

# **CHILDREN (EQUAL PROTECTION FROM ASSAULT) (SCOTLAND) ACT 2019**

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

#### ***Section 1 – Abolition of defence of reasonable chastisement***

5. Until this Act comes fully into force, there is a defence, mainly at common law, under which the physical punishment of a child by a parent, or by a person having charge or care of a child, is justifiable and so does not constitute assault of the child. The defence is commonly referred to as the defence of “reasonable chastisement”. Section 1(1) abolishes this defence insofar as it exists at common law. A “rule of law”, when referred to in statute, means a principle of the common law. The common law is a body of law developed over time from individual judicial decisions and from legal texts and other sources of authority.
6. Section 1(2) repeals section 51 (physical punishment of children) of the Criminal Justice (Scotland) Act 2003. Section 51 of the 2003 Act restricted the scope of the common-law rule by prohibiting any physical punishment of a child that involved hitting the child with an implement, hitting the child on the head, or shaking the child. It also put into statute common law principles about the factors a court must have regard to when considering whether an assault on a child, in exercise of a parental right or a right derived from having charge or care of a child, was justifiable.
7. The effect, therefore, of section 1 is that a parent, or anyone in charge or care of a child, will no longer be able to claim a defence of reasonable chastisement or justifiable assault if accused of assaulting a child in any proceedings (civil or criminal). Children will therefore be in the same position and have the same protections, in terms of the law on assault, as adults. To secure a conviction for assault the prosecution has to demonstrate *mens rea* or “criminal intent” on the part of the accused. As with adults, the requirement for *mens rea* (criminal intent) as an element of the offence of “assault” would prevent trivial physical contact being treated as an assault. Nor, for example, would the use of physical force in medical treatment or to remove a person from danger be treated as an assault (so long as no criminal intent was present).
8. It should be noted that section 51 of the 2003 Act also amended section 12 of the Children and Young Persons (Scotland) Act 1937 (“the 1937 Act”) to remove references to assault (which were made unnecessary by the 2003 Act and common law) and to remove the reference in that section to the right of parents and others to administer physical punishment to a child. The repeal of section 51 by the Act has no effect on the 1937 Act and does not serve to undo the amendments made to it by the 2003 Act (see section 15(2)(d) of the Interpretation and Legislative Reform (Scotland) Act 2010).
9. The Act does not define “child”. The meaning of “child” will be determined by the common law rule. This is so that the abolition of that rule extends to the whole rule.