Crown Office and Procurator Fiscal
Written Responses to the Equalities and Human Rights Committee

From a legal point of view what, if any, are the practical implications of removing the defence of reasonable chastisement?

As set out at paragraph 8 of the Explanatory Notes published to accompany the Bill, the practical effect of removing the common law defence of reasonable chastisement and repealing section 51 of the Criminal Justice (Scotland) Act 2003, which restricts and clarifies the scope of that common law defence, is that it will no longer be possible to claim that the physical punishment was a justifiable assault. This means that children will be in the same position and have the same protections, in terms of the law on assault, as adults.

Does this Bill as currently drafted criminalise what is commonly referred to as “smacking”? And would it make actions or behaviour which are currently lawful criminal? If so, what sort of actions or behaviour?

The Bill, as currently drafted, removes a defence to behaviour which otherwise falls within the scope of the common law crime of assault, rather than creating a new crime. The practical effect of that would be that some acts carried out as physical punishment, which may be commonly referred to as ‘smacking’, would no longer benefit from the defence of reasonable chastisement and would fall to be considered in terms of the law of assault as it applies generally.

Each case would require to be considered on its own individual circumstances to assess whether the actions of the accused amount to an assault in law, namely an attack upon another person, and to determine whether the necessary mens rea or criminal intent can be established. Such questions would arise in particular when the physical contact is of an extremely minor or trivial nature. Similarly, the use of physical force to remove a child from danger, such as pushing the child out of the way of an oncoming car, would lack criminal intent and would not, for that reason, constitute an assault.

Does the offence of assault draw a clear distinction between actions such as mild physical intervention, forceful restraint, striking with an open palm, a tap on the wrist and smacking?

As outlined in the previous response, any deliberate attack upon the person of another can be an assault. Attack has a wide meaning and covers more than a forcible attack.
There need not be substantial violence or any injury. For example, it can be an assault to slap or tap someone on the back, or to spit on someone. The deliberate use of threatening gestures in order to place a person in a state of fear and alarm for their safety can also constitute an assault even if there is no actual physical contact.

In addition to actions which amount to an attack upon the person of another, there needs to be criminal intent to satisfy the necessary *mens rea*. The question of whether the required criminal intent can be established would fall to be decided upon in light of the whole context and circumstances of the individual case. This requirement for criminal intent would mean that some minor physical interventions would not be considered to be assault.

**What would the threshold/tests be for prosecution of physical punishment under the common law offence of assault both in terms of public interest and parental intention? Who would make this decision if this Bill is passed?**

Decisions on prosecution are taken by professional prosecutors within the Crown Office and Procurator Fiscal Service, acting independently and in the public interest, and within the framework of prosecution policy set by the Lord Advocate.

The Scottish Prosecution Code, issued on the authority of the Lord Advocate, sets out the tests which prosecutors apply to any case of alleged criminal conduct reported to the Crown in deciding whether to take prosecutorial action. The Prosecution Code can be accessed from the following link:


Firstly, prosecutors must establish if any report received discloses a crime known to the law of Scotland. Secondly, prosecutors assess whether there is sufficient admissible, credible and reliable evidence that the offence was committed and it was the accused person who committed it. Finally, if there is sufficient evidence of a crime, prosecutors consider what action, if any, best serves the public interest.

In considering the public interest, the Code requires prosecutors to take into account a range of factors, including the nature and gravity of the offence, the impact of the offence on the victim, the personal circumstances of the accused, the attitude of the victim, the age of the offence, any mitigating circumstances, the effect of a prosecution on the accused, and the risk of further offending.

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1 It is open to the Lord Advocate to issue directions to the Chief Constable about the reporting of offences. Such directions may permit the police to deal with certain categories of offending by way of a recorded police warning without reporting the matter to the procurator fiscal.
These public interest considerations would be applied in any report received in relation to an alleged assault on a child as a form of physical punishment.

As the Scottish Prosecution Code points out, the actions available to prosecutors are not limited to prosecution. Those actions include, in addition to prosecution, diversion from prosecution, a formal warning, and the various direct measures (fiscal fine, fiscal compensation order, fiscal work order, and combined order) which a prosecutor may, by statute, offer to an accused person instead of prosecuting them.

Some evidence has suggested the common law is currently ambiguous - do you agree? If so, do you think the current approach to remove the defence is the correct approach or would consolidation and codification of this area of law in statute provide greater clarity?

The common law crime of assault is well understood and is widely used to prosecute offending in courts across Scotland, resulting in a large number of convictions each year. The crime of assault is already used to prosecute cases involving children, some of which relate to physical chastisement.

Data on cases reported to COPFS for assault, assault to injury, assault to severe injury and other forms of serious assault, where the victim was a child and the accused had parental rights or rights derived from charge or care of the child, is provided in the table below. This is based on a review of cases reported to COPFS over a 3 month period in the year 2015/16, and includes annualised estimations.

<table>
<thead>
<tr>
<th>Types of assaults</th>
<th>Actual number of cases reported over 3 month period (Sept-Nov 2015)</th>
<th>Actual number of these cases marked for prosecution</th>
<th>Estimated number of cases reported over 12 month period</th>
<th>Estimated number of cases marked for prosecution over 12 month period</th>
</tr>
</thead>
<tbody>
<tr>
<td>1) Assault and assault to injury cases with child victims and accused who have parental rights or rights derived from charge or care of the child</td>
<td>184</td>
<td>Summary - 106</td>
<td>736</td>
<td>Summary - 424</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Solemn - 6</td>
<td></td>
<td>Solemn - 24</td>
</tr>
</tbody>
</table>

\[2\text{ The number of cases reported over the 12 month period has been estimated based on the actual number of cases reported between September 2015 and November 2015.}\]
There is, under the current law, a common law defence of reasonable chastisement which can be available in certain circumstances when a person being prosecuted for assault on a child claims that their actions amounted to a physical punishment. Section 51 of the Criminal Justice (Scotland) Act 2003 confirms the factors which a court must have regard to in considering whether such a defence applies and the physical punishment was a justifiable assault. The section also removes the availability of the defence from actions which include or consist of a blow to the head, shaking, or the use of an implement.

The Bill proposes to remove this defence which means that the legal situation would be simplified and children would receive the same protection from assault as adults. It would not be appropriate for COPFS to offer an opinion about the merits of consolidating or codifying the law of assault or about the approach set out in the Bill as currently drafted; the question of whether any further or alternative reform is required would be a matter for Parliament.

Some witnesses have suggested that the bill should not see parents fined or prosecuted and that the focus should be on education and a collaborative approach. Do you think we will see any change in prosecution and/or reporting? Is there any merit in writing a presumption against prosecution into the bill?

As noted above, parents may, under the current law, be prosecuted if they assault their child. The purpose of the Bill is to remove the defence of reasonable chastisement. It is unknown whether the number of reports from the police to the Procurator Fiscal relating to assaults on children committed as a form of physical punishment is likely to increase. Since the Bill removes a defence which would currently be available, that is quite possible. It is also not unusual for the publicity and awareness-raising which generally accompanies new legislation and the resultant changes in societal attitudes to result in increased reporting.

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3 “Assaults of a more serious nature” refer to assaults reported that were of a more serious nature than assaults to injury, eg. assault to severe injury, assault to severe injury and permanent disfigurement etc.
On the other hand, evidence from other jurisdictions which have banned physical punishment of children suggests that such a change did not result in a significant increase in prosecutions. As stated above, each case would need to be carefully considered on its own facts and circumstances and the considerations set out in the Prosecution Code applied. Even where there was sufficient evidence that a crime had been committed by the accused, there would only be a prosecution where prosecution — as opposed to one of the other actions available to a prosecutor — was considered to be merited in the public interest.

The Crown would oppose the enactment of a presumption which would necessarily impinge on the exercise of the independent prosecutorial function. The Scotland Act states that it is for the Lord Advocate to exercise his prosecutorial responsibilities independently of any other person. A presumption of this sort would be a constitutional novelty. It would raise the possibility of an accused person challenging a decision to prosecute by reference to the presumption, and the court requiring to adjudicate on the prosecutor’s decision making in that regard — something which would be at odds with the structure of our criminal justice system. In any event, such a provision would fetter the prosecutor’s ability to respond appropriately to the particular facts and circumstances of each case, and would be inconsistent with the basic purpose of the Bill, which is to afford children the same protection against assault as adults.

Prosecutors are used to assessing carefully the factors relevant in each individual case in order to determine the appropriate prosecutorial response to that case; and they can be expected to apply the same careful professional judgment to cases of the sort which the Committee has under consideration. The application of a presumption would imply that a case which would, on an objective and independent assessment of the relevant public interest considerations, merit prosecution might, in fact, not be prosecuted — indeed, if there were to be a general presumption against the prosecution of parents for assaulting their children that would, presumably, apply equally to cases which would, under the current law, be the subject of prosecution.