Equality and Human Rights Committee: Children (Equal Protection from Assault) (Scotland) Bill

I offer the following responses to your questions. I apologise if some of this is already familiar to the Committee members, or has already been considered by the Committee, but given the short response time, I have had no opportunity to look at the Committee’s Minutes.

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

Some context is necessary to answer this question. In any criminal trial, the burden of proof is on the prosecution (the Crown). The prosecution must prove beyond a reasonable doubt that a crime was committed, and that the accused was the person who committed it. Assault is currently a common law crime – we have no statute/legislation defining it. It consists of a physical attack by one person against another person, with the intention of causing that other person to suffer personal/physical injury, or alternatively, intending to place that person in a state of fear and alarm for his or her safety.

An attack, for the purposes of an assault, can range from something relatively trivial (e.g. a slap on the face, spitting at someone) to something very serious indeed (e.g. multiple stabbings). The motive behind an attack (e.g. an attack by a parent on a child, where the parent is motivated from a desire to teach the child a lesson) is not relevant to criminal liability, but could be considered by a court in determining the appropriate sentence.

At present, a parent who is charged with assaulting his or her child could put forward the defence of ‘reasonable chastisement’ – this too is defined at common law but broadly speaking means that the accused is claiming that any physical attack he or she made on another person was justified by the parental right to punish a child as part of inculcating discipline in the child. Parents can only avail themselves of this defence if they have used reasonable force and that their behaviour is not proscribed by section 51 of the Criminal Justice (Scotland) Act 2003, which prohibits shaking, hitting with an implement, etc.

The practical implication of removing this defence, therefore, is that any evidence of chastisement could only be considered by a court in mitigation of sentence (unless the legislation also excludes this possibility, as has been done in relation to using voluntary intoxication as a mitigating factor). In practice, the Crown Office and Procurator Fiscal Service (COPFS) may decide not to prosecute parents unless more than minimal injury was caused or intended, but there is no guaranteed that it would adopt such a policy.
Even if there was such a policy, there would be no guarantee that the prosecution would apply it in any particular case. If the Committee wishes to limit prosecutorial discretion, it would be preferable for the Bill to specify that parents will not be prosecuted unless more than minimal injury was caused or intended.

2. **Does this Bill as currently drafted criminalise what is commonly referred to as “smacking”?**

Yes, in my opinion the Bill would criminalise smacking: striking another person with the palm of one’s hand is clearly to engage in an attack on their physical person, since the intent is to cause injury, albeit of a minor nature.

   **And would it make actions or behaviours which are currently lawful criminal? If so, what sort of actions or behaviour?**

The Bill would criminalise actions or behaviours which are currently lawful, such as smacking. Indeed, any physical contact with a child *where the intention is to cause personal injury* – even minor personal injury – would be an assault. As previously described, the parent’s motive is irrelevant, except perhaps in determining the appropriate sentence after conviction.

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

The law does not draw a distinction between these actions, so long as the intention behind the behaviour is to cause personal injury. Generally, however, some forms of forcible restraint, such as ensuring that a child does not run onto a busy road or stick his or her hand in an electric socket, would not constitute an assault since there is no intent to injure.

4. **What would threshold/test 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?**

Any threshold test would be a matter for the COPFS; Crown Office would presumably issue guidance to procurators fiscal as to the threshold, if none was specified in the legislation. It would, however, be possible (and in my view, preferable) for this to be included in the legislation. For example, the Bill could provide that a prosecution should only be taken where there was intention to cause more than minor injury or (irrespective of the intention) serious injury was in fact caused.
5. Some evidence has suggested the common law is currently ambiguous – do you agree?

In my view, while the current common law definition of assault is clear, the role of consent should be clarified. Please see further, below.

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?

Greater clarity would be provided by codification of this area of the law (and indeed of the entire criminal law.)

As the Committee is no doubt aware, I was one of a small group of academics which drafted a criminal code for Scotland in 2003: Clive, Ferguson, Gane and McCall Smith: Draft Criminal Code for Scotland with Commentary. This was published by the Scottish Law Commission and is available on the Commission’s website at:


In considering the provisions of the Draft Code, it is important to note that there is a general provision on the “state of mind” which is required to be proven by the prosecution, in section 8. This states:

8 General rules on state of mind required

(1) The general rule is that a person is criminally liable–

(a) for an act, only if the person intended to perform that act;

(b) for causing a result, only if the person intended to cause that result.

As the Commentary to this section explains:

As a general rule, crimes comprise at least two elements: (1) some prohibited conduct, and (2) a legally blameworthy state of mind. In other words, it is not sufficient, in order to establish criminal responsibility that an accused person has engaged in conduct prohibited by the criminal law. It is necessary also to show that that conduct was accompanied by a state of mind which the law regards as being appropriate for the attribution of criminal responsibility. … Section 8 provides that, as a general rule, intention will be required.

In relation to the crime of assault, section 41 of the Draft Code provides:

Assault
(1) A person who attacks another person, presents a weapon at another person in a menacing manner or uses force against another person, without that person’s consent, is guilty of the offence of assault.

(2) For the purposes of this section, attacking a person includes punching, kicking, hitting, biting, grabbing or pushing that person; striking, stabbing or cutting that person with a weapon or implement; causing that person to be struck by any projectile; causing that person to come into contact with any object or structure to that person’s injury; and otherwise infringing that person’s interest in bodily integrity.

The Commentary states:

*The primary meaning of an assault is any attack on the person of another. “Attack” is given an inclusive definition in subsection (2) of this section. It covers a range of behaviour from spitting to stabbing or shooting. The attack must be intentional.*

Section 7 of the Draft Code provides for more serious forms of basic offences such as assault. Of particular relevance here are s 7(2)(f) and (g) (in bold, below):

**Aggravations**

(1) An offence may be aggravated by the intent or motivation with which it is committed, by the manner or circumstances in which it is committed, by the serious nature of the effects produced, by the special vulnerability of the victim; or by the abuse of a special relationship between the perpetrator and the victim, and may be charged and tried accordingly.

(2) An offence under this Act may, in particular, be aggravated—

(a) if committed with intent to commit another offence;

(b) if motivated by hatred or contempt for, or malice or ill-will towards, a group of persons defined by reference to race, colour, religion, gender, sexual orientation, nationality, citizenship or ethnic or national origins;

(c) if accompanied by expressions of abuse or ill-will based on the victim’s membership or supposed membership of any such group;

(d) if committed in circumstances involving an invasion of the victim’s home or privacy;

(e) if committed against an officer of the law carrying out official duties by a person who knows, or could reasonably be expected to know, those circumstances;

(f) if committed against a child under the age of 16 years;
(g) if committed by a person who has, to that person’s knowledge, a position of trust or authority in relation to the victim; or

(h) if it results in danger to life or serious personal injury or impairment.

Section 22 of the Draft Code provides a defence of “lawful authority”:

**Lawful authority**

(1) A person is not guilty of an offence if the acts in question are justified by lawful authority.

(2) An act is justified by lawful authority if—

(a) it is required by an enactment or rule of law;

(b) an enactment or rule of law confers a right to do it or authorises it; or

(c) it is done in the proper exercise of a responsibility or authority conferred by an enactment or rule of law.

(3) The following are, in particular, regarded as having lawful authority to act in the proper exercise of their role or functions—

(a) judges, officers of court, members of the armed forces, police officers and prison officers;

(b) members of the public assisting police officers in the exercise of their functions or exercising any lawful power of arrest or responsibility to prevent crime;

(c) parents or guardians having parental responsibility;

(d) teachers and others having the lawful care or control of a child or young person; and

(e) guardians, relatives and others having the care of, or a legitimate role in relation to the welfare of, an adult with incapacity within the meaning of the Adults with Incapacity (Scotland) Act 2000 (asp 4).

(4) Nothing in this section justifies—

(a) the use of force which is excessive in the circumstances;

(b) the infliction of torture, inhuman or degrading treatment or corporal punishment; or

(c) any violence, abuse, or maltreatment by those exercising the responsibilities or roles mentioned in subsection (3)(c)(d) or (e).
The Commentary to this section explains:

Subsection (3)(c) deals with the special position of parents or guardians exercising parental responsibility. A parent, for example may, in the exercise of his or her parental responsibility, have to restrain a child by means of a safety harness or seat belt or may have to prevent the child from playing with a toy. Forcibly restraining another person, or interfering with another person’s use of their property in this way, would normally involve the commission of a criminal offence. Subsection (3)(c) prevents the parent from being criminally liable.

It is interesting to note that the Commentary also states:

The code goes beyond section 51 of the Criminal Justice (Scotland) Act 2003, and provides a clearer rule, in not allowing any physical punishment of children. It gives children the same protection from physical punishment as is given to other people, such as prisoners or adults with incapacity, over whom others may have some lawful authority. This is in line with the recommendations of the United Nations Committee on the Rights of the Child which monitors compliance by States with the United Nations Convention on the Rights of the Child and which observed in 2002, with regard to the United Kingdom:

“...The Committee is of the opinion that governmental proposals to limit rather than to remove the ‘reasonable chastisement’ defence do not comply with the principles and provisions of the Convention … particularly since they constitute a serious violation of the dignity of the child.”

The Committee further recommended to the United Kingdom that it should: “with urgency adopt legislation throughout the State party to remove the ‘reasonable chastisement’ defence and prohibit all corporal punishment in the family and in any other contexts not covered by existing legislation…”

A similar view has recently been taken by the Joint Parliamentary Committee on Human Rights. It observed:

“There is little ambiguity in Article 19 of the CRC … On the face of it the retention of the defence of reasonable chastisement is a breach of Article 19…”

It is worth noting, also, that the House of Commons Health Committee has very recently recommended abolition of the lawful chastisement defence.

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1 UN Committee on the Rights of the Child, 4 October 2002 CRC/C/15/Add.188, para. 35. 134
2 UN Committee on the Rights of the Child, 4 October 2002 CRC/C/15/Add.188, para. 36.
In the light of these recommendations, and as a matter of policy and principle, it seems difficult to justify the retention of a special exception which would allow parents to hit children. However, this is a controversial and politically sensitive matter. Whatever is put in the draft code could be regarded only as a marker. The question is for the Parliament to decide.

**Consent**

If the Committee does decide that the best approach is to codify the law of assault, then consideration would need to be given to the role of consent. At present, it is not generally a defence for a person charged with assault to prove that the ‘victim’ consented to the behaviour in question. However, public policy allows some behaviour which would otherwise constitute assault to be immune from prosecution. This includes injuries inflicted during a boxing match (assuming the match is conducted within the rules), and surgical operations: the surgeon who slices open a patient’s abdomen does not commit an assault because public policy has determined that this should not be regarded as an assault.

The Draft Code offers some rules on consent in section 111. The subsections relevant to assault are as follows:

**Rules on consent**

(1) For the purposes of any Part of this Act any consent given by a person is to be disregarded if at the time when the consent was given—

(a) the person giving the consent was, by reason of his or her young age or mental disorder, unable to understand what was being consented to or to withhold consent;

(b) the consent was induced by force or fear or was otherwise not freely given; or

(c) the consent was induced by fraud as to the nature of what was being consented to or the identity of the person doing what was consented to.

(2) For the purposes of Part 2 of this Act (Non-sexual offences against life, bodily integrity, liberty and other personal interests) any consent given by a person is to be disregarded if the consent was to a socially unacceptable activity likely to cause serious injury or a risk of serious injury.

The Commentary provides:

Various offences throughout this Act are committed only if the victim does not consent to what is done. This applies, for example, to assault... It is important, however, that these provisions ensure that those who lack the capacity to consent,
or whose ability to consent freely may be impaired, are properly protected. .... [The Code] recognises that in some circumstances public policy requires that even those of full age and capacity should not be permitted to consent to the causing of serious injury (or the risk of serious injury) by socially unacceptable means. This formulation is designed to allow consent to be given to minor injuries. A person can consent, for example, to having his or her hair cut or ears pierced and there would be no assault in such cases. It is also designed to allow consent to major injuries such as might be incurred in surgery or in lawful sports (such as boxing matches), provided that the serious injury is not caused by socially unacceptable means, such as sadomasochistic practices, or through an unregulated brawl.

One alternative to the current Children (Equal Protection from Assault) (Scotland) Bill would be to reform the law of assault in general by enacting a modified versions of the relevant sections of the Draft Criminal Code. For example:

1  Assault

(1) A person who attacks another person with intent to cause personal injury is guilty of the offence of assault.

(2) For the purposes of this section, attacking a person includes but is not limited to punching, kicking, hitting, biting, grabbing or pushing that person; striking, stabbing or cutting that person with a weapon or implement; causing that person to be struck by any projectile; causing that person to come into contact with any object or structure to that person’s injury; presenting a weapon at that person in a menacing manner; using force against that person, without that person’s consent, or otherwise infringing that person’s interest in bodily integrity.

2  Aggravated assault

(1) The offence in section 1 may be aggravated by the intent or motivation with which it is committed, by the manner or circumstances in which it is committed, by the serious nature of the effects produced, by the special vulnerability of the victim; or by the abuse of a special relationship between the perpetrator and the victim, and may be charged and tried accordingly.

(2) An offence under this Act may, in particular, be aggravated—

(a) if committed against a child under the age of 16 years;

(b) if committed by a person who has, to that person’s knowledge, a position of trust or authority in relation to the victim; or
(c) if it results in danger to life or serious personal injury or impairment.

[The other aggravations listed in the Draft Code could be included, if thought to be desirable].

Optional section:

3 Prosecution policy

(1) Where the acts committed under section 1 were committed by a parent against his or her child, or by a guardian having parental responsibility, prosecution will only be competent where the person committing the act

(a) intended to cause more than minimal injury, or

(b) did in fact cause serious injury.

6. 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?

It is difficult to predict the outcome of the Bill but an increase of reporting and prosecution of assaults on children by parents is a distinct possibility. Much would depend on the approach taken by the COPFS. However, the current requirement for the prosecution to prove that a crime was committed, and that the accused was the person who committed it, by means of corroboration (i.e. there needs to be two independent sources of evidence) means that they will be fewer cases than one might at first imagine. Unless a parent chastises a child before a witness, the child will often be the only source of evidence of the assault, and this is insufficient in law for prosecution/conviction.

Is there any merit in writing a presumption against prosecution into the bill?

It would be possible and, I believe, desirable, to include a section in the Bill which specifies a presumption in favour of an alternative to prosecution. For example, the legislation could specify that where a parent or guardian is reported to the COPFS for having committed an offence of assault against a child, there is a presumption that a prosecution will not be taken if the parent or guardian agrees to attend (and in fact, does attend) a course on child discipline.
Pamela Ferguson
Professor of Scots law