Children (Equal Protection from Assault) (Scotland) Bill

Common Law assault in Scotland: definition and comparison with selected countries

Introduction

On 7 March, the Committee requested further research from SPICe to assist in its Stage 1 scrutiny of the Children (Equal Protection from Assault) (Scotland) Bill (‘the Bill’).

SPICe was asked to provide information on:

- The definition of common law assault in Scotland.
- Current case law on assault and physical punishment in Scotland
- Comparison between Scotland and selected countries – namely, Ireland, New Zealand and Sweden.

Scots Criminal Law

Scots criminal law is a mixture of common law, based on judicial precedent, including decisions of the Scottish courts, and statutory crimes and offences, based on legislation. As a dynamic legal system, it is constantly changing and evolving.

As a consequence, Stair¹ explains that “the task of laying down a comprehensive yet succinct definition of any crime must be seen as well nigh impossible.”

Definition of assault

The definition of assault in Scots law has developed over time. Stair contrasts the ‘ordinary meaning of assault’, or dictionary definition, with the ‘legal meaning of assault’. The former implies an attack upon one person on another, it can include both physical and verbal attacks. The legal meaning of

¹ The key text used for this section is the Stair Memorial Encyclopaedia on Criminal Law (2005 - a subscription online version is periodically updated), as well as a reference to the Stair Memorial Encyclopaedia on Child and Family Law.
assault tends to be narrower in that verbal attacks are not held to be assaults, although words may come under the common law offence of threats.

Stair points to a similarity between the legal and dictionary meanings of assault:

“Thus the criminal law has defined assault as an attack on the person of another if it is done with evil intent. Fluidity of definition is, however, a feature of many common law crimes and has been exploited to the full in relation to assault. As early as 1854 it was declared that the word assault was one of the most flexible terms, and in 1952 it was opined that assault, in law, was in some ways a technical term. The notion of attack, therefore, has been given a much wider interpretation than might be acceptable in ordinary usage, whilst there remains some doubt as to what is meant by evil intent”.

Stair goes on to consider the different elements of assault:

- The meaning of ‘attack’ has never been authoritatively determined by the criminal law. Because ‘attack’ is fundamental to understanding the physical aspect of assault, it is necessary to consider its meaning. Stair states:
  
  “Perusal of reported cases suggests that an attack may be defined as personal, aggressive, physical conduct on the part of one individual which is aimed at the person of another and which causes the victim immediate physical injury, or is likely to cause such injury, or causes him immediate fear and alarm for his personal safety. Whilst it is often correctly emphasised that injury to the victim is unnecessary, assault is a crime of real injury. Since in this context ‘real injury’ has its normal meaning it would follow that fear for one’s personal safety refers to the fear that one may be physically injured”.

- It is generally considered essential that the accused’s own conduct should immediately and directly bring about injury, or the fear of it.

- The conduct of the accused should be aggressive in the sense that there must be at least the appearance of a deliberate, hostile setting upon the victim.

  “Thus, sending a two-week-old child in a basket by rail as a parcel was grossly negligent and likely to cause the child great harm, but there was no aggressive conduct towards it and no charge of assault was brought. Conversely, in a homicide case where a young child had been neglected and not provided with sufficient food and clothing, assault was included in the narrative of events since the accused had also struck and kicked the child to its injury and the effusion of its blood.”
It is essential that there must be some physical conduct on the part of the accused.

“Conduct may be of any physical kind provided it is designed immediately to injure the person at whom it is aimed or, at the very least, to put him into a state of fear and alarm for his personal safety. Thus, striking at another with a cane, baton or whip (or any other instrument), or with hands or feet (or any other part of the body) is quite sufficient, as is knocking the victim down. Violently seizing a person is probably enough, as is forcible kissing.”

Where there has been no injury, the criteria applied is that the physical conduct of the accused should have been such as to place the victim in a state where they feared, or would reasonably be considered to have feared, the immediate infliction of injury. It is considered assault “to brandish a candlestick or a truncheon at another or indeed to shake one’s fist menacingly in his face.”

Assault is a crime of real injury against the person, and therefore the conduct must be aimed at the person of another and not his property. If conduct is aggressive but not aimed at any particular person, it is probably not sufficient for assault.

Assault is a crime of real injury in Scots law:

“If 'real injury' is given its ordinary meaning, this proposition would suggest that the conduct of the accused should have caused bodily injury to the victim, or, at the least, put him in fear of bodily injury. If the decisions are to be reconciled, however, bodily injury must be given a wide interpretation. Serious injuries are of course sufficient, but so it seems are the 'injuries' suffered by having one's face slapped, one's arm compressed, water thrown over one, one's horse (or presumably vehicle) forcibly stopped, or one's person spat at. It would be false, however, to imagine that all such 'injuries' had been authoritatively pronounced as sufficient for assault. Indeed, some are arguably insufficient if any content is to be given to the requirement of real injury.”

According to Stair, the mens rea (or criminal intent) of assault is ‘presently in a state of some confusion’. Mens rea may be any of the following:

“evil intention to injure and do bodily harm, a simple intention to injure and do bodily harm, an intention to put the victim in a state of alarm, a constructive intention to injure, or recklessness. … What is settled is that no prior malice or ill will towards the victim is necessary, and that mere negligence is not enough.”
Defences to assault

- **Entitlement in the execution of duty** – some people, by virtue of their employment (e.g., police officers), are entitled to use physical force against others. In such cases, no assault will have been committed, provided the degree of force was not excessive in the circumstances.

- **Provocation** – it is not a defence for a person accused of assault to claim they were provoked, but it can be used to mitigate the sentence.

- **Diminished responsibility** – to claim diminished responsibility is relevant only in terms of mitigation of circumstances and sentence. It can be pled in a case of assault, but cannot result in an acquittal of the charge.

- **Parental entitlement in keeping of discipline** – parents are “entitled to use physical force against their children if this is necessary for the purposes of discipline or due correction”.

However, this defence to assault is lost if the chastisement is excessive in the circumstances. Two cases are given as examples in Stair:

**Guest v Annan 1988 SCCR 275**

Assault—Reasonable chastisement—Assault by father on eight-year-old daughter by smacking repeatedly on bottom—Whether evil intent proved

The appellant was charged with assaulting his eight-year-old daughter by repeatedly striking her on the buttocks with his hand, to her injury. The girl had come home late and told lies about where she had been, and the appellant lost his temper and smacked her. She was found to have a bruise on one buttock. The sheriff held that although punishment had been justified, the punishment inflicted was excessive, and 'on balance' he convicted the appellant, who appealed to the High Court by stated case.

*Held*, that there was no evidence to justify the sheriff in concluding beyond reasonable doubt that the appellant had acted with the necessary evil intent; and appeal allowed and conviction quashed.
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Peebles v MacPhail 1989 SCCR 410

28th June 1989
Assault—Reasonable chastisement—Assault by angry mother on two-year-old son by slapping on face—Whether evil intent proved

The appellant was charged with assaulting her two-year-old son by slapping him on the face. The child was having a temper tantrum and the appellant became angry and slapped him on the face with moderate force, knocking him off balance and leaving a red mark on his face. The sheriff held that the appellant had acted in anger and had intended to strike the child, and convicted her. She appealed to the High Court.

Held, that to slap a child aged two on the face knocking him over is an act as remote from reasonable chastisement as one could possibly imagine, and that the sheriff was entitled to draw the inference of intent which he did; and appeal refused.

The Criminal Justice (Scotland) Act 2003 reformed the law in relation to the physical punishment of children. Under s.51 of the 2003 Act assault by a parent against their child is never justifiable where there has been a blow to the head, shaking, or the use of an implement.

S.51 also sets out what must be considered to address whether an assault on a child was justifiable:

- the nature of what was done, the reason for it and the circumstances in which it took place;
- its duration and frequency;
- any effect (whether physical or mental) which it has been shown to have had on the child;
- the child’s age; and
- the child’s personal characteristics (including, without prejudice to the generality of this paragraph, sex and state of health) at the time the thing was done.
These reforms were made in response to a European Court of Human Rights ruling in 1998, in the case of A v United Kingdom:

“There, a nine-year-old boy had been caned by his step-father with considerable force on a number of occasions. In 1994, while not denying the factual allegations, the step-father argued that his actions amounted to 'reasonable chastisement' and was acquitted of the charge of occasioning actual bodily harm (broadly equivalent to assault, in Scotland). In a unanimous judgment, the European Court found that there had been a breach of the child’s rights under article 3 of the European Convention on Human Rights and awarded him £10,000 in damages.”

The author continues that, while the European Court:

“...stopped short of condemning all physical punishment of children, the message is clear. Physical punishment of children is growing less acceptable and will be subject to more rigorous scrutiny. As more and more European and other countries join the group of nations by banning all physical punishment of children, it becomes increasingly likely that the European Court will countenance such a condemnation in the future. This is particularly likely when one considers that the European Court is increasingly using the United Nations Convention as the indicator of standards in respect of children's rights.”

Did the 2003 Act lead to an increase in prosecutions of physical punishment against children?

There appear to be no reported cases relating to the physical punishment of children since the 2003 Act defined the defence of reasonable chastisement.

The Scottish Government responded to a Freedom of Information request on the physical punishment of children: prosecutions and convictions. On the 25 September 2018 the Scottish Government was asked:

“how many arrests, prosecutions and convictions have taken place in Scotland specifically in connection with section 51 of the Criminal Justice (Scotland) Act 2003 since it was introduced and what the Government’s prediction of this was when this legislation was being considered”.

The Government’s response refers to the Criminal Justice (Scotland) Bill and notes that the Explanatory Notes to the Bill said:

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2 Article 3 of the Convention is the Prohibition of Torture. It states: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”
3 Stair Memorial Encyclopaedia on Child and Family Law (online version).
4 Ibid
“It is not expected that changes to the law on physical punishment of children will lead to substantial increases in numbers of prosecutions and convictions for assaulting children.” (paragraph 403)

Further, the Government affirmed that it does not hold this information because:

“Section 51 of the Criminal Justice (Scotland) Act 2003 did not create a specific new offence. Instead, it made changes to a defence to existing criminal offences. As a result, there are no arrests, prosecutions and convictions which relate specifically to section 51.”

**Consideration of cases**

If the police believe that a crime has been committed they will make a report to the Procurator Fiscal. The Procurator Fiscal\(^5\) must decide if there is sufficient admissible evidence to justify court proceedings. The evidence must be reliable and credible. If it meets these criteria, the Procurator Fiscal must then consider if it is in the public interest to prosecute. This includes consideration of competing interests, including the interests of the victim, the accused and the wider community. The following factors will be considered to affect public interest, though not all will apply in every case:

- The nature and gravity of the offence
- The impact of the offence on the victim and other witnesses
- The age, background and personal circumstances of the accused
- The age and personal circumstances of the victim and other witnesses
- The attitude of the victim
- The motive of the crime
- The age of the offence
- Mitigating circumstances
- The effect of the prosecution on the accused
- The risk of further offending
- The availability of a more appropriate civil remedy
- Powers of the court
- Public concern.

If there is insufficient evidence, or it is not deemed in the public interest to proceed with the case, there will not be a prosecution.

While, as noted above, there have been no reported court cases since the 2003 Act, where the defence of reasonable chastisement has been used, the Scottish Government, in responding to a UNCRC ‘list of issues’ report\(^6\) in

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2016, referred to two cases where parents had been convicted of an offence for hitting their children\(^7\).

**International evidence**

Throughout Stage 1 scrutiny of the Bill, witnesses have referred to other countries which have ended the physical punishment of children. The First Minister also referred to this when she indicated that the Scottish Government would support the Bill (5 September 2017).

Comparing a specific law in one country with a similar law in another country is fraught with difficulties. The Welsh Government considered this matter when it consulted on removing the defence of reasonable punishment\(^9\). It noted that, of all the countries that had ended the corporal punishment of children in all settings, including the home, only 4 operated a common law system. The other countries had civil law systems. This makes it impossible to “draw any useful comparisons in the drafting of legislation”.

Three of the four countries that operate a common law system have ended corporal punishment— the Republic of Ireland, New Zealand and Malta. The Welsh Assembly Government said:

“In developing our legislative proposals we have therefore looked closely at the examples provided by these 3 countries. Whilst there are some potential lessons, the differences in how our laws have developed means that exact comparisons cannot be drawn. For example, in the Republic of Ireland legislation had already been introduced amending aspects of the common law of assault and battery, prior to the removal of the defence of reasonable punishment. This therefore provided them with a different starting point to England and Wales.”

However, the Welsh Assembly Government did suggest that, despite there being no useful comparisons to be made when drafting legislation, “we can learn from the wider experiences of all 53 countries in bringing forward and implementing such laws.”

\(^7\) STV (2013) Father ended up in court for slapping son who ‘threw a tantrum’. Available at: https://stv.tv/news/tayside/220280-creiff-father-faces-court-for-slapping-son-who-threw-a-tantrum/


Sweden

*How did the law prohibit the physical punishment of children?*

In 1957, the law excusing parents who caused their children minor injury through corporal punishment was removed from the Penal Code.

In 1966, the provision allowing ‘reprimands’ was removed from the Children and Parents Code.

Corporal punishment was explicitly prohibited in the home in Sweden in 1979\(^\text{10}\).

In this year, the Children and Penal code was amended to provide that:

> “Children are entitled to care, security and a good upbringing. Children shall be treated with respect for their person and individuality and may not be subjected to corporal punishment or any other humiliating treatment.”

The prohibition in the Children and Parents Code does not itself carry penalties. However, actions that meet the legal criteria of assault are subject to imprisonment of up to two years, or if petty, with a fine or imprisonment of up to six months. Assault is defined as the infliction of “bodily injury, illness or pain upon another”.

The Parliament voted almost unanimously in favour of the amendment to the Children and Parents Code. The result was 259 votes for, 6 against and 3 abstentions. All the political parties supported the amendment\(^\text{11}\).

> “The amendment gained majority support but there were critics in Parliament who predicted that it would lead to a rise in parents being reported to the authorities and large numbers of Swedes being branded as criminals. Some critics claimed that the new law was contradicting the Christian faith.”\(^\text{12}\)

*What has been the effect of the prohibition on the physical punishment of children in Sweden?*

The Global Initiative refers to research in 2011 which showed that 92% of parents thought that it was wrong to beat or slap a child. The same research found that 3% of parents had struck their child at some point in the past year,

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\(^{12}\) Ibid
compared to 28% in 1980. A review conducted by the Swedish Government and Save the Children thirty years after this change in the law showed that there has been a consistent decline in the use of physical punishment, and also in the number of adults who are in favour of it. However, the reporting of cases of assault on children has increased since the 1980s. Opponents of law reform have claimed that this increase in reporting reflects an actual increase in assaults and argue that the figures suggest that banning physical punishment increases child abuse. Those in support of the reform suggest that it may reflect less tolerance towards the physical punishment of children.

The report on the 30 year review stated:

“Contrary to what the law’s critics predicted in 1979 – and contrary to what today’s opponents of law reform continue to predict, the proportion of reported assaults that are prosecuted has not increased. This is partly due to the fact that it is extremely difficult to obtain convictions for crimes committed within the four walls of a home where there are no witnesses other than the perpetrator and the child. The legal system does not allow a lower burden of proof in cases of assault on children than in other criminal cases.”

New Zealand

*How did the law prohibit the physical punishment of children?*

In 2007, corporal punishment of children in the home was made unlawful.

The Crimes (Substituted Section 59) Amendment Act 2007 repealed the legal defence for the use of reasonable force “by way of correction” in section 59 of the Crimes Act 1961.

This defence was replaced by a new provision allowing parents to use reasonable force for the purposes of protection from danger or prevention of damage to people or property. The law states that nothing justifies the use of force for the purpose of correction. Section 59, as amended, is reproduced below:

59 Parental control

“(1) Every parent of a child and every person in the place of a parent of the child is justified in using force if the force used is reasonable in the circumstances and is for the purpose of—

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13 Ibid
(a) preventing or minimising harm to the child or another person; or
(b) preventing the child from engaging or continuing to engage in conduct that amounts to a criminal offence; or
(c) preventing the child from engaging or continuing to engage in offensive or disruptive behaviour; or
(d) performing the normal daily tasks that are incidental to good care and parenting.

(2) Nothing in subsection (1) or in any rule of common law justifies the use of force for the purpose of correction.
(3) Subsection (2) prevails over subsection (1).
(4) To avoid doubt, it is affirmed that the Police have the discretion not to prosecute complaints against a parent of a child or person in the place of a parent of a child in relation to an offence involving the use of force against a child, where the offence is considered to be so inconsequential that there is no public interest in proceeding with a prosecution."

What has been the effect of the prohibition on the physical punishment of children in New Zealand?

Implementation of the revised law is monitored closely and supported by the promotion of positive parenting. The New Zealand Government reported to the Committee on the Rights of the Child in 2015, that, between 2007 and 2012, the police found no significant issues with enforcement of the law. Research on attitudinal change over the last three decades found a progressive and substantial decline in approval of physical punishment from 89% in 1981, 58% in 2008, to 40% in 2013\(^\text{16}\).

A two-year review of police activity since the legislation was enacted found an increase in reported cases of 'smacking' or 'minor acts of physical discipline'. However, there was a negligible increase in the number of prosecutions\(^\text{17}\).

Opposition to the prohibition of corporal punishment remains. A campaign against the ban has been led by the group, Family First NZ, which seeks to "promote strong families, marriage, and the value of life, based on principles that have benefit New Zealand for generations." Family First NZ first sought a legal opinion on the ban in 2014, and requested an update referring to recent case law, published in 2018\(^\text{18}\).

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\(^\text{16}\) Ibid
The legal opinion stated that:

“...the amendments to section 59 have criminalised parents who smack their children, even if only lightly, for the purposes of correction or in any circumstances outside those prescribed in section 59(1).

An analysis of section 59 and the relevant case law shows that non-lawyers, including parents and the Police, struggle to understand and apply section 59. The cases also demonstrate that even lawyers and judges struggle to apply section 59 correctly, with examples of cases going to the District Court, the High Court and then being overturned by the Court of Appeal, as well as equivocal guilty pleas being accepted”19.

The legal opinion also commented that subsection 59(4), which provides discretion to the Police on whether to prosecute, is a ‘significant aspect’ of section 5920. It states that there is little guidance on how Police should exercise discretion, “nor information available as to how it has or does.” It is suggested that Family First NZ request data regarding the use of discretion.

Ireland

How did the law prohibit the physical punishment of children?

Corporal punishment has been prohibited in the home in Ireland since 201521. Until 2015, Ireland had a common law defence of ‘reasonable chastisement’. This defence was repealed under the Children First Act 2015 which came into effect in December of that year.

A submission from Jillian van Turnhout22, former Senator of the Irish Parliament, states:

“This ancient defence of ‘reasonable chastisement’ came to Ireland from English common law. Through its colonial past, England has been responsible for rooting this legal defence in over 70 countries and territories throughout the world. The basis is the 1860 Case: This defence originated from a decision in R v Hopley in 1860 where Chief Justice Cockburn [2F&F 202] proclaimed that:

19 Ibid
20 Ibid
21 Global Initiative to end all Corporal Punishment of Children. (2017) Ireland. Available at: https://endcorporalpunishment.org/reports-on-every-state-and-territory/ireland/
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By the law of England, a parent ... may for the purpose of correcting what is evil in the child, inflict moderate and reasonable corporal punishment...

It was also confirmed in the Children Act 1908 (when Ireland was part of the UK)²³.

The Children Act 2011 repealed the Children Act 1908. The 2011 Act removed the right to administer punishment, but did not remove the common law defence of reasonable chastisement²⁴.

The common law defence of “reasonable chastisement” was repealed by the Children First Act 2015 by means of an amendment to the Offences Against the Person (Non Fatal) Act 1997.

According to the Global Initiative²⁵, the prohibition came after more than a decade of mounting human rights pressure, to give children in Ireland equal protection from assault.

What has been the effect of the prohibition on the physical punishment of children in Ireland?

As the law changed just over two years ago, there is little available information on its impact to date.

However, a year after the repeal, the Children’s Rights Alliance²⁶ said that it believed the majority of people in Ireland did not know that the law had changed. Tanya Ward, the Chief Executive, was quoted in a newspaper article²⁷:

“There hasn’t been any public education. Firstly, we didn’t seek an outright legal ban on smacking we just removed the right to reasonable chastisement. What legal bans have done in other countries is they’ve acted like an advertising campaign and made a public statement that smacking is wrong. I’d like to see some national awareness happening through support services and potentially translated into different languages too.”

²³ Global Initiative to end all Corporal Punishment of Children. (2017) Ireland. Available at: https://endcorporalpunishment.org/reports-on-every-state-and-territory/ireland/
²⁵ Global Initiative to end all Corporal Punishment of Children. (2017) Ireland. Available at: https://endcorporalpunishment.org/reports-on-every-state-and-territory/ireland/
²⁶ The Children’s Rights Alliance has over 100 members working to make Ireland ‘one of the best places in the world to be a child’.
²⁷ Irish Examiner (29 November 2016) Ban smacks of needing more work. Available at: https://www.irishexaminer.com/lifestyle/features/ban-smacks-of-need-ing-more-work-432730.html
In the same article\textsuperscript{28}, the Irish Society for Prevention of Cruelty to Children said that children who call Childline are, “confused in relation to the law surrounding chastisement.” Further, their support line can also receive calls from parents who have just smacked their child, or considered smacking their child:

“If this happens our staff respond by thanking the parent for their honesty and talking through what caused them to smack the child or consider smacking the child.

We would work through with them how they reached this particular point, about what was the triggers and bring the parent to the conclusion that smacking doesn’t work.”

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\textdate{18 March 2018}

\textsuperscript{28} Ibid