

CRIMINAL JUSTICE (SCOTLAND) ACT 2003

EXPLANATORY NOTES

THE ACT THE ACT IS IN 12 PARTS.

Part 7 – Children

Section 51 – Physical punishment of children

263. **Section 51** clarifies the law as it applies to the exercise of physical punishment of children by their parents, guardians and other persons with charge or control of them.
264. At common law parents, guardians and other persons with charge or control of children are entitled to use force for the purpose of disciplining children if these actions are considered by the court to be justified as “reasonable chastisement”. Such punishment must be moderate and not inspired by vindictiveness. To secure a conviction for assault the prosecution has to demonstrate *mens rea* or “criminal intent” on the part of the accused, and this prevents trivial contacts or harmless warning taps being treated as an assault.
265. In addition to the common law of assault, section 12 of the Children and Young Persons (Scotland) Act 1937 contains provisions dealing with the treatment of children and young people by persons of 16 years or over who have parental responsibilities in relation to them or who have charge or care of them. That section makes it an offence for such persons to treat that child with cruelty (described as wilful assault, ill-treatment, neglect, abandoning, exposing, or causing or procuring such treatment in a way which is likely to cause unnecessary suffering or injury to health).
266. Section 12 of the 1937 Act also provides that the rights of any parent, teacher, or other person having the lawful control or charge of a child or young person to administer physical punishment to the child are not affected by the offence provision. However, a teacher’s right to administer physical punishment has effectively been removed subsequently by section 48A of the Education (Scotland) Act 1980 and section 16 of the Standards in Scotland’s Schools etc Act 2000. Other provisions exist to prohibit physical punishment in other public care settings.
267. **Section 51** clarifies the circumstances in which physical punishment of a child will never be reasonable, and provides a non-exhaustive list of the factors which are to be taken into account when considering whether such punishment in other circumstances is reasonable.
268. At common law, only certain categories of people can physically punish a child. These are people with parental responsibilities and rights in relation to the child, and anyone to whom they delegate their right to do so. In addition, a person with a close connection with the child, and who has care and control of the child, will also be entitled to physically punish a child. This covers, for example, the position of a child’s unmarried father or step-parent who does not have formal parental responsibilities and rights.
269. The provisions of section 51 apply to cases where the defence to a charge of assault is based on the claim that the assault was reasonable chastisement. If the court is

*These notes relate to the Criminal Justice (Scotland) Act
2003 (asp 7) which received Royal Assent on 26 March 2003*

satisfied that the accused person is within the category of people entitled at common law to physically punish the child in question, the prosecutor will have to prove that the punishment went beyond what was reasonable chastisement. Where the accused did not have such a right, the prosecutor need only prove that the assault, or punishment, occurred.

270. Subsection (1) sets out the factors which must be considered by the court in deciding whether or not something which is claimed to have been done to a child by way of physical punishment was justifiable. The factors are derived from judgements by the European Court of Human Rights, relating to Article 3 of the European Convention on Human Rights, which states that “No one shall be subjected to torture or to inhuman or degrading treatment”.
271. The factors set out in subsection (1)(a) are the nature of what was done to the child, the reason for it and the circumstances in which it took place. It is envisaged that these should prompt the court to consider the whole circumstances of the case, including the severity of the punishment, whether it was proportionate to the child’s behaviour and whether it was given in appropriate circumstances.
272. Subsection (1)(b) directs the court to consider the duration and frequency of the punishment.
273. Subsection (1)(c) directs the court to consider any effect (whether physical or mental) which the punishment has been shown to have had on the child. It does not oblige the court to obtain medical or psychiatric evidence in every case, but to consider such evidence as is produced.
274. Subsection 1(d) directs the court to consider the child’s age.
275. Subsection (1)(e) directs the court to consider the child’s personal characteristics, including sex, and state of health at the time of the punishment. An example of how a court might take sex into account would be where it considers treatment which may be additionally humiliating, for example because a child’s bare bottom is beaten in front of strangers of the opposite sex.
276. Subsection (2) provides that the court may also take into account any other factors which it considers appropriate in relation to the case.
277. Subsection (3) prohibits three specified types of punishment given to a child of any age: blows to the head; shaking; and the use of an implement, such as a belt, slipper or cane. Where these are used, then the punishment cannot be found to be justifiable assault. This list does not affect the power of the court to determine on other grounds that what was done was not justifiable. As in all cases, the prosecution will have to demonstrate an intention by the accused to punish the child. If it can be shown that the accused struck a child of any age by one of the means specified in subsection (3)(b) then that would be sufficient to secure a conviction. It will not be necessary also to demonstrate “criminal intent” or an intention to inflict severe pain or punishment that is excessive or unreasonable in all the circumstances.
278. Subsection (4) makes clear that this section applies only in respect of children who were under 16 at the time of the supposed punishment. There is no entitlement to use physical punishment above that age. Any supposed “punishment” of a person aged 16 or over would constitute assault.
279. Subsection (5) repeals references to “assault” in the Children and Young Persons (Scotland) Act 1937 which the Act renders unnecessary. Physical punishment of a child will be covered by the common law and by this section, while the 1937 Act will apply to cruelty, neglect and ill-treatment, which cannot be justifiable as reasonable punishment.
280. The section does not introduce new penalties, and sentences for assault will continue to be limited only by the sentencing powers of the court involved. At present, most such

cases result in non-custodial sentences, and this is not expected to change as a result of the Act.

Section 52 – Prohibition of publication of proceedings at children’s hearings etc.

281. **Section 52** (a) extends section 44 of the Children (Scotland) Act 1995 (“the 1995 Act”) to cover cases from the time that they are referred to the Principal Reporter. Previously, the protection only applied to a case when a children’s hearing had actually been convened.
282. The prohibition on publication applies to all children who are connected with the hearing and not just the child referred to the hearing, including, for example, child witnesses and child victims. Such protection is offered in criminal justice proceedings, but has not been offered in cases referred to the Principal Reporter under existing legislative provisions.
283. The changes introduced by section 52 to the interpretation provisions in section 93 of the Children (Scotland) Act 1995 mean that the prohibitions extend to children and young people up to the age of eighteen years.

Section 53 – Provision by Principal Reporter of information to victims

284. **Section 53** is a new provision enabling the Principal Reporter to share certain information with victims and certain other categories of approved person about offence cases referred to the Reporter.
285. Subsection (1)(a) provides that the information has to be requested by the approved person.
286. Subsection (1)(b) provides that the Principal Reporter needs to be satisfied that the provision of the information would not be detrimental to the best interests of the child concerned in the case or any other child in any way connected with it and that it is otherwise appropriate to provide the information.
287. Subsection (2) provides that the information that can be conveyed is restricted to the action taken by the Principal Reporter and any disposal of the case, but only insofar as that information relates to the offence rather than to any wider issues in the child’s life
288. Subsection (3) details those classes of person with whom the Principal Reporter may share the information. The victim of the offence is the primary intended recipient of the information. Where the victim is a child under the age of eighteen, then the information can be shared with someone who is a “relevant person” in relation to that child. In addition, it is recognised that other third parties may have a genuine requirement to receive such information directly from the Principal Reporter. Scottish Ministers may therefore designate other persons or groups of persons as being approved persons for the purposes of this section. For example, it is intended that those persons making a determination as to whether to pay compensation to the victim in respect of any loss injury or damage suffered as a result of the offence and agencies providing counselling and advice services to victims will be among the third parties approved by Scottish Ministers for this purpose. When specifying approved parties, Ministers may impose conditions on the authorisation to receive information. For example, detailed conditions relating to the confidential handling of the information could be laid down in the order.
289. The definition of child for the purposes of these provisions is a person who has not attained the age of eighteen years.