During focus group discussions with Action for Children, social workers reported concern as to the limits which the current law places on the ability of police to respond to cases of non-physical neglect. Social workers explained that the police generally only intervene when there is physical evidence. Their involvement in cases of neglect is seen as positive, whether or not a prosecution is pursued, as it reinforces the need to change behaviour. The police shared this frustration in being unable to intervene and cited the term 'wilful' as a significant barrier to prosecuting cases of neglect.³³

In 2008 the UN Committee on the Rights of the Child identified a range of issues in the UK including the 'alarmingly' 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.³⁴ Work remains to be done to bring the UK's ability to protect children in line with that of its European counterparts. Research commissioned by Action for Children compared laws equivalent to the Children and Young Persons Act 1933 in thirty-one jurisdictions, across the continents of Europe, Asia, North America, Africa and Australia.³⁵ Of the 31 jurisdictions examined, 25 include emotional abuse within criminal child protection legislation. A further three jurisdictions uphold criminal law which is unclear in its coverage of emotional abuse; those jurisdictions being Scotland, Australian Capital Territory and Canada, under federal law. Scotland's criminal law is near identical to England and Wales' in its wording. In addition to the initial 31 jurisdictions, the report references research from the Swedish Government which identified a further ten jurisdictions where it is a criminal offence to mentally abuse a child. These are Denmark, Finland, Cyprus, Israel, Croatia, Lithuania, Germany, Austria, Italy and Belgium. Of all jurisdictions examined, only two explicitly omit emotional abuse of a child within criminal law; England and Wales, and Washington state.

The research also uncovered that many statutes contain clear definitions of what emotional abuse encompasses alongside the evidence needed to form a prosecution. These examples provide helpful comparisons when considering how best to update the law in England and Wales, and particularly how to define severe emotional abuse. Clear definitions of what 'emotional abuse' encompasses, as well as the evidence of how to demonstrate a child has been emotionally abused, have been included in many statutes. The Children and Young Persons Act (CYPA (Sing)) is the statute in Singapore which provides legal protection for children (aged below 14) and young persons

³² HM Government, *Working together to safeguard children: a guide to inter-agency working to safeguard and promote the welfare of children* (2013 HM Government, London)

³³ Laura Hoyano et al. *The criminal law and child neglect: an independent analysis and proposal for reform* (2013 Action for Children, London)

³⁴ Laura Hoyano et al. *The criminal law and child neglect: an independent analysis and proposal for reform* (2013 Action for Children, London)

³⁵ Katherine Copperthwaite, *Emotional abuse and the criminal law: an international comparison* (2013 Action for Children, London)

(aged 14-16). A parent is deemed to have neglected a child if they have neglected to 'provide adequate food, clothing, medical aid, lodging, care or other necessities of life. Judge Foo in *BGC v Child Protector* defined 'adequate' to cover 'her emotional, psychological and developmental needs' and defined emotional injury as anything that causes damage to the behavioural, social, cognitive, affective functioning of the child'. These international comparisons also serve as useful case law to demonstrate the most effective evidence tests and safeguards to protect vulnerable parents.

The time is right for a change in the law on child neglect. The current law stems back to a Victorian age in which extreme poverty often led to adults failing to fulfil the basic physical needs of children and the law was designed to reflect this. In the twenty-first century the context is different. Notwithstanding the current shift in law and policy towards greater understanding of notions of parental responsibility, there is now support for state intervention to protect children as more is known about the detrimental consequences of abuse and neglect.³⁶

Part III The serious crime bill

In 2013, an independent group of experts from a range of backgrounds was convened by Action for Children to put forward an alternative. This Independent Neglect Law Change Advisory Group sought to draft a succinct, clear and workable alternative offence:³⁷

- using the internationally recognised term 'maltreatment' to encompass the full range of harm done to neglected and abused children under 16, including emotional harm;
- replacing the widely misunderstood term 'wilfully' with a clearer term of 'recklessness';
- replacing 'unnecessary suffering' with 'significant harm';
- providing a criminal law counterpart to the civil law (Children Act 1989, sections 17 and 39); allowing for shared investigatory practices across agencies using common definitions and evidence, whilst preserving the more stringent standard of proof for criminal prosecutions;
- avoiding the criminalisation of vulnerable parents and carers;
- removing section 1(2)(b) which is an out dated example of the offence concerning co-sleeping with an infant in a bed whilst drunk.

The proposed alternative is as follows:

'(1) It is an offence for a person 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 decided to take that risk;

(b) 'responsibility' shall be as defined in section 17³⁸;

(c) 'maltreatment' includes—

³⁶ Christine Piper, 'Neglect neglected in the Crime and Courts Act' [2013] FLJ 722

³⁷ Laura Hoyano et al. *The criminal law and child neglect: an independent analysis and proposal for reform* (2013 Action for Children, London)

³⁸ As amended by the Children Act 1989.

- (i) neglect (including abandonment),
 - (ii) physical abuse,
 - (iii) sexual abuse,
 - (iv) exploitation, and
 - (v) emotional abuse (including exposing the child to violence against others in the same household);
- (d) 'harm' means the impairment of—
- (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.'

Last year this proposed change to the law was published and was presented to the Public Bill Committee in February 2013 as a proposed new clause in the Crime and Courts Bill. This Bill received Royal Assent without the inclusion of the new clause. However it created the political interest necessary to further pursue a change to the law. The proposed alternative offence was then put forward as a Private Members' Bill sponsored by Mark Williams MP. This Child Maltreatment Bill received its 1st reading in the House of Commons on 19 June 2013 but did not progress any further through parliament.

Given the increased political interest in the issue, Damian Green MP, Minister for Policing, Criminal Justice and Victims, announced in October 2013 that he had asked officials to undertake a targeted consultation with the relevant experts to explore the adequacy of the existing offence of child cruelty and the results of this are anticipated shortly.³⁹

Then in June 2014, the Queen announced in her annual speech that the Government would introduce a Serious Crime Bill to tackle child neglect. The amendments to the Children and Young Persons Act 1933 proposed within this bill are not the same as those proposed within the Child Maltreatment Bill:

Child cruelty offence

- (1) Section 1 of the Children and Young Persons Act 1933 (cruelty to persons under 16) is amended as follows.
- (2) In subsection (1), for the words from "(including" to "derangement)" substitute "(whether the suffering or injury is of a physical or a psychological nature)".
- (3) In that subsection, for "a misdemeanour" substitute "an offence".

³⁹ Jacqueline Beard, 'Calls for reform of the criminal law on child neglect' (Parliament UK 2014) . www.parliament.uk/business/publications/research/briefing-papers/SN06372/calls-for-reform-of-the-criminal-law-on-child-neglect accessed 20 April 2014

The new bill will make clear that it is a crime to inflict cruelty which is likely to cause psychological suffering or injury to a child. At the time of writing the Bill is currently passing through parliament and the exact content of the Bill is being finalised.

Part IV The challenges of getting a new law right

A new law on child neglect presents challenging questions to law makers, the Government and professionals working directly with families. The campaign to update the law has opened up the space within which debate on the issue can take place and various stakeholders including social workers, the police and other charities have voiced opinions.

Protecting vulnerable parents

The Independent Law Advisory Group's 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, so the criminal law would not be appropriate. Equally, the proposal does not aim to prosecute parents who have difficulty physically or financially providing for their children. Prosecution would only be an option in the most severe cases where parents actively refuse to engage with professionals to change their behaviour, as was evident in JH's case study.

Safeguards are already in place aimed at protecting vulnerable parents. In any potential prosecution, 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 test also offers the Crown Prosecution Service 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). The CPS should develop specific guidance for prosecutors to govern their decisions on cases under the reformed offence.

Under the existing Children and Young Persons Act 1933 perpetrators of domestic violence cannot be prosecuted for forcing a child to witness abuse. This should be captured within a new law. The existing application of the law concerning child protection and domestic abuse has also 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.⁴¹

It would not be feasible or realistic to give a form of blanket exemption to victims of domestic violence with regard to responsibility for all forms of child maltreatment. This is because victims are not necessarily rendered incapable of protecting and caring for their children. A blanket exemption for parents or carers attributing a failure to protect their child to the alleged violence against them could open up the possibility of the concoction of a defence and would therefore be legally problematic. Whilst a blanket exemption would not be feasible, in most cases parents who are experiencing domestic abuse do everything possible to protect their child from experiencing or witnessing the abuse and should not be at risk of prosecution. A balance is needed in terms of providing the

⁴⁰ Laura Hoyano et al. *The criminal law and child neglect: an independent analysis and proposal for reform* (2013 Action for Children, London)

⁴¹ Lorraine Radford et al. *Meeting the needs of children living with domestic violence in London* (2011 Refuge/NSPCC London).

necessary and adequate safeguards to identify the real perpetrator of harm to the child, and to protect a vulnerable parent.

The potential solution to this challenge is contained within the Independent Neglect Law Change Advisory Group's proposed offence. Following a change to the law, new CPS prosecutorial guidance would be required which would 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 the work currently being done by the CPS in this area has been widely welcomed. It is also worth noting that prosecutors are currently required to take the rights and interests of children and young people into account at all stages of cases where domestic violence is present,⁴² with sentencing guidance on personal mitigation including the criterion of an 'offender [being] dominated by an abusive or stronger partner'.⁴³

A legal threshold for severe emotional abuse

Action for Children's comparative research examining laws on child neglect demonstrates that other country's legal systems do provide examples and thresholds within legislation. For example, in Florida a child is emotionally abused if they have suffered a mental injury, which is an 'injury to the intellectual or psychological capacity of a child'. This is evidenced by 'a discernible and substantial impairment in the ability of the child to function within the normal range of performance and behaviour as supported by expert testimony'. It thus gives an objective standard by which to assess the level of abuse of the child against. A range of other jurisdictions offer similar objective standards.⁴⁴ If the law in England and Wales were to be updated, an objective standard, by which levels of neglect would be assessed, would need to be established. Under civil law, which informs social work practice and interventions, the threshold is set at 'significant harm'. This would be one option when setting the threshold for an updated criminal law, and may also enable police and social workers to put a co-ordinated response into effect when this threshold is reached. Even if the threshold was not reached and therefore a prosecution not sought, an update to the law would also serve to encourage professionals to see the issue as a legitimate concern. By updating the criminal law so that the definition of neglect contained within it is in line with that within civil law, professionals would be able to warn parents and demonstrate the seriousness of their behaviour, and also allow 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 family court proceedings.⁴⁵

Whilst definitions need to be better aligned to enable professionals to work more effectively together, the standards of proof for the two laws will remain different. The civil law would adhere to the 'balance of probabilities' where the defendant may be judged 'more likely than not' to be guilty, while the criminal law would require the defendant to be found guilty 'beyond reasonable doubt'. The proposals are also not intended to lower the threshold so that many more parents become the subject of criminal proceedings.

⁴² Crown Prosecution Service (Policy for Prosecuting Cases of Domestic Violence (CPS 2014) www.cps.gov.uk/publications/prosecution/domestic/domv.html#a12 accessed 28 April 2014.

⁴³ Crown Prosecution Service 'Cruelty to a Child – sentencing manual' (CPS 2014) www.cps.gov.uk/legal/s_to_u/sentencing_manual/cruelty_to_a_child/ accessed 28 April 2014

⁴⁴ Katherine Copperthwaite, *Emotional abuse and the criminal law: an international comparison* (2013 Action for Children, London)

⁴⁵ Laura Hoyano et al. *The criminal law and child neglect: an independent analysis and proposal for reform* (2013 Action for Children, London)

Conclusions

This article has outlined the case for updating the criminal law on neglect as the 81 year old Children and Young Persons Act 1933 (CYPA) does not sufficiently protect child from emotional neglect. Evidence was presented outlining the impact of emotional neglect on children in terms of their development and wellbeing. The case study of JH highlights the impact when adults deliberately inflict emotional abuse onto a child. The article then outlined how the current criminal law does not protect children from such abuse, due to out of date conduct elements, confusion around the term 'wilful, a lack of alignment between definitions of neglect. The article then considered progress to date and the attempts made to update the law, culminating in the inclusion of the law change in the forthcoming Serious Crime Bill. Finally, challenges were considered which, it is hoped, will be deliberated as the Bill passes through parliament. Upon the Bill becoming an Act, it is essential that clear, comprehensive guidance is published to enable those working on the ground to effectively translate the law into practice. By finally updating the 81 year old law and providing effective guidance for practitioners, it is hoped that children in England and Wales will finally be protected in law from emotional neglect.

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