



FAMILIES FIRST

e-mail: info@families-first.org.uk Web: www.families-first.org.uk

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Dear Sir/Madam

CRIMINAL JUSTICE (SCOTLAND) BILL
SECTION 43 - Physical Punishment of Children

Families First is a family advocacy group, committed to supporting parents and children in the family unit. We support the rights and responsibilities of parents to protect and guide their children and to bring them up in a reasonable manner, according to their religious and philosophical convictions.

The organisation was originally founded in 1993 amid concern at the growing influence of an unrepresentative lobby seeking to impose an unproven philosophy of child-rearing on all families by force of law.

We are convinced that the family is by far the best environment in which to bring up children and that parents are best qualified and equipped to undertake this demanding task. Since bringing up children is an art rather than a science, we believe that the law should respect a variety of parenting styles and not demand a 'one-size-fits-all' approach. The liberty of parents to raise children according to their religious and philosophical convictions and to transmit their values from one generation to the next is fundamental to the maintenance of a free and democratic society.

We are therefore concerned about the implications of Section 43 of the Bill and its consequences for loving and stable families throughout Scotland where the children are well looked-after and would ask you to take into consideration the points made in the attached paper.

Yours faithfully

Norman Wells

1. It is unnecessary to change the law in the way the Executive is proposing

The law in Scotland already protects children from unreasonable punishment, as the Scottish Executive has itself acknowledged.¹ As such, it has served Scotland well for many generations. The removal from the parent of the defence of ‘reasonable chastisement’ in circumstances where it is currently available, and the removal of all discretion from the courts in such situations clearly represents a marked change in the law. Currently, a mother who gives a child under the age of three a moderate smack would not expect to be convicted of a criminal assault, whereas under the terms of the Bill, a court would have no option but to convict her.

The European Court ruling in *A v UK* does not require the Scottish Parliament to enact any new legislation. The Court’s judgment was, as ever, limited to the single case before it, and the Court refused to make any general comments about physical correction even though it was invited to do so.

The factors set out in subsection 1 of the Bill give clear guidance to the courts in assessing whether a parent has acted moderately and reasonably. The section on the physical correction of children should conclude at the end of this subsection. The key thing is to protect children from significant harm. If the child is being harmed then it is irrelevant how old the child is, or how the injury was caused - whether it was caused by shaking, by a blow to the head, by the use of an implement, by an elbow, fist, knee or an open hand.

The Policy Memorandum states that the Bill ‘aims to help...parents and carers avoid the use of unnecessary and excessive physical punishment’ (para 209). In other words, it presumes to dictate to parents what constitutes ‘unnecessary and excessive’ discipline and allows the courts no discretion by predetermining that only a smack given with an open hand to a child aged three or over may be deemed necessary and reasonable. This represents a gross insult to the 90% of Scottish parents who currently smack their children before they reach the age of three and to those parents who make careful and occasional use of a safe object such as a slipper or wooden spoon to discipline their children.

If the Executive accepts that the law already provides adequate protection to children, then it owes the public an explanation as to how its proposals will provide improved protection to children ‘without encroaching needlessly in the private life of the family’ (*Policy Memorandum*, para 211). So far a convincing explanation has not been forthcoming.

2. The Executive’s proposals lack any solid foundation

It is difficult to see why the Executive has chosen to single out physical correction for special treatment when it has not produced any evidence that smacking is any more harmful than many other forms of discipline. In his consultation response, Professor Schaffer of the University of Strathclyde wrote:

‘It is...important to bear in mind that forms of punishment such as verbal abuse, mocking, or sarcasm may be a lot more inhuman and degrading in their effects, and to focus on physical punishment without taking into account its alternatives is thus not justified.’²

There is a complete absence of objective academic research demonstrating adverse consequences from the use of moderate physical correction in the context of a warm, supportive home environment where the child is loved and cherished. While there is evidence to show the dangers associated with the vigorous shaking of young children and forceful blows to head, there is no research to support a blanket ban on the use of implements or smacking under three. This point is recognised even by many of those who support an absolute ban on all smacking. For example, the British Psychological Society wrote:

‘The use of objects in corporal punishment is an irrelevance... The damage depends on the motivation, the circumstances, the anger and the physical and psychological damage. No distinction should be made.’³

There are many things that a parent can do to a child which will have far more lasting and damaging effects than smacking a child under the age of three or making careful and responsible use of a slipper to discipline a child. For example, not speaking to children for a period of time, shouting and swearing at them, and saying 'I hate you; I wish you had never been born' can cause emotional and psychological pain that far exceeds the momentary physical pain of a moderate smack. Yet under the Executive's proposals all these would be legal, but the parent who smacks a child under three or uses a slipper to smack a child could be faced with criminal charges and the lifelong consequences of a conviction.

3. The proposals give rise to a number of anomalies

As the Bill is currently drafted, the reasonable chastisement defence would be available to a parent who performed violent actions such as punching a child in the stomach, kicking a child in the genital region, or stamping on a child's toes, but not to the parent who gently smacks a toddler for defiance or to the parent who smacked a child with a wooden spoon. If the section of the Bill on physical punishment finished at the end of subsection 1, the factors set out would be sufficient to secure a conviction in the case of the first parent, but would grant the courts discretion in determining whether or not the second parent had acted in a reasonable manner.

The Policy Memorandum states, 'The Scottish Ministers consider it wrong to inflict physical punishment on very young children' (para 216), but does not provide any basis for this assertion. Many parents would consider the word 'punishment' inappropriate in this context, since smacking is generally used as a teaching or training tool for very young children rather than as a punitive sanction. In practice very few parents would use physical *punishment* with toddlers, but the majority (around 90%) do use physical *correction*. When used with care, such discipline runs no risk of injuring the child's immature body, and it is patently untrue to suggest that it 'may be ineffective before a child has developed language and reasoning abilities'. Every parent knows that young children are able to understand far more than they can articulate. If it were true that a child could not understand a smack before the age of three, the same logic would require us to say that a child could not understand any alternative method of discipline before that age either. To be consistent, the Executive would have to propose outlawing any form of discipline during the first three years of a child's life.

It is also without foundation to claim that 'the use of implements' risks injury to children and that 'it is hard to judge the impact of a blow on an immature body'. The fact that a tiny minority of people may misuse implements and cause harm to their children is no reason for imposing a blanket ban on their use altogether. If the Executive were to go down the road of banning anything that is open to abuse, it would also have to outlaw alcohol, motor vehicles, computers, cameras and a whole host of other things!

There appears to be a presumption that parents who use an 'implement' are acting excessively. We would submit that this, too, is without foundation. We feel that the Policy Memorandum misrepresents the position of many parents when it speaks of 'the ritual of fetching an implement' and that it does them an injustice by implying that the use of an 'implement' constitutes 'unnecessary physical violence' (para 229). We feel that more respect is due to those who out of genuine religious conviction choose to use a safe object rather than their bare hands to smack their children for disobedience or defiance. Such parents are no more going through a 'ritual' or engaging in physical violence than is a doctor when s/he gives a patient an injection.

The proposal to ban the use of physical punishment by childminders and in non-publicly-funded pre-school centres will give rise to a number of anomalies and not secure the consistency sought by the Executive. No reason is given to explain why parents should be allowed to set ground rules for babysitters and nannies but not for childminders. Childminding is the preferred option for many parents precisely because standards of care can be tailored to meet the individual needs and requirements of the child. The only consistency of interest to the child is the continuity of care provided by his parent and his childminder.

4. The proposals appear to rest on false assumptions about physical correction

The Executive appears to feel that the need to change parental attitudes and behaviour is so urgent that a programme of public education would be insufficient to protect ‘the most vulnerable children’ (*Policy Memorandum*, para 222). But in reality, ‘the most vulnerable children’ are already adequately protected by the law. We find it hard to accept that the Executive genuinely believes that 90% of toddlers are at risk from their parents and need additional legal protection. It seems clear that things have got seriously out of proportion.

From some of the language used in the White Paper and in the Parliamentary debate on 13 September 2001, it is clear that the Executive’s understanding of ‘physical punishment’ is quite different from the understanding of many Scottish parents. Terms such as ‘violence’, ‘retribution’ and ‘hitting’ are quite alien to what most parents understand by corporal discipline. Indeed, we prefer to speak of ‘physical *correction*’ rather than ‘physical *punishment*’, because we see it primarily as a teaching and training tool and not as a punitive sanction.

It is assumed that parents ‘resort’ to physical correction when all else has failed, when they are stressed, out of control and at the end of their tether. However, for many parents, physical correction is something done with care and self-control, with the best interests of the child at heart, combined with gentle words of rebuke and instruction appropriate to the age of the child.

5. The proposals do not enjoy widespread public support

The Policy Memorandum gives the impression that there is widespread support for the Executive’s proposals (para 226). While 77% may have indicated support for a change of some kind, less than half the respondents to the consultation document supported any one of the proposals found in Section 43(3) of the Bill.⁴ Indeed, less than 5% of respondents were in favour of a law that would criminalise parents who smacked a child under the age of three.

It is, in any case, always a hazardous exercise to legislate for what takes place in family life on the basis of opinion polls and surveys. Many of the surveys that have been undertaken on this particular subject have been skewed by the language in which the questions have been framed. For example, in its recent telephone poll, the NSPCC asked whether parents ‘should be allowed to physically punish children by hitting them’ in various different ways.⁵ The NSPCC then used the results of the survey to urge the government to legislate against physical correction. Such a plea is about as convincing as a campaign to ban all inoculations by the medical profession because public opinion polls have shown that the majority of people do not think health professionals should be allowed to assault their patients by stabbing them.

The Policy Memorandum states that children were ‘against smacking’ (para 227). This is not surprising and hardly constitutes a basis for legal reform. But again, the language used in the Children in Scotland survey, and in the more recent exercise undertaken by Save the Children, equates any form of physical correction with ‘hitting’.⁶ Survey questions on the use of ‘implements’ have also tended to refer to ‘hitting’ and to draw no distinction between the careful use of a safe object and the harsh and violent use of an implement that risks causing damage.⁷

People tend not to think through the implications and consequences of their answers when responding to questionnaires. So, while the Executive claims there is widespread support for a blanket ban on the use of implements on the basis of surveys and polls, it is doubtful that there would be widespread support for care proceedings or court cases involving children who have been smacked with a slipper or a wooden spoon in a careful and responsible way by a good, loving parent. We would therefore caution against using opinion polls as a basis of legal reform.

6. The proposals are unworkable and would prove counterproductive

We note that the Policy Memorandum to the Bill states that the Executive is not proposing a total ban because it would be impossible to enforce and would constitute ‘an excessive intrusion into the rights of parents to bring up children’ (para 223). Yet precisely the same objections can be made about the proposals in Section 43(3) of the Bill. The Executive has yet to explain how it will enforce the proposed legislation without imposing a one-size-fits-all approach to discipline on every family in Scotland.

It is claimed that the proposals have ‘the merit of clarity’. However, many parents will be more confused than ever, particularly when they are told that ‘trivial smacks’ or ‘light warning taps to attract a child’s attention to a danger would, as now not constitute a crime’ (*Policy Memorandum*, para 224). In the absence of any definition of a ‘trivial smack’ or ‘light tap’, parents will not know where they stand. The general public will also be thrown into confusion about when they should report parents for smacking, and there will be increased scope for false and malicious reports to be made to the authorities.

Many parents are persuaded that a disciplinary smack is often the kindest way to deal with a defiant toddler and will not be prepared to use alternatives they believe to be second-best in some circumstances. Such parents will continue to do what they believe to be best for their children rather than fall into line with the Executive’s views.

Likewise, some parents have well thought-out reasons for using a safe object such as a slipper or wooden spoon in preference to their hands. Many such parents would disregard any prohibition on the basis that it is completely unfounded. Some parents use a safe object out of religious conviction and for them it would be a matter of conscience to continue in the way they believe to be right. As the Policy Memorandum intimates, a blanket ban on the use of implements would be open to legal challenge under Articles 8, 9 and 14 of the European Convention on Human Rights (para 228). We are not persuaded that any such infringement could be ‘justified by the overall aim of protecting children from unnecessary physical violence’ when no case has been made for equating the careful, responsible and moderate use of a safe object with ‘physical violence’. There is no basis for assuming that parents who use an ‘implement’ are acting in any more violent a manner than other parents who lawfully smack with their hands. This appears to be another example of emotive language being pressed into service where the argument is weak.

Social service departments in Scotland are already over-stretched and under-staffed. It is therefore difficult to see how they could possibly cope with the increased workload that the proper enforcement of such a law would involve. The involvement of social workers in good, stable families where the children are not suffering any harm would result in fewer resources being available for children in genuine need of protection. It makes much more sense to give priority to the thousands of children who are living in chronic deprivation and are at times suffering from physical, mental, emotional and sexual abuse. Likewise, police resources would be far better expended on addressing crime that is actually causing harm people and their property.

7. The proposals pose a serious threat to loving parents

We fail to see how the proposed measures will provide any additional protection to children from abuse. Child abusers can be prosecuted under the current law. The parents most likely to fall foul of the proposed measures are ordinary honest, decent, law-abiding, loving mothers and fathers who are doing their best to bring up their children. Those placed most at risk by the proposals are not the child abusers but parents who are not injuring or abusing their children at all.

Polls have consistently indicated that around 90% of parents use physical correction, and particularly during the toddler years, when many parents believe it is particularly necessary and effective. It is nothing short of an insult to suggest that they are all child abusers worthy of a criminal record. Many parents are concerned that deprivation of an effective form of discipline during the toddler years will lead to greater discipline problems later

on. No smacking under three may mean far more smacking over three than might otherwise have been the case. Such parents would have to act contrary to their beliefs or face possible penalties.

The bottom line...

Family life is an extremely complex area to legislate for. Bringing up children is an art and not a science. There are all kinds of areas where parents take a different view about what is best for children. There are lively debates on the merits of bottle feeding v breastfeeding; on daycare v mothercare, on children's bedtimes, and what constitutes suitable TV viewing. It would be quite wrong for the state to impose any particular view in these areas. The same principle applies in the area of discipline. 'Ideal parenting' is not something that can be decided by polls and surveys, nor by parliamentary vote. Parents must be able to exercise their discretion and judgment. It is not the role of the state to dictate to parents precisely how and when they may discipline their children. The state should intervene in the family only to protect children from actual significant harm.

Notes

¹ Scottish Executive News Release, 6 September 2001.

² Professor H R Schaffer, Response 15 to the Consultation on the Physical Punishment of Children.

³ British Psychological Society: Psychologists and Social Services, Response 160 to the Consultation on the Physical Punishment of Children.

⁴ Scottish Justice Department Consultation: The Physical Punishment of Children in Scotland: Analysis of Responses. 47% considered it should never be considered reasonable to strike a child on the head; 44% considered it should never be reasonable to shake a child, and 39% considered it should never be reasonable to use an implement to discipline a child.

⁵ NSPCC public opinion snapshot, Physical punishment of children: Summary of findings, February 2002.

⁶ Elizabeth Cutting, 'It Doesn't Sort Anything! A report on the views of children and young people about the use of physical punishment', Save the Children, November 2001.

⁷ For example, the survey undertaken by the Scottish Parent Teacher Council (SPTC) in December 2001-January 2002. SPTC press release, 15 February 2002.