



FAMILIES FIRST

A briefing paper on Section 43 of the Criminal Justice (Scotland) Bill on the physical punishment of children for the parliamentary debate at Stage 3 *February 2003*

Protecting parents from pointless prosecution

Ever since the Scottish Executive announced in September 2001 that it was to use the Criminal Justice (Scotland) Bill to change the law on the physical correction of children, the proposals have been surrounded by controversy. When the bill was first published in March 2002, Section 43 proposed to designate any physical punishment of a child as an 'unjustifiable assault' if the child was under the age of three, or if the punishment included or consisted of a blow to the head, shaking, or the use of an implement.

In its Stage 1 Report, published in September 2002, the Justice 2 Committee recommended that the proposed ban on all physical punishment of children under the age of three should be removed from the bill. While this had always been the most contentious proposal in the bill, the remaining proposals in Section 43(3) are by no means beyond dispute.

Further consideration

The same report noted that 'some members felt that the existing law was adequate as it stands to prevent abuse or harm and provide the appropriate protection.' By a slender majority of 4-3, the committee concluded that, 'on the basis of the risk of harm to the child, it was reasonable for there to be a blanket ban on blows to the head'.

However, while the *intention* behind the ban on shaking or the use of an implement was accepted, the Committee felt that 'these provisions may require further clarity' and undertook to give them further consideration at Stage 2.

Changed tone

Justice 2 Committee returned to Section 43 for its Stage 2 consideration on 27 November, but the anticipated discussion of the proposals promised in the Stage 1 report did not materialise. Indeed, there was a marked change in the tone of the debate. Those who had raised questions and objections were summarily dismissed, and an amendment in favour of maintaining the *status quo* was roundly defeated by 6-1.

An SNP member of the Committee asked Justice Minister, Jim Wallace, what was unclear in the present legislation that made a change in the law necessary. He said that the question had been asked 'about 34 times', but a satisfactory answer had still not been given. He concluded: 'Although I suspect that I will support the Executive's amendments, it would put my mind at ease if the minister explained what is unclear about the current position and provided evidence to show how it has been unclear in the courts.'

The Convener intervened, saying, 'The minister is not bound to answer that question,' and so it remained unanswered.

Like the Executive and Justice 2 Committee, *Families First* fully supports any action that would prevent injury or harm to children, whether physical or psychological. However, we are not persuaded that the provisions contained in the present bill offer any further protection to children than is already afforded under the present law.

Penalties

It is important to bear in mind that laws have penalties attached to them. In this case, the maximum sentence is a £5,000 fine or three months' imprisonment. Under the proposals as they stand, a parent who cuffs a child on the cheek for insolence, restrains a child in a manner that could be construed as shaking, or who administers the mildest of taps with a slipper, could end up in court and leave with a criminal record.

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email: info@families-first.org.uk website: www.families-first.org.uk

SETTING THE SCENE

The degree of force used, the reason for the intervention, the effect of the discipline on the child, and the overall relationship between the parent and the child would all be irrelevant. The parent would be guilty without any defence. Not only could this have disastrous consequences for the child and the family concerned, but it could also mean that police and child protection resources would be wasted on trivial matters rather than spent where they are most needed.

We want to see children protected, but just as important, we want to see families protected too.

Unfounded assumptions

Behind the proposals lies the unfounded assumption that any form of physical correction is unacceptable and to be discouraged. On 27 November 2002, Jim Wallace, the Justice Minister, told the Justice 2 Committee that: 'Over time, parental attitudes to discipline have shifted; indeed, they might shift further. We hope that, with better information, attitudes will continue to change. Perhaps one day - which will probably be years rather than months away - physical punishment will be unacceptable to the majority of parents.'

In the mind of the Scottish Executive, the proposals contained in the present bill are only the first stage on the road to far more wide-ranging legal reforms.

Parental responsibility

Of course, in the ideal world, children would never misbehave and would never need to be corrected, whether physically or otherwise. However, we do not live in an ideal world, and children do need to be taught the difference between right and wrong, and it is the responsibility of parents to discipline and correct them when they behave in an unacceptable way.

Research evidence, combined with the experience of generations of parents, demonstrates that physical correction, in the context of a warm family environment where the child is valued and cherished, is a positive and effective disciplinary tool. It is also often more kind and merciful to the child than other approaches which can be more drawn-out and cause emotional harm.

Concerns

As they stand, we believe that the proposals contained in Section 43(3) are arbitrary, unnecessary, discriminatory, ambiguous, and not supported by research evidence. We are also concerned that they will lead to the misappropriation of already over-stretched child protection resources and to the criminalisation of responsible and caring parents who are doing a good job of raising their children.

Section 43 - Physical punishment of children

(1) Where a person claims that something done to a child was a physical punishment carried out in exercise of a parental right or of a right derived from having charge or care of the child, then in determining any question as to whether what was done was, by virtue of being in such exercise, a justifiable assault a court must have regard to the following factors—

(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 the child;
(ca) the child's age; and
(d) the child's personal characteristics (including, without prejudice to the generality of this paragraph, sex and state of health) at the time the thing was done.

(2) The court may also have regard to such other factors as it considers appropriate in the circumstances of the case.

(3) If what was done included or consisted of—
(a) a blow to the head;
(b) shaking; or
(c) the use of an implement,

the court must determine that it was not something which, by virtue of being in exercise of a parental right or of a right derived as is mentioned in subsection (1), was a justifiable assault; but this subsection is without prejudice to the power of the court so to determine on whatever other grounds it thinks fit.

FIVE REASONS TO THINK AGAIN

1. The proposals are arbitrary

Since there are many ways of abusing a child and it is not possible to produce an exhaustive list, it is difficult to appreciate why shaking, blows to the head and the use of an implement are being singled out. In the event of a parent being prosecuted for kicking, punching, or inflicting cigarette burns on the child, the defence of 'reasonable chastisement' would remain available. The defence may not always be successful, but it could still be employed.

It does not make sense to remove the defence for actions which may or may not be abusive (e.g. the use of an implement), while allowing it to remain available for actions which are invariably abusive (e.g. kicking, punching and cigarette burns). An implement may be used in an abusive way, or in a moderate and reasonable manner. It all depends on *what* is used, *how* it is used, and the *context* in which it is used - factors which would all need to be taken into account under Section 43(1) of the bill.

In paragraph 123 of its Stage 1 report, the Justice 2 Committee acknowledged that, '*Blows to the head, shaking and use of implements...could at present be considered either reasonable punishment or assault depending on the circumstances.*' We can see no reason why this should not continue to be the case.

2. The proposals are unnecessary

The existing law is adequate. The Executive has not been able to produce any evidence that the provisions of Section 43(3) would provide children with any further protection against genuine abuse than is already afforded under the present legislation.

Paragraph 121 of the Committee's Stage 1 Report states: '*The Executive did not convince the*

Committee that there was any great uncertainty about the existing law and was only able to point the Committee towards one or two specific cases where there appeared to be inconsistency or inappropriate application of the existing law. No information could be supplied about prosecutions which might have failed because the existing law is insufficiently clear.'

As Duncan Hamilton put it in committee at Stage 2, 'it would put my mind at ease if the minister explained what is unclear about the current position and provided evidence to show how it has been unclear in the courts.' But no answer was given.

3. The proposals are discriminatory

With regard to removing the defence of reasonable chastisement from a parent who uses a safe implement to physically correct his/her child in a careful and responsible way, the bill is discriminating against those parents who use a safe implement out of religious conviction. The Bible consistently speaks of a safe implement when referring to physical correction, and for this reason some parents are uncomfortable about using their hands to discipline their children. Such parents may be considered 'old-fashioned' by many, but just because a practice has fallen out of fashion does not provide a sufficient basis for legislating against it.

It would be unreasonable and unjust to criminalise parents for the use of an implement when the child is not suffering any degree of harm. The current proposals could give rise to an anomalous situation whereby a parent who smacks his/her child with an open hand is not prosecuted, while a parent who smacks his/her child with a safe object such as a slipper or wooden spoon, is prosecuted and criminalised, even though a lesser degree of force was used by the parent using the implement. Such an action would not serve the best interests of the child concerned, but would rather cause serious damage to the child and to the entire family.

FIVE REASONS TO THINK AGAIN

4. *The proposals are ambiguous*

It is unclear whether the legislation would apply only to 'punishment' or whether it would apply also to physical actions where the primary purpose is to *teach* or to *correct*. Section 107 of the Committee's Stage 1 Report states:

'The Committee...understands that the section only applies to situations in which the parent's intent is to punish. So, for example, this section would not apply to the act of grabbing or restraining a child to stop them from running into traffic as this would be an act of protection rather than punishment; but it would apply to hitting a two year old subsequent to restraining them in this way. While the distinction between punishment and protection will generally be clear, we consider that there will almost inevitably be a grey area between the two, particularly in relation to actions in the heat of the moment.'

The Committee appears to be alluding at this point to evidence given by the Justice Minister, Jim Wallace, where he said that the bill referred only to actions where the intention was to punish, and not to actions designed to warn, train or protect (Justice 2 Committee, *Official Report*, 18 June 2002, cols 1617-18).

While the above comments were made with specific reference to the proposal to outlaw the physical correction of children under the age of three, which has subsequently been dropped, they may be equally applicable to the careful and responsible use of a safe object. It is clear that the proposals as they currently stand would remove the defence of reasonable chastisement from a parent who uses an implement to *punish* his/her child, but there remains a degree of ambiguity with regard to whether a parent may continue to use a safe object to *discipline* or to *correct* his/her child.

There are many parents, particularly those guided by religious principles, for whom this is relevant. Many such parents use physical discipline, not to punish

their children, but to train and correct. They use it as a teaching tool - in a calm and controlled way and not in the heat of the moment when they have lost control. There is no element of retribution in their action, but rather a desire to protect their children from a moral or physical danger. From the wording of the bill and the remarks of the Minister in Committee, it is unclear whether such parents and their children would receive any protection under the proposed new measures.

5. *The proposals are not supported by research evidence*

In presenting oral evidence to the Committee, Helen Stirling of the British Psychological Society, was asked whether there was 'any research to show that there is a difference in the effect of using an implement to chastise the child, rather than a hand or some other part of the human body, where the physical impact is equivalent?'

In reply, she stated that she was not aware of any such study: 'I am not aware of a study that compares a hand smack with a blow from a belt of equal force. I do not know that such a study exists.' (Justice 2 Committee, *Official Report*, 22 May 2002, cols 1377-78).

We, too, are not aware of any study which demonstrates that the careful and responsible use of a safe object in the loving physical correction of a child has any negative impact. There is no basis in the research to support a legislative change which would allow parents to defend their actions in the physical correction of children only if they have used their hands.

The case therefore remains to be made to justify intervening within the privacy of the family or to interfere in the exercise of a genuine religious conviction within the historic Judaeo-Christian tradition.

SUMMARY

The proposed legislative measures contained in Section 43(3) should be opposed because they are:

- **Arbitrary**: three actions are singled out from many others without justification;
- **Unnecessary**: the current law provides adequate protection;
- **Discriminatory**: they do not have regard to the religious convictions of many parents and would be open to challenge under Articles 8 and 9 of the European Convention on Human Rights;
- **Ambiguous**: it is unclear whether an action intended to *correct*, as opposed to *punish*, a child is covered;
- **Unfounded**: they are not supported by research evidence.

If passed, they would also bring good parents into the criminal justice system and lead to prosecutions that are neither in the public interest nor in the best interests of the children involved.

A sense of proportion is required. The inevitable case conferences, care proceedings and court cases will be far more damaging to children than a moderate disciplinary intervention from a parent. And the misappropriation of police and child protection resources will expose genuinely abused children to greater risk of harm.

This briefing paper is published by:

FAMILIES FIRST

a family advocacy organisation, committed to supporting parents and children in the family unit. It supports 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.

FIVE FAMILIES

Very little attention has been given so far in public debate to the families who would fall foul of the proposed changes in the law. It is all too easy to respond emotively on this issue, rather than giving careful consideration to the possible impact of the legislation on loving and responsible parents who are doing a good job of bringing up their children. The maximum sentence for any breach of the new law would be a £5,000 fine or three months imprisonment.

In its written evidence to the Committee, the Faculty of Advocates expressed concern that ‘the absolute nature of the exclusion of the use of any implement raises the risk...of bringing into the criminal justice system persons who would otherwise not be so.’ Below we quote from families who would risk prosecution if the proposals pass into law as currently drafted:

1 ‘We are parents of three children, aged 10, 8 and 4. We use a number of methods of discipline: instruction, verbal rebuke, withdrawal of privileges, etc. On the comparatively rare occasions where there is deliberate disobedience and defiance, we use physical correction, applying a wooden spoon to the child’s bottom. This inflicts transient pain but does not cause any damage. This physical discipline is accompanied by verbal reproof to make sure that the child understands why the discipline is being applied. It is followed by reassurance of our love.

‘Because a particular room and implement is used for this purpose, there is time to calm down before administering correction (rather than lashing out in anger), and the child is not humiliated by being smacked in front of other people. It also clearly separates the means of correction from the use of arm and hand for hugs and other expressions of affection.

‘We have found that this approach is generally effective. The fact that the children know that the wooden spoon will be used if necessary in itself reduces the need to use it. The proposal to remove the defence of “reasonable chastisement” if an implement is used would require us either to disobey the law or to use some less effective means of discipline.

‘It seems to us that the crucial issue is not the means of correction, but its effects. There is no reason to *continued over...*

FIVE FAMILIES UNDER THREAT

suppose that the controlled use of a safe implement will be any more damaging than the use of a hand. The fact that an implement has been used, therefore, should not of itself render the chastisement unreasonable in the eyes of the law.’ *Andrew and Janet Shrimpton*

2 ‘My husband is a secondary school teacher, and I am a full time mother and also a childminder. We have three young children, and are expecting our fourth. We use physical correction to discipline our children, not because we are angry with them, but because we wish them to learn what is acceptable and responsible behaviour. We use verbal instruction to correct misbehaviour, and this almost always brings about the desired response. However, we use a single, mild smack to deal with continued disobedience, after which we discuss with the child the reason for the smack, and give them a hug. We prefer to use an implement so that they associate that implement with correction, rather than our hands, which we wish to use to express warmth and love. If convicted, in addition to the distress which it would cause to our children, who are very secure, we would both lose our employment, as we both work with children.’ *Kate Morris*

3 ‘I am married and have three children. My wife and I believe in using an implement such as the wooden spoon because the Bible teaches us to use an implement to correct our children. In Proverbs chapter 13 verse 24, it says “He who spares the rod hates his son, but he who loves him disciplines him promptly”, showing that children should be disciplined in love and with the use of an implement.

‘Every child needs clear boundaries and consistent discipline in order to feel happy and secure. I do not believe that smacking your children with your hand every time they drive your patience too far is an effective means of discipline. The way in which we have disciplined our children has not in any way damaged the close relationship that we have with them. All three of our children show us the love and respect that all parents should receive from their children.’

Iain Brown

4 ‘My husband is a leading welder in a local boat building company and I have stayed at home to look after our five children. We have at times used an implement to smack our children. I have never smacked my children in anger. I believe that a smack on the bottom with a wooden

spoon, administered calmly, which the child understands, is far more effective than a slap with the hand done in anger. My children know that when my husband and myself lift our hands to them it is to cuddle them or express love. They are never afraid that we might be going to strike them. We have a happy and loving home. My children are happy and well adjusted, and my two eldest are at university.’

Helen Muirhead

5 ‘My two lads are now 18 and 21 but when they were small I did use a wooden spoon to smack them sometimes. This was really because in a loving family I felt the need to discipline them for something they had done wrong.

‘All children are different. My older son was one who rarely needed a smack. The younger one was quite different, often not responding to a telling off or to reason, and so it took a smack for him to be obedient and to behave in an acceptable way. After all, that is why we discipline our children, so that they will grow up to behave well, to show consideration for others, and to be able to have a measure of self-discipline.

‘As a teacher of 30 years standing, I see only too often the harmful results of children who have never been disciplined at home and who have therefore no discipline or control themselves over their own behaviour... I did sometimes use a wooden spoon... [because] if I just used my hand on my child’s bottom, it was so well protected with pants, heavy jogging bottoms, T-shirt, jumper [etc] my child felt nothing.

‘I disciplined my children because I loved them, because I wanted them to grow up to be people who would behave in a socially acceptable way, respecting themselves and others, and able to control themselves and their own behaviour. For me, not to discipline a child is not to love him or her.’ *Alma Edwards*

If any of these ordinary Scottish families were to come to the attention of the authorities, under the provisions of Section 43(3) they could be prosecuted, irrespective of how loving their homes are and how happy and well-adjusted their children are. The unnecessary damage and distress that would be caused to such families would be incalculable and not serve the best interests of the children.