UNEQUAL PROTECTION OF CHILDREN?

By Gordon Lindhurst MSP

Surprisingly, perhaps, only fifteen years after the Scottish Parliament gave detailed consideration to the law on parental discipline the matter has been brought up yet again. I say "surprisingly" because the law as amended at that time by section 51 of the *Criminal Justice (Scotland) Act 2003* appears to have worked well.

The law as it stands allows "reasonable chastisement" as a means of instruction, correction and discipline. It prevents disproportionate physical punishment of children. This represents a compromise which takes account of all philosophical and religious world-views. No parent or other individual is obliged to use physical instruction or correction, nor are they obliged to use specific alternative means, whether psychological or otherwise.

The law as it stands also means that the persons most closely connected with a child (usually the parents) are empowered to make decisions on what is in the best interests of the child. This chimes with the longstanding principle that parents, rather than the state, should have primary responsibility for their children and that intervention by the courts in family matters should be a last resort.

The UK Supreme Court has recently affirmed that approach as a fundamental aspect of human rights law, emphasising the need for:

> "the detailed working out, for children, of the principle established in article 16(3) of the Universal Declaration of Human Rights and article 23(1) of the International Covenant on Civil and Political Rights that 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the state'. There is an inextricable link between the protection of the family and the protection of fundamental freedoms in liberal democracies." *(The Christian Institute and others (Appellants) v The Lord Advocate (Respondent) (Scotland)* [2016] UKSC 51, para. 73)

The Children (Equal Protection from Assault) (Scotland) Bill Consultation

The new Holyrood consultation on the matter makes only one proposal.

That proposal is to subject parents to criminal liability at common law by removing the "reasonable chastisement" defence. Creating a common law crime at this stage in history, with all that entails, runs contrary to modern public policy. The proposal refers to the approach in other European countries, such as Sweden and Germany, but ignores the fact that these other jurisdictions deal with the matter in clearly defined statutory codes.

The consultation refers to a "proposal for a Bill to give children equal protection from assault by prohibiting the physical punishment of children by parents and others caring for or in charge of children". This is a tendentious way of expressing the matter because, of course, the current law prohibits assault on children and on adults. What the proposal aims to do is to classify "reasonable chastisement", whether for the purpose of instruction, correction or discipline, as "assault".

In spite of the "equal protection" reference in the title, there is no intention to place children in a "grown up" position of responsibility towards one another or towards adults. The effect of the consultation proposal is to remove parental discretion and to give that power to the state.

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A Flawed Approach?

The UN position is much more nuanced than the consultation would suggest.

First, it draws a "clear distinction between the use of force motivated by the need to protect a child or others and the use of force to punish." (at para. 15)

Secondly, the Convention emphasises the harm that non-physical punishment can cause. The consultation paper quotation from the UN Committee on the Rights of the Child (at para. 11) omits the crucial wording at the end of the paragraph quoted:

"In addition, there are other non-physical forms of punishment that are also cruel and degrading and thus incompatible with the Convention. These include, for example, punishment which belittles, humiliates, denigrates, scapegoats, threatens, scares or ridicules the child."

Our current law recognizes the complexity of human relationships and the distinctions to be drawn between children and adults. It is based on the fundamental recognition that children are not adults, nor adults children. Different approaches therefore apply to children, particularly in terms of the responsibilities not placed upon them because they are not adults. This is for their protection.

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And adults make conscious decisions on whether or not to involve the state in their affairs, having both capacity and understanding of the potential consequences of doing so. Particularly younger children are unlikely to be aware of or understand the serious consequences of involving state authorities in their family's life. These consequences can have a lifelong detrimental effect on a child and other family members alike.

Equalities

Deeply concerning are the comments on religion and belief in the consultation paper section headed "Equalities".

The consultation paper suggests that criminalising modes of physical intervention would "provide clarity and ensure consistency in the law for children belonging to all cultural and religious groups." It fails to enter a discussion about the protection of children and families, or beliefs and values against state interference.

Bizarrely, the consultation paper identifies current discriminatory inequality in treatment of children on grounds of age. This is on the basis that physical "chastisement" diminishes as children grow up. Is it not true that physical interventions decrease simply because children learn as they grow up the differences between right and wrong and become progressively more amenable to rational persuasion, even as they themselves develop their own personalities and abilities to rationally persuade and enter into discussion?

The consultation paper thus fails to reflect the nuances of modern equality law which comprehends that equal treatment does not equate to precisely the same treatment of individuals with different characteristics or from within the same group.

Vigilante Law?

Another concern is the comment in the consultation paper that the bill would "provide clarity to members of the public" meaning, apparently, to bystanders who may know nothing about the parent, the child or even the circumstances as they are unfolding. According to the consultation: "Currently, they can find it difficult to know whether to intervene if they see a child being physically punished in public. Should legislation be passed, then they will be in no doubt that such behaviour towards a child is unacceptable."

Well-meaning as this may sound, criminal lawyers will immediately grasp the significance and consequences of such an attitude applied in a public place. What may appear to be a "punishment" or "assault" to one person is not to another. Complex considerations apply to the treatment of children (as Scottish judges have very recently discussed in *JM v Brechin* 2016 SC 98).

Conclusion

The consultation responses are in and we await a draft bill. Based on some of the premises of the consultation paper itself, the result may turn out to be disappointing. If passed into law it could end up to be not just disappointing, but a source of pain for many.

At the end of the day, the purpose of the law should not be to provide supposed clarity to strangers as a basis to interfere in other people's family relationships.