

**IN THE MATTER OF:-**

**Re: Section 43(3)(b) of the Criminal Justice (Scotland) Bill:**

**JOINT OPINION OF COUNSEL**

**INTRODUCTION:**

1. We have been asked to consider the meaning and effect of Section 43(3)(b) of the Criminal Justice (Scotland) Bill and whether the proposed Section breaches the European Convention on Human Rights (1950)<sup>1</sup>.

**STATUTORY PROVISIONS:**

2. Section 43 of the Criminal Justice (Scotland) Bill provides:-

**(1) Where a person claims that something done to a child was a physical punishment carried out in exercise of a parental right, or 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) ...**

**(2) ...**

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<sup>1</sup> Section 29(2)(d) of the Scotland Act 1998.

**(3) If what was done-**

**(b) included or consisted of-**

**(i) a blow to the head;**

**(ii) shaking; or**

**(iii) 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;...**

## **THE EUROPEAN CONVENTION ON HUMAN RIGHTS**

**(1950):**

3. Two primary Convention rights are engaged; Article 8 (family life), and Article 9 (religious rights). Article 2 of the First Protocol (right to educate children in accordance with religious/ philosophical beliefs) is additionally engaged, but will be only discussed tangentially.

### **The Requirements Under the Convention: The General Law of Assault:**

4. Primarily, the Convention is binding on the State under international law. Article 3 of the Convention reads:-

**No one shall be subject to torture or to**

**inhumane or degrading treatment or punishment.**

5. In Article 3, the distinction between "torture", "inhumane" and "degrading treatment" is mainly one of gradation in the suffering inflicted<sup>2</sup>.

6. The general law of assault satisfies the United Kingdom's international obligations under Article 3 and 8 (in relation to the physical integrity of individuals).

7. The Convention clearly sets limits in Article 3 to the types of treatment children may be subjected to, and the State has responsibilities to ensure that those limits are *upheld by all*; by other children, parents, teachers (public or private).

**The Lawfulness of Corporal Punishment:**

8. The corporal punishment of children is an act that is recognised as lawful under the Convention; this lawful right must be balanced with the need to protect the integrity of individuals and of children.

9. In **A v United Kingdom**<sup>3</sup> in which a nine year old child was severely caned by his step- father. The Commission held:-

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<sup>2</sup> Ireland v United Kingdom A. 25 (1978).

<sup>3</sup> (1999) 27 EHRR 611.

**The Commission would emphasise that the finding does not mean that Article 3 is to be interpreted as imposing an obligation on States to protect, through their criminal law, against any form of physical rebuke, however mild, by a parent of a child. (para 55).**

10. Following A, the United Kingdom Government has not prohibited parental 'disciplining' of children; nor subsequent to the findings of the United Nations Committee on the Rights of the Child<sup>4</sup>

11. Further, for the purposes of Article 2 of the First Protocol, corporal punishment has been expressly upheld in the schools context.

12. In **Campbell and Cosans v United Kingdom**<sup>5</sup>, the use of corporal punishment was not 'degrading' by reason of "... *the above mentioned circumstances obtaining in Scotland*" (para 29).

13. In **Costello- Roberts v United Kingdom**<sup>6</sup>, the Court held by 5-4 votes that corporal punishment was not contrary to Article 3. This

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<sup>4</sup> See United Nations Website October 2002.

<sup>5</sup> (1982) 4 EHRR 293.

<sup>6</sup> (1993) 19 EHRR 112.

decision was influenced by the fact that the parent was unaware that the school implemented corporal punishment; and thus, issues of parental consent were relevant.

14. Thus, it is submitted that corporal punishment which is a proportionate response to wrong- doing (and which has no lasting physical effect on the child) is *not prohibited* by the Convention.

**The Principle of Proportionality:**

15. The law of assault prohibits any arbitrary or cruel punishment by any individual or its infliction for an improper motive given by either a parent or an individual with care of a child.

16. Section 43(1)(a)-(d) and section 43(2) clarifies the law of assault and the defence of 'reasonable chastisement' in line with the decision of **A v United Kingdom**.

17. Section 43(3)(a) is not to be proceeded with. Section 43(3)(b) introduces three categories of methods of 'disciplining' a child that create an automatic criminal offence.

18. Thus, there is a criminalisation of an otherwise lawful act; it goes further than a reversal of the 'burden of proof' under Article 6 of the Convention<sup>7</sup>.

19. Section 43(3)(b) goes beyond Convention requirement and transgresses the Convention rights of parents; such an act is only justifiable for reasons of 'imperative necessity'.

20. In **Chassagnou v France**<sup>8</sup>, the Court held that where there is an interference with a Convention right (in situ Articles 2, First Protocol/ Articles 8,9 and 10) the 'claw- back' provisions of Articles 8(2), 9(2) and 10(2) (such as the protection of the rights of others) such rights **i**) must be a Convention right (para 113).

21. Otherwise, there must be an 'indisputable imperative' to justify an interference with a Convention right by national law.

22. This test is clearly not satisfied, nor is there any evidence with regard to why this measure is 'necessary in democratic society'.

### **The Test of Proportionality:**

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<sup>7</sup> See the recent case of Roth GmbH v Secretary of State for the Home Department [2002] ALR, CA.

<sup>8</sup> (1999) 29 EHRR 615.

23. The test of 'proportionality' requires that the measure pursues a legitimate aim and is 'necessary in a democratic society'.

24. The requirement of 'necessary' and 'legitimate aim' are related to the concept illuminated in Chassagnou of '**indisputable imperatives**'.

25. This is an extremely high threshold; the **first** test is one of identification of the legitimate aim and is one of verification ('indisputable') and the **second** test is an objective requirement of an 'imperative' requirement (ie. the measure is objectively necessary and not merely convenient or desirable<sup>9</sup>).

26. Section 43(3)(b) satisfies neither of these tests/ requirements of '**indisputable imperatives**'. It falls at the first hurdle.

27. It is noted that the Scottish Executive has been unable to state a single Scottish case where the law of assault has failed to protect children.

28. It is the belief of those with responsibility that the present law is adequate: the Scottish Police Federation<sup>10</sup> and of the Law Society of

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<sup>9</sup> Silver v United Kingdom (1983) 5 EHRR 347.

<sup>10</sup> Scotland on Sunday of 31st March 2002.

Scotland<sup>11</sup>. The present law of assault has prevented unreasonable chastisement<sup>12</sup>.

29. Paragraph 121 of Justice 2 Committee's 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.**

30. Corporal punishment falls within the scope of a Convention right<sup>13</sup> and, thus, the State may only prohibit it in *proportionate pursuit of a legitimate aim* for reason of 'indisputable imperatives'.

This is not the case.

31. It is not accepted that the Bill pursues a legitimate aim, *despite* the fact that it is possible to ascertain that aim. This is not enough in Convention case law.

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<sup>11</sup> The formal Response to the proposal by the Executive.

<sup>12</sup> Guest v Annan [1988], Kennedy v A [1993] SLT 206.

<sup>13</sup> Articles 8 and 9.

32. The law of assault protects the physical integrity of all individuals; a compelling State interest must be general, neutral and all- embracing.

33. The general law of assault prevents excessive, arbitrary or cruel punishment by any individual, or its infliction for an improper motive.

*34. Thus, an adequate measure suffices to maintain the physical integrity of children; the European Court accepted in the Article 3 context that the criminal law of assault provides sufficient protection of children. Any further prohibition of corporal punishment is therefore disproportionate since it is not necessary (a less intrusive measure suffices- the law of assault) in pursuit of the legitimate public interest.*

**Arbitrary Limitations:**

35. The above consideration is compounded by the fact that the restrictions on methods for 'disciplining' children appear arbitrary, *a fortiori*, in the context of a blanket prohibition.

36. There appears to be no evidence that the types of disciplining identified in section 43(3)(b) manifest particular areas of difficult societal problem; to that end, they are anomalous.

37. A parent who violently punishes, kicks or 'stubs cigarettes out on' a child, is subject to the general law of assault and the court can consider the defence of 'reasonable chastisement'.

38. However, a loving parent who gives a child 'a clip around the ear'<sup>14</sup>, or uses a wooden spoon, or old slipper has no defence.

39. An anomaly may not unlawful per se, but requires 'objective justification'; however, in the absence of any evidence for the society intrusion into family life, this seems unlikely.

40. The Bill appears arbitrary and non- uniform, and, as such, cannot present a compelling State interest. The reasons adduced by the State for the interference with a Convention right must be 'relevant and sufficient'<sup>15</sup>.

### **The Presumption of Innocence:**

41. It is one thing to criminalise a former lawful activity; it is another to both criminalise it and make it an offence of strict liability.

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<sup>14</sup> Pending definition of 'a blow to the head'.

<sup>15</sup> Vogt v Germany (1996) 21 EHRR 205 at para 52(iii).

42. In circumstances, where section 43(3)(b) are satisfied, it becomes irrelevant whether **i)** the child was actually harmed, **ii)** whether the parent intended harm, or **iii)** whether the measure taken was necessary in the circumstances of the case.

43. The Courts of the United Kingdom resist strict liability offences and will read in 'mens rea' where appropriate: **Sweet v Parsley**<sup>16</sup>.

44. In **Salabiaku v France**<sup>17</sup>, the European Court held:-

**... the contracting states may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence.**

45. The requirement is that **i)** unspecified 'certain conditions' exist (this is analogous to the 'indisputable imperative' test), **ii)** it is submitted that this test is relevant to the penalty of the offence.

46. Since the measure must represent a pressing societal requirement, an offence absent 'mens rea' that could result in a

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<sup>16</sup> [1970] AC 132 at 148-149: HL.

<sup>17</sup> (1991) 13 EHRR 379.

substantial prison sentence<sup>18</sup> is likely to be contrary to the convention.

47. In the decision of the Canadian Supreme Court in **Reference Re: Section 94(2) of the Motor Vehicle Act**<sup>19</sup>, a provision creating an absolute strict liability offence for driving whilst suspended with imprisonment between one week and six months, was struck down.

48. The provision creating liability to imprisonment for a strict liability offence was contrary to 'fundamental justice'.

**Article 8 Rights:**

49. Article 8 protects rights to family life. The disciplining of children is seen as an axiomatic aspect of family life; for which State interference must cross the highest of threshold tests.

50. In **Seven Individuals v Sweden**<sup>20</sup>, the Commission held:-

**... must start from the premise that parental rights and choices in the upbringing and education of their children are paramount as against the State ... the upbringing of children is a central aspect of family life.**

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<sup>18</sup> In excess of six months: Salabiaku was convicted for six months.

<sup>19</sup> (1986) 24 DLR (4th) 536.

<sup>20</sup> Appl. No. 8811/79.

51. In **Parham v JR**<sup>21</sup>, the United States Supreme Court held (emphasis added):-

**... The Statist notion that government power should supersede parental authority in *all* cases, because *some* parents abuse and neglect children is repugnant to American tradition.**

52. The United States courts required that prior to an intrusion into family life, a law must not be overbroad and must relate to individual circumstances.

53. In **Troxel v Granville**<sup>22</sup>, the Supreme Court held that the Washington State could not interfere with parental rights over children and family life, on what the State deemed to better decisions regarding children. In **Ingram v Wright**<sup>23</sup>, the Supreme Court upheld the constitutionality of corporal punishment.

54. Likewise the Court of Appeal (Ontario) (on appeal to the Canadian Supreme Court) recently declared that law enable parents

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<sup>21</sup> 442 US 584 at pages 602-606 (1979).

<sup>22</sup> (2000) 530 US 56.

<sup>23</sup> (1977) 430 US 651.

and schoolteachers to exercise corporal discipline were constitutional: **Canadian Foundation for Children**<sup>24</sup>.

55. All these Anglo Saxon decision have a similar theme. They did not specifically deal with a partial prohibition on corporal punishment as in section 43; but the sanctity (and inviolability) of family life was recognised and for the State to interfere it can only do so for the most cogent reasons.

56. The State may disagree with parental choices on disciplining of children; the state may have beliefs on 'disciplining' that parents disagree with. However, the Courts require cogent reasoning for State interference on the basis of the 'indisputable imperatives' test.

57. It is submitted that the State must respect the views of parents that if disobedient, their children should be punished corporally. This, by logical implication includes the methods by which they should chose to do so (absent an 'indisputable imperative').

58. The primary responsibility for educating and disciplining children rests with parents. Thus, any interference in the rights of parents to discipline children (either by themselves or designated

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<sup>24</sup> 15th January 2002.

agents thereof) breaches Article 8 and must be justified by Article 8(2).

**Article 9 Rights and Section 13 of the Human Rights Act 1998:**

59. Article 9 of the European Convention states:-

**(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or in private, to manifest his religion or belief, in worship, teaching, practice or observance.**

**(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.**

60. Section 13 of HRA reads:-

**(1) If a court's determination of any question arising under this Act might affect the exercise by a religious organisation (itself or of its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right.**

61. Notice can be taken that current views on the approach to educational requirements of children are contrary to orthodox

Christian teaching. The disciplining of children in the home and educational context is clear Christian doctrine<sup>25</sup>.

62. In Biblical doctrine, children are a gift from God, but that parents have responsibility for care, instruction, nurturing and disciplining<sup>26</sup>.

The Judaeo- Christian tradition is to recognise the autonomy of the family, and the State should only interfere in the most pressing cases.

63. It is a central tenet of the Christian religion that man- kind is born with a heart inclined to all kinds of evil<sup>27</sup>; disciplining in the educational context is therefore vital. It is not an 'optional extra', but corporal punishment is expressly sanctioned, approved and may be necessary.

64. In **Kokkinakis v Greece**<sup>28</sup>, the European Court of Human Rights held that:-

**It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life ...**

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<sup>25</sup> Although, all religious organizations have a liberal and orthodox wing.

<sup>26</sup> 2 Corinthians 12:14, Deuteronomy 6:4-7, Proverbs 1:8 and 13:24, Ephesians 6: 1- 4; Colossians 3:20, 1 Thessalonians 2:11;

<sup>27</sup> Psalm 51:5; Jeremiah 17:9; Mark 7:21-23.

<sup>28</sup> [1994] EHHR (25th May 1993)

**Article 9...is one of the foundations of a "democratic society" within the meaning of the Convention...The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. (paragraph 31).**

65. The jurisprudence of religious rights under the European Convention is extremely under-developed; decisions appear to be arbitrary, inconsistent and to an extent contradictory.

66. In **Thilmmenos v Greece**<sup>29</sup>, an accountant refused to serve in the Greek military by reason of his pacifist Jehovah Witness faith. He was subsequently imprisoned, and then banned from becoming an accountant by reason of his conviction.

67. The European Court held that this was religious discrimination as detriment was by reason of religious belief. The fact that the law was neutral and of general applicability and to maintain the efficacy of the armed forces was of no avail to the Greek government; they had to make religious exemption and treat objections based on religious principles as requiring differential treatment.

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<sup>29</sup> (2001) 31 EHRR 15.

68. However, the seminal decision on religious rights is that of the United States Supreme Court in Wisconsin v Yoder<sup>30</sup>. In this case the Amish people wished to remove their children from State schools at 14 years (the educational requirement was to 16 years) to prevent their 'contamination' by the world.

69. Chief Justice Burger's decision is seminal in his dealing of conflicting religious and state rights. He deals profoundly with the conflict between 'majoritarian' viewpoints and 'minority' viewpoints that are contrary to most people's experience.

70. The State must protect religious pluralism; 'majoritarian' views must not be imposed, except for the most pressing reasons. The State has no right to save people from themselves.

71. The Amish were allowed to withdraw their children from the schools despite the obvious impairment to their educational levels and future career prospects (should they ever leave the Amish people).

72. Burger CJ's analysis of 'majoritarian' viewpoints is highly relevant in a era of 'political correctness' and when religious groups and individuals are increasingly unable to conform.

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<sup>30</sup> (1972) 406 US 205.

73. Whatever, the ambiguities of Article 9 of the Convention, this provision is strengthened by the inclusion of section 13 of the Human Rights Act 1998.

74. Section 13 resolves dispute in favour of religious rights; heightening the threshold of intervention from 'pressing social need' to 'compelling State interest'. This is a consequence of democratic government.

75. However, section 13 creates 'collective religious rights', rather than individual religious rights. This is unusual in human rights jurisprudence as the right is reserved to 'religious organisations'.

76. Therefore, Christian parents would need to exercise their section 13 rights through the medium of a Church. Their Article 9 rights are operative regardless.

**Statutory Construction:**

77. Section 43 in conjunction with the Policy Memorandum appears to create ambiguity as to the exact meaning of the statutory provisions.

78. The use of the term 'by virtue of being in such exercise' in section 43(1) is, of course, a *limitation* on the scope of the section.

79. A similar limitation is used in Section 16 of the Standards in Scotland's Schools Act 2000 where the giving of corporal punishment is restricted to those 'exercisable by virtue of having a position as a member of staff'.

80. The limitation of the scope of section 43 is recognised by the fact that it does not apply to childminders and further regulations are required under the Regulation of Care (Scotland) Act 2001<sup>31</sup>; section 2(1)(l) and (m) define 'child minding' as a 'Care Service'.

**CONCLUSION:**

81. There is a legitimate public interest in protecting the physical integrity of children.

82. However, the Court has accepted in the Article 3 context that the general criminal law of assault provides sufficient protection for children in this respect; any further measures prohibiting corporal

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<sup>31</sup> Paragraph 220 of the Policy Memorandum.

punishment are 'disproportionate' (as a less intrusive measure suffices and exists) in pursuit of the State's legitimate aim to protect children.

83. If we can be of any further assistance, please do not hesitate to contact us.



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