

Equalities and Human Rights Committee

Children (Equal Protection from Assault) (Scotland) Bill

Submission from Michael Sheridan, Secretary, the Scottish Law Agents Society

Thank you for your letter and enquiry dated 25 March 2018 and, while this request does not provide me with sufficient time to make a properly researched statement, nevertheless, I am willing to offer the following comments as a reflection of my own personal opinion and with no guarantee of accuracy as to any of the factual or legal content.

1. The removal of the defence which is specified in the Criminal Justice (Scotland) act 2003 may render a parent who strikes a child in a manner presently permitted by that Act liable to be charged with common assault. However, given that an element of the present defence is the requirement that the parent has acted reasonably in the judgement of the court, it would appear that the parent could, under the new legislation, be guilty of assault, even if acting reasonably. To that extent, the new legislation may be contradictory within itself
2. The current law already criminalises “smacking” unless it is administered within certain specific constraints.

The Bill as presently drafted does appear to make certain actions or behaviour which are currently lawful, criminal. In particular, whereas it is currently lawful for a parent to strike a child as long as no implement is used and the child is not shaken nor struck on the head and as long as the conduct of the parent is justifiable with reference to

- (a) the nature of that conduct and the reasons for it and the circumstances in which it was carried out
- (b) The frequency and duration of the conduct
- (c) The physical or mental effect of the conduct upon the child
- (d) The age of the child
- (e) The personal characteristics of the child including sex and state of health
- (f) Such other factors as appear to the court to be appropriate

According to the Bill, however, a parent who strikes a child within the above constraints and even in circumstances which to the court seem reasonable, commits an offence of assault

3. The offence of assault does not draw a clear distinction between actions such as mild physical intervention, forcible restraint, striking with an open palm, a tap on the wrist and smacking. Any of these actions or even putting the victim into a state of apprehension that any of these actions might take place even where no actual contact takes place okay five minutes, satisfies the definition of common law assault.
4. Where an assault is suspected of having taken place then I am not aware of any further legal threshold or test which has to be satisfied to enable prosecution to take place. There is a general principle that *de minimis non curat lex* so that a matter should not be brought to court if it is too trivial. There is also a policy of diversion from prosecution under which the Procurator Fiscal Service has a discretion not to prosecute in certain circumstances. However, this is not a defence to a charge of assault and is not an entitlement available to a person who has been charged with assault.
5. I would not agree that there is any significant ambiguity in the current common-law of assault. It seems reasonably clear as set out at 3 above. There may be some potential for ambiguity in terms of the consequences of a conviction for assault. Whereas the assault may be very minor indeed and not even involve contact upon the victim, it might also be very serious indeed with extremely serious consequences upon the victim. Nevertheless, both of these extremes fall within the single heading of "assault" so that the perpetrator of the minor incident is likely in some way to be classified along with perpetrators of major incidents. Of course, the degree of offending is recognised in the sentences handed down which might involve absolute discharge, admonition or a fine at the lower end of the scale and lengthy prison sentences at the other end of the scale. Again, the requirements for rehabilitation (i.e. expunging of criminal record) vary according to the sentences imposed so that rehabilitation comes sooner where the offender was admonished or fined as compared with the case of an offender who has received a lengthy prison sentence.

Therefore, I would not agree that it is appropriate to remove the existing defence which is a wholly appropriate mechanism for restricting unnecessary law enforcement from the private, domestic household where such enforcement would be entirely disproportionate to any possible level of offending created by the Bill and which enforcement could destroy family relations and trust.

Similarly, I would not agree that there is any case for codification.

6. I would certainly agree that prosecution is not appropriate in respect of the level of conduct which would be affected by the Bill.

I cannot comment on any differences which might come to pass in relation to prosecution and reporting other than to point out that, where particular conduct is made criminal, then prosecution must follow as a matter of course. Otherwise, the change to the law would be meaningless and unnecessary. Similarly, in my view, there would be no merit whatsoever in writing into a Bill which criminalises certain conduct a presumption that there would be no prosecution.

In conclusion, I would offer the further comment that whereas this Bill seeks to provide children with treatment which is equal to the treatment of adults whereas children require treatment which is very different to that required by adults and the Bill appears to me therefore to be based entirely upon a false premise. Further, the literature around the Bill suggests that the reasoning behind the Bill is based on a United Nations definition of punishment which includes

hitting (—smacking, —slapping, —spanking) children, with the hand or with an implement - a whip, stick, belt, shoe, wooden spoon, etc. But it can also involve, for example, kicking, shaking or throwing children, scratching, pinching, biting, pulling hair or boxing ears, forcing children to stay in uncomfortable positions, burning, scalding or forced ingestion (for example, washing children's mouths out with soap or forcing them to swallow hot spices). In the view of the Committee, corporal punishment is invariably degrading.

However, these activities are clearly criminally illegal under present Scots law and, again, the Bill appears to be based upon a false premise.

I hope that these comments may be of assistance to you.