

# Children (Equal Protection from Assault) (Scotland) Bill

## Page 2: About you

Are you responding as an individual or on behalf of an organisation?

an individual

Which of the following best describes you? (If you are a professional or academic, but not in a subject relevant to the consultation, please choose "Member of the public".)

Academic with expertise in a relevant subject

Please select the category which best describes your organisation

*No Response*

Please choose one of the following; if you choose the first option, please provide your name or the name of your organisation as you wish it to be published.

I am content for this response to be attributed to me or my organisation

Please insert your name or the name of your organisation. If you choose the first option above, this should be the name as you wish it to be published. If you choose the second or third option, a name is still required, but it will not be published.

Elaine E Sutherland, Professor of Child and Family Law

Please provide details of a way in which we can contact you if there are queries regarding your response. Email is preferred but you can also provide a postal address or phone number. We will not publish these details.

## Page 7: Your views on the proposal

Q1. Which of the following best expresses your view of the proposal of giving children equal protection from assault by prohibiting all physical punishment of children?

Fully Supportive

Q1. Which of the following best expresses your view of the proposal of giving children equal protection from assault by prohibiting all physical punishment of children?

**Please explain the reasons for your response**

The case for removing the defence of 'justifiable assault' from the statute book is set out clearly and comprehensively, alongside the supporting evidence, in the consultation paper. This response will not repeat all of the very valid arguments and evidence advanced therein. Rather, will highlight some of the reasons – reasons founded in principle, practice and law – for supporting the proposed reform and provide additional evidence, where appropriate.

As a matter of principle, it is simply wrong to permit children to be assaulted. The legal system acknowledges its obligation to protect adults from assault. Children and young people are less able than other members of the community to protect themselves and wield less power in society. Thus, it is incumbent on adults to secure their protection and, for the most part, the legal system seeks to do so. It continues to fail in its obligation, however, by permitting this discriminatory application of the criminal law on assault.

Recognition of children's rights advanced considerably in the late 20th and early 21st Centuries. Children are no longer regarded simply as the objects of protection but, rather, as people with rights. In many respects, Scots law acknowledges these developments and seeks to give effect to the rights of children and young people. It is wholly inconsistent with that trend for it to persist in permitting children to be subject to physical violence at the hands of their parents, something that has its roots in the antiquated notion of parental power (Erskine, *Institutes of the Law of Scotland*, I, v, 53) and to shield violent parents from having to answer for their unacceptable conduct.

In practice, subjecting children to physical punishment can have a serious adverse physical and/or emotional impact on them, an impact that can continue well beyond childhood. The consultation paper notes much of the research here and further evidence can be found in the work of Professor Murray A Strauss: see, for example, Murray A Straus, *Beating the Devil Out of Them: Corporal Punishment in American Families and Its Effects on Children* (New York: Routledge, 2001).

Children learn by example, by modelling their behaviour on that of others. To permit parents to hit their children sends the young entirely the wrong message: that the strong and powerful will prevail by using physical coercion against the vulnerable and powerless.

While the Criminal Justice (Scotland) Act 2003 did not go nearly far enough, it improved on the previous law in a number of respects. By replacing the term 'reasonable chastisement' with 'justifiable assault', it acknowledged what is happening here – that one person has assaulted another. Dressing that conduct up in euphemisms like 'a safe smack' does nothing to alter that reality. The fundamental problem with the 2003 Act lies in the use of the word 'justifiable' and the notion that, simply because children are young and there is a family relationship, it becomes acceptable for the parent to behave in a way that would not be permissible were the behaviour directed at another adult. What the current legislation does is to tell parents that hitting children is tolerable, provided they stick to the rules. By signalling that some violence against children is acceptable, the legal system opens the door to an escalation in parental violence, sometimes with fatal consequences. See, for example, the report of the inquiry into the circumstances surrounding the death of Victoria Climbié where it is noted that, 'what happened to Victoria involved the apparent escalation of discipline and punishment.' (Sixth Report of the House of Commons Committee: *The Victoria Climbié Inquiry*, HC 570, 2003, HMSO, para 54).

As the consultation paper demonstrates, international legal norms are designed to protect children from all forms of physical violence. The United Nations Convention on the Rights of the Child makes it quite clear that States Parties are under an obligation to provide this protection. The United Nations Human Rights Committee and the United Nations Committee on the Rights of the Child have consistently and persistently highlighted the shortcomings of the law throughout the United Kingdom in this respect and have called for law reform (see, most recently, Human Rights Committee, Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland, CCPR/C/GBR/CO/7, 2015, para 20 and the United Nations Committee on the Rights of the Child, Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, CRC/C/GBR/CO/5, 2016, para 41, respectively).

On the comparative front, many other jurisdictions, including the majority of EU member states, have understood their obligation to prohibit physical violence against children in all settings, including the family home, and have enshrined that protection in law. At the time of writing, some 52 countries have done so, with a further 55 expressing a commitment to take the necessary steps. That Scots law lags behind these enlightened nations is a matter of national shame and is all the more surprising when one considers the

Q1. Which of the following best expresses your view of the proposal of giving children equal protection from assault by prohibiting all physical punishment of children?

many positive aspects of the law on children's rights and the oft-repeated government commitment to 'make Scotland the best place in the world to grow up'.

Empirical evidence suggests that there is increasing support from adults and children in Scotland to bring the law into line with international norms. While that is encouraging, there is no reason for the Scottish parliament to wait for wholehearted parental support before adopting the reform outlined in the consultation paper. The law may be an expression of the will of the people, but it can also serve valuable educational and boundary-setting functions and should do so in protecting all children from physical violence in all settings.

Q2. Could the aims of the proposal be better delivered in another way (without a Bill in the Scottish Parliament)?

No

**Please explain the reasons for your response**

The defence of 'justifiable assault' is enshrined in statute. Thus, any parent who hits their child can seek to invoke it and nothing short of repeal of the relevant provision will prevent them from doing so. While a concerted public education campaign is likely to reduce the instances of parents hitting their children, it would not prevent those who persisted in doing so from being protected by the legal system. Where the defence is used successfully, the parent will, of course, suffer no legal penalty and might well feel vindicated. In short, as long as the defence remains available, the legal system is sending a clear message that it is acceptable for parents to hit their children provided they stick to the rules.

Q3. What do you think would be the main advantages, if any, of giving children equal protection from assault by prohibiting all physical punishment of children?

A prohibition on all physical punishment of children would:

- send the message, both within Scotland and to the world, that Scots law regards children as people with rights who are entitled to respect for their dignity and physical integrity;
- reassure children that they are entitled to feel safe and to be free from violence;
- provide parents with a 'bright line rule', removing any scope for doubt over how much violence against children is legally permissible.

Q4. What do you think would be the main disadvantages, if any, of giving children equal protection from assault by prohibiting all physical punishment of children?

There are no disadvantages of extending equal protection from assault to children.

## Page 11: Financial implications

Q5. Taking account of both costs and potential savings, what financial impact would you expect the proposed Bill to have?

Some reduction in cost

**Please explain the reasons for your response**

The goal of the proposed Bill is not that it will lead to widespread prosecution of parents. Rather, it seeks

Q5. Taking account of both costs and potential savings, what financial impact would you expect the proposed Bill to have?

remove an invidious example of discrimination that creates an obstacle to full and effective protection of children. It is anticipated that law reform will be accompanied by educational initiatives offering parents advice on the strategies they might adopt to prevent and discourage undesirable behaviour by children, something that has been a feature of such legislation in other countries. The consultation paper acknowledges the cost of providing these educational initiatives is a cost associated with the Bill. However, the Scottish Government has made clear that it does not support the physical punishment of children (see statement by Mark McDonald MSP, the Minister for Childcare and Early Years, November 2016: Scottish Government answer to Question S4W-29202 (10 February 2016)). It would be reasonable to expect, therefore, that the Government would seek to educate parents about the other options regardless of whether the proposed Bill became law. Thus, the cost of educational programmes should not be viewed solely as a cost of the proposed Bill. As the consultation paper acknowledges, other costs associated with the measure include investigation and prosecution of cases of assault of children by parents and the consequences of criminal convictions. However, the savings associated with the Bill would outweigh the costs significantly. It is reasonable to anticipate that, were the law to be reformed along the lines proposed, fewer parents would hit their children, with an overall reduction in the climate of violence surrounding childhood. Given the adverse physical and emotional impact on children, both short- and long-term, of physical punishment, there are short- and long-term costs of dealing with the impact. While difficult to quantify, these costs will disappear eventually if their source is removed. In addition, there would be savings in terms of social work investigations, the removal of children, associated legal proceedings and looking after children removed from parental care.

## Page 12: Equalities

Q6. What overall impact is the proposed Bill likely to have on the following protected groups (under the Equality Act 2010): race, disability, sex, gender re-assignment, age, religion and belief, sexual orientation, marriage and civil partnership, pregnancy and maternity?

Positive

**Please explain the reasons for your response**

The proposed Bill will have a positive impact in terms of age discrimination. While it is acknowledged that treating adults and children differently may sometimes be justified, age (or youthfulness) is not, in itself, a justification for different treatment. At present, the criminal law offers children less protection from assault than it offers to adults. The proposed Bill would remove that discriminatory treatment of children. Some research indicates that particular groups of children – notably younger children and boys – are more likely to experience physical punishment than are others. The proposed Bill would extend the protection of the criminal law to all children and, thus, would remove this source of discrimination. Some parents might seek to justify the use of physical punishment of children on the basis of their religious or other beliefs. Such beliefs are not, nor should they be, a 'free pass' to act as one wishes regardless of the impact on others, something acknowledged by the (then) House of Lords in 2005 (*R (Williamson and Others) v Secretary of State for Education and Employment* [2005] 2 AC 246). Thus, the proposed legislation does not offend against freedom of religion.

Q7. Could any negative impact of the proposed Bill on any of these protected groups be minimised or avoided?

Not applicable.

## Page 14: Sustainability of the proposal

Q8. Do you consider that the proposed Bill can be delivered sustainably i.e. without having a disproportionate economic, social and/or environmental impact?

Yes

## Page 15: General

Q9. Do you have any other comments or suggestions on the proposal?

Mr Finnie is to be congratulated for addressing an issue that the Scottish Government and many MSPs have been avoiding since the Criminal Justice (Scotland) Act 2003 Act was passed and for making the case for reform so clearly and comprehensively. For many of us who have campaigned for years to secure this change in the law, it is a welcome stage in what has been a very long and, sometimes, frustrating journey. It is to be hoped either that the Scottish Government adopts this proposal and brings forward legislation on this issue – possibly when legislating on the minimum age of criminal responsibility – or that Mr Finnie's efforts result in a Bill that sails through the Scottish parliament.