

## **Response by The Christian Institute to the report by Justice 2 Committee on The Criminal Justice (Scotland) Bill**

### **The Christian Institute**

We are a registered charity with 1,900 supporters in Scotland from all Christian denominations, including 500 Church Ministers. We seek to promote a Christian perspective on ethical issues and public policy. We are not convinced that there is any need for new laws on the physical punishment of children. We are therefore not convinced of the need for Section 43 of the Bill.

### **The Committee findings**

- The Executive could not supply any evidence to convince Justice 2 that there was uncertainty about the present law.  
*“No information could be supplied about prosecutions which might have failed because the existing law is insufficiently clear.”* (para 121)
- The ban on the smacking of children aged under 3 was rejected (Section 43(3)(a)).
- By a majority of 4 to 3 (Alasdair Morrison, Duncan Hamilton and Bill Aitken dissenting) the committee report concluded  
*“on the basis of a test of the risk of harm to the child, it is reasonable for there to be a blanket ban on blows to the head. We also accept the intention behind the ban on shaking or the use of an implement. However, we feel that these provisions may require further clarity.”* (para 140)

### **Under three ban : Section 43(3)(a)**

The committee concluded that “there was no convincing evidence that the proposals here would reduce harm to children to such an extent as to justify a blanket provision of this kind” (para 141). We strongly welcome this conclusion. The under three ban would have been totally unworkable. We are therefore delighted that Justice 2 have come out against the ban.

### **Section 43(3)(b)**

*“125. The evidence to the Committee in relation to the ban on blows to the head, shaking and the use of implements **did not suggest** a failure to apply the existing law appropriately. If such actions are carried out in a way which has caused harm to the child, there is no evidence that the courts would uphold a defence of reasonable chastisement. The Committee noted the possibility that the proposed changes might prove **overly inflexible**, whereas the current law allows the individual circumstances of each case to be considered.”*  
(para 125-emphasis added)

In other words, the committee believed that the existing law successfully dealt with incidents which included blows to the head, shaking and the use of implements.

Whilst accepting that there is no evidence of the present law failing to work, the committee noted nonetheless that such actions as blows to the head, shaking and the use of implements did carry the highest risk of causing substantial harm (para 126) and a blanket ban “may be a better way to give clarity to parents” (para 126).

Having said this “The Committee also noted that some of these provisions made more sense in relation to younger children” (para 127). As the committee indicated “overly inflexible” drafting means that the individual circumstances of each case cannot be considered as is the case with the present law. The implications of this are considered on page 3 below.

## **Blows to the head: Section 43(3)(b)(i)**

As the committee have pointed out, abusive or reckless blows to the head are already criminal (para 125).

Therefore the effect of this subsection will be to criminalise *non-abusive* actions not covered by the present law. Banning blows to the head for children of all ages would present problems of workability. It would also tie the hands of the procurators fiscal and the courts in such a way that will lead, we believe, to prosecutions and convictions for trivial incidents.

The absolute ban for children of all ages means that a mother who taps her ten year old son on the head would be committing a criminal offence. There is a theoretical maximum sentence of three months in jail or a £5,000 fine. Can it be right to pass such a law?

What the committee called the “overly inflexible” drafting of this section bars the court from considering common sense factors such as the age of the child, the force that was used and whether any harm was caused. There is no doubt that giving a young child a blow to the head is medically dangerous. In our view banning all blows to the head for children aged under three would be workable and widely accepted.

## **Shaking and the use of implements : Section 43(3)(b)(ii) & (iii)**

The committee clearly believes that these provisions “may require further clarity” (para 140). This is certainly the case.

The report notes that “Shaking a very young child is a different proposition to shaking a teenager who may indeed be taller and stronger than their parent” (para 127).

The report questions the definition of implement, citing the example of whether a sock would be considered an implement.

As with blows to the head, the “overly inflexible” drafting of these subsections bars the court from considering common sense factors such as the age of the child, the force that was used and whether any harm was caused.

## **Our proposals**

The Committee accepts that the present law is working satisfactorily. A majority of the committee would like to see additional laws on the grounds that such laws could prevent further harm to children.

Whilst we can see no convincing case for changing the law at all, the proposals could be made workable by deleting Section 43(3) and incorporating blows to the head and shaking *as factors for the court to consider* in Section 43(1). It would be essential for such factors only to be relevant where children were under the age of three. In this way trivial incidents would be excluded from the scope of the Bill.

A hand can cause as much damage as an implement. As the committee suggested the word “implement” is undefined (para 127). We cannot see the logical case for a ban on implements which puts a wooden spoon on the same level as an iron bar. Though it is certainly unusual, there are many loving parents in Scotland who would use a wooden spoon because they believe that the hand should be reserved for comforting a child. It does not make sense to criminalise such parents.

## The problems caused by “overly inflexible” existing drafting of Section 43(3)(b)

### (a) Intention to harm becomes irrelevant to a conviction

To be convicted of breaking Section 43(3)(b) a parent has to *intentionally punish* a child of any age by tapping them on the head, shaking them or using an implement.

*Under existing law the court must have regard to harm* in assessing a defence of reasonable chastisement. This is the also case with Section 43(1), but under the actions listed in Section 43(3)(b) the court is directed to ignore any factors such as harm.

Under Section 43(3) as drafted intention to harm becomes irrelevant. It may be relevant to the sentence given, but in deciding whether or not an assault has been committed the proposed new law will *absolutely bar* the courts from considering whether:

- (a) the child actually was harmed, or
- (b) whether the parent intended harm, or
- (c) whether the force used was reasonable.

So Section 43(3)(b) forbids consideration of highly relevant factors. Only an intention to punish is required. Ironically, this goes against the principles of Section 43(1) and the “A” case precedent which emphasises factors such as the nature of the punishment and the characteristics of the child in deciding if punishment was reasonable.

### (b) barring the courts from considering relevant factors

Section 43(3)(b) bars the court from considering any relevant factors such as the potential for harm. This will lead to trivial cases becoming criminal.

Many of these cases will involve mothers disciplining their sons. If a nine year boy punched his sister on the arm and his mother then tapped him on the head, the mother would be committing a criminal offence. A mother who uses the flat of a ruler on the palm of the hand to discipline her ten-year-old son must also be found guilty of assault. No proof of harm is required. The mere use of an “implement” to punish the child is enough to result in a conviction. If a mother enters a teenager’s room and, finding it a mess, picks up a pillow from the floor and throws it at the child, has she used an implement to punish him? Under section 43(3)(b) we think she has.

## Summary

We are able to agree with much of the Justice 2 committee report. We are delighted that the smacking ban for children under three is to be abandoned by the Executive.

In our view there are still inherent problems with the inflexibility of Section 43(3)(b). These could be addressed by deleting Section 43(3) and incorporating blows to the head and shaking as factors in Section 43(1) where a child is under the age of three.

Many ordinary loving parents use moderate physical punishment. The criminal law is very powerful. Parents who face a criminal charge will be under considerable stress *as will their families*. A prosecution would put the child at the centre of a highly distressing court case. Changes to the law must not be made lightly - particularly where it is accepted, as the Committee itself does, that the present law is working well.

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The Christian Institute, Scotland, 14 September 2002