

# CRIMINAL JUSTICE (SCOTLAND) ACT 2003

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## 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

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

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

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