

This document relates to the Criminal Justice (Scotland) Bill (SP Bill 50) as introduced in the Scottish Parliament on 26 March 2002

Physical punishment of children

Policy objective

209. The Bill will provide improved protection for children against physical assault. By giving greater clarity to the law, it aims to help their parents and carers avoid the use of unnecessary and excessive physical punishment. For those cases which come to court, it aims to provide clearer guidance to the courts on the factors which they must consider, and bring these into line with judgements of the European Court of Human Rights.

210. The Scottish Ministers consider it essential that every child should have the best possible start in life. The Scottish Executive is pursuing an integrated strategy to support children's early years, spanning improvements to health, housing, childcare and education. The challenge facing parents has never been greater; and both the UK Government and the Scottish Executive are working to help parents achieve work/life balance and to support them in their parenting role. In Sure Start Scotland they have developed a strategy which aims to support families with very young children (aged 0 to 3), with a focus on those living in deprived communities. The Youth Crime Review dealt with crime in the community and the Discipline Task Force covered misbehaviour in schools. This provision is aimed at modernising the law covering how misbehaviour is dealt with in the family setting.

211. Those with parental responsibilities and rights in respect of a child under the Children (Scotland) Act 1995 have a responsibility to provide direction and guidance to the child. Both they and any other person who has care and control of a child must safeguard and promote the child's health, development and welfare. The Scottish Ministers consider that it is vital that children grow up with a strong sense of right and wrong, and a clear disciplinary framework. Where necessary, parents are entitled to punish children for doing wrong, and this can include the use of physical punishment within limits. The Bill is intended to set the limits clearly and for the benefit of children, without encroaching needlessly in the private life of the family.

212. Under the current common law in Scotland parents, guardians and other persons with care or control of children are entitled to use force for the purpose of disciplining a child. The reasonable physical punishment of a child can be a justified assault where the force is moderate and not inspired by vindictiveness.

213. This Bill aims to provide clarification in this area by setting out the circumstances in which the physical punishment of a child will never be regarded as reasonable, and by setting out a non exhaustive list of the factors which are to be taken into account when considering whether such punishment is reasonable. The courts will be able to take into account any other relevant factors.

214. The factors which the court will be required to consider in determining whether the physical punishment of a child under the age of 16 is reasonable will be:

- the nature and context of the punishment;
- its duration and frequency;
- its physical and mental effects on the child;

- the personal characteristics of the child, including the sex, age and state of health of the child.

215. These factors were laid down by the European Court of Human Rights, and re-affirmed in the case of *A-v-UK*. Although this was directly concerned with the law in England, the law of Scotland is substantially the same.

216. The Bill prohibits the use of physical punishment on a child under the age of three. The Scottish Ministers consider it wrong to inflict physical punishment on very small children. This risks injury to the immature body of a young child, and may be ineffective before a child has developed language and reasoning abilities. Setting an age limit provides clarity to parents and reduces the risk that children will be physically punished at an unreasonably early age. Ministers consider that the limit should be set at the age of three.

217. The Scottish Ministers consider that the following should never be regarded as reasonable punishment by the courts:

- blows to the head;
- shaking;
- the use of implements.

218. These are all methods which risk injury to a child. It is hard to judge the impact of a blow on an immature body when using an implement. The Scottish Law Commission recommended prohibiting the use of implements in its report entitled *Report on Family Law* in 1992.

219. The effect of the Bill should be to change parents' behaviour. Ministers do not intend to introduce any new investigation and enforcement regime. If potential cases of assault are brought to the attention of the police or the procurator fiscal, they will continue to be investigated and dealt with as at present. No new penalties are proposed and sentences for assault will continue to be limited by the sentencing powers of the court involved. At present, most such cases will result in non-custodial sentences, and this is not expected to change.

220. Physical punishment by childminders and in non-publicly-funded pre-school centres will also be banned by separate regulations under the Regulation of Care (Scotland) Act 2001 to bring them into line with publicly funded pre-school centres where physical punishment is already banned. However, babysitters and nannies working in the child's home will not be banned from using physical punishment. They will be subject to the ground rules set by parents, so that discipline within the home can be consistent.

Alternative approaches

221. The "no change" option was considered. Currently physical punishment of a child will normally constitute the common law crime of assault, but there is a right to administer moderate physical punishment to a child. Such punishment, if within the bounds of what a court considers reasonable, will not expose the parent or other person with lawful control of the child to a

criminal conviction for assault. Since the incorporation of the European Convention on Human Rights, Scottish courts must take into account the factors set out in paragraph 214. However, there would be no clear statement of the law in statute, and parents would have to be advised on the basis of cases under the common law.

222. If only long-term change in parental attitudes and behaviour were desired, an alternative would be not to legislate but to embark on a programme of public education. The Scottish Ministers feel that by itself this would not quickly bring about changes, and in the meantime would not provide protection for the most vulnerable children. Legislation provides a clear signal to parents and carers about what is not permitted. The Scottish Ministers will also develop a strategy for providing information to the public and advice in conjunction with relevant voluntary organisations.

223. Another alternative was to introduce a complete ban on the physical punishment of children. This would in theory provide complete protection for children. However, the Scottish Ministers do not believe that there is public support for such a ban and it would be impossible to enforce. It would be an excessive intrusion into the rights of parents to bring up children.

224. The Scottish Ministers believe that the proposals as contained in the Bill have the merit of clarity. They contain guidance to the courts as to what factors are relevant to deciding whether an alleged offence has been committed, and they also contain clear “dos and don’ts” for parents. It would be clear to a parent who acted in the manner which is prohibited, that he or she was liable to prosecution. Physical removal of a child from danger, or light warning taps to attract a child’s attention to a danger would, as now, not constitute a crime. Smacking as such, which is the method chosen by most parents to administer physical punishment, would be permitted provided it was “reasonable” and the child is at least 3 years of age.

Consultation

225. Following the case of A-v-UK in the European Court of Human Rights, the consultation paper *The Physical Punishment of Children in Scotland* was issued in February 2000. 220 responses were received. Of the responses received:

- 47% supported the Scottish Executive’s proposals for clarification;
- 34% wanted complete ban on smacking;
- 17% opposed any change to law;
- 6% gave other answers.

226. The majority (77%) agreed there should be some clarification of the law and/or further restrictions introduced.

227. The views of children themselves were sought by asking bodies such as local authorities to seek their views. Children in Scotland was commissioned to canvass children’s views on these questions and research was conducted in small groups across Scotland. Children’s views were against smacking, which was seen as frequently unfair and counterproductive.

228. Seventeen per cent of the responses to the consultation wanted no change in the law. It was argued that the law had been sufficiently clarified by the judgement in *A v the UK* and that there was no need to impose further restrictions on parents. Some religious groups and individuals have claimed that their understanding of the Bible is that it encourages or demands the use of implements such as “the rod” on children. Some go so far as to claim that not to use the rod is to withhold proper correction from a child. They claim that any interference with the physical punishment of children under three, or the use of implements on any child, would be an infringement of their religious beliefs and would be contrary to Articles 8 (Respect for private and family life), 9 (Freedom of thought, conscience and religion) and 14 (Prohibition of discrimination) of the European Convention on Human Rights. The Scottish Ministers consider that if there were any such infringement then it would be justified by the overall aim of protecting children from unnecessary physical violence. It was noted that not all responses from religious organisations to the consultation were opposed to legislation.

229. Some responses said that the use of implements allowed the hand to be used in love and the rod for reproof. The ritual of fetching an implement allowed a parent time to cool down. Parents who were not permitted to smack might bottle up their rage, risking an uncontrollable explosion of violence. The Scottish Ministers consider that, to the extent that these considerations are valid, parents are able to control themselves by alternative methods, and one of the aims of the legislation is to ensure that parents are not permitted to inflict their own lack of control on the children.

230. A number of organisations and individuals consulted were in favour of a complete ban on the physical punishment of children. The 34% of those who responded to the paper who wanted a complete ban included leading bodies representing the interests of children. Some bodies cited experience in Sweden, which imposed a complete ban ahead of public opinion. However, the Scottish Ministers do not believe that there is public support for such a ban and it would be impossible to enforce.

Monitoring

231. The aim of **section 43** is to help parents and carers avoid unnecessary and excessive physical punishment. The Scottish Executive has commissioned research which will establish a base line for the incidence of physical punishment in Scotland, of injuries to children, and of parental attitudes to physical punishment. This will enable the subsequent effects of legislation to be monitored.

Youth crime pilot study

Policy objective

232. The Bill enables pilot schemes to be developed to test the effectiveness of appropriately diverting 16 and 17 year old minor offenders away from the adult criminal justice system to the children’s hearings system wherever this is appropriate.

233. The pilot schemes will be designed to address offending behaviour and to prevent the young people from continuing their offending into adult life. As appropriate, persistent minor offenders will be subject to special programmes addressing their offending behaviour and contributory factors in their individual backgrounds.