

Consultation Response

Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Criminal Law Committee and Family Law Sub-committee welcome the opportunity to consider and respond to the Scottish Parliament's Equalities and Human Rights Committee call for views on the Children (Equal Protection from Assault) (Scotland) Bill (the Bill).¹

Questions

Question 1: Do you support the Bill's aim to end the physical punishment of children by parents or carers? It will do this by abolishing the defence of reasonable chastisement. Please provide an explanation for your response. What groups would be impacted by the change (for example, parents, children, public services, the legal profession, etc)?

The Policy Memorandum² sets out the objectives of the Bill at paragraphs 4-6 which include:

- ending the physical punishment of children by parents and others caring for them or in charge of them

¹ [http://www.parliament.scot/S5_Bills/Children%20\(Equal%20Protection%20from%20Assault\)%20\(Scotland\)%20Bill/SPBill38S052018.pdf](http://www.parliament.scot/S5_Bills/Children%20(Equal%20Protection%20from%20Assault)%20(Scotland)%20Bill/SPBill38S052018.pdf)

² [http://www.parliament.scot/S5_Bills/Children%20\(Equal%20Protection%20from%20Assault\)%20\(Scotland\)%20Bill/SPBill38PMS052018.pdf](http://www.parliament.scot/S5_Bills/Children%20(Equal%20Protection%20from%20Assault)%20(Scotland)%20Bill/SPBill38PMS052018.pdf)

- giving children equal protection from assault by abolishing the defence of reasonable chastisement used to justify the use of physical force to discipline a child
- driving behaviour change in Scotland which is out of line with other countries with regard to parenting practices

The historic and current law in Scotland is set out in paragraphs 10-18³ of the Policy Memorandum. The Society has also set out the current law in its response dated 4 August 2017⁴.

As the law currently stands, an assault on a child may be legally justified where a parent (or other person being in charge or having the care of a child) establishes that the assault amounted to reasonable chastisement of the child. There are qualifying factors⁵ to which a court must have regard in deciding whether the assault can be considered to be a justifiable assault (our emphasis). The factors include:

- (a) the nature of what was done, the reason for it and the circumstances in which it took place
- (b) its duration and frequency
- (c) any effect (whether physical or mental) which it has been shown to have had on that child
- (d) the child's age
- (e) the child's personal characteristics

The court⁶ can also have regard to any other factors that it considers appropriate in the circumstances.

The law does not permit physical punishment of a child. When the defence of reasonable chastisement is made out, this will result in an acquittal. This defence does not currently apply in relation to any assault by an adult on an adult so that children do not have the same protection of the law. This is inequitable.

The Bill proposes to remove the defence that is available to adults with regard to assaults on children. Section 1 of the Bill gives effect to the proposed change. It also implements the first two policy objectives.

It is not for the Society to comment on social policy that is being brought forward by the Bill though we welcome the clarification of the criminal law that the Bill is seeking to provide.

The public has a right to know what they can and cannot do in so far as the criminal law is concerned. As the law stands, it is a matter for the defence, if appropriate, to establish on the basis of the evidence presented at court if the defence of reasonable chastisement is made out. Each case, as it arises, will be

³ [http://www.parliament.scot/S5_Bills/Children%20\(Equal%20Protection%20from%20Assault\)%20\(Scotland\)%20Bill/SPBill38PMS052018.pdf](http://www.parliament.scot/S5_Bills/Children%20(Equal%20Protection%20from%20Assault)%20(Scotland)%20Bill/SPBill38PMS052018.pdf)

⁴ <https://www.lawscot.org.uk/research-and-policy/influencing-the-law-and-policy/our-responses-to-consultations/criminal-law/>

⁵ Section 51(1) of the Criminal Justice (Scotland) Act 2003

⁶ Section 51(2) of the Criminal Justice (Scotland) Act 2003.

considered on its facts and circumstances. Attitudes towards the verdict of a case that involved the defence of reasonable chastisement will vary as there may be a feeling from the outcome, whether an acquittal or not that justice was not necessarily achieved.

The Bill, as presented, would increase that clarity.

There has been considerable development in policy with regard to physical punishment of children over the passage of time reflecting the changing attitudes of society. The Scottish Government's own policies have further developed⁷ to take account of providing children and young people with equal protection from assault. Scotland would be seen by this change to embrace children and young persons as citizens in their own right. It would bring Scots law into line with the UN Convention on the Rights of the Child⁸ on this issue and address concerns expressed by the UN Human Rights Committee which stated that:

"The State party should take practical steps, including through legislative measures where appropriate, to put an end to corporeal punishment in all settings, including the home...."⁹

Scotland would be joining a number of other countries which fully protect children from physical punishment (understood to comprise 10% of the world's children)¹⁰.

We would also refer to the objective in the Policy Memorandum¹¹ about the change in the law being about "driving behaviour change." This Bill is about changing attitudes to physical punishment of children in Scotland. It is not about making prosecutions easier.

The discretion exercised by the Crown Office and Procurator Fiscal Service (COPFS) under their Prosecution Code¹² sets out the criteria for their decision-making and the range of options available to them when dealing with reports of crime. Assuming that any report to COPFS discloses sufficient admissible, reliable and credible evidence of a crime committed by an identified accused, COPFS must consider what action lies in the public interest. Their assessment of the public interest includes consideration of competing interests, including, in this case, the interests of the child, the accused and the wider community.

All the groups referred to in the question would be impacted by any change in the law being brought forward. Parents, children and public services such as social worker and those working in schools would

⁷ Paragraph 39 of the Policy Memorandum where reference is made to Getting it Right for Every Child

⁸ Article 19 of the United Nations Convention on the Rights of the Child

⁹ Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland CCPR/C/GBR/CO/7, 2015 <https://www.refworld.org/docid/5645a59c4.html>

¹⁰ Paragraph 28 of the Policy Memorandum

¹¹ [http://www.parliament.scot/S5_Bills/Children%20\(Equal%20Protection%20from%20Assault\)%20\(Scotland\)%20Bill/SPBill38PMS052018.pdf](http://www.parliament.scot/S5_Bills/Children%20(Equal%20Protection%20from%20Assault)%20(Scotland)%20Bill/SPBill38PMS052018.pdf)

¹² http://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Prosecution20Code20_Final20180412__1.pdf

be directly affected at the front line. The legal profession would be involved in providing advice to clients on the change to the law where their clients will include parents, children and the relevant public services.

Question 2: Do you see any additional impact on groups with protected characteristics?

Effective communication of this important policy change will be important if it goes forward. The groups mentioned in Question 1 all would need to be aware of the change, its effect, and the significance for them. They would need to be involved in rolling out awareness of the change.

As part of that campaign in raising awareness, specific attention needs to be paid to those groups that fall into the category of 'protected characteristics' under the Equality Act 2010. There may be different cultural implications of the change in policy for some of the groups with 'protected characteristics' groups. Identifying and involving the relevant community groups at the earliest stage seems vital to secure their support and the implementation of the policy change.

Section 2 of the Bill refers to the duty of Scottish Ministers. Scottish Ministers should take such steps as they consider appropriate to promote public awareness and understanding about the effect of the change made by section 1. The roll out will deal with implementation of the third policy objective of 'driving behaviour change'.

We fully endorse the need for the inclusion of section 1 of the Bill. Details of the resources and mechanisms for delivering education and support should be identified during the passage of the Bill. Public awareness campaigns would need to run in tandem with the future implementation of the Bill.

Much of the responsibility for such campaigns would involve the local authorities with their role with social work and children.

Question 3: Are there any equalities and human rights issues raised by the approach taken in the Bill that should be considered?

Please see our answer to Question 2.



Question 4: Will the Bill result in any resource implications for your organisation or you as an individual? If so, please explain and provide any supporting information.

The legal profession should have the opportunity to understand the change in the law and its implications in so far as their clients are concerned. They need to be able to provide effective up to date legal advice.

Question 5: Please tell us about any other comments you feel are relevant to the Bill.

We have nothing further to add.

For further information please contact

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