



OFFICIAL REPORT
AITHISG OIFIGEIL

Equalities and Human Rights Committee

Thursday 6 June 2019

Session 5



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EQUALITIES AND HUMAN RIGHTS COMMITTEE

15th Meeting 2019, Session 5

CONVENER

*Ruth Maguire (Cunninghame South) (SNP)

DEPUTY CONVENER

*Alex Cole-Hamilton (Edinburgh Western) (LD)

COMMITTEE MEMBERS

Mary Fee (West Scotland) (Lab)

*Fulton MacGregor (Coatbridge and Chryston) (SNP)

*Oliver Mundell (Dumfriesshire) (Con)

*Gail Ross (Caithness, Sutherland and Ross) (SNP)

Annie Wells (Glasgow) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

John Finnie (Highlands and Islands) (Green)

Rhoda Grant (Highlands and Islands) (Lab) (Committee Substitute)

Alison Harris (Central Scotland) (Con) (Committee Substitute)

Anne Marie Hicks (Crown Office and Procurator Fiscal Service)

Rt Hon James Wolffe QC (The Lord Advocate)

CLERK TO THE COMMITTEE

Claire Menzies

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament
Equalities and Human Rights
Committee

Thursday 6 June 2019

[The Convener opened the meeting at 09:15]

Decision on Taking Business in
Private

The Convener (Ruth Maguire): Good morning, and welcome to the 15th meeting in 2019 of the Equalities and Human Rights Committee. I ask that all mobile devices be switched off and put away, please. We have received apologies from Annie Wells and Mary Fee, and I welcome Alison Harris and Rhoda Grant. John Finnie, the member in charge of the Children (Equal Protection from Assault) (Scotland) Bill, has joined us as well—you are welcome.

Agenda item 1 is a decision on whether to take items 3 and 4 in private. Item 3 is consideration of the committee's approach to forthcoming legislation and item 4 is consideration of our approach to scrutiny of the Scottish Government's draft budget 2020-21. Do members agree to take those items in private?

Members indicated agreement.

Children (Equal Protection from
Assault) (Scotland) Bill: Stage 2

09:15

The Convener: Agenda item 2 is the Children (Equal Protection from Assault) (Scotland) Bill. I welcome the Lord Advocate, James Wolffe QC, and Anne Marie Hicks, the national procurator fiscal for domestic abuse at the Crown Office and Procurator Fiscal Service. Good morning—you are both very welcome. I invite the Lord Advocate to make an opening statement of up to five minutes, please.

The Lord Advocate (Rt Hon James Wolffe): Thank you, convener. I am grateful for the invitation to give evidence again to the committee, as head of the system for the investigation and prosecution of crime in Scotland, and to supplement the written evidence that you have already received from the Crown Office and Procurator Fiscal Service.

The bill that you have under consideration will simplify the law by removing from the law of assault the defence of reasonable chastisement and by repealing section 51 of the Criminal Justice (Scotland) Act 2003, which restricts the scope of that defence. It is worth being clear at the outset that, as the law stands, parents do not have an unqualified right to smack or chastise a child. Subject to the defence of reasonable chastisement, an assault by a parent on a child is a criminal offence. Allegations that a parent has assaulted their child are investigated by the police and reported to the Crown and may be, and are, prosecuted.

When considering any report of an alleged crime, the prosecutor must address two things: first, whether there is sufficient admissible, credible and reliable evidence that the accused has committed a crime known to the law of Scotland; and, secondly, if there is sufficient evidence, what action if any would be in the public interest. Those considerations apply to an allegation that a parent has assaulted their child, just as they apply in any other case.

The Scottish prosecution code sets out the factors that may, depending on the circumstances, be relevant in assessing the public interest. Those include the nature and gravity of the offence; the impact of the offence on the victim and other witnesses; the age, background and personal circumstances of the accused; the age and personal circumstances of the victim and other witnesses; the attitude of the victim; the motive for the crime; the age of the offence; mitigating circumstances; the effect of the prosecution on the accused; and the risk of further offending.

The code points out that the actions that are available to prosecutors are not limited to prosecution. They include diversion, a formal warning and various direct measures that a prosecutor may offer as an alternative to prosecution. In appropriate circumstances, it may be in the public interest to take no action. Making decisions within the framework of the Scottish prosecution code is part of the daily work of professional prosecutors. If the bill is passed, cases that are reported to the procurator fiscal will continue to be assessed by reference to the two tests that I have mentioned: whether there is sufficient evidence in law that the accused has committed a crime and, if so, what action would be in the public interest.

Repeal of the defence of reasonable chastisement would not mean that the prosecutor would ignore the special features of the relationship between parent and child. Those features will be present in any consideration of the public interest. For example, they will be present in consideration of the context and circumstances of the alleged offence, the impact on the victim, the circumstances of the accused and the effect of a prosecution on the accused and the victim. Paragraph 40 of the United Nations Convention on the Rights of the Child general comment 8, of 2006, reminds us that,

“While all reports of violence against children should be appropriately investigated”,

it does not follow that all cases that come to light should be prosecuted.

If the bill is passed, I intend to issue Lord Advocate’s guidelines to the chief constable of Police Scotland on the investigation and reporting of allegations of assaults by parents on children. Those guidelines and prosecutorial policy will support a proportionate and appropriate response to the individual circumstances of particular cases. When appropriate, that response may include the use of informal response by the police, recorded police warnings, diversion and other alternatives to prosecution. At the same time, prosecution will be enabled when that is properly justified by reference to the circumstances of the individual case. The approach will be informed by our responsibility to protect children from harm and by a consideration of the best interests of the child.

I am confident that if the bill is enacted, Scotland’s prosecutors will continue—as they do today—to apply sound and responsible judgment to the cases that are reported to them in a way that is consistent with the values that underpin all prosecutorial decision making: impartiality, thoroughness, integrity, sensitivity and professionalism.

The Convener: Thank you. That was very helpful. We will move to questions.

Oliver Mundell (Dumfriesshire) (Con): I put on record my thanks to the Lord Advocate for attending the meeting. I am pleased to hear that Lord Advocate’s guidance will be issued in the event that the bill is passed.

You mentioned the legal relationship between parents and children. Would you go as far as to recognise that that relationship is different and distinct from that between two adults, even when those two adults are connected?

The Lord Advocate: One of the things that one learns as a prosecutor is that every case must be considered on its individual facts and circumstances. In all the decision making that prosecutors undertake, they must look carefully at the specifics of particular facts and circumstances. When one is dealing with a case involving an alleged assault by a parent on a child, the fact that one is dealing with a parent and a child is one of the circumstances that must be considered.

As the statistics show, we see assaults by parents on children. When a parent assaults a child and the public interest justifies it, that case will be prosecuted.

Oliver Mundell: I am asking whether it is recognised in law that the relationship between parents and children is different from the relationship between two adults. Is it correct to say that that difference is recognised?

The Lord Advocate: There are legal aspects of the relationship that are particular to that relationship, and the factual context is different from that in other relationships.

Oliver Mundell: I am interested in what responsibilities the law places on parents and what rights they can exercise in relation to their children.

The Lord Advocate: I do not think that it would be right for me to give you a general exegesis on the law of parent and child. We are in a context in which parents have responsibilities in relation to their children; they also have certain rights, with a view to promoting those responsibilities.

Prosecutors will look at what the evidence is in any given case and whether it supports the conclusion that a crime has been committed. If a crime has been committed, they will look at the particular circumstances of the case in determining what action it is appropriate to take in response.

The Convener: A couple of colleagues would like to follow up on that specific point.

Oliver Mundell: I have one more question on the same point.

Do prosecutors take parents' statutory rights and responsibilities into consideration—which involves looking across different pieces of legislation—when they decide whether it is in the public interest to prosecute?

The Lord Advocate: The responsibilities of parents for the upbringing of their children do not justify parents committing crimes against their children.

Alex Cole-Hamilton (Edinburgh Western) (LD): Good morning. I want to follow up on Oliver Mundell's line of questioning. I think that he was trying to bottom out where in statute the relationship between parent and child is defined. During my speech in the stage 1 debate on the bill, Murdo Fraser intervened to make the point that, if parenting techniques were to be applied to another adult—for example, if an adult was grounded or had something that they valued removed as a sanction—that would be seen as abusive or inappropriate.

If a person has a duty of care for someone who is in their charge, such as that which a parent has to their child, the same could be said for the duty to an elder relative with Alzheimer's who has a mental capacity of a three-year-old and who is looked after. Is there a legal framework for the rights and responsibilities of people who have a duty of care? If so, is it different for people who care for their children and people who care for adults who have incapacity?

The Lord Advocate: As a generality, the legal framework differs. As a prosecutor, one is looking at whether the evidence discloses a crime that is known to the law of Scotland. In this context, that crime would be an assault: an attack on the person of another with deliberate intent. If that is what the evidence discloses, what does the public interest demand by way of response? Into that latter public interest question, all the relevant facts and circumstances of any case, whether it involves a parent and child or a vulnerable older person, would be taken into consideration.

Alex Cole-Hamilton: Something that has come up time and again in our consideration of the bill at stage 1 is the slight incongruity that an adult who is responsible for a child and an adult who is responsible for an adult who has a mental age of a child work within different parameters. We would not believe for a minute that an adult could exercise the defence of reasonable chastisement if they sanctioned an adult with the mental age of three. Is that incongruous?

The Lord Advocate: It is the current state of the law. The committee is considering whether the law should be changed. Prosecutors work within the law as Parliament lays it down from time to time.

Rhoda Grant (Highlands and Islands) (Lab):

You have mentioned that parents are currently charged with assault and prosecuted for it. Is the defence of reasonable chastisement used or are those offences so severe that nobody could use the defence?

The Lord Advocate: Prosecutors already see a wide range of offences. I asked for some illustrations and have been given examples that range from cases that were ultimately dealt with by a decision to take no further action, although prosecutors were satisfied that there was an assault in law, and cases in which options other than prosecution were taken, all the way up to some of the most serious cases that we see.

It may be important to separate out the stages of investigation and prosecution. Under the current law, of course, a case of an assault on a child would require to be investigated in order to assess whether, in all the facts and circumstances, that defence could properly be made out. I do not have any statistical information on the incidence of reliance on the defence by accused persons in those cases or, indeed, in the context of prosecutorial decision making. Anne Marie Hicks may like to add something from her experience.

Anne Marie Hicks (Crown Office and Procurator Fiscal Service): Although it is easier for us to find the cases that involve an assault on a child by a parent or someone with carer charge of a child, it is not necessarily easy from that to see the cases in which someone may have tried to assert that defence. Certainly, in quite a number of the cases that we have had, the incident occurred in the context of an assault by way of punishment for something that they perceived that the child had done wrong. In one case, someone thought the child had been lying or had come home late; in another, they thought that the child had stolen money from a purse.

Clearly, a range of cases is reported to us; some involve direct violence without a punishment element, but there are definitely others in which the account given indicates that what happened was punishment for something that it had been deemed the child had done wrong.

09:30

Oliver Mundell: Is there any public interest in prosecuting a parent for smacking or physically punishing their child where there are no child welfare concerns and where the action clearly did not result in any lasting pain? Could tests be put into the bill or set out in guidance to make it absolutely clear to parents what you feel amounts to criminal intent?

The Lord Advocate: As I said a few moments ago, in this and in many contexts, there is no

substitute for paying very close attention to the facts of particular cases. Conduct that in one context might look relatively trivial or minor might, in another, carry much more serious significance. I am not trying to be unhelpful in not being drawn on responding to particular scenarios, but what I can say is that the kinds of considerations that you have mentioned will be taken into account by prosecutors when they look at a particular case.

Going back to my opening remarks, I would point out that among the considerations and factors that prosecutors will need to consider will be the question of our responsibility to protect children from harm and a recognition of the need to take the child's best interests into account in the round. As for the Lord Advocate's guidelines that I am minded to issue to the chief constable and which we are currently discussing with the police, I anticipate that they will seek to articulate the considerations that the police may have regard to in deciding whether it would be necessary to report a particular case to the fiscal instead of taking other action.

Oliver Mundell: I ask this with all due respect, but when Parliament chooses to legislate for things and put them in statute, is it not normal to at least put some parameters or tests into that legislation, as we saw with the domestic abuse legislation? If you feel that there is a need for guidance or to set out some of these tests for the police, is it not better to have in the bill a broad provision relating to the best interests of the child? Would that not make more legislative sense, make things clearer for parents and the police and make the legislation easier for you to operate?

The Lord Advocate: The premise of your question is that the law of assault is unclear, but I would point out that it is applied day and daily by police officers and prosecutors. There is not a problem with the clarity of the law. At the same time, though, a case could be made that removing the defence with the qualification that currently applies would increase that clarity.

As for the framing of guidelines, I issue Lord Advocate's guidelines to the police on a number of matters. For example, I have defined the framework within which the police may issue recorded police warnings by giving instructions as to when cases must be reported. There is therefore nothing particularly novel or unusual in giving a framework within which the police may act.

I should say that it is a feature of our law that the police are not obliged to report every crime—they report within parameters that I lay down—and prosecutors are not obliged to prosecute every crime. The responsibility of the prosecutors is to take the action that is appropriate in the public interest in any given case.

The Convener: I see that you would like to ask a further question, Mr Mundell, but a couple of people would like to ask supplementary questions. I will let you back in after that.

Fulton MacGregor (Coatbridge and Chryston) (SNP): I welcome the report that you have provided to the committee. It will be helpful to our stage 1 deliberations.

I would like to tease something out, based on what you have said in your opening statements and some of your answers to Oliver Mundell. With regard to an allegation that a child has been smacked or has had physical force used on them, what would be the difference for your team the day after the legislation came into effect compared with the day before?

The Lord Advocate: Let us start with the question of investigation. For something to happen, the matter must be brought to the attention of the police and the authorities. If an allegation is made today that a parent has assaulted a child, the police will require to investigate that. They will do that within the framework of the current legal regime. They will, in appropriate circumstances, report that to the procurator fiscal, who will assess the evidence that is available and determine whether there is evidence in law that a crime has been committed. If the procurator fiscal finds that there is, they will then ask what is in the public interest.

After the bill is passed, those processes will be the same. The one thing that will be different is that the qualified defence that is currently available to the allegation of assault will not be part of the law and, therefore, would not form part of the analysis of the legal question that police officers and, ultimately, prosecutors would have to ask themselves.

Anne Marie Hicks might have something to say, based on her experience.

Anne Marie Hicks: Obviously, as the Lord Advocate said, cases that are reported today would still be reported. The key difference is that, at the moment, that defence is available. It is only an available defence; it is not a barrier to cases being prosecuted. Section 51 of the 2003 act sets out factors for the court to consider. The court considers all of those factors and people are convicted in cases in which the circumstances merit it and the defence is not made out. In a sense, the bill simply provides clarity that that defence no longer applies in relation to the use of physical violence as a form of punishment on children. At the moment, that defence might apply or might not, depending on whether the test of the defence is made out.

Fulton MacGregor: I do not know whether you have seen the stage 1 evidence that we have

received from Social Work Scotland and Police Scotland, but both those organisations said that they did not think that there would be any change to the way in which they dealt with the process after the law was passed. Do you recognise the view of the police in that regard?

Anne Marie Hicks: In relation to the child protection work that they do, the police have an obligation to investigate any concerns that are brought to their attention about a child. That happens today, it will happen tomorrow and if the bill is passed, it will happen then. If there is evidence of a crime, they will report it.

Obviously, as prosecutors, if there were an available defence of reasonable chastisement or justifiable assault, we would have to consider that as part of our considerations. If that is no longer a defence, that will not be a factor. However, the same public interest considerations would still apply, and we will continue to take account of a lot of the considerations in terms of the defence that exist at the moment, which concern the nature and the gravity of the offence and all the surrounding contexts and circumstances.

Alex Cole-Hamilton: I would like to explore the issue of Lord Advocate's guidelines. I have come across them once before—it was in my previous professional capacity, when your predecessor issued guidelines on the criminalisation of victims of human trafficking who were coerced into committing criminal acts. On that occasion, we came up against the guidelines because they had not been adhered to by the police, and young people who were victims of trafficking had ended up in Polmont despite the guidelines from your predecessor.

With regard to the bill, when do you anticipate that you will issue guidelines? How will they be disseminated to your coppers on the ground, as it were?

The Lord Advocate: As I said, we are already in discussion with Police Scotland about the shape and parameters of guidelines. That is under active consideration. I certainly intend to issue guidelines as near as possible to the coming into force of the legislation. I issue guidelines to the chief constable, and it is then his responsibility to disseminate the instructions to his officers on the ground. I do not know whether Anne Marie Hicks wants to add anything.

Anne Marie Hicks: We will now have to work with the police on agreeing the content of any guidelines, and then it will be a matter for the police to incorporate them.

Alex Cole-Hamilton: Do you adapt guidelines over time if you ascertain that they are not working properly, or there have been too many

prosecutions, or too few? In such cases, do you move guidelines or change them in any way?

The Lord Advocate: I have the power under statute to issue instructions to the chief constable in relation to the reporting of crime, and these matters are kept under review. I do not recognise the idea of there being too many or too few prosecutions. That is not the way that we think about the job that we require to do.

Anne Marie Hicks: A good example is the Lord Advocate's issued guidelines on liberation. They were amended in the light of the Criminal Justice (Scotland) Act 2016, which introduced new provisions on liberation on undertaking and investigative liberation. The guidelines were updated to take account of that. That is the normal practice that we would adopt.

Alison Harris (Central Scotland) (Con): I have been listening with interest this morning, and I would like to ask you a couple of questions. During the stage 1 debate, Maree Todd said:

"I assure members that our intention is not to criminalise parents".—[*Official Report*, 28 May 2019; c 15.]

Does that intention have any legal force? Would it be, in your view, fair to say that that is a foreseeable outcome and consequence of the bill?

The Lord Advocate: From a prosecutorial point of view, the law is whatever Parliament enacts. We look to the law as it is in common law and in statute.

It is perhaps important to keep in mind that, at present, it is a crime for a parent to assault a child. As I said in my introduction, the law currently treats as criminal parents who assault their children. A qualified defence of reasonable chastisement is currently available, which will no longer be available to parents who assault their children if the bill is passed.

Alison Harris: Can I try to drill down into that? I appreciate that there is the reasonable chastisement element. Does the bill not have potential to criminalise loving and caring parents who use a smack on the back of the hand or the bottom, or a light tap? Does the bill not have potential, ultimately, to criminalise them, because that is going to be deemed to be assault? You are removing the reasonable chastisement clause.

The Lord Advocate: It is not a defence to an allegation of assault that it was motivated by love. The whole facts and circumstances would be taken into account in the context of considering what action was appropriate in the public interest if there was sufficient evidence that a crime had been committed. There is a range of circumstances in which crimes are committed and people offer benign motives. The motivation is not,

of itself, a defence, although it might be highly relevant to the decision and how the law responds.

09:45

The Convener: You are down to ask questions about guidelines and guidance.

Alison Harris: That was part of it. I appreciate that the Lord Advocate mentioned that guidelines would be brought in.

Anne Marie Hicks: I understand that the bill's intention is to remove the defence so that parents can no longer claim that it is acceptable to use physical violence as a form of corporal punishment of children. The policy driver of the bill is to say that that is no longer acceptable and to change attitudes.

I have read the policy memorandum and my team has been involved in the on-going discussions. We have watched the development of the policy with interest, so I understand that it is not being introduced with a view to increasing the number of people in court; it is about saying that physical violence should not be used as a form of punishment of children.

At its simplest, the policy is about removing the defence, but the Lord Advocate is saying that the use of physical violence as a form of punishment can already be a form of assault. It is today and it would be if the bill is passed; it is just that there would no longer be any statutory defence that could be claimed. The law is being simplified, but we are not setting up a whole new framework. At the moment, people can smack their children and say that that is absolutely fine in every circumstance, but that is not the case under the current law.

Oliver Mundell: You danced around the issue a little bit there. Is it not correct that, when a defence is successfully established, that is, in effect, saying that a crime has not been committed?

The Lord Advocate: Yes.

Oliver Mundell: So, by removing the defence, we are creating a new area of behaviour that is criminal. We heard from the Law Society of Scotland, from a professor of law at the University of Dundee and from several law agents that the bill will create a new category of behaviour that is criminal.

The Lord Advocate: Yes. One has to be clear about that. If a defence in law is removed, by definition, there will be conduct for which the defence can currently be successfully invoked for which it could no longer be successfully invoked.

Oliver Mundell: Do you think that, as a matter of policy, it is a good idea to have legislation on the statute books that we do not intend to enforce

in all circumstances, most circumstances or some circumstances?

The Lord Advocate: It is a feature of our legal system across the board that, when there is sufficient evidence that a crime has been committed, prosecutors assess what is the appropriate response in the public interest. We see that in all areas of criminality.

In our system, we do not prosecute every case that is reported to us, and we are not obliged to do so. There is a range of possible responses, which include diversion from prosecution, a range of direct measures and, ultimately, the option of taking no action. The same principles are applied by prosecutors every day across the wide spectrum of cases that are reported to them.

Alex Cole-Hamilton: One of the concerns that critics of the bill voice is that it will result in the criminalisation of hundreds of parents for normal parenting behaviour. That presupposes that the legal defence is being used hundreds of times. Is that accurate?

The Lord Advocate: I have no statistical way of answering that question. I do not have any data that would allow me to give a figure. It is unknown, in the true sense, whether the bill would result in an increase in cases being reported. New legislation, with the attendant publicity around it, might result in an increase in reporting, partly because attitudes change and people are sensitised to behaviour that they might not otherwise have reported. At the same time, it might have an impact in changing behaviours in another direction. The question of whether more cases would be reported remains to be seen.

Anne Marie Hicks: The international experience of where legislation to ban the physical punishment of children has been introduced elsewhere suggests that we would not see significant increases in prosecution, but it remains to be seen what the effect would be on the number of cases that are reported.

If I can give a parallel example from my experience of dealing with domestic abuse, when the law changes and there is greater public awareness of behaviours that are not acceptable, members of the public might involve the authorities more. We have certainly seen that in the context of domestic abuse—neighbours and other people have picked up the phone to the police to report things that, 20 or 30 years ago, might have been overlooked as just domestic matters and were maybe not reported.

We have seen that happen in some of our cases, when members of the public have intervened and called the police when something has happened in public. There might be an increase in reporting if there is greater public

awareness of the issue. However, it has been made really clear that the policy intent of the bill is not all about prosecution or the criminal law; it is about saying, "This is not an acceptable way to chastise your children."

The Convener: A couple of members are signalling that they have brief supplementaries.

Oliver Mundell: Mine is not a supplementary.

Fulton MacGregor: There has been a lot of talk during our consideration of the bill about a possible increase in the criminalisation of parents. The evidence does not point to that, although I know that it is difficult for you to give a view on that. Do you agree that our biggest challenge from a prosecution point of view is prosecuting really terrible offences against children rather than worrying about whether the bill would lead to an increase in prosecutions of parents?

The Lord Advocate: Prosecutors deal with a wide range of offending, from the most serious to the other end of the scale. That is why, as I indicated in my opening statement, we are focused on taking action that is appropriate and proportionate to the particular circumstances of the case that comes before the prosecutor. We can all assess the relative gravity and seriousness of the different types of criminality that we have to deal with, and prosecutors respond in a way that reflects that.

Rhoda Grant: You have mentioned a number of times that, when decisions are taken about whether to prosecute, you look at what would be in the public interest. I want to push you a wee bit on where that falls. What would you consider to be in the public interest and what would you consider not to be in the public interest? Can you give us examples to illustrate that?

The Lord Advocate: The Scottish prosecution code, which is a publicly available document, sets out factors that, depending on the circumstances, will inform the consideration of the public interest. Unsurprisingly, it includes

"The nature and gravity of the offence"

and

"The impact of the offence on the victim".

Harm, which Mr Mundell asked about, is a consideration that would come into play in that regard.

Other factors that are considered are

"The age, background and personal circumstances of the accused"

and of the victim, and

"The motive for the crime",

which relates to the issue that Ms Harris raised.

The code sets out more detail under each of the public interest factors that are identified. Those factors will apply in relation to any report of any crime. Prosecutors are well used to applying them, and they do so currently when cases involving alleged assaults by parents on children are brought to their attention.

Anne Marie Hicks: In preparation for today's meeting, we looked at a few of the cases from last year in which we took no action or took action other than prosecution. One case involved an assault by a mother on her 10-year-old daughter who came home late and had not answered her calls. The assault was a punishment for what was deemed to be bad behaviour. The accused had no previous convictions and there were mental health issues. We had information about social work involvement with the family. Once we had full information on the background, we decided that social work diversion was appropriate, as it would enable social work to work with the family on some of the issues.

We had other cases with similar reported behaviour towards children, in which it was felt that diversion was not necessary, because a framework of support was already in place. We were satisfied that the police were working with social work and that there would be no public interest in prosecuting.

Another case involved an assault on a nine-year-old that arose after a family argument one morning, at a time of great pressure and stress. The parent was working and there was a lot of pressure on the family at the time. Again, we received further information about other assistance that the family were getting through social work and other family members, and we were satisfied that no action needed to be taken.

That is the kind of information that we would look to the police to give us. As well as getting information about the incident, we would want to find out about the background and would want to know whether the parent had ever behaved in that way before or whether the incident took place in the context of domestic abuse. Sadly—this is not surprising—quite a number of such cases take place in that environment. As with other crimes, we would want to look at all the circumstances, including any pressures that the parent was under and any factors that were relevant to them. In determining what is in the public interest, we do not look through the narrow lens of the individual act; we take account of the full context and circumstances of the behaviour.

The Lord Advocate: Particularly at that end of the spectrum, when one is considering whether the public interest is best served by some form of diversion or support rather than a prosecutorial

option, as Anne Marie Hicks has said, that is one of the considerations.

At the same time, we have a string of examples of cases in which the balance went the other way: when the circumstances and the particular nature of the case were looked at, as well as the full background and context of the act, a decision was made to prosecute the case. We have a number of examples of those cases, too, but, as Anne Marie Hicks has said, the important point is that, as part of their professional practice, prosecutors routinely consider the appropriate course to take to respond to a particular report of an alleged crime, assuming that there is sufficient evidence to justify action. In this context—as in others—we will look at all the relevant factors.

Rhoda Grant: Given child protection guidance and regulation, I assume that, if a case came to be prosecuted, social work would already be involved. Is your decision influenced by whether or not social workers have taken action? For example, if they thought that the child was in danger, they might have taken them into care and removed them from the family home, or they might be working with the family. Do you look closely at such things before you decide how to act?

10:00

Anne Marie Hicks: We would want to know what involvement social work might have had, if any, and whether any on-going concerns or previous behaviour had been reported. Those are relevant to the context. One of the factors that we consider is the risk of reoffending, which is a clear public interest consideration. We would know about the involvement of social work, but we would not think, “Social work has done this, so we will do that.” We would look at the full circumstances of the incident.

There are cases in which the police properly involve social work, because they are required to do so, and social work will take a view and say, for example, “We are content as far as the incident is concerned, and we see no need for on-going work with the family.” We have seen that in a number of cases. We just want a full picture, so that we understand the situation.

Oliver Mundell: Going back to earlier comments, I note that, in our system, the parameters of the common-law crime of assault are in effect set by case law. Is there any issue with the fact that, because of this particular defence, there is perhaps a sparsity of case law on cases involving minor or mild physical force, as such cases have probably not been tested or fully explored? Should we consider that issue?

The Lord Advocate: I am not aware of any particular practical difficulties in the application of the law.

Anne Marie Hicks: You are right in the sense that the case law on reasonable chastisement tends to predate the 2003 act, but even if the purpose of the bill is to say that that is no longer a defence and to remove it, the case law on assault will still apply. A sheriff will have to consider the evidence and decide whether what happened constitutes a crime and whether that has been proved beyond reasonable doubt. Those considerations will still apply. If a sheriff listens to what has happened and says that it does not constitute an assault in law, there will not be a conviction.

Oliver Mundell: Do you recognise the possibility that, in the absence of any thresholds in the bill, the courts might come up with their own new tests? In effect, they could say that your decision to prosecute was not, in their view, in the public interest.

Anne Marie Hicks: I do not think that they could come up with a new test in law. As we have occasionally seen, it is always open to the courts to criticise a decision to prosecute. It is obviously for them to determine on the basis of the evidence whether a crime has been committed, and if they believe that it has, whether that has been proved beyond reasonable doubt. As the decision maker in a summary case, they would have to make that decision.

Moreover, if the courts did not think that it had been appropriate to prosecute the case, they could reflect that in sentencing, which is also a matter for them. I do not think that there will be an array of new tests around the law of assault. We already prosecute cases of parental chastisement, which amounts to assault in the courts, so they are used to dealing with that.

Oliver Mundell: The common law continues to evolve and develop, and a number of things that this Parliament now takes pride in, such as law regarding relations between married people, have developed through case law; they were not developed through statute. Surely it is possible that common law will continue to develop in this area, and that the courts might refine what they consider to be parental assault of a child in the context of the parental rights and responsibilities in other statutes.

The Lord Advocate: It would be wrong for me to pre-empt the natural development of the law, but the legal test for an assault is straightforward. It is an attack on the person of another with the relevant mens rea, or mental state for committing a crime, and courts are used to applying those tests in a range of circumstances.

As Anne Marie Hicks has said, there will be cases where a court concludes that, on the basis of the evidence that it has heard, there was no crime. That happens across the board. Prosecutors assess cases and take them to court, and on occasion the evidence does not support the charge. Indeed, as Anne Marie has said, there are sometimes cases where, even though a crime has been committed, the court is critical of the case having been brought by the prosecutor.

It is our responsibility to take the cases that we consider it right to take in the public interest, but sheriffs are entitled to comment. At the end of the day, a sheriff will reflect their assessment of the case in any sentence that is imposed.

Alex Cole-Hamilton: I wonder whether Oliver Mundell's concerns about the lack of case law and thresholds on this issue go some way towards answering my earlier question about scale. There is not, as he has suggested, a great deal to go on; the legal defence is not regularly exercised, and courts are not often asked to sit in judgment of loving physical chastisement, which critics of the bill would describe as being reasonable. It is not something that comes up in court very often. Oliver Mundell might be worried about the absence of case law, but it strikes me that the matter just does not come up very much.

Anne Marie Hicks: In our written evidence, we provide some data on the number of cases that we have had. We looked at a three-month period from three years ago and increased that to create an estimate for a 12-month period, and we estimated that the number of cases prosecuted was fewer than 500 for the whole year, including assaults on children to injury, no injury and severe injury. On any reading, the numbers are small. That is within a framework where we have the statutory defence, but even when we take that into account, the numbers are small. We will have to wait and see whether there is any increase.

Alex Cole-Hamilton: Do you have data on how many of those people were acquitted on the basis of the defence of reasonable punishment?

Anne Marie Hicks: No. To get that, we would have to go through every individual case. We can pull cases based on the charge and see that they involved a parent and that the victim was a child, but we could not go into that sort of detail without a thorough manual research exercise.

Alex Cole-Hamilton: I understand.

The Convener: Okay. Everyone looks content. I thank the witnesses very much for their evidence this morning.

The committee's next meeting will be on Thursday 13 June, when we will take evidence from Engender on its shadow report on the United

Nations Convention on the Elimination of all Forms of Discrimination Against Women.

10:08

Meeting continued in private until 10:43.

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