

Locking up parents?

**Unworkable laws
will catch ordinary
parents**

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Unworkable laws catching ordinary parents

A vocal minority is calling for a total ban on all forms of physical punishment. This minority includes well-organised children's charities and child-rights groups. They say that all smacking is child abuse. Most people disagree. Most reasonable people see there is a world of difference between abuse and a loving smack.

Jim Wallace, however, believes that parents who smack their children aged under three should be criminals. He believes that smacking a child under three should be a criminal offence carrying a three month prison sentence for the first offence and six months for subsequent offences.¹ Scottish Ministers have also floated the possibility of compulsory parent retraining courses instead of jail.

Mothers bear the burden of looking after young children. New laws on physical punishment will therefore target mothers as they struggle to raise their kids.

Of course it is never right for a parent to smack when they have lost their temper. Nor should a parent discipline a child for being a child, it would be indefensible to smack a child who simply made a child's mistake. And parents should never have inappropriate expectations or put impossible demands on their children. All this represents bad parenting. But banning *all* smacking for children under three is unnecessary and frankly unworkable.

The Executive says that it is open to argument on the minimum smacking age. Some MSPs have said they would be prepared to back one as the age below which smacking should become illegal. But why are any new laws needed at all? The case has not been made.

To most people Jim Wallace's other proposals to ban the use of implements, shaking and blows to the head may sound fine. But these matters are already covered in our existing laws. Going much further will plunge parents into fear and confusion. No one really knows what the definitions will mean in practice.

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Passers-by could misinterpret the reasonable actions of parents even when they are seeking to protect their children. What happens if a mother is just restraining a child in a tantrum by a dangerous roadside? Is the mother shaking the child? It might look like it viewed from some angles. The other less controversial changes in fact have significant problems of workability.

The existing law works perfectly well. There is no need to change it. The new laws proposed by Jim Wallace will catch ordinary parents and are simply unworkable.

Smacking: used by loving parents

Most parents use a range of approaches to discipline including smacking. Such parents are not child abusers. They are loving parents.

A study by the Office for National Statistics found that 88 % of people in the UK say it is “sometimes necessary to smack a naughty child”.²

The fact that the vast majority of parents smack their children is not seriously debated by anyone. Penelope Leach, the leading campaigner for a legal ban on smacking, readily accepts the research evidence showing that 90% of children are smacked by their parents.³

Children, particularly those aged between 2 and 6, do not tend to agree rationally with what their parents say is good for them. Smacking is not a measure of first resort. It is used when verbal warnings and other low-key disciplinary tactics have been ignored. Smacking is not the only way of teaching discipline to children, but it is one important way. If, after being warned, a five-year-old boy runs out onto a busy road, his mother may smack him to show the seriousness of what he did and to protect him from doing the same thing again. Most people regard this as necessary and reasonable.

Parental use of smacking diminishes as children get older.

Child abuse is already illegal. Social workers and the police certainly have their work cut out keeping up with the number of cases, but the Executive has failed to explain how it believes there are problems with the existing law. Indeed this has not even been attempted.

The existing law is firm enough and fair enough to protect children.

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What people have said

Health Minister, Jacqui Smith MP

Explaining why the UK Government is not changing the law on parental smacking for the rest of Britain :

“...we do not believe that any further change to the law at this time would be appropriate – it would neither command widespread public support nor be capable of consistent enforcement.”⁴

Tony Blair MP

“I smacked them occasionally if they were really naughty or did something nasty to another child.”⁵

Jim Wallace MSP

“Yes, I have on occasion skelped my bairns and I don’t think it’s done them any harm.”⁶

“Surveys have shown that the vast majority of people in Scotland support the right of parents to smack their children.”⁷

***The Scotsman* on Jim Wallace**

“Jim Wallace announced he wanted to ban smacking of toddlers, even though he admitted to smacking his own children occasionally.”⁸

Fergus Ewing MSP

“I see no need for children to have a family made up of Mummy, Daddy and Justice Minister.”⁹

Gordon Jackson QC MSP Glasgow Govan

“There is a danger that decent, law abiding people could think this was daft.”¹⁰

Sheriff Frank Lunny (Lanarkshire Sheriff until 1999)

“There is a large question mark over whether this ban is workable.”¹¹

Judith Gillespie, Scottish Parent Teacher Council

“...it was clear from our discussion, that there is majority support for the view that parents should continue to be allowed to use reasonable physical punishment for their children.”¹²

“Do we need video cameras in houses? If we allow the State to come into the house and determine this behaviour, are they going to set bedtimes by law next?”¹³

The Law Society of Scotland

“In the opinion of the Law Society of Scotland, the Scottish Executive should consider whether it is really necessary to take a particular view on this issue...”

“Nor does the Society think that when parents make child minding arrangements should they necessarily be constrained to give explicit permission physically to punish their children. If they do not want a childminder physically to punish their children, they can tell them not to do so. This is a matter the Society believes is for private and not legal regulation.”¹⁴

Christine Grahame MSP South of Scotland

“We should educate not legislate... I cannot see how a ban would work.”¹⁵

Mrs Lyndsay MacIntosh MSP Central Scotland

“Public opinion polls north and south of the border support the position that loving parents should not be criminalised for administering a safe smack.”¹⁶

Lord James Douglas-Hamilton MSP Lothians

“The proposals reek of the nanny state, by notifying all Scotland’s parents that they are potential criminals.”

“We will oppose the measure, as it is unnecessary, unworkable, unenforceable and misconceived.”¹⁷

Margaret Smith MSP Edinburgh West

“There ought to be a rethink on lowering the age.”¹⁸

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Donald Gorrie MSP Central Scotland

“It’s good to legislate but the age should be put down to people up to one.”¹⁹

The Scotsman, editorial

”The Executive is sending a signal that there is no area of parental mores and behaviour into which it is not prepared to intrude.”²⁰

The Catholic Bishops’ Conference of Scotland

“In looking at the matter of discipline it is therefore important that the legitimate authority of parents is not usurped by the state.... We see this matter as one to be freely arranged by parents and not to be dictated by legislation.”²¹

Alan Cochrane, *The Daily Telegraph*

“...I might point to the wisdom of the senior SNP front-bencher who said: ‘If this ever becomes law, the police will have to arrest every mother in Safeways on Saturday mornings’.”²²

Ruby Harrold-Claesson, a Swedish Barrister

The Swedish law banning smacking “has resulted in hundreds of normal parents being harassed by the police and social authorities, prosecuted, sentenced and criminalised”.²³

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Who will be caught?

Most parents are currently disciplining their children in ways which will become a criminal offence under Jim Wallace's proposals.

Everyone accepts, including those who want to see a total ban, that 90% of children are smacked by their parents.²⁴ It is also common ground between those who support smacking and those who don't that the vast majority of parents have started smacking before the age of three.

Penelope Leach, the leading campaigner to ban smacking in the UK, has admitted that three is the peak age for parental smacking with the frequency of smacking declining over time from the age of four.²⁵ If three is the peak age the vast majority of parents will already be using smacking when their children are two.

Imposing a ban up to the age of three will therefore cause maximum disruption and intrusion into family life.

Even if a smacking ban was brought in for children aged *under* one most parents would be breaking the law. When children are under the age of one it is not unusual for a mother to tap the child's leg to get their attention. For example, some mothers continue to breast feed as children develop their first teeth. If the baby starts to bite the mother cannot pull the sucking child away from her. A simple tap on the leg surprises the baby who usually then opens his mouth allowing the mother to stop feeding.

Leach points to one study of 400 families funded by the Department of Health which found that 61% of parents had used mild smacking (defined as including the smallest tap) by the age of one.²⁶

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Treating parents as strangers

The changes proposed by the Scottish Executive represent a radical, fundamental shift in the legal relationship between parents and children, and in the way in which the courts will have to approach parental discipline.

At the moment courts must have regard to the relationship between a parent and child and assess whether a particular instance of punishment was reasonable and moderate within that context. In the future, under the Executive's proposals, courts will be told that where a child is under three, or where there is any evidence at all of shaking or use of an implement, the punishment can never be reasonable. Parents in these circumstances will be convicted of assaulting their own children as if they were strangers attacking them in the street.

The penalties

If the Executive's proposals go onto the statute book, parents who break the new law could be imprisoned for up to three months for a first offence, or up to six months for second and subsequent offences.²⁷

These heavy-handed custodial penalties are on a par with the average sentences in a Summary Sheriffs Court for violence and indecency (104 days). Violence and indecency includes 'flashing' and prostitution-related offences. They are also on a par with housebreaking (112 days), theft (98 days), shoplifting (93 days) and drunk driving (114 days).²⁸

Is the Executive seriously saying that smacking your own child is on the same level of seriousness as committing these offences?

If a custodial sentence is not given, a maximum fine of up to £5,000 is open to the sheriff. The Executive has also suggested sending parents on "parenting classes" instead of locking them up.²⁹

But whatever the penalty, the fact remains that parents who are convicted under this new law will have a criminal record, because they choose to lovingly discipline their own children in the way they think best, rather than in the way the Executive tells them to. Their lives will be ruined.

How the new law is radically different

Reasonable chastisement has always been lawful in Scotland. The Executive now wants to bounce Scottish Courts into ruling that hitherto reasonable punishment should be criminal. It is the blanket framing of the law with its bans and prohibitions which will hamstring prosecutors and the courts into taking unreasonable and intrusive actions against parents.

No proof of harm needed

Jim Wallace's proposals are radically different to the present law. They specify that particular actions are to be illegal. The new laws do not require any evidence of harm to the child or unreasonableness on the part of the parent. It is this aspect of the proposals that is likely to render them extraordinarily unworkable and unjust. Once an action has been committed, all that a prosecutor has to show is that the parent intended to do it.

The Executive could have proposed legislation requiring evidence of harm or unreasonableness. For example, the American State of Arkansas automatically classifies as abuse any action by a parent which deliberately causes a nonaccidental injury to a child under the age of 18 months. Any parental action which causes bodily harm greater than "transient pain or minor temporary marks" is also outlawed.³⁰

Uncertainty, fear and confusion

Given that 90% of children are smacked, will the judicial system be able to prosecute all the cases of "illegal" smacking? If so, then it will not be long before Scotland's prisons are full to the brim with parents who smacked their toddler for throwing a supermarket tantrum. The only way of preventing this would be to prioritise prosecutions. To stop large scale arrests of parents Procurators Fiscal will have to decide not to prosecute certain cases.

This will add to the considerable uncertainty, fear and confusion amongst parents. Less eloquent parents or those who cannot afford proper legal advice will be the first to be prosecuted. Women will be affected disproportionately since they bear the burden of looking after pre-school children.

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The current law works

The existing law on parental smacking has a long history and it works. This law is clearly able to defend children from abuse whilst at the same time accepting the right of parents to use reasonable punishment. This defence is also available to other relatives such as grandparents and to close family friends entrusted with the care of children.

That this law works well is attested to by the fact that anti-smacking campaigners can only cite one miscarriage of justice in the UK (and none in Scotland) where a parent was acquitted of assault in circumstances where the punishment did appear to be unreasonable (see Appendix 1). If there had been others, we would no doubt have heard of them. This is a good record for any law. Because all courts follow the legal precedent set by the European Court of Human Rights, such a case can never occur again.

As the Executive's proposals were announced to the Scottish Parliament, the then Deputy Minister for Justice, Iain Gray, said that "A balance must be struck between acceptable intervention by the state for the welfare of children, and the freedom of parents to use their own good judgement. That balance is not new in this country. It was established in the Children and Young Persons (Scotland) Act 1937. That Act has stood the test of time and it makes quite clear that cruelty towards or neglect of a child is an offence, but it does not interfere with a parent's right to administer reasonable chastisement."³¹

If the existing legal 'balance' has "stood the test of time", why change it? At the moment, a parent who uses his judgement and reasonably decides to smack his two year-old faces no danger of arrest, prosecution or conviction. Under the new law, the parent does.

Summary of the proposals

There are four main proposals on physical punishment in the Executive's Criminal Justice Bill.

Proposal 1: 'Clarify' the law on reasonable punishment

The courts are to be required to take account of certain factors in judging whether parental punishment is reasonable.

Proposal 2: Ban smacking under three

Making it a criminal offence to smack a child under three years of age is the most controversial proposal to come from the Executive.

Proposal 3: A total ban on blows to the head, shaking and the use of implements

Parents who, for example, use the flat side of a ruler, or give their child a tap on the back of the head would run the risk of criminal proceedings.

Proposal 4: A total ban on smacking by childminders outside the home

Registered childminders outside the home will not be permitted to smack a child in their care even if parents want them to. Carers in the home (such as nannies or au pairs) will still be permitted to use physical punishment within the home if they have specific permission from the parents.

The proposals are discussed in greater depth in the pages which follow.

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Proposal 1: 'Clarify' the law on reasonable punishment

The Executive's White Paper argues that the law needs clarifying because of the European Court of Human Rights ruling in the "A" case.³² The Human Rights Act was also cited as a reason to change the law when the proposals were announced to the Scottish Parliament. The Minister, then Iain Gray said:

"On the basis of the incorporation of the European Convention on Human Rights into our domestic law, any punishment that constitutes "inhuman or degrading treatment" can never now be acceptable under Scots law. Our proposals seek to clarify what that means in practice."³³

This statement, like so many other Executive statements, carries the implication that the law must be clarified because of Europe. But the law is already perfectly clear and the courts are already required to take on board any legal precedents from Europe without the intervention of the Executive.

The reality is that there is absolutely no *legal* need to clarify the law:

- (1) The UK Government has concluded that no change is needed to the law (see Appendix 1). If new laws are not needed in England and Wales (where the "A" case arose) they are certainly not needed in Scotland. The Executive's White Paper accepts that on physical punishment, Scots and English law is very similar.
- (2) In fact the "A" case could never have occurred in Scotland. The Executive has admitted in such a case the Procurator Fiscal would have been able to invite the court to rule that there could be no finding that the chastisement was reasonable. Two years ago the Executive's own consultation paper admitted that in Scotland "It would not be possible for 'inhuman or degrading treatment' to be held to be 'reasonable chastisement'."³⁴

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- (3) In any event, as the Executive admits,³⁵ under the Human Rights Act 1998, which came into force in October 2000, all UK courts must now take into account judgments from Strasbourg including the “A” Case.³⁶ This has already happened in the case of *R v H* in the Court of Appeal in London. It will also happen in Scotland. There is no need for legislation.

The smacking checklist

The Executive wants to require courts to take into account the following factors when deciding what constitutes reasonable chastisement :

- The nature and context of the punishment.
- Its duration and frequency.
- Its physical and mental effects.
- The sex, age and state of health of the child.³⁷

All of these factors were central in the “A” case ruling. But Scottish Courts already have to take into account any judgments from the European Court of Human Rights. They are required to do so by the Human Rights Act 1998.

R v H

This Court of Appeal case, heard in April 2001, developed the common law for England and Wales to take account of the “A” case.³⁸ The case shows that courts routinely take account of European precedents.

Lord Justice Rose, giving the judgment of the court, held that juries must be directed by the judge to consider certain factors in determining whether the chastisement in question is reasonable. The judge listed the four factors from the “A” case and also added a fifth concerning the intent of the defendant.

R v H proves that the “A” case does not require the Westminster Parliament or the Scottish Executive to re-write the law.

Proposal 2: Ban smacking under three

The Scottish Executive proposes to make it illegal for parents to smack a child under three years old. If the plans become law, smacking a child under three could result in a fine of up to £5,000 or a jail sentence of up to three months for a first offence and six months for the second and subsequent offences.³⁹

The Executive clearly believes that public opposition can be assuaged by lowering the age at which the ban is applied. The White Paper concedes that, “There may be room for debate about the exact age which should be prescribed...”⁴⁰

The proposal to ban smacking of under-threes is fatally flawed for five reasons:

- It assumes that politicians know better than parents
- It criminalises trivial smacks
- It assumes that children don’t know why they are smacked
- Its key supporters believe that all smacking is child abuse
- The Executive’s consultation was flawed

It assumes that politicians know better than parents

Every parent knows that children develop at different rates. Even within the same family, one child can be walking at nine months while another may not take his first step until 19 months.

Children will become potty trained at different ages and will speak at different ages. And children will be morally aware at different ages.

A standard book used by health visitors in Scotland asserts that by the age of fifteen months a child can understand the word ‘no’.⁴¹ And at 18 months a child can understand cause-and-effect relationships in his mind.⁴² These are average ages. Some children develop more quickly, some more slowly.

A gentle smack is used by many parents with children of fifteen to eighteen

months to help them learn not to do certain things that are dangerous to themselves or other people. They use it occasionally to reinforce the use of the word ‘no’ so that the child learns to do as the parents tells him. This is in the interests of his own and other children’s safety.

These parents know that this technique works. Research backs this up. There have been a number of studies covering two year old children. Professor Larzelere’s systematic review of the studies concluded that children smacked at the age of two have beneficial outcomes in terms of improved behaviour.⁴³

If child development can greatly vary between children then the question is who should decide how much a particular child has developed? Can a Justice Minister decide and lay down a blanket law?

It is really only parents who can accurately understand their child at such a young age. It is often amazing to onlookers that a parent can translate what are seemingly the garbled coos of a baby into proper words. Parents can spot mood swings. They know the difference between a cry of tiredness, a cry of hunger, or a cry of a tantrum. Only parents can flexibly and properly respond to their own children.

It criminalises trivial smacks

Jim Wallace has suggested that parents will not be criminalised for trivial smacks. He has said: “We are not talking about trivial smacking... Ordinary parents need not fear being criminalised.”⁴⁴

The fact is that nothing in the wording of the bill excludes “trivial smacks”. Jim Wallace seems to be suggesting that parents engage in a highly subjective guessing game to work out whether their mode of smacking might qualify as “trivial”. But the fact remains that once it has been proved that a smack occurred, unless the parent can prove, for example, that it was unintentional or, even less likely, in “self defence”, they will be guilty of assault.

A prosecutor does not have to prove any harm or unreasonableness on the part of the parent as is the case under the existing law. All that has to be proved is that the parent intended to smack their child.

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It assumes that children don't know why they are smacked

The Executive does not seem to appreciate that children can understand much more than they can articulate and that, particularly with young children, parents use physical discipline for other reasons than retributive punishment (eg for protection, a warning or a deterrent).

The White Paper states: “A child cannot learn from punishment unless it understands the relationship between the bad behaviour and the punishment. Before language skills have properly developed, many children will not be able to understand why they are being punished.”⁴⁵

Jim Wallace has said: “There is no point in smacking children under two, because at that age they don't understand punishment. Parents may believe they are doing some good by disciplining their child in that way, but the evidence suggests infants as young as that have no concept of what is right or wrong, or what it is to be disciplined.”⁴⁶

Of course, it is wrong to smack a child who does not understand what the smack means. But children *do know* that a tap on the leg or a smack on the bottom immediately following a certain action means “stop”. With young children this is often *not punishment at all*. It is a warning – a negative reinforcement of a parental instruction to protect the child from committing an action that is dangerous, unhealthy or anti-social. Children can understand an instruction not to do something long before they can verbally explain themselves as to why they shouldn't do it.

It is precisely because language skills are not yet developed that a smack is sometimes necessary to protect a child. It is because some behaviour – such as putting a hand near a fire – cannot be reasoned verbally to young children that they sometimes need a firm tap on the hand to teach them not to do it. Very young children will understand that a smack means they shouldn't do it again, even if they do not yet know why fires are dangerous. This is enough to protect a young child from danger or to instil good behaviour until they are old enough to understand for themselves.

Young children are not convinced by rational argument not to put their hand into a gas fire. One day they will be, but until that day a tap on the hand can

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teach them not to do it. This is not a matter of punishment, but a matter of training and protection.

Child development experts have long debated whether language shapes thought, or thought shapes language. Whilst there is a legitimate debate as far as older children are concerned, for younger children there is no doubt that cognitive skills precede the emergence of language. The authors of a leading language development textbook conclude: “Since language is used to express what we think, common sense would certainly suggest that thought shapes language, at least in the early stages of human development.”⁴⁷

Most parents don’t need experts to tell them this. They know from first-hand experience that very young children are capable of understanding complicated ideas even though they have only basic language skills. A child of eighteen months can understand “go and get teddy from the kitchen”, even if he can’t utter the words himself. It may be months before he can use the phrase.

A lack of language skills is not the same thing as a lack of understanding. Physical discipline is not all about punishment, for younger children it is much more about protection, deterrence and helping them to grow up.

Its key supporters believe that all smacking is child abuse

Support for the under three ban does not come from ordinary parents - it comes from children’s rights campaigners. They believe that all smacking is child abuse and that smacked children become violent adults. A ban for under threes is the thin end of the wedge.

Penelope Leach the UK’s leading campaigner for the banning of smacking argues “There’s a very thin line between “ordinary” smacking and cruel abuse and wherever you choose to draw that line, it’s easy to cross it.”⁴⁸

Many children’s charities now campaign for smacking to be made a criminal offence. If you believe that all smacking is child abuse, then banning the smacking of children under three is a logical first step. That is why organisations which support a complete ban have so warmly endorsed the Executive’s proposals.

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NCH Scotland described the proposals as “very modest”.⁴⁹ *Children are Unbeatable* said “We believe the Executive is taking a brave lead in the UK on protecting children.”⁵⁰ The NSPCC said “This is definitely a case of Scotland the brave on child protection”.⁵¹

Some senior members of the Executive endorse the views of children’s rights organisations. Deputy Justice Minister Richard Simpson has made no secret of the fact that he would like to see smacking outlawed altogether.⁵² He believes that boys who are smacked commit domestic violence in later life.⁵³

In a letter to a fellow MSP, Jim Wallace routinely equates “discipline” with “violence”. He argues that smacking children makes them violent as adults: “Physical violence is the antithesis of the behaviour we want to promote in children. If we want children to behave well, we should set a good example. We believe that children should have explanations, a clear disciplinary framework and sanctions other than physical violence whenever possible. Our aim is to discourage casual or excessive use of physical punishment or its use for inappropriate purposes. If children are set a good example by thoughtful parents, this should help lessen levels of violence in society at large.”⁵⁴

According to this theory disciplining children can make them violent. This is *precisely the opposite* of what most people think is common sense. Loving parents discipline their children to help them learn right from wrong, to help promote self-discipline and good behaviour and to protect them from harm and danger.

Most adults have been smacked as children. They have not become violent and are not in the habit of using physical force to get their way. Of course, children who are physically abused can go on to be abusers themselves.⁵⁵ But child abuse is one thing, smacking by a loving parent quite another. As Paul Boateng, a Minister in the UK Government has rightly said “The overwhelming majority of parents know the difference between smacking and beating.”⁵⁶

The Executive's consultation was flawed

When the Executive announced its consultation in February 2000, Jim Wallace went out of his way to emphasise that “The Scottish Executive feels it would be unacceptable to outlaw all physical punishment of a child by a parent.”⁵⁷

These remarks were reported in *The Herald*, *The Scotsman* and *The Daily Record*. The pledge not to outlaw all smacking made the consultation a news story which sank without trace.

The Record, the largest circulation paper in Scotland headlined the story as “MSPs tell parents they can carry on smacking”⁵⁸. *The Scotsman* quoted Children First, formerly SSPCA, as expressing disappointment that the consultation started “from the premise that smacking children should be an option for parents.”⁵⁹ Similarly *The Herald* report also focused on the annoyance of children’s rights campaigners that there was not to be a ban.⁶⁰

It *seemed* that the intention of the Executive *not* to introduce a ban couldn’t have been clearer. If the Executive had said at the outset in February 2000 what they announced in September 2001, no doubt far more than 77 members of the public would have taken part in the consultation.

Having launched the consultation and given the impression that no ban was being proposed, the Executive then experienced stiff criticism from organisations supporting children’s rights. Large numbers of them responded to the consultation. They urged the Executive to think again about not imposing a ban. Some 34% of the respondents, said they wished to see a total ban on physical punishment.

These organisations included Barnardos, NCH Scotland, Save the Children and the alliance of organisations called “Children are Unbeatable”.⁶¹

Despite the fact that the Executive ensured the consultation was very low-key, the irony is that the under three ban is still the least supported option in the Executive’s own flawed consultation: only 5% of the responses gave it their support.⁶²

Proposal 3: Ban all blows to the head, all shaking and all use of implements

These proposals relate to children of *all* ages – not just under threes. At first reading, these proposals may appear reasonable to most Scots. But on closer inspection serious questions about workability arise. No loophole in the present law exists. The fact is, blows to the head, shaking and the use of implements can already be prosecuted under current law. There are serious penalties for any parent injuring or harming their child in these ways.

So the main effect of new laws in these areas will be to criminalise actions at the trivial end of the spectrum. Since the present law automatically criminalises actions which injure or harm children, by definition the only difference the new law will make is to outlaw those situations where there is no evidence that children are harmed or injured.

Blows to the head

Giving a young child a blow to the head is medically dangerous. All parents should be well aware of this. Banning all blows to the head for children under three would be perfectly justifiable. But this is not what the Executive is proposing. The Executive wants to ban all blows to the head to a child of *any* age.

The phrase “blows to the head” sounds brutal, and no child should ever be subjected to brutality. But a closer look at the legal meaning of “blows to the head” reveals that it is not so simple. The legal meaning of the phrase includes actions which are not brutal, but are unwise. For example, it includes a mother giving a tap on the back of the head to an *older* child. Should a mother be sent to prison for that?

Whatever individuals’ views may be, the bottom line is this: If the Executive believes that all blows to the head should be banned, then it is saying a single mum who gives her nine-year-old son a tap on the back of the head should be arrested, tried, given a criminal record and possibly a prison sentence.

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There are many unwise actions which parents can legally take which are not criminal. They can smoke in front of their children. They can feed their children on a very unhealthy high fat diet. They can take them on holidays to war-torn countries. All of these things are unwise. All are arguably many times more dangerous than a mother giving her nine year old son a tap on the back of the head. Yet none of them are illegal.

The best way to deal with the issue is to consider whether there was any harm to the child and to decide whether the action of the parent was appropriate and reasonable. That is exactly what the current law does. Keeping the current law means that the authorities will be able to continue prosecuting harmful and unreasonable “blows to the head”, rather than clogging up the courts with trivial technical infringements of an ill-considered law.

Shaking

Shaking young children can be extremely dangerous. But banning all shaking of children under the age of three is not what the Executive has proposed. Its complete ban for children of all ages might catch many trivial cases.

Hugh Henry MSP referred in the parliamentary debate in September 2001 to the example of a parent who stops a child from running out into the road and, instead of smacking him, shakes him gently as he tells him off.

The Deputy Justice Minister responded by saying “the primary reassurance that can be given is that any legislation following our proposals would require evil intent to be demonstrated. In the circumstances that Mr Henry describes that would clearly not be the case.”⁶³

The Minister referred to the Scottish legal concept of “evil intent” (or *mens rea* in English law). In the context of the example, this merely means that the parent must have intended to shake the child as a punishment. “Evil intent” sounds ominous but it simply means an intent to do something which breaks the law.

If the child has been shaken, “evil intent” is present if the parent intended to shake the child and he intended to punish the child.

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The new law simply says, “If what was done... included or consisted of...shaking...the court must determine that it was not...a justifiable assault.”⁶⁴ There is nothing in the Bill which would prevent a court from finding the parent guilty in Hugh Henry’s example.

Is the parent shaking, or is the child wriggling?

Violently shaking a child – particularly a very young child – can be extremely dangerous. Internal organs can be irreparably damaged. No one disagrees that violent and uncontrolled shaking of a child is wicked and wrong. But there are occasions where a parent needs to restrain a child. It is sometimes necessary to restrain a child who is writhing about in a tantrum, or to restrain a child who is about to put themselves in harm’s way.

How will an onlooker be able to tell the difference between a parent who is shaking a child and a parent who is restraining a wriggling child? Nor does this proposal attempt to draw a distinction between violent and unrestrained shaking and pulling a child from harm’s way, or a gentle and controlled shake. Current Scottish law *does* see this distinction. The current law is firm enough and fair enough.

Many parents use a gentle and controlled shake at the same time as telling the child why their behaviour was dangerous or wrong. Under Jim Wallace’s proposals this gentle shaking will be a criminal offence.

Implements

Banning “implements” sounds perfectly reasonable. The use of the word “implements” conjures up an image of children being flogged with a belt by their father or hit with a metal rod. Of course, any parent doing such things would clearly intend to harm their children and should be prosecuted. There are already severe penalties for parents who harm or injure their children using an implement.

But what about a mother who uses the flat side of a ruler on her ten-year-old son? Should she be made a criminal? Under Jim Wallace’s proposals she

would be. But should the law send out the message that she is as brutal as a man who uses an iron bar to beat a child? Is that really what the Executive wants?

What exactly is an “implement”? Consider a mother who goes into her nine-year-old son’s room and discovers it to be a mess. If a mother picks up a pillow and tosses it at the son, telling him to tidy up, has she used an “implement”? It is precisely these sorts of trivial incidents that this proposal could criminalise.

Penelope Leach has cited one study showing that in the mid 1960’s 29% of mothers of boys in social classes I and II had used an “implement”. She argues that more recent studies would give lower figures, perhaps 20%.⁶⁵ One in five of all mothers is certainly a minority, but it represents a very large number of mothers who will be at risk of entering the criminal justice system. Many adult men alive today – even those in their twenties and thirties – would have been disciplined by their mums using an “implement”. Their mothers could have been in jail under Jim Wallace’s plans.

Some parents – albeit a small minority – believe that hands should be a source of comfort to hold, hug or caress a child. They therefore choose a neutral object such as a wooden spoon to discipline their children. This approach is advocated by Dr. James Dobson, a psychologist and author of *Dare to Discipline*. His book has sold over 130,000 copies in the UK and over 3.5 million copies world-wide.⁶⁶ The issue is whether parents with such beliefs should be compelled to give them up. Such parents could hardly be described as child abusers. But under Jim Wallace’s proposals, parents who use a wooden spoon will be committing a criminal offence.

The evidence on implements

Many MSPs who are highly sceptical about most aspects of the Executive’s proposals believe that at the very least the use of implements should be banned. There is a common perception that the use of implements is far more harmful than smacking.

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But even those who want to ban all smacking reject this. Penelope Leach is critical of researchers who “have assumed that punishment with implements is more severe than punishment without. This judgement has been uncritically adopted by policy makers and educators”.⁶⁷

The British Psychological Society argue

“The use of objects in corporal punishment...are irrelevant if the child is being hit. The damage depends on the motivation, the circumstances, the anger and the physical and psychological damage. No distinction should be made”.⁶⁸

A recent US study looked at children from 390 families who had been referred to a mental health centre for specialist help. Researchers considered the kind of discipline that parents used on these children. The study found that parents of the referred children were statistically no more likely than other US parents to smack their children or to use implements to discipline them. But parents of referred children were much more likely to be still smacking their children when they were teenagers and were much more likely to have slapped their child on the face, head or ears.⁶⁹

In terms of discomfort or harm to a child, “implements” – such as a wooden spoon or the flat side of a ruler – can be no different to the use of a hand.

The Deputy Justice Minister, Richard Simpson, has said: “People talk about the use of implements – let us just call them weapons. Why do we use these euphemisms? They are weapons. They risk serious injury to the child.”⁷⁰

Clearly with many inappropriate “implements” these comments are perfectly true. But a father flogging his son with his belt is one thing, a mother using a wooden spoon is quite another. She can hardly be described as using a weapon. Should she face a having a criminal record?

The fact is, this law has no flexibility to distinguish between actions which are appropriate and those which are not. The use of the word “implement” naturally gives a distorted impression. Many current adults were smacked with an “implement” when they were young – their parents are not child

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abusers. Research shows that the use of “implements” has no significant difference from the use of the hand. Even anti-smacking campaigners say it is a red herring.

The present law can deal robustly with any parent who harms or injures their child using an implement. Imposing an absolute ban will certainly catch many cases which to the ordinary person have nothing to do with abuse.

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Proposal 4: Ban all smacking in regulated childcare

The Executive says “...we will ban smacking in all regulated childcare including by childminders” although “[c]arers in the home would still be permitted to smack if they had specific permission from the parents...”⁷¹

The Regulation of Care (Scotland) Act 2001 gives Ministers power to issue regulations to give effect to this promise. Section 29 of the Act allows Scottish Ministers to create new offences applying to childminders and others involved in childcare. Childminders, under Scottish law, are those who look after a child on domestic premises for a reward. This does not, however, cover relatives of the child or foster parents. Nor does it cover those who look after a child for his parents mainly in the parents’ home.⁷²

A friend who babysits for children in the home, occasionally taking the children out on day trips or to the shops, does not fall within the statutory definition of childminder. Neither does an aunt who looks after a niece or nephew, or a grandparent who looks after a grandchild, whether at their own home or the child’s home. As the Executive says, they will continue to be able to use smacking if that is the parents’ request.

But registered childminders will no longer have had the freedom to enter into the same sort of agreement with parents. The Executive claims this will create “clarity and consistency”. But a distinction will still remain between parents who employ au pairs or nannies and parents who rely on state registered child-minders. The former will be able to request that certain infractions on the part of the child meet with a smack. The latter will not.

This creates a somewhat perverse situation. Childminders are officially licensed. New childminders must be rigorously vetted and committed to their own professional development. But for parents who can afford them, au pairs or nannies need no vetting or licensing, yet they will continue to be able to use physical punishment if that is what the parents want.

A personal view from one Scottish Social Worker

The following is a statement from one Scottish social worker:

“The law at the moment allows a Sheriff to decide what constitutes ‘reasonable chastisement’ based on the context of the situation. In one situation a child may be happy, healthy, thriving at nursery, securely attached to both parents and displays no distress from a momentary smack. In another situation a child that is smacked is constantly defiant, has violent tantrums, is disruptive in nursery, shows cruelty to other children, displays sexualised behaviour and cowers when their mum or dad walks into the room. Both children are smacked but their situations are poles apart. To equate all smacking as equally criminal does not make sense. Just as drinking and drug taking are likely to have serious effects on a child, a difference needs to be made between a mother and father who drink a bottle of wine on a Friday night after the children go to bed, and a mother and father who use their home to sell heroin wraps. As with smacking at the moment, it is left to the assessment skills of the Social Worker, and ultimately the decision of the court.

Another concern amongst many professionals is the distribution of resources. All evidence would suggest that abuse of children is on the increase. Making smacking illegal will add a massive burden to an already over-stretched and undervalued profession. Is this really the best focus for a profession that is already fire-fighting the most horrific cases of multiple abuse? Surely it would make sense to prioritise the thousands of children who are living in chronic deprivation and are at times suffering from physical, mental, emotional and sexual abuse.

A final question needs to be asked. Why is smacking being singled out? A parent can smoke in front of their child and give them health problems for years to come without any danger of prison. Some children can reel off every horror movie from “Halloween” to “Friday the 13th” and their parents will never become criminals for it. Yet a loving parent could smack their child and potentially be faced with criminal charges and the lifelong consequences of a conviction.

The majority of Social Workers would be opposed to smacking. Many would welcome more guidance on what constitutes ‘reasonable punishment’. However, being opposed to something and making it illegal are very different things. Many Social Workers believe that while a ban on smacking under 3s is well meant, it is fatally flawed and unworkable in practice.”

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What discipline is about

The Executive argues that physical chastisement is solely about “retribution”. It says that children under the age of three are too young to understand the difference between right and wrong. It therefore follows, says the Executive, that children should not be smacked under three.⁷³

Even if it were true that children under three know nothing about right and wrong, there are still many good reasons why children are disciplined at this age which have nothing to do with punishment.

Restraint of human nature

In order to function civilised adult society requires a wide variety of laws, customs and conventions to restrain human nature. This is our common experience. As John Stott says:

“A promise is not enough; we need a contract. Doors are not enough; we have to lock and bolt them. The payment of fares is not enough; tickets have to be issued, inspected and collected. Law and order are not enough; we need the police to enforce them”.⁷⁴

Martin Luther King said that “Judicial decrees may not change the heart; but they can restrain the heartless”.⁷⁵ King rightly believed that the law is necessary to restrain the human heart.

As well as laws there is also a vast array of social customs which restrain anti-social behaviour. There is no law against jumping a queue in the supermarket, yet civilisation depends on such unwritten social rules being kept. Most forms of lying are not illegal, yet where would we be if lying became just as acceptable as telling the truth?

Children only *gradually* come to appreciate these things. Children like adults are “only human”. It is in the family that children first have to restrain their natural impulses; to learn to share with others instead of keeping things for themselves; and to respect the needs of others before their own wants. For

there to be ordered family life parents have to impose a level of restraint on children. However, the parents' ultimate aim is for their children to develop self-discipline.

Protection

Children's ability to think rationally only develops gradually. Reasoning with a child is always necessary, even before a child can speak, but reasoning *alone* may often not be sufficient. There are many occasions when adults have to exercise control to protect their children.

For example, adults have physically to stop children from running into a road or reaching out to touch hot objects. Parents have to restrain a child who refuses to sit still in car so that a seat belt can be put on. Children will come to appreciate the dangers eventually, but in the meantime they must be protected.

Most parents include physical chastisement amongst the ways in which they discipline their children. A gentle smack from a parent can stop children running into a road. Children may not understand the dangers from being hit by a car, but they do understand a smack. And that smack is sufficient to deter them from actions which put their lives at risk.

Right and wrong

Children need to learn standards of behaviour and the boundaries of right and wrong.

Children soon show themselves to have a sense of right and wrong, and most parents are well aware that left to themselves, without any outside influence, children from an early age can wilfully do what they know to be wrong.

The idea that all smacking is child abuse stems from a failure to distinguish loving restraint from cruel violence and from the secular theory that children are corrupted by their environment and upbringing alone. No one denies that children can learn bad behaviour from others, but the current determinism of some children's rights activists denies personal responsibility.

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Children can gradually be held accountable for their actions. But the younger children are, the less physical chastisement has to do with punishment and the more it has to do with protection.

The Christian view on discipline

Christians have a high view of the role of parents. Children should obey their parents. “Honour your father and your mother” is one of the Ten Commandments.⁷⁶ Jesus Christ quoted this commandment, as did the Apostle Paul.⁷⁷ As well as stressing obedience, Paul also warns against harsh and unreasonable discipline. Paul says “Fathers, do not exasperate your children...”⁷⁸

Discipline can certainly be for restraint, protection and deterrence, but the New Testament word for ‘discipline’ used in Hebrews and elsewhere carries with it the concept of training.

Christian theology gives a wide definition to the word ‘discipline’. Christians reject the idea that physical chastisement is the same as punishment. The Greek word for punishment (*kolasis*) is never used in relation to children in the New Testament.⁷⁹ Neither is the Greek word *enkrateia* which means self-control, self-restraint or abstinence.⁸⁰

The New Testament uses the word *paideutes*. This is the word used of fathers disciplining their sons in the book of Hebrews. It means teacher or instructor. The root word is *paideuo* meaning to bring up, instruct, train or educate.⁸¹ The word literally means “to be together with a child”. The word has a wide meaning, as a standard theological dictionary comments:

“The New Testament view of education through discipline is, however, fundamentally different, not only from the Greek concept of education (ie towards an ideal), but also from the rabbinic teachings which accord to suffering as a result of chastening an expiatory power.”⁸²

In Christian understanding discipline is not about developing ascetic self-perfection, paying penance or exercising power, but about education.

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The writer to the Hebrews argues that God disciplines those he loves. In the trials that Christians can experience, God has a good and loving purpose.⁸³ To illustrate the point the author asks “For what son is not disciplined by his father?” and comments “we have all had human fathers who disciplined us and we respected them for it”.⁸⁴

The writer to the Hebrews argues that discipline is part of love.⁸⁵ Our parents disciplined us because they loved us and they wanted us to learn.

The book of Hebrews clearly envisages parents using physical chastisement since it states that “No discipline seems pleasant at the time, but painful.”⁸⁶ This is only momentary, but the lessons that children first learn in the home may last a lifetime.

Appendix 1: Does Scotland need new laws because of Europe?

The legal precedent

The Executive has made out that the law on parental punishment should be clarified because of a ruling by the European Court of Human Rights. But the UK Government has considered the particular case in question and rejected the need for any change in the law for England and Wales.

The same precedent applies throughout Britain, but only in Scotland is there to be legislation to change the law.⁸⁷ Sheriffs, like other UK judges, *already have to take account* of judgments from the European Court of Human Rights. This is because of the Human Rights Act. So legislation is unnecessary.

The “A” case involved a step-parent who successfully used a reasonable chastisement defence before an English jury. The European Court of Human Rights ruled that the punishment was *unreasonable* and that the step-father should have been convicted under English law.

The “A” case is in many ways a freak case. The punishment was indeed unreasonable, but the provocation was also quite extraordinary. The case arose under English law. The Executive admits that if the case had occurred in Scotland, Procurators Fiscal could have stopped a miscarriage of justice.

The details of the “A” case

The case concerned a boy who, according to his stepfather, was punished for stealing from shops and threatening his younger brother with a knife.⁸⁸ The medical evidence to the court found that the stepfather beat him more than once with a garden cane, leaving marks, some of which may have lasted up to a week.⁸⁹ Surprisingly, an English jury found the step-father not guilty of assault causing actual bodily harm. He relied on the long-standing defence of “reasonable chastisement”. This is intended to protect the right

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of parents (and those in the place of parents) to administer ordinary, loving discipline. English and Scottish law are very similar on this point.

The Strasbourg court found that this failure to convict by a British court was a breach of Article 3 of the European Convention on Human Rights. The Article outlaws “inhuman or degrading treatment or punishment”. The Court found that, in this particular case, the use of the “reasonable chastisement” defence did not provide adequate protection to the boy.⁹⁰ The Court awarded the boy £10,000 compensation and £20,000 legal costs.⁹¹

The fact is that the English jury seems to have made a mistake. The punishment of the child in this case does not appear to have been “reasonable” given the injuries that were inflicted. There was a miscarriage of justice. The existing law could and should have been used to convict the step-father.

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- ³⁷ *Making Scotland Safer: Improving The Criminal Justice System, Op cit*, Para. 111
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 - (i) the nature and context of the defendant's behaviour;
 - (ii) the duration of that behaviour;

- (iii) the physical and mental consequences in respect of the child;
- (iv) the age and personal characteristics of the child;
- (v) the reasons given by the defendant for administering the punishment.

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