



Law Society
of Scotland

Consultation Response

Children (Equal Protection from Assault) (Scotland) Bill

4 August 2017



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.

The Society's Criminal Law and Family Law Committees welcome the opportunity to consider and respond to the consultation on the proposed Children (Equal Protection from Assault) (Scotland) Bill. The Committees have not answered the specific questions posed in the consultation document but have the following comments to put forward for consideration.

The Current Law

Under the common law in Scotland an assault on a child may be legally justified where a parent (or another having a right derived from having charge or care of a child) establishes that the assault amounted to *reasonable chastisement* of the child. Subsection 51(1) of the Criminal Justice (Scotland) Act 2003 (CJ(S)A) qualifies this by listing the factors that a court must have regard to when deciding whether the assault in question can be considered a *justifiable* assault. These factors are as follows:-

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

The court may also have a regard to any other factors that it considers appropriate in the circumstances (Subsection 51(2)). Section 51(3) of the CJ(S)A stipulates that an assault that includes or consists of a blow to the head, shaking or the use of an implement can never be found to be justifiable.¹ It is worth noting that the position in law does not create a right to physically punish a child but rather provides a

¹ Section 51, Criminal Justice (Scotland) Act 2003 available at <http://www.legislation.gov.uk/asp/2003/7/contents>

defence to physical punishment in certain circumstances. As there is no defence of this nature for an assault on an adult, it is a matter of fact that children do not have the same protection under the law as that afforded to adults.

The proposed Children (Equal Protection from Assault) (Scotland) Bill

The proposed bill would remove the common law defence and, as a required consequential change, would also repeal or amend relevant sections of Section 51 of the CJ(S)A. Removing the defence would create greater clarity in the law by eliminating any need to interpret or define “reasonableness” in the context of a physical assault on a child.

The Society understands that the intent of the proposed bill is not to criminalise parents (or others) but rather to help clearly define the limits of acceptable behaviour and to extend the same limits of acceptable behaviour to all people, regardless of age. This is based on an understanding that the culture in Scotland has changed over time and that the physical chastisement of children is increasingly understood to be both ineffective and out of step with our understanding of children’s rights. While it is not for us to comment on social policy, we would agree that it is generally good to seek clarity in the law and that the development of the law in Scotland to have increasing recognition of children rights is a positive trend.

The International Context

The effect of the proposed bill would also be to bring Scotland in line with its obligations under international law. The United Kingdom has both signed and ratified the United Nations Convention on the Rights of the Child (UNCRC). Article 19 of the UNCRC states that:

States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect, or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.²

While most forms of physical force used against a child would be unlawful under the current law in Scotland, the law has not gone so far as to make *all* forms of physical force against children unlawful. By retaining the common law defence of reasonable chastisement, the law in Scotland is signalling that some forms of assaults against children are acceptable. International legal norms and bodies disagree. The UN Human Rights Committee (UNHRC) and UN Committee on the Rights of the Child (UNCRC) have both stressed that the law in the United Kingdom is falling short when it comes to the protection of children and have called for the law to be reformed as a matter of priority.³ The UNHRC stated that “The State party should take practical steps, including through legislative measures where appropriate, to put an end to corporeal punishment in all settings, including the home...”⁴ While the UNCRC said “the Committee urges

² United Nations Convention on the Rights of the Child available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>

³ Concluding Observations on the Fifth Periodic Report of the United Kingdom of Great Britain and Northern Ireland. CRC/C/GBR/CO/5. 2016 at 40

⁴ Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland, CCPR/C/GBR/CO/7, 2015

the State party, in all devolved administrations... to (a) Prohibit as a matter of priority all corporeal punishment in the family including through the repeal of all legal defences, such as “reasonable chastisement”. The international legal community is clear that corporeal punishment is not in keeping with the present day understanding of human rights. The global trend supports this view - the consultation document noted that the physical punishment of children is now unlawful in 52 countries including the vast majority of those in the European Union.

Conclusion

As stated above, it is not for the Society to comment on the social policy underlying the proposal but rather to comment on the law. If the law in this area is changed as per the proposed bill, it will set clear boundaries as to what is acceptable when it comes to the physical punishment of children. It will also bring Scotland in line with our international obligations. On this basis, the Society is generally supportive of the proposal but would need to see a draft bill in order to comment further.

For further information, please contact:

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