

## Submission by The Christian Institute to Justice Committee 2 On The Criminal Justice (Scotland) Bill

### The Christian Institute

We are a registered charity with 1,800 supporters in Scotland from all Christian denominations, including 500 Church Ministers. We seek to promote a Christian perspective on ethical issues and public policy. We raise no objection to the Bill except to the proposals covering the physical punishment of children (Section 43).

### Changing the law

All cases of child abuse are already unlawful in Scotland. And so they should be. The question is whether the law should go much further to cover non-abusive forms of punishment. The Executive think it should. It stated in November 2000 that:

*“The aim of our policy is to reduce the level of violence in society, and it is well known that children learn their habits in later life by example. Physical punishment has its uses, but it may also teach a child that force is permissible to get your own way.”<sup>1</sup>*

The belief that *ordinary* rather than *abusive*, smacking of children teaches them to be violent is not a widely held viewpoint. We, like most people, were smacked as children before the age of three. We do not believe that our mothers are child abusers, neither do we use physical force to get our way.

The Executive has been unable to state *a single Scottish case* where the present law failed to protect children. Both the Scottish Police Federation<sup>2</sup> and the Law Society of Scotland believe the present law is adequate.<sup>3</sup> Even the Scottish Law Commission (SLC) proposals are extremely modest compared to those in Section 43 of the Bill.<sup>4</sup>

It is doubtful whether even the freak English “A” case which led to a ruling from the European Court of Human Rights could ever have occurred in Scotland. Now that a ruling has been given Scottish Courts will automatically follow it as they have already done in England in the R v H case<sup>5</sup>. **There is therefore no need for Section 43(1).**

### The existing law

Children are protected from physical attack by the law of assault. Section 12 of the Children and Young Persons (Scotland) Act 1937 adds to the protection by criminalising cruelty and ill-treatment.

#### *THE LAW OF ASSAULT*

Where a parent uses force which is moderate and not inspired by vindictiveness, the law regards this as reasonable chastisement. A parent prosecuted for assault in such circumstances would be able to rely on that defence. The 1988 case of *Guest v Annan*<sup>6</sup> illustrates this. A father smacked his eight-year-old on the bottom after she stayed out late and told lies as to where she had been. This was held to be reasonable chastisement.

As soon as a parent oversteps the mark the law is flexible enough to catch their actions:

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<sup>1</sup> *Making Scotland Safer: Improving the Criminal Justice System*, para. 117. See <http://www.scotland.gov.uk/library3/justice/mssp-06.asp>

<sup>2</sup> *Scotland on Sunday*, 31 March 2002

<sup>3</sup> The Law Society of Scotland response to *The Physical Punishment of Children in Scotland: A Consultation*, The Scottish Executive Justice Department, February 2000, Response 212, see [http://www.scotland.gov.uk/justice/family\\_law/responses/physpunr.pdf](http://www.scotland.gov.uk/justice/family_law/responses/physpunr.pdf)

<sup>4</sup> See *The Physical Punishment of Children in Scotland: A Consultation*, The Scottish Executive Justice Department, February 2000, para. 2.11 and *Report on Family Law*, The Scottish Law Commission, (Scot Law No 135), 1992, Part 2.67

<sup>5</sup> R v H, *The Times Law Reports*, 17 May 2001, page 329

<sup>6</sup> *Scottish Criminal Case Reports*, 1988, page 275. See Gordon, G H, *Criminal Law*, Third Edition, Vol. 2, 2001, para. 29.39, footnote 46

- In *Peebles v McPhail* [1989]<sup>7</sup> a mother slapped her two-year-old son in the face with moderate force knocking him off his balance. This was held to be assault. It was observed that to slap a child of two years on the face knocking him over was “as remote from reasonable chastisement as one could possibly imagine”.
- In *Kennedy v A* [1993]<sup>8</sup> a father smacked his baby at least twice on the bottom, causing bruising. This was held to be assault.
- In *Byrd v Wither* [1991]<sup>9</sup> a person acting as father to a four-year-old child struck the child on the buttocks with such force that he caused abrasions and drew blood. The man was convicted of assault.
- *Stewart v Thain* [1981]<sup>10</sup> held that even if the chastisement is moderate, if it is administered for reasons other than the correction of the child it is unlawful.
- In the recent F case a Motherwell teacher was convicted for smacking his eight-year-old daughter on her bare bottom in a dentist’s waiting room. He admitted he had lost his temper.<sup>11</sup>

#### *THE CHILDREN AND YOUNG PERSONS (SCOTLAND) ACT 1937*

Section 12 of the Act deals with cases of neglect and cruelty to children. This offence seems to be mainly used for abandonment. However, because it covers “assault” and “ill-treatment” it can also be used to prosecute physical punishment. Section 43(5)(a) deletes “assault” from Section 12 of CYPA which we accept is a legal ‘tidying up’ exercise.

#### **Why the age ban will criminalise most parents**

Penelope Leach, the UK’s leading campaigner to ban all smacking, has argued that 90% of children are smacked by their parents and three is the peak age when children are smacked.<sup>12</sup> We also agree with Leach that frequency of smacking typically declines from the age of four.<sup>13</sup>

The obvious conclusion from three being the peak age (with 90% incidence) is the vast majority of children will be smacked at the age of two. Leach goes even further. She quotes one Government funded study of 400 families which found that *by the age of one* 61% of parents had used mild smacking (defined as including the smallest tap).<sup>14</sup>

Small taps, unlike hitting, are of no concern to the criminal law at present. Under Section 43 these will become criminal offences. **Imposing an age ban is totally unworkable.** The legislation will certainly cover trivial actions as the following section explains.

#### **Intention to harm replaced by intention to punish**

The new law intrudes into a highly sensitive area of parental decision-making and removes all parental discretion. Paragraph 253 of the Explanatory Notes to the Bill encapsulates very neatly how the new law differs in a fundamental respect to the current law.

*“As in all cases, the prosecution will have to demonstrate an intention by the accused to punish the child. Where the child is under the age of three, proving an intention to punish should be sufficient to secure a conviction. Similarly if it can be shown that the accused intended to strike a child of any age*

<sup>7</sup> Scottish Criminal Case Reports, 1989, page 410. (As referred to in Gordon, G H, *Op cit*, page 413, footnote 46)

<sup>8</sup> *Scots Law Times*, 1993, pages 1134

<sup>9</sup> *Scots Law Times*, 1991, page 206

<sup>10</sup> *Scots Law Times*, 1981, (Notes) page 2

<sup>11</sup> See *The Guardian*, 20 May 1999; *The Daily Telegraph*, 10 June 1999

<sup>12</sup> Leach, P, *The Physical Punishment of Children*, NSPCC, 1999, page 6

<sup>13</sup> *Ibid*, page 7

<sup>14</sup> *Loc cit*. An additional 14% of parents had used moderate smacking (which would have included a tap)

*by one of the means specified in subsection (3)(b) then that should also be sufficient to secure a conviction. It will not be necessary in either situation also to demonstrate “criminal intent” or an intention to inflict severe pain or punishment that is excessive or unreasonable in all the circumstances.”*

#### *INTENTION TO HARM NOW IRRELEVANT TO A CONVICTION*

*Under existing law the court must have regard to harm* in assessing a defence of reasonable chastisement. This is the also case with Section 43(1), but not under Section 43(3). To be convicted under Section 43(3) a parent only has to intentionally punish an under three by smacking, or intentionally punish a child of any age by tapping them on the head, shaking them or using an implement.

Under Section 43(3) as drafted intention to harm becomes irrelevant. It may be relevant to the sentence given, but in deciding whether or not an assault has been committed the proposed new law will *absolutely bar* the courts from considering whether:

- (a) the child actually was harmed, or
- (b) whether the parent intended harm, or
- (c) whether the force used was reasonable.

#### *INTENTION TO PUNISH BECOMES CENTRAL*

So Section 43(3) forbids consideration of highly relevant factors. Only an intention to punish is required. Ironically, this goes against the principles of Section 43(1) and the “A” case precedent which emphasises factors such as the nature of the punishment and the characteristics of the child in deciding if punishment was reasonable.

### **Section 43(3)(a) – the under-three ban**

#### *COURTS ARE BARRED FROM CONSIDERING RELEVANT FACTORS*

Section 43(3)(a) does not permit the court to consider any relevant factors. It is therefore inevitable that trivial smacks will be caught. The general *de minimis* principle may prevent extremely minor contact being criminal, but a court properly applying the words of the statute would have to convict for many activities which are trivial, harmless and currently legal.

For example, a parent may admit that a single mild smack took place involving a two-year-old. She may demonstrate that the child had been extremely naughty. She may prove through witnesses and medical reports that the force used was moderate and that absolutely no harm resulted to the child, not even a bout of tears. Nonetheless, the court is required under Section 43(3) to regard such questions as irrelevant and, on the basis of her admission that the smack was intended to punish, would have to convict.

The Policy Memorandum accompanying the Bill states that “Light warning taps to attract a child’s attention to a danger would, as now, not constitute a crime.”<sup>15</sup> But light warning taps to punish an under-three would constitute a crime because the intention was punishment not warning.

#### *THE SLC PROPOSALS*

Section 43(3)(a) goes much further than the SLC’s 1992 recommendations. The Commission did not back an under-three ban. Instead, it was concerned with where a parent “struck” a child “in such a way as to cause, or to risk causing, injury” or “in such a way as to cause, or risk causing, pain or discomfort lasting more than a very short time”.<sup>16</sup> The

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<sup>15</sup> Criminal Justice (Scotland) Bill, Policy Memorandum, 2002, para. 224

<sup>16</sup> See *The Physical Punishment of Children in Scotland: A Consultation. Op cit*, para. 2.11

present law focuses on actual or likely harm and reasonableness. The SLC proposal is consistent with these principles.

### **Section 43(3)(b) – banning all blows to the head, implements and shaking**

#### *COURTS ARE BARRED FROM CONSIDERING RELEVANT FACTORS*

Section 43(3)(b) as with 43(3)(a) bars the court from considering any relevant factors such as potential for harm. This will lead to trivial cases becoming criminal.

Many of these cases will involve mothers disciplining their sons. If a nine year boy punched his sister on the arm and his mother then tapped him on the head, the mother would be committing a criminal offence. A mother who uses the flat of a ruler or the palm of the hand to discipline her ten-year-old son must also be found guilty of assault. No proof of harm is required. The mere use of an “implement” to punish the child is enough to result in a conviction. If a mother enters a teenager’s room and, finding it a mess, picks up a pillow from the floor and throws it at the child, has she used an implement to punish him? Under section 43(3)(b) we think she has.

#### *THE SLC PROPOSALS*

The SLC did not suggest banning shaking or blows to the head. It suggested the reasonable chastisement defence could be removed where a parent “struck” a child “with a stick, belt or other object” or “in such a way as to cause, or to risk causing, injury”.<sup>17</sup> This proposal would at least continue to require some evidence of harm, potential harm or unreasonableness. The word “struck” implies more than a trivial degree of force. The phrase “stick, belt or other object” would direct the court to consider serious rather than trivial implements.

### **Summary**

The criminal law is very powerful. Parents who face a criminal charge will be under considerable stress *as will their families*. A prosecution would put the child at the centre of a highly distressing court case. The parent may be imprisoned or lose their job. The parents’ marriage may break up under the strain.

As in the F case, social workers would become highly involved in any family where there was a conviction under the new law. Even where there is no prosecution, social workers may still seek a court order in respect of a child where there is evidence of a breach of the new law. Social work intervention can cause a family extreme stress.

Many ordinary affectionate parents use moderate physical punishment. These parents totally condemn child abuse and believe the law should criminalise it. But instead of catching child abusers, section 43 as drafted will catch ordinary parents.

We would welcome an opportunity to present further evidence to the Committee.

Colin Hart, BSc, PGCE  
and Simon Calvert, LLB, Solicitor  
The Christian Institute, Scotland  
29<sup>th</sup> April 2002

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<sup>17</sup> *Loc cit*