

This document relates to the Children (Equal Protection from Assault) (Scotland) Bill (SP Bill 38) as introduced in the Scottish Parliament on 6 September 2018

# Children (Equal Protection from Assault) (Scotland) Bill

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## Explanatory Notes

### Introduction

1. As required under Rule 9.3.2A of the Parliament's Standing Orders, these Explanatory Notes are published to accompany the Children (Equal Protection from Assault) (Scotland) Bill, introduced in the Scottish Parliament on 6 September 2018. It has been prepared by the Non-Government Bills Unit on behalf of John Finnie MSP, the member who introduced the Bill.

2. The following other accompanying documents are published separately:

- statements on legislative competence by the Presiding Officer and the member who introduced the Bill (SP Bill 38–LC);
- a Financial Memorandum (SP Bill 38–FM);
- a Policy Memorandum (SP Bill 38–PM).

3. The Explanatory Notes are intended to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section, or a part of a section, does not seem to require any explanation or comment, none is given.

### The Bill

4. The aim of the Children (Equal Protection from Assault) (Scotland) Bill is to help bring to an end the physical punishment of children by parents and others caring for or in charge of children by abolishing the common law

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defence of “reasonable chastisement”. A person charged with assault of a child will no longer be entitled to claim that a use of physical force was justifiable on the basis that it was physical punishment administered in exercise of a parental right (or a right derived from having care or charge of a child). This will give children the same protection from assault as adults.

5. The Bill is in five sections. Section 1 abolishes the common law defence and repeals section 51 (physical punishment of children) of the Criminal Justice (Scotland) Act 2003 (“the 2003 Act”), which further regulated the common law defence. Section 2 places a duty on Scottish Ministers to raise awareness about the effect of the Bill. Section 3 deals with transitional and saving provisions, section 4 sets out when different parts of the Bill will commence, and section 5 sets out the short title.

## Commentary on sections

### Section 1 – abolition of defence of reasonable chastisement

6. There is a defence, mainly at common law, under which the physical punishment of a child by a parent, or by a person having charge or care of a child, is justifiable and so does not constitute assault of the child. The defence is commonly referred to as the defence of “reasonable chastisement”. Section 1(1) abolishes this defence insofar as it exists at common law. A “rule of law”, when referred to in statute, means a principle of the common law. The common law is a body of law developed over time from individual judicial decisions and from legal texts and other sources of authority.

7. Section 1(2) repeals section 51 (physical punishment of children) of the Criminal Justice (Scotland) Act 2003. Section 51 of the 2003 Act restricted the scope of the common-law rule by prohibiting any physical punishment of a child that involved hitting the child with an implement, hitting the child on the head, or shaking the child. It also put into statute common law principles about the factors a court must have regard to when considering whether an assault on a child, in exercise of a parental right or a right derived from having charge or care of a child, was justifiable.

8. The effect, therefore, of section 1 is that a parent, or anyone in charge or care of a child, will no longer be able to claim a defence of reasonable chastisement or justifiable assault if accused of assaulting a

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child in any proceedings (civil or criminal). Children will therefore be in the same position and have the same protections, in terms of the law on assault, as adults. To secure a conviction for assault the prosecution has to demonstrate mens rea or “criminal intent” on the part of the accused. As with adults, the requirement for mens rea (criminal intent) as an element of the offence of “assault” would prevent trivial physical contact being treated as an assault. Nor, for example, would the use of physical force in medical treatment or to remove a person from danger, be treated as an assault (so long as no criminal intent was present).

9. It should be noted that section 51 of the 2003 Act also amended the Children and Young Persons (Scotland) Act 1937 (“the 1937 Act”) to remove references to assault (which were made unnecessary by the 2003 Act and common law) and to remove the reference in that section to the right of parents and others to administer physical punishment to a child. The repeal of section 51 by the Bill has no effect on the 1937 Act and does not serve to undo the amendments made to it by the 2003 Act (see section 15(2)(d) of the Interpretation and Legislative Reform (Scotland) Act 2010).

10. The Bill does not define “child”. The meaning of “child” will be determined by the common law rule. This is so that the abolition of that rule extends to the whole rule.

## **Section 2 – duty of Scottish Ministers to raise awareness**

11. Under section 2, the Scottish Ministers are required to promote public awareness and understanding about the effect of the new legislation. How this is done will be for Ministers to decide, but might, for example, include a Scotland-wide publicity campaign, aimed at parents and carers, promoting a move towards non-physical methods of child discipline. The Scottish Government might also want to take the opportunity to ensure that children and young people are aware of their own rights as part of the awareness raising duty.

## **Section 3 – transitional and saving provision**

12. Section 3(1) confirms that the abolition of the reasonable chastisement defence and the repeal of section 51 of the 2003 Act (by section 1) do not apply to anything done to a child before the day on which section 1 comes into force (at the end of 12 months from the day of Royal Assent). The Bill, in other words, has no retrospective effect.

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13. Section 3(2) “saves” (i.e. continues in effect) the rule of law mentioned in section 1(1), together with section 51 of the 2003 Act, for the purposes of any proceedings, criminal or civil, in relation to an alleged assault committed before the day section 1 comes into force (whether those proceedings are ongoing on, or are brought on or after that day).

14. Section 3(3) allows the Scottish Ministers to make regulations for such further transitional transitory or saving provision as they consider necessary or expedient. Under section 3(4), such regulations are subject to the negative procedure. Regulations subject to negative procedure are laid before the Parliament after they are made, and come into force on the day specified in the regulations unless annulled by the Parliament within 40 days of being laid.

## **Section 4 – commencement**

15. Section 2 (awareness raising), sections 3(3) and 3(4) (regulation making powers), section 4 (commencement) and section 5 (short title) all come into force on the day after the Bill receives Royal Assent. This is to enable the Scottish Government to raise awareness, and make any further transitional, transitory or saving provision they consider necessary, before the abolition of the reasonable chastisement defence comes into force 12 months later



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