



Law Society
of Scotland



Stage 1 Briefing

Children (Equal Protection from Assault) (Scotland) Bill

24 May 2019



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

We refer to the Children (Equal Protection from Assault (Scotland) Bill (the Bill) which is scheduled for the Parliament's scrutiny at the Stage 1 Debate on Tuesday, 28 May 2019.

The Bill aims to:

- abolish the defence of reasonable chastisement
- end the physical punishment of children by parents and others caring for them or in charge of them
- drive behavioural change in Scotland

We would make the following comments which we hope are helpful for your purposes which deal with:

- clarification of the law
- changing societal attitudes
- driving behavioural change

Clarification of the Law

We agree, as recognised in the Bill's Stage 1 Report¹, that there may be:

“a lack of clarity around the law which has led to confusion amongst parents and carers and has also made it harder for public services to have confidence in their approach when working with parents.”²

¹ <https://digitalpublications.parliament.scot/Committees/Report/EHRiC/2019/5/16/Children--Equal-Protection-from-Assault---Scotland--Bill-Stage-1-Report#Background>

² Paragraph 269 of the Stage 1 Report <https://digitalpublications.parliament.scot/Committees/Report/EHRiC/2019/5/16/Children--Equal-Protection-from-Assault---Scotland--Bill-Stage-1-Report#Background>

When we gave evidence to the Scottish Parliament's Equalities and Human Rights Committee, we recognised that an advantage in the Bill progressing would be to bring clarification of the law for all concerned. This would be appreciated by the public as they have a right to know what they can and cannot do in so far as the criminal law is concerned.

Under the current law, we stated:

“For a prosecution [to proceed], there needs to be evidence of the intention to harm, which is looked at in various ways...ultimately, a prosecutorial decision will be made on whether it is in the public interest to prosecute.”³

The proposed change is not about making prosecutions easier.

The Crown Office and Procurator Fiscal Service (COPFS) under their Prosecution Code⁴ has the discretion to decide whether, in all the circumstances, it is in the public interest to prosecute. They have a range of options with regard to non-court disposals following receipt of reports of crime made to them. Not every case will result in a prosecution through the courts. For a prosecution to proceed, it requires sufficient admissible, reliable and credible evidence that a crime (actus reus and mens rea) was committed by an identified accused. At court, the Crown needs to establish, by leading evidence beyond reasonable doubt, that there is a case to answer in law.

It is then a matter for the defence to set up on the facts that the assault amounted to reasonable chastisement. Each case as to establishing the defence will require to be examined on its own facts and circumstances. Exactly when these factors amount to reasonable chastisement refers to the various qualifying factors⁵ to which the court must have regard to ascertain if the assault was a justified assault. These factors include:

- (a) the nature of what was done, the reason for it, and the circumstances in which it took place
- (b) the duration and frequency
- (c) any effect (whether physical or mental) which it has been shown to have had on that child
- (d) the child's age
- (e) the child's personal characteristics

The court⁶ can also have regard to any other factors that it considers appropriate in the circumstances.

That makes it a challenge to be sure in what circumstances, the defence will be made out.

³ Paragraph 154 of the Stage 1 Report <https://digitalpublications.parliament.scot/Committees/Report/EHRIC/2019/5/16/Children--Equal-Protection-from-Assault---Scotland--Bill-Stage-1-Report#Background> Mhairi McMillan Law Society of Scotland

⁴ <https://www.copfs.gov.uk/publications/prosecution-policy-and-guidance>

⁵ Section 5(1) of the Criminal Justice (Scotland) Act 2003

⁶ Section 51(2) of the Criminal Justice (Scotland) Act 2003

By removing the defence of reasonable chastisement, this would bring that clarity to the law. Children would be in a similar position to adults where the defence does not currently apply. Children do not currently have the same protection from assault in the law. That presents an inequitable position which can be addressed by the Bill.

Changing attitudes

There has been considerable policy development with regard to changing societal attitudes towards children and physical punishment over the passage of time. Making the change proposed by the Bill would bring Scots law into line with the UN Convention on the Rights of the Child which makes it clear that there should be “an end to corporal punishment in all settings including the home.”⁷

As “over 50 countries in the world have already taken the step to address the use of physical punishment in the home, with a similar number indicating their commitment to address this issue,”⁸ Scotland would now join that group of countries who fully protect children from physical punishment. That would change the fact that “[a]t present, the United Kingdom is one of only four countries in the EU not to legislate against the physical punishment of children in all settings.”⁹

Driving Behavioural Change

If the Bill goes ahead, it is not just about changing the law. As the Stage 1 report referred to, as well as a providing a legislative solution, there needs to be “a comprehensive public education and awareness campaign.”¹⁰ The public will of course be impacted by the change. But within the public there are specific groups who will need to be proactive in managing such change.

Foremost, we consider that there is a need for Scottish Government (including Police Scotland and COPFS) to set out a clear message regarding the change and its implications as far as reporting and prosecutions of crimes of assault on children are concerned. That should form part of the public awareness campaign.

⁷ <https://www.refworld.org/docid/5645a59c4.html> paragraph 20 of the concluding observations on the Seventh periodic report of the United Kingdom of Great Britain and Ireland Civil and political rights | International Covenant on Civil and Political Rights (ICCPR)

⁸ Paragraph 247 of the Stage 1 Report <https://digitalpublications.parliament.scot/Committees/Report/EHRiC/2019/5/16/Children--Equal-Protection-from-Assault---Scotland--Bill-Stage-1-Report#Background>

⁹ Paragraph 102 Of the Stage 1 Report <https://digitalpublications.parliament.scot/Committees/Report/EHRiC/2019/5/16/Children--Equal-Protection-from-Assault---Scotland--Bill-Stage-1-Report#Background>

¹⁰ <https://digitalpublications.parliament.scot/Committees/Report/EHRiC/2019/5/16/Children--Equal-Protection-from-Assault---Scotland--Bill-Stage-1-Report#Background>

Groups of significance will include parents and children, but especially we would highlight those responsible for public services such as schools and care homes as they will be on the front line as far as providing advice and receiving complaints are concerned.

In addition, our solicitor members will be involved in providing advice to clients on the change to the law where their clients may wish to make a complaint or defend against an allegation.

We would highlight that there may be “particular pressures...associated with some communities” in view of the cultural challenges and those faced by parents of children with additional needs.¹¹

We fully endorse that support must be provided sensitively and in different ways to reach out to all these communities. We would welcome information regarding what additional mechanisms will be put in place to support these groups such as families who are not currently supported by any services.

For further information, please contact:

Gillian Mawdsley
Policy Executive
Law Society of Scotland
DD: 0131 476 8206
gillianmawdsley@lawscot.org.uk

¹¹ Paragraph 177 Stage 1 Report <https://digitalpublications.parliament.scot/Committees/Report/EHRiC/2019/5/16/Children--Equal-Protection-from-Assault---Scotland--Bill-Stage-1-Report#Background>