OPINION OF SENIOR COUNSEL

Re

THE LEGALITY OF SCOTS LAW ON THE PHYSICAL PUNISHMENT OF CHILDREN

The question

[1] I am asked to advise whether the law of Scotland permitting assault of children by adults responsible for their care, is now open to challenge as a violation of the European Convention on Human Rights (ECHR). The issue of corporal punishment of children currently subject to consultation by John Finnie MSP, who has a draft 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 opinion addresses legal issues relevant to that consultation. It is the responsibility of the state under article 1 of ECHR to secure the rights and freedoms defined in the Convention to everyone within its jurisdiction. This is apparent from cases such as *Costello-Roberts v United Kingdom* (1995) 19 EHRR 112, and more recently *O'Keeffe v Ireland* (2014) 59 E.H.R.R. 15. There must be effective safeguards of the rights guaranteed to children by (*inter alia*) article 3 and 8 of ECHR.

[2] The European Court of Human Rights has considered physical punishment of children in the past, but this does not mean there can be no reconsideration of the issue. ECHR is a

"living instrument" and must be interpreted in the light of present-day conditions. The European Court of Human Rights will be influenced in a case relating to physical punishment of children by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field (see *Tyrer v United Kingdom* (1979 -80) 2 EHRR 1 at paragraph 31). The Court may well change its position in the light of evolving convergence of standards, in order to render "rights practical and effective, not theoretical and illusory". This was confirmed in *Selmouni v France* (2000) 29 EHRR 403 where the Court remarked that certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future. An increasingly high standard is required in the area of the protection of human rights and fundamental liberties correspondingly and this, according to the Court, inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies. The changing approach of the Court can be seen, for example, in *Goodwin v United Kingdom* (2002) 35 EHRR 18), where the international trend in favour of legal recognition of the new sexual identity of post-operative transsexuals caused the Court to depart from its previous position and hold that failure to afford full recognition violated article 8. States must therefore keep issues such as physical punishment of children under review. They cannot simply rely on past cases.

The law relating to assault of children in Scotland

[3] The criminal law generally proscribes assault. As any judge charging a jury in Scotland will tell them "An assault is any deliberate attack on another person with evil intent." Evil intent, the judge will explain, is the intention to cause physical injury or fear of physical injury. Historically, if what would ordinarily be considered an attack is carried out by a person such as a parent, who has some authority over the child, and is an exercise in discipline, then there will be no evil intent, unless the physical force used is excessive. In *Stewart v Thain* 1981 JC 13 the High Court refused the appeal of a procurator-fiscal against the sheriff's acquittal of a headmaster who punished a boy by smacking him on his bare buttocks, holding there was no evil intent or excess involved and that humiliation may be a

legitimate aspect of punishment. The distinction between criminal assault and acceptable punishment lay in the intention of the perpetrator, rather than the nature of the action. Thus, an angry mother who punished her nine-year old with a belt had not assaulted her (*C v Harris* 1989 SC 278), but a mother who delivered a bad-tempered slap to her two-year old was rightly convicted of assault (*Peebles v Macphail* 1990 SLT 245).

[4] The position changed following the case of *A v United Kingdom* (1999) 27 EHRR 611. In that case a nine-year old was beaten with considerable force with a garden cane on a number of occasions by his stepfather. The stepfather pleaded that this treatment constituted "reasonable chastisement" and was acquitted by a jury. The European Court of Human Rights held that the beating violated article 3 of the European Convention on Human Rights and that the state had failed to take measures designed to ensure that individuals within their jurisdiction were not subjected to torture or inhuman or degrading treatment or punishment. Steps were then taken in the various parts of the United Kingdom to limit the common law defence of "reasonable chastisement".

[5] In Scotland the common law defence was limited by section 51 of the Criminal Justice (Scotland) Act 2003. If what was done to a child consisted of a blow to the head, shaking or use of an implement, albeit done in exercise of a parental right or a right derived from having charge or care of a child, this could not be a "justifiable assault". The legislation effectively removed the defence of reasonable chastisement in these instances. Other than that, the court was simply directed to have regard to a number of factors in deciding whether the assault in question was justifiable. These are:

> "(a) the nature of what was done, the reason for it and the circumstances in which it took place;
> (b) its duration and frequency;
> (c) any effect (whether physical or mental) which it has been shown to have had on the child;
> (d) the child's age; and
> (e) the child's personal characteristics (including, without prejudice to the generality..., sex and state of health) at the time the thing was done."

The court may also have regard to such other factors as it considers appropriate in the circumstances of the case.

[6] These factors are designed to assist a court considering whether the common law defence of "reasonable chastisement" applies. The section goes on to clarify that the defence can only be raised with respect to children aged under 16. The Explanatory Memorandum to the 2003 Act explains that the requirement for "criminal intent" on the part of the accused prevented "trivial contacts or harmless warning taps being treated as assault". With respect this is somewhat muddled. A "trivial contact or harmless warning tap" describes the action (*actus reus*) not the intent (*mens rea*). Such actions are unlikely to constitute an "attack" in any event. The issue here is whether what would otherwise be an assault can be justified on the grounds that it is intended as a punishment.

[7] At the same time as enacting section 51 of the 2003 Act , the Scottish Parliament revoked the statutory offence of wilful assault found in section 12 of the Children and Young Persons (Scotland) Act 1937, but left in place the offence of wilful ill-treatment of a child under the age of 16. This offence was considered by the Inner House of the Court of Session in *JM v Locality Reporter* [2015] CSIH 58, 2016 SC 98. If an action is deliberate and can be categorised as "ill-treatment" then it will constitute an offence, regardless of whether the perpetrator intended or was reckless as to any resulting harm. The English position requiring awareness of the likelihood of harm, or recklessness as to such harm was rejected. There is no question therefore of the law permitting what would, in effect, be cruelty to a child, in the name of corporal punishment. Deliberate ill-treatment of a child is an offence.

[8] The defence of "reasonable chastisement" is not open to teachers, having been removed within the state system by the Education (No 2) Act 1986, and then taken away generally in all schools by section 16 of the Standards in Scotland's Schools etc. Act 2000, with the qualification that corporal punishment does not include anything done to avert immediate danger of personal injury to, or damage to the property of, any person including the pupil in

question. Foster carers and kinship carers are obliged to enter into an agreement which (*inter alia*) provides that they will not administer corporal punishment to any child placed with them (Looked After Children (Scotland) Regulations 2009 (SSI 2009/210). Corporal punishment cannot be administered in residential establishments, albeit the definition of corporal punishment in this context still refers to the repealed measure in the Education (Scotland) Act 1980 (Residential Establishments – Child Care (Scotland) Regulations 1996 (SI 1996/3256), regulation 10).

Article 3 ECHR

[9] Article 3 provides that:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The prohibition in article 3 of ECHR is absolute. There is no provision for exceptions. No derogation is permissible. Torture and inhuman or degrading treatment or punishment contravene article 3, irrespective of the conduct of the recipient of any such measures. A judicial sentence of birching by an Isle of Man juvenile court fell foul of article 3 in *Tyrer v United Kingdom* (1979 -80) 2 EHRR 1. Caning on the hand by a headteacher in the presence of another male teacher was held by the European Commission of Human Rights to be a breach of article 3 in *Warwick v United Kingdom* (Application No. 9471/81). And caning by a stepfather violated article 3 in *A v United Kingdom* (1999) 27 EHRR 611. This is accepted. None of these activities are permitted by the current criminal law of Scotland.

[10] The European Court of Human Rights has applied article 3 only to actions which reach a minimum level of severity. Jeremy Costello-Roberts (*Costello-Roberts v United Kingdom* (1995) 19 EHRR 112) complained of being slippered three times on the buttocks through his shorts with a rubber-soled gym shoe by his headmaster in private. He maintained that there had been an assault on his dignity and physical integrity, but the Court held that the minimum level of severity had not been attained. This case is however now of some vintage. A distinction must also be drawn between a challenge to application of the law as

in the *Costello-Roberts* case and a failure by the state to legislate to provide an adequate legal framework of protection, which is the issue here. This was a distinction drawn by the European Court of Human Rights in *O'Keeffe v Ireland* (2014) 59 E.H.R.R. 15. In the latter case the applicant's core complaint was that the state had failed, in violation of its positive obligation under art.3, to put in place an adequate legal framework of protection of children from sexual abuse, the risk of which the state knew or ought to have known. The Court makes it clear that it is not necessary to show that "but for" the state's omission ill-treatment would not have happened. A failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the state. This positive obligation to protect is however to be interpreted in such a way as not to impose an excessive burden on the authorities. Measures should, at least, provide effective protection in particular of children and other vulnerable persons and should include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.

[11] The obligation of the state to protect children from serious ill-treatment is considered in some detail in the judgment of Baroness Hale of Richmond in *E v Chief Constable of Northern Ireland* [2008] UKHL 66, [2009] 1 AC 536. As she explains the special vulnerability of children is relevant both as a factor in assessing whether the treatment to which they have been subjected reaches the minimum level of severity that is needed to attract the protection of article 3 and as to the scope of the obligations of the state to protect them from such treatment. Steps should be taken to enable effective protection to be provided particularly to children and other vulnerable members of society. Article 3 required the state and its emanations to do all that could reasonably be expected of them to prevent the infliction by third parties of such treatment. The reasonableness of the steps to be taken to protect the parents and children has to be assessed in the light of the evidence and applying the test of proportionality. Protection should not be unduly burdensome on the state (see judgment of Lord Carswell at paragraph 48). The argument in relation to physical punishment is that it should be straightforward to afford children the protection of the law against assault. To

remove the defence of reasonable chastisement would not be unduly burdensome on the state. As explained below this has been done in other jurisdictions and there is now weighty domestic support in favour of such a step.

[12] Turning to the issue of minimum level of severity, in the recent case of *Bouyid v Belgium* (2016) 62 EHRR 32 a majority of the Grand Chamber of the European Court of Human Rights reiterated that ill-treatment that attains a minimum level of severity usually involves actual bodily injury or intense physical or mental suffering. However, the Court went on to say:

> "even in the absence of these aspects, where treatment humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition set forth in art.3. It should also be pointed out that it may well suffice that the victim is humiliated in his own eyes, even if not in the eyes of others."

The Court held that a slap on the face by a police officer, resulting in some minor bruising, constituted degrading treatment and represented a violation of article 3. The decision was controversial in so far as the original Chamber of the Court and the minority of the Grand Chamber did not consider a slap of sufficient severity to constitute a violation of article 3. The decision does however show that the position of the Court has developed.

[13] In considering article 3 the Court has repeatedly referred to protection of dignity as one of the main purposes of the article. This can be seen from the decision in *Tyrer v United Kingdom*. There was a greater emphasis on the concept of "dignity" in the *Bouyid* case. The Court reviewed international human rights instruments, starting with the 1946 Charter of the United Nations, which reaffirms "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small." It went on to cite the Preamble to the Universal Declaration of Human Rights which refers to "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family" as the foundation of freedom, justice and peace in the world.

Article 1 of the Declaration provides that "all human beings are born free and equal in dignity and rights." The recital continues with numerous references to the concept of "dignity" in international instruments, including the preamble to the United Nations Convention on the Rights of the Child and the preamble to the Charter of Fundamental Rights of the European Union. The Court also refers to the particular vulnerability of minors, and the consequent recognition in international instruments of the right of the child to measures of protection. The fact that one of the complainers was only 17 years old did influence the decision of the majority. The judgment refers to the need to take account of the vulnerability of minors, affirmed at an international level and the consequent need for greater protection of minors than adults (paragraphs 109 and 110).

[14] The *Bouyid* case may be taken as a further marker that the Strasbourg court has moved on, and that earlier challenges to corporal punishment of children such as in *Costello-Roberts,* which foundered on the concept of the minimum level of severity should now be reviewed. It is ten years since Northern Ireland's Commissioner for Children sought judicial review of Northern Irish legislation providing for a defence of reasonable chastisement of a child to a charge of assault ([2007] NIQB 115). Gillen J (as he then was) accepted that children represented a vulnerable class of individuals who should be accorded particular protection, and that the nature of that protection must "move with the grain of our times and accord with contemporary notions of social justice." He accepted that changes in social standards demanded better provision for the vulnerable if their human dignity was not to be impaired. He acknowledged the influence of UNCRC but held that article 3 did not require the total abolition of corporal punishment of children as this "would be to so diminish the impact of article 3 that all previous judicial references to a minimum level of severity would be rendered meaningless..." His judgment must however now be reviewed in the light of developments over the last decade.

[15] Since the Northern Irish decision, the international consensus on corporal punishment of children has changed. The change reflects an increased focus on the United Nations Convention on the Rights of the Child (UNCRC). Article 19 of UNCRC provides:

> "1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
> 2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement."

Article 37 contains similar provisions to article 3 of ECHR, it starts:

> "States Parties shall ensure that:
> (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment...."

[16] The Committee on the Rights of the Child, which monitors implementation of UNCRC, produces General Comments which clarify and explain the various articles. General Comment No 8 (2006) makes it clear that all forms of violent punishment of children are incompatible with UNCRC. It says:

> "There is no ambiguity: "all forms of physical or mental violence" does not leave room for any level of legalised violence against children."

The United Kingdom reports regularly to the Committee. In its observations on the United Kingdom's 2008 report, the Committee expressed concern at the United Kingdom's failure to explicitly prohibit all corporal punishment in the home. The Committee went out of its way to emphasise its view that the existence of any defence in cases of corporal punishment of children did not comply with the principles and provisions of the Convention, as it suggested that some forms of corporal punishment were acceptable. All parts of the United Kingdom, including Scotland, were called on to repeal legal defences to physical punishment of children. Most recently, in its 2016 concluding observations on the fifth period report of the United Kingdom, the Committee specifically mentioned all devolved

administrations again urging the United Kingdom to prohibit as a matter of priority all corporal punishment in the family, including through the repeal of all legal defences, such as "reasonable chastisement".

[17] The United Kingdom is now significantly out of step with other European states in relation to corporal punishment. In 2008 the Council of Europe launched the "Raise your hand against smacking" campaign, seeking total abolition of physical punishment of children. By 2016 27 of the 47 member states had abolished physical punishment of children, with 8 more committed to abolition. Of the 28 member states of the European Union, 22 have fully prohibited all corporal punishment of children, the last to do so being Lithuania on 14 February 2017. On a wider front there is a "Global Initiative to End All Corporal Punishment of Children" launched in Geneva in 2001. This has the support of UNICEF and UNESCO.

[18] There is increasing impatience with the position of the United Kingdom on corporal punishment. In July 2015 the Human Rights Committee of the United Nations criticised the United Kingdom for its failure to outlaw corporal punishment, with specific mention of the Scottish defence of "justifiable assault". The Committee called on the United Kingdom to put an end to corporal punishment in all settings, including the home. The European Social Charter, in article 17, requires legal prohibition of any form of violence against children. This charter is monitored by the European Committee of Social Rights. In July 2012 the Committee commented that the situation in the United Kingdom was not inconformity with article 17 as not all forms of corporal punishment were prohibited in the home.

[19] The international consensus on the unacceptability of corporal punishment is supported by evidence to suggest that such punishment has the potential to damage children and carries the risk of escalation into physical abuse. This is set out in a report commissioned by the NSPCC Scotland, Children 1st, Barnardo's Scotland and the Children and Young People's Commissioner Scotland dated November 2015 and entitled "Equally

Protected? A review of the evidence on physical punishment of children". This report noted that public attitudes towards physical punishment were changing, with a noticeable shift towards viewing physical punishment as unacceptable in modern society. There is now pressure for change in the law from children's organisations, the Church of Scotland, the Scottish Directors of the Public Health Group, the Royal College of Paediatrics and Child Health, the Royal College of Nursing, Social Work Scotland, the Police Violence Reduction Unit and the Scottish Police Federation. Scotland's National Action Plan for Human Rights 2013-2017 recognised the national and international concern that Scotland has to date retained a defence of "justifiable assault" in respect of children and identified this as an area requiring change.

[20] The shift in attitudes towards physical punishment of children has now gathered such momentum that the position under article 3 of ECHR must be open to review. There is a strong argument that any violent punishment of a child is contrary to the dignity of the child and as such a form of punishment that is degrading. If the law relating to assaults on children is left as it currently stands then there is a serious risk that punishment of a child in Scotland, that has to date been treated as 'justifiable' under domestic law, will now represent a violation of article 3 of ECHR.

Article 8 ECHR

[21] Article 8 states:

> "1. Everyone has the right to respect for his private . . . life . . .
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

If article 3 of ECHR proscribes corporal punishment of children then there will be no need to consider the matter under article 8. Unlike article 3, rights under article 8 are qualified. The state may interfere with the right to respect for a person's private life in the circumstances

set out in the second part of article 8. In consequence, when considering whether there is a violation of article 8, it is necessary to consider whether the subject-matter falls within the scope of article 8, whether there has been interference, whether the interference was 'lawful', whether it had a legitimate aim and finally whether the interference was "necessary in a democratic society."

[22] In *Costello-Roberts v United Kingdom* the European Court of Human Rights recognised that the concept of "private life" covered a person's physical and moral integrity, and was of the opinion that the protection afforded by article 8 to a person's physical integrity could be wider than that contemplated by article 3. The Court was not however prepared to hold that the slippering in that case entailed adverse effects for the boy's physical or moral integrity sufficient to bring the case within article 8. Matters have however moved on in this area too. Gillen J reviewed more recent authority in the case brought by the Northern Irish Commissioner for Children and accepted that corporal punishment fell within the scope of article 8. Perhaps most telling of the authorities he cites is *Pretty v United Kingdom* (2002) 35 EHRR where the Court said:

> "(61) .... the concept of 'private life' is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. It can sometimes embrace aspects of an individual's physical and social identity ... Article 8 also protects a right to personal development and the right to establish and develop relationships with other human beings and the outside world. Though no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees."

At paragraph 65 of *Pretty* the court went on to say "The very essence of the Convention is respect for human dignity and human freedom." Gillen J accepted that it was therefore correct to start from the premise that children have the same rights as adults not to suffer assault, and if there are reasons to make exceptions, it is these that require justification, not the basic right.

[23] Article 8 does not merely require the state to refrain from interference. The state has a positive obligation to operate a legislative or administrative scheme to protect the right to respect for private life. This may involve criminal law remedies, particularly where effective deterrence is important, and in areas where a state has in general opted for protection based on the criminal law (see *X and Y v Netherlands* (1986) 8 EHRR 235, which involved a sexual assault on a disabled 16 year old). Given that in Scotland assault is a criminal offence, and the issue here is whether there should be a defence of "reasonable chastisement", it would be difficult to argue that there has been no interference with the rights of children.

[24] It can be argued that leaving the defence of reasonable chastisement open to parents serves a legitimate aim in so far as it permits parents to use mild physical punishment as a means of educating and correcting their children. This argument was acknowledged in *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246 by Lord Nicholls of Birkenhead at paragraph 47 and Baroness Hale at paragraph 77. The principal issue is however whether it is necessary in a democratic society to permit parents, and those with charge or care of children, to assault them however mildly in the name of punishment. Permitting physical punishment of children will not violate article 8 if there is a pressing social need and the permission is proportionate.

[25] The argument about corporal punishment does not appear to centre on the necessity for children to be disciplined by any form or assault. It can be shown that there are alternative methods of correction and discipline that do not involve striking children. Further, there is now evidence to suggest that physical punishment may damage children and carries the risk of escalation into physical assault. Corporal punishment of children is proscribed in all other settings. No other member of society can be assaulted in the name of discipline. The issue is rather whether criminalising behaviour that occurs within the family represents an unacceptable interference with family life and would result in damage to the family that would in turn damage children. This was the concern of the Canadian Supreme Court in *Canadian Foundation for Children Youth and the Law v Canada (Attorney General).* It is the

current concern of the Scottish Ministers. Mark McDonald, Minister for Childcare and Early Years, indicated as recently as November 2016 that the government does not propose to change the law as to do so risks unnecessarily or unreasonably criminalising parents.

[26] As Baroness Hale acknowledged in the *Williamson* case physical punishment within the family setting raises more complex questions than does corporal punishment in institutional settings. Article 8 of ECHR enshrines a right to respect for family life. Criminalising corporal punishment within the family implies greater state interference in family life. Where there is a need to balance Convention rights then it will generally fall to the state in question to address this. The European Court of Human Rights affords states a 'margin of appreciation' for this purpose. There is however now a change in commonly accepted standards in relation to corporal punishment of children. This is set out in paragraphs [13] to [17] above. The point may be reinforced in the context of article 8 by the leader in the Herald newspaper on 16 April 2017 questioning why Scotland is lagging behind universally-accepted standards when it comes to the abolition of physical punishment of children and referring to "the misguided notion that the intention of legal reform is somehow to criminalise parents for their actions, whereas the point is to help redefine what is acceptable in how we treat our children."

[27] The question is whether the convergence of international standards in relation to corporal punishment has reached the point where the issue can no longer be treated an area for the state's discretion. If this is shown to be the case, and there is a significant body of evidence that it is, it will be open to the European Court of Human Rights to rule that the issue no longer falls within the United Kingdom's margin of appreciation. It will then no longer be open to the United Kingdom, or its constituent parts, to claim that 'smacking' remains legal in order to protect families.

[28] It is also possible to look at the issue from the other direction and argue that the law as presently framed may constitute an interference with family life as it leaves parents

uncertain about their rights. Section 51 does not validate smacking or any other assault, it simply points to a series of factors that are relevant to a defence. The Human Rights Act 1998, section 3, requires subordinate legislation to be "read and given effect in a way which is compatible with Convention Rights". The Criminal Justice (Scotland) Act 2003 is subordinate legislation by virtue of section 21(2) of the Human Rights Act 1998. It must accordingly be read in such a way as to comply with both article 3 and article 8 of ECHR. This could materially restrict the availability of the defence. Were this the case however, it could be argued that section 51 contravenes article 7 and potentially article 5 of ECHR as there would be uncertainty about what constituted a defence and accordingly when a parent would be committing an offence.

[29] Article 7 of ECHR provides that:

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed."

Article 5 states:

> "Everyone has the right to liberty..."

It is inherent in article 7 that an offence is clearly defined in law. The argument on this issue generally is set out with reference to the common law offence of breach of the peace in *Smith v Donnelly* 2002 JC 65. In that case the High Court of Justiciary also referred to article 5(1) of ECHR and the necessity that the applicable national law meets the standard of "lawfulness". This requires that all law be sufficiently precise to allow the citizen—if need be, with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. It must be accepted that this argument did not appeal to Gillen J in the Northern Irish case, nor to the Canadian Supreme Court in *Canadian Foundation for Children Youth and the Law v Canada (Attorney General)* 2004 1 SCR 76 but the issue has not been examined with specific reference to the Scottish position and in particular to the Human Rights Act 1998 and articles 5 and 7 of ECHR. The argument does

show that the issue in relation to interference in family life is not one-sided. Parents may currently be left in an exposed position.

Article 14 ECHR

[30] Article 14 states:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Article 14 safeguards individuals, placed in similar situations, from any discrimination in the enjoyment of the rights and freedoms set forth in other provisions of ECHR, "as though Article 14 formed an integral part of each of the provisions laying down rights and freedoms" (*Marckx v Belgium* (1979) 2 EHRR 330, see paragraph 32). Lord Hoffmann put it this way in *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173 , para 14: "Discrimination means a failure to treat like cases alike". He mentions certain characteristics as being seldom, if ever, acceptable grounds for difference in treatment. These include race, caste, membership of a political party and gender. Youth does not feature in his list and has not to date been taken as one of areas where discrimination is particularly difficult to justify.

[31] As noted by the Grand Chamber of the European Court of Human Rights in *Sommerfeld v Germany* (2004) 38 EHRR 35 article 14 complements the other substantive provisions of the Convention and Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of article 14 does not presuppose a breach of those provisions and to that extent it is autonomous, there can be no room for its application unless the facts at issue fall within the ambit of one or more of the other provisions. A violation of article 14 arises where there is: (1) a difference in treatment, (2) of persons in relevantly similar positions, (3) which does not pursue a legitimate aim, or (4) if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be

realised (see explanation given by Lord Reed in *R (JS) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449 at paragraph 7). As he explains, in practice the focus is generally on whether differential treatment is justified. Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment.

[32] If corporal punishment of children violates article 3, then it cannot be justified and this leaves little scope for the application of article 14. There possibly greater potential for the application of article 14 in a case falling within the ambit of article 8. It is abundantly clear that children are treated differently from adults in so far as they are not protected by the criminal law from all assaults by parents and carers. One adult cannot strike another and claim that the blow was justifiable as a punishment. A parent or carer may strike a child as punishment and be exempt from criminal liability (provided the blow was not to the head, was not a shaking, did not involve use of an implement and the attack cannot be characterised as "ill-treatment"). Children are therefore treated differently. In so far as the child's position may be compared with that of the adult, they can both be characterised as 'victims of assault' but the child is actually more vulnerable than the adult and in need of greater, not lesser, protection. The supposed aims of allowing assaults on children are, first, that children require 'discipline', but it is now acknowledged that there are other and better ways of disciplining children and allowing corporal punishment undesirable consequences (see paragraphs [13] to [18] above). Second, it is said that it is necessary to allow some mild violence towards children in order to avoid the greater harm to them of damaging family life. That notion is now also challenged. The argument on proportionality has changed.

[33] Where a substantive article of the Convention or its Protocols has been relied on both on its own and in conjunction with article 14, but the Court has found there has been a breach of the substantive article, it is not generally found it necessary to consider the case under article14 as well. An exception is made if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case (see *eg. Oršuš v Croatia*

(2011) 52 E.H.R.R involving discrimination against Roma children in schools). In the case of corporal punishment, the arguments relating to discrimination are closely related to the arguments based on the substantive articles of ECHR, namely articles 3 and 8. In these circumstances article 14 may add little to the debate.

UNCRC

[34] UNCRC has been increasingly influential in the interpretation of ECHR as it applies to children. This can be seen at a national level in, for example *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246 where parents and teachers were held not to be entitled to establish a school where corporal punishment was permitted. The need to regard the best interests of the child as a primary consideration was part of the ratio for allowing the appeal of a somewhat unmeritorious asylum seeker in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4. Baroness Hale explained that in making a proportionality assessment under article 8 of ECHR the best interests of the child must be a primary consideration as required by article 3 of UNCRC. In *E v Chief Constable of Northern Ireland* Lord Carswell referred to the requirement to have regard to the best interests of the child in terms of UNCRC as "a consideration which should properly be taken into account by the state and its emanations in determining upon their actions". Likewise the European Court of Human Rights, when dealing with a case regarding a child, will now refer to UNCRC, as for example occurred in the *Bouyid* case and in *O'Keeffe v Ireland*. UNCRC is firmly ensconced as an important measure for interpreting ECHR.

[35] There are however limits to the support that can be derived from UNCRC. There was an attempt to rely on article 3.1 of UNCRC in an attempt to challenge the welfare benefits cap *(R(SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449). The issue split the Supreme Court. Baroness Hale would have allowed the appellants to rely on UNCRC both to inform the interpretation of article 8 and the proportionality assessment required by article 14, read with the right to property in protocol 1, article 1 of ECHR. Lord

Kerr stated expressly that he considered article 3.1 directly enforceable in United Kingdom domestic law. These two justices were however in the minority. The majority (Lord Reed, Lord Carnwath and Lord Hughes) held that article 3.1 was not relevant to any article 8 issues in that case and even if the Secretary of State had failed to show how the relevant regulations were compatible with article 3.1 of UNCRC this was not the relevant test when considering whether there had been discrimination. Further they adhered to the accepted principle that domestic courts have no jurisdiction to interpret or apply an unincorporated treaty such as UNCRC (see Lord Reed, para 90). The comments of the United Nations Committee on the Rights of the Child are certainly not part of the domestic law. The decision of the majority will not found direct reliance on UNCRC in relation to abolition of corporal punishment of children.

[36] The position is arguably different in Scotland as a result of the Children and Young People (Scotland) Act 2014, section 1, which provides:

> **1 Duties of Scottish Ministers in relation to the rights of children**
> (1) The Scottish Ministers must—
> (a) keep under consideration whether there are any steps which they could take which would or might secure better or further effect in Scotland of the UNCRC requirements, and
> (b) if they consider it appropriate to do so, take any of the steps identified by that consideration.
> (2) In complying with their duty under subsection (1)(a), the Scottish Ministers must take such account as they consider appropriate of any relevant views of children of which the Scottish Ministers are aware.
> (3) The Scottish Ministers must promote public awareness and understanding (including appropriate awareness and understanding among children) of the rights of children...

The failure to address the issue of corporal punishment clearly falls within scope of this section, but does not bind the Ministers to take any particular step. They are however open to challenge as to whether they have kept an issue such as corporal punishment under consideration, and as to what they propose to do about the issue.

Conclusion

[37] In conclusion there are strong legal reasons to support further consideration of the law relating to physical punishment of children, given the position under articles 3 and 8 of ECHR, the influence of UNCRC and the legislative commitment to keeping under consideration steps which would secure better or further effect in Scotland of the UNCRC requirements.

[38] It would be relatively straightforward to prohibit corporal punishment of children in Scotland altogether, by repealing the first three subsections of section 51 of the Criminal Justice (Scotland) Act 2003 and substituting a provision such as:

> "Assault of a child cannot be justified on the grounds that such an assault constituted a physical punishment, whether by a person claiming to be exercising a parental right or a right derived from having charge or care of the child, or by any other person."

It may be considered appropriate to make an exception similar to that found in section 16 of the Standards in Scotland's Schools etc Act 2000 in terms such as:

> "It shall not be an assault of a child to take reasonable steps with the intention of averting –
>
> (a) an immediate danger of personal injury to; or
>
> (b) an immediate danger to the property of,
>
> any person (including the child concerned)."

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13 June 2017

OPINION OF SENIOR COUNSEL

Re

THE LEGALITY OF SCOTS LAW ON THE PHYSICAL PUNISHMENT OF CHILDREN

2017

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Working Group on Equal Protection.