

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

## Page 2: About you

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

on behalf of an organisation

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".)

*No Response*

Please select the category which best describes your organisation

Third sector (charitable, campaigning, social enterprise, voluntary, non-profit)

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 If you choose the second or third option, a name is still required, but it will not be published.

Clan Childlaw

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**

Clan Childlaw is fully supportive of the proposal to give children equal protection from assault. A legal opinion by Janys Scott QC on the legality of Scots law on the physical punishment of children, available on our website, concludes there are strong legal reasons to further consider legal reform.

Clan Childlaw's position is in line with a broad shift in attitude against physical punishment of children that has been taking place both domestically and internationally.

This shift is recognised in Scotland's National Action Plan for Human Rights 2013-2017, which identifies violence against children as an area requiring change, recalling that national and international human rights organisations and bodies have called on Scotland to "enhance protection of children from assault, repealing the defence of "justifiable assault", enhancing parenting support and child protection" (page 42).

The report "Equally Protected? A review of the evidence on the physical punishment of children", commissioned by the Children and Young People's Commissioner Scotland, Children 1st, Barnardo's Scotland and NSPCC Scotland and published in November 2015, concluded that across the UK and elsewhere the prevalence of physical punishment is decreasing and that public attitudes are changing. The report also concluded that physical punishment is related to detrimental childhood and adult outcomes, as well as an increased risk of child mistreatment. Recommendations included that all physical punishment be prohibited by law.

Within Scotland, there is now widespread support for law reform on this issue. The Scottish Youth Parliament 2016-2021 Manifesto, based on 72,744 responses from young people, highlights overwhelming support for amendment to the law of justifiable assault. The Scottish Directors of Public Health Group and the Royal College of Paediatrics and Child Health support a change to the law (Scottish Directors of Public Health Group (2012) – Consultation on the proposed Children's Services Legislation; Royal College of Paediatrics and Child Health Position Statement on corporal punishment, 20 November 2009). Those calling for children to be given equal protection also include the Police Violence Reduction Unit, the Church of Scotland, Social Work Scotland, the Scottish Police Federation, and the Royal College of Nursing.

International pressure to change the law continues to grow. Scotland and the rest of the UK has long been criticised by the European Union, the Council of Europe, and the United Nations for failing to end corporal punishment. The UK is one of only six European Union countries not to fully prohibit all corporal punishment of children. It is one of only seven member states of the Council of Europe not to have at least committed to equal protection for children, and has been found to be in breach of article 17 of the European Social Charter on multiple occasions. In publishing its Concluding Observations on the UK in 2016, the United Nations Committee on the Rights of the Child urged the UK, in all devolved administrations, Overseas Territories and Dependencies, to "[p]rohibit as a matter of priority all corporal punishment in the family, including through the repeal of all legal defences, such as 'reasonable chastisement'". Similar recommendations have been made in recent years by the United Nations Committee on the Elimination of Discrimination Against Women (CEDAW/C/GBR/CO/7, para 35(e)), the Committee Against Torture (CAT/C/GBR/CO/5, para 29) and the Human Rights Committee (CCPR/C/GBR/CO/7). Similar recommendations were also made by a number of countries in the UK's latest Universal Periodic Review (A/HRC/WG.6/27/L.7), namely Liechtenstein (para 134.193), Ireland (para 134.195), Mongolia (para 134.196), Sweden (para 134.197), Croatia (para 134.198) and Estonia (para 134.199).

Change is evident elsewhere within the UK. The Welsh Government recently announced a consultation on removing the legal defence of "reasonable chastisement" within the next 12 months. Scotland is also being left behind by its close neighbours. In Ireland the common law defence of reasonable chastisement was abolished in 2015 following a finding by the European Committee of Social Rights that the Republic of Ireland violated the European Social Charter.

The considerable shift in culture, attitudes and language around physical punishment in the last two decades gives good reason to expect that the European Court of Human Rights (ECtHR) would pronounce physical punishment of children unlawful, were it presented with the opportunity to do so. A legal challenge to the Scots law on physical punishment could thus result in a finding that Scotland is breaching its obligations in this area. Bound by the Human Rights Act 1998 to take into account the judgments of the ECtHR when determining questions which arise in connection with a right under the European Convention on Human Rights (the Convention), the Scottish courts could well find the current legislation unlawful.

Scottish Government has the responsibility under article 1 of the Convention to secure the rights and

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freedoms defined in the Convention to everyone within its jurisdiction. This includes the responsibility to ensure effective safeguards of the rights guaranteed to children by, for example, article 3 and article 8 of the Convention. Were section 51 Criminal Justice (Scotland) Act 2003 to be tested in court, we consider there is good reason to expect doubts to be cast on its lawfulness on the following grounds.

#### Article 3

Article 3 prohibits in absolute terms torture or inhuman or degrading treatment or punishment and, in conjunction with article 1, places a positive obligation on the State to protect its citizens from such treatment, including by private individuals.

The key test is whether the level of severity of physical punishment currently permitted in Scotland attains the "minimum level of severity" required to engage article 3 of the Convention. The ECtHR looks at the individual circumstances of the case, but in general there has been a lowering in the level of severity of mistreatment required to engage article 3. In keeping with its interpretation of the Convention as a living instrument, we think it is likely the Court would take into account the evolution in international consensus that corporal punishment is prohibited by international human rights instruments, as well as the unequivocal evidence of the harmful effects of physical punishment on children.

Corporal punishment is today considered to be completely prohibited by the UNCRC. The relevant articles of the UNCRC are articles 5, 19 and 37. The Committee on the Rights of the Child issued General Comment 8 in 2006 "to highlight the obligation of all States parties to move quickly to prohibit and eliminate all corporal punishment and all other cruel or degrading forms of punishment of children and to outline the legislative and other awareness-raising and educational measures that States must take" (CRC/C/GC/8 2, March 2007, paragraph 2).

It is of note that at the time of the case *A v United Kingdom* (1999) 27 EHRR 611, the UN Committee on the Rights of the Child stopped short of interpreting the UNCRC as completely banning corporal punishment. The subsequent evolution in the UN Committee's interpretation of the UNCRC reflects evolution in wider society. This is of particular relevance given the weight both the ECtHR and the UK Supreme Court place on international instruments in interpreting Convention rights. In the recent 'Named Person' case the UK Supreme Court noted: "[a]s is well known, it is proper to look to international instruments, such as the UN Convention on the Rights of the Child 1989, as aids to the interpretation of the ECHR" (see *The Christian Institute and others (Appellants) v The Lord Advocate (Respondent)* (Scotland), [2016] UKSC 51, paragraph 72).

Thus although not directly incorporated into domestic law, the principles of the UNCRC guide domestic law and practice. The Scottish Parliament has recognised its importance in placing a duty, under Part 1 of the Children and Young People (Scotland) Act 2014, on the Scottish Ministers to 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 if they consider it appropriate to do so, take any of the steps identified by that consideration. Scottish Government is therefore obliged to take into account the UN Committee's recommendations concerning physical punishment of children. We believe that such a reasonable consideration would suggest prohibition of physical punishment as an effective, straightforward step to secure UNCRC requirements.

There is also increasing emphasis on the special vulnerability of children as a relevant factor in determining whether ill-treatment reaches the minimum level of severity threshold. As outlined by Lady Scott QC in her opinion at paragraph [11], this was considered by Baroness Hale of Richmond in *E v Constable of Northern Ireland* [2008] UKHL 66, [2009] 1 AC 536. The Grand Chamber of the ECtHR, in *Bouyid v Belgium* (2016) 62 EHRR 32, has also referred to the need to take the vulnerability of minors into account when considering a state's obligation to protect article 3 rights, highlighting too the consequent need for greater protection of children than adults.

The Government is not required to take action that would be unduly burdensome. However, it is Clan's view that amending section 51 Criminal Justice (Scotland) Act 2003 would not qualify as unduly burdensome, and would in fact be a relatively straightforward means of ensuring the protection of article 3 rights.

#### Article 8

Article 8 protects a person's physical and psychological integrity as an aspect of private life. Given the evidence of the harmful effect of physical punishment on the mental health and personal development of children, we consider article 8 to be engaged.

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The State has a positive obligation to ensure that steps are taken to prevent undue interference with article 8 rights. While article 8 rights are not absolute, the onus is on the State to justify any interference with those rights.

The previously described changes in societal attitudes, as well as the compelling evidence of the harm involved in physical punishment, would make it difficult for Scottish Government to establish that the defence of justifiable assault is "necessary in a democratic society". There must be a "pressing social need" for the interference with the right and the interference must be proportionate. The degradation and humiliation of children cannot, in our view, be a proportionate response. The evidence shows that physical punishment is both ineffective as a means of correcting behaviour in children, and is in fact likely to be detrimental to the health and wellbeing of the child. Furthermore, there are alternatives to physical punishment available, undermining the argument that there is any "pressing social need" for corporal punishment. For these reasons, Clan is of the view that the ECtHR would likely rule that the issue no longer falls within the UK's margin of appreciation.

As outlined by Janys Scott QC at paragraph [28], there is also an argument that the current state of the law constitutes an interference with family life, in that the law is not at all clear as to when a parent is justified in assaulting a child. The ECtHR could therefore construe the current law as a contravention of article 5 and article 7 of the Convention on the basis of uncertainty about what constitutes a defence and thus when a parent would be committing an offence.

#### Article 14

Children have the right not to be discriminated against compared to adults in relation to their enjoyment of Convention rights on grounds of their age. By providing an exception to assault in relation to children but not in relation to adults, the law on physical punishment discriminates on the grounds of age. While discrimination would not likely be considered by the ECtHR in relation to article 3, it could be considered relevant in relation to article 8, as discussed by Janys Scott QC in her opinion at [32].

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 aim of the proposal is to promote and safeguard the health and well-being of children and young people by ensuring they are afforded the same right to protection from assault as adults. The aims of this Bill can only be achieved through legislative reform of the statutory defence of 'justifiable assault' and the common law defence of 'reasonable chastisement'.

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?

An important advantage of the passage of this Bill would be the high likelihood of improved behaviour and health outcomes for children in the short term, and for both children and adults in the long term. This contention is based on the growing evidence that physical punishment is related to detrimental childhood and adult outcomes (see Gershoff & Grogan-Kaylor, 'Spanking and child outcomes: Old controversies and new meta-analyses' *Journal of Family Psychology* (2016) 30(4) 453-469, as well as the above-mentioned 'Equally Protected' report). A similar advantage will be a decrease in the risk of childhood mistreatment, based again on the scientific evidence that physical punishment of children is related to a serious risk of escalation to injurious abuse and mistreatment.

Another advantage would be the aligning of Scottish Government action with its domestic and international legal obligations. Law reform on this issue would ensure that Scotland is, in relation to corporal punishment, not vulnerable to legal challenge on the basis of its Convention obligations. In addition, it would mean that Scottish Government will be seen to be acting in accordance with its duties

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under Part 1 of the Children and Young People (Scotland) Act 2014, as well as the recommendations of the many UN committee bodies who have raised the issue.

A further likely advantage will be a positive impact on community attitudes with regards to violence against children. As noted in the 'Equally Protected?' report:

"...[t]here is convincing evidence that these declines are accelerated in countries that have prohibited the use of physical punishment, and that such laws have important symbolic value. Gershoff pointed out that legal bans in many countries have been implemented without a majority of public support and that there is evidence that the passage of legislation in combination with public awareness campaigns leads to a change in public attitudes." (page 38)

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?

Clan Childlaw does not believe that there will be any significant disadvantages to prohibiting physical punishment of children.

While the international evidence suggests that prohibiting physical punishment of children does not lead to trivial prosecution of parents and carers, there may be some increased pressure on frontline services such as police and social workers. However, Clan does not believe that this is a reason to delay prohibition of physical punishment. A sustained information campaign to provide parents with the resources they need to understand the alternatives to physical punishment would decrease the impact on frontline services.

## 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 increase in cost

**Please explain the reasons for your response**

Clan Childlaw believes that the minimal to modest financial implications of the Bill, as outlined in the consultation documents (pages 23-24), are a reasonable estimate of the likely economic impact of the Bill.

## 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**

For the reasons outlined above, Clan Childlaw believes that the Bill is likely to have a positive impact on children and young people. Given that the 'justifiable assault' exception in section 51 of the Criminal Justice (Scotland) Act 2003 only applies in relation to children under 16, its removal will contribute to the

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furtherance of equality in Scotland. There is unlikely to be any negative impact on any of the groups protected under the Equality Act 2010. If it is the case that certain protected groups are more exposed to corporal punishment than others at present, prohibition will eradicate any unequal treatment in this regard.

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

Clan Childlaw believes that there will not be negative impacts on any of the groups protected under the Equality Act 2010.

## 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

**Please explain the reasons for your response:**

Clan Childlaw believes that there is no evidence to suggest that amending the 'justified assault' exception cannot be delivered sustainably. As outlined in the proposed Bill consultation documents, the Bill is designed to contribute to a number of the United Nations Sustainable Development Goals. Evidence from the growing number of countries that have prohibited physical punishment does not indicate any disproportionate economic, social and/or environmental impacts. Indeed, the fact that the number of countries following this path has grown steadily since Sweden took the initiative in 1979 is a testament to the absence of unsustainable consequences.

## Page 15: General

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

We would like to take this opportunity to include the words of Professor Sir Michael Marmot, from the foreword of the 'Equally Protected?' report (page 3):

"It is now time for action. On the issue of physical punishment, Scotland is out of step with Europe and increasingly, the world. There is an urgent need for Scotland and the rest of the UK to comply with international human rights law and to prohibit all forms of physical punishment. Politicians in the Scottish and UK governments need to be bold and provide a lead in this major social and public health issue. As was the case with smoke free legislation, public attitudes and social norms will change once legislation is introduced and the benefits are evident. The intention of legal change is not to criminalise parents but to help redefine what is acceptable in how we treat our children – and each other – and what we teach them through our own behaviour. Protecting children equally against assault in the law does not lead to prosecutions of parents for 'trivial smacking', any more than it leads to prosecution of adults for trivial assaults on other adults. Legal reform to protect all children fully against assault is a simple but fundamental preventative measure. Governments can no longer simply wait until public attitudes towards physical punishment change sufficiently to allow legal change to be ushered in without controversy. They must stand up for the change they purport they want to see. Urgent action is needed, now."

