

These documents relate to the Criminal Justice (Scotland) Bill (SP Bill 50) as introduced in the Scottish Parliament on 26 March 2002

237. Restriction of liberty orders (RLOs) were introduced in Scotland by section 5 of the Crime and Punishment (Scotland) Act 1997, which resulted in the insertion of sections 245A to 245I in the 1995 Act. RLOs require an offender to be restricted to a specified place for up to 12 hours per day or from a specified place for up to 24 hours per day, or both, for a maximum period of 12 months. Compliance with an RLO is monitored by remote monitoring equipment.

238. The amendments to section 245A of the Criminal Procedure (Scotland) Act 1995 (the 1995 Act) allow a court to impose a RLO made under that section as an alternative to imprisonment or any other form of detention.

239. Subsection (3) amends section 245A of the 1995 Act to make a RLO available to courts for offences (other than an offence for which the sentence is fixed by law) instead of imposing a sentence which includes a custodial element.

PART 7 – CHILDREN

Section 43 – Physical punishment of children

240. Section 43 clarifies the law as it applies to the exercise of physical punishment of children by their parents, guardians and other persons with charge or control of them.

241. At common law parents, guardians and other persons with charge or control of children are entitled to use force for the purpose of disciplining children if these actions are considered by the court to be justified as “reasonable chastisement”. Such punishment must be moderate and not inspired by vindictiveness. To secure a conviction for assault the prosecution has to demonstrate *mens rea* or “criminal intent” on the part of the accused, and this prevents trivial contacts or harmless warning taps being treated as an assault.

242. In addition to the common law of assault, section 12 of the Children and Young Persons (Scotland) Act 1937 contains provisions dealing with the treatment of children and young people by persons of 16 years or over who have parental responsibilities in relation to them or who have charge or care of them. That section makes it an offence for such persons to treat that child with cruelty (described as wilful assault, ill-treatment, neglect, abandoning, exposing, or causing or procuring such treatment in a way which is likely to cause unnecessary suffering or injury to health).

243. Section 12 of the 1937 Act also provides that the rights of any parent, teacher, or other person having the lawful control or charge of a child or young person to administer physical punishment to the child are not affected by the offence provision. However, a teacher’s right to administer physical punishment has effectively been removed subsequently by section 48A of the Education (Scotland) Act 1980 and section 16 of the Standards in Scotland’s Schools Act 2000. Other provisions exist to prohibit physical punishment in other public care settings.

244. Section 43 clarifies the circumstances in which physical punishment of a child will never be reasonable, and provides a non-exhaustive list of the factors which are to be taken into account when considering whether such punishment in other circumstances is reasonable.

245. At common law, only certain categories of people can physically punish a child. These are people with parental responsibilities and rights in relation to the child, and anyone to whom they delegate their right to do so. In addition, a person with a close connection with the child, and who has care and control of the child, will also be entitled to physically punish a child. This covers, for example, the position of a child's unmarried father or step-parent who does not have formal parental responsibilities and rights.

246. The provisions of section 43 apply to cases where the defence to a charge of assault is based on the claim that the assault was reasonable chastisement. If the court is satisfied that the accused person is within the category of people entitled at common law to physically punish the child in question, the prosecutor will have to prove that the punishment went beyond what was reasonable chastisement. Where the accused did not have such a right, the prosecutor need only prove that the assault, or punishment, occurred.

247. Subsection (1) sets out the factors which must be considered by the court in deciding whether or not something which is claimed to have been done to a child by way of physical punishment was justifiable. The factors are derived from judgements by the European Court of Human Rights, relating to Article 3 of the European Convention on Human Rights, which states that "No one shall be subjected to torture or to inhuman or degrading treatment".

248. The factors set out in subsection (1)(a) are the nature of what was done to the child, the reason for it and the circumstances in which it took place. It is envisaged that these should prompt the court to consider the whole circumstances of the case, including the severity of the punishment, whether it was proportionate to the child's behaviour and whether it was given in appropriate circumstances.

249. Subsection (1)(b) directs the court to consider the duration and frequency of the punishment.

250. Subsection (1)(c) directs the court to consider any effect (whether physical or mental) which the punishment has been shown to have had on the child. It does not oblige the court to obtain medical or psychiatric evidence in every case, but to consider such evidence as is produced.

251. Subsection (1)(d) directs the court to consider the child's personal characteristics, including sex, age and state of health at the time of the punishment. An example of how a court might take sex into account would be where it considers treatment which may be additionally humiliating, for example because a child's bare bottom is beaten in front of strangers of the opposite sex.

252. Subsection (2) provides that the court may also take into account any other factors which it considers appropriate in relation to the case.

253. Subsection (3) prohibits any physical punishment given to a child under the age of three, and three specified types of punishment given to a child of any age: blows to the head; shaking; and the use of an implement, such as a belt, slipper or cane. Where these are used, then the

punishment cannot be found to be justifiable assault. This list does not affect the power of the court to determine on other grounds that what was done was not justifiable. As in all cases, the prosecution will have to demonstrate an intention by the accused to punish the child. Where the child is under the age of three, proving an intention to punish should be sufficient to secure a conviction. Similarly if it can be shown that the accused intended to strike a child of any age by one of the means specified in subsection (3)(b) then that should also be sufficient to secure a conviction. It will not be necessary in either situation also to demonstrate “criminal intent” or an intention to inflict severe pain or punishment that is excessive or unreasonable in all the circumstances.

254. Subsection (4) makes clear that this section applies only in respect of children who were under 16 at the time of the supposed punishment. There is no entitlement to use physical punishment above that age. Any supposed “punishment” of a person aged 16 or over would constitute assault.

255. Subsection (5) repeals references to “assault” in the Children and Young Persons (Scotland) Act 1937 which the Bill renders unnecessary. Physical punishment of a child will be covered by the common law and by this section, while the 1937 Act will apply to cruelty, neglect and ill-treatment, which cannot be justifiable as reasonable punishment.

256. The section does not introduce new penalties, and sentences for assault will continue to be limited only by the sentencing powers of the court involved. At present, most such cases result in non-custodial sentences, and this is not expected to change as a result of the Bill.

Section 44 – Youth crime pilot study

257. Section 44 provides for the setting up of a pilot scheme to study the effectiveness of diverting 16 and 17 year old minor offenders away from the adult criminal justice system and into the children’s hearing system.

258. Subsections (1) and (2) allow the Scottish Ministers to provide for this study by way of regulations which will specify the locations and arrangements for the study.

259. Subsection (3) defines the references to Principal Reporter and children’s hearing as having the meaning in section 93 of the Children (Scotland) Act 1995.

260. Subsection (4) amends section 73 of the Children (Scotland) Act 1995 by inserting a new subsection (3A). Children’s hearings are empowered under section 70 of the Children (Scotland) Act 1995 to make a supervision requirement placing a child under compulsory measures of supervision. The hearing may attach any condition it considers appropriate to address the child’s needs. This may include for example a requirement on the child to attend a particular programme to address offending behaviour, be placed in residential accommodation, or have regular contact with a social worker. The supervision requirement may last up to one year after the date of making supervision requirement until the child reaches 18. As a child up to age 18 may have a supervision requirement made, new subsection (3A) extends the upper age limit from 18 years to 19 years in respect of areas operating a pilot scheme.