

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 If you choose the second or third option, a name is still required, but it will not be published.

Kasey Lowe McCall-Smith and Elisenda Casanas

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

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**

Please see document pasted into final page.

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?

See comments attached on final page.

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?

None.

## 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

## 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?

Neutral (neither positive nor negative)

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

Please see document pasted into final page.

## 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?

Response to the Consultation on the Children (Equal Protection from Assault) (Scotland) Bill  
Dr Elisenda Casanas Adam, University of Edinburgh  
Dr Kasey McCall-Smith, University of Edinburgh

We welcome the proposal to legislate to prohibit the physical punishment of children in Scotland, by removing the defence of 'reasonable chastisement' for cases of assault. Firstly, this will bring Scotland's law in line with International Human Rights Law, in particular the UN Convention on the Rights of the Child (UNCRC), and in compliance with the recommendations of international human rights bodies. Scotland will also be following what is now the trend across Europe and the rest of the world. Secondly, the proposed legislation will provide clarity to the current law in Scotland, where judges have to determine whether the use of physical punishment by parents is reasonable and justifiable based on a series of established criteria, in the context of the growing national and international awareness of its detrimental impact on children. Thirdly, the proposed legislation is consistent with the Scottish Government and Parliament's more recent approach to the protection of the rights and wellbeing of children and young people in Scotland, and their commitment to upholding the principles of the UNCRC.

Drawing upon the examples of other states' prohibitions on corporal punishment by parents or those standing in locus parentis, clear definitions, limits and explanations are crucial to delivering effective legislation. The following points are worth reiterating:

1. In the Scottish context, assault is not codified but is a crime recognised under the common law. As the aim of the proposed measure is the repeal of the statutory defence of 'justifiable assault' (Criminal Justice (Scotland) Act 2003 §51), consideration must also be given to defences remaining at common law and be clear how the repeal relates to other potential defences.

2. The Scots common law definition of assault is very broad, including any attack upon another person, without need for there to be substantial violence or injury to the victim. For example, the deliberate use of threatening gestures in order to place a person in a state of fear and alarm for his safety is also included. By removing the justification of 'reasonable chastisement' of children by their parents, the proposed legislation will open the door to the prosecution of parents if they use even very minor physical acts to control or protect their children or others, as part of their parenting duties.

3. If the aim is the prohibition of physical 'punishment', any legislation proposed should do more than merely repeal the defence; it must further elaborate physical acts that do not equate to punishment or assault. In this context, it is notable that the Irish Children First Act 2015, which repealed the common law defence of 'reasonable chastisement' in Ireland as a defence against both common law and statutory offences of assault, specifies that certain acts do not amount to statutory assault as described in the Non-Fatal Offences Against the Person Act 1997, §2 Assault:

(3) No such offence is committed if the force or impact, not being intended or likely to cause injury, is in the circumstances such as is generally acceptable in the ordinary conduct of daily life and the defendant does not know or believe that it is in fact unacceptable to the other person...

But this is the general exception to a charge of assault and not specific to children, which is acknowledged as at the heart of this proposal with the intent to ensure the best interests of the child.

A more precise acknowledgement that some physical acts are necessary is reflected in the New Zealand Crimes Act 1961 as amended by Crimes (Substituted Section 59) Amendment Act 2007 (in force from June 2007):

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

§59 Parental control

(1) Every parent of a child and every person in the place of a parent of the child is justified in using force if the force used is reasonable in the circumstances and is for the purpose of—

- (a) preventing or minimising harm to the child or another person; or
- (b) preventing the child from engaging or continuing to engage in conduct that amounts to a criminal offence; or
- (c) preventing the child from engaging or continuing to engage in offensive or disruptive behaviour; or
- (d) performing the normal daily tasks that are incidental to good care and parenting.

(2) Nothing in subsection (1) or in any rule of common law justifies the use of force for the purpose of correction.

A well-defined statute will deliver greater confidence to the public that the everyday necessities of normal parenting will not be proscribed. Therefore, general, undefined prohibition clauses reflecting highly variable interpretations should be avoided, such as that set out in the Danish Parental Custody and Care Act (amended in 1997):

A child has the right to care and security. He or she shall be treated with respect as an individual and may not be subjected to corporal punishment or other degrading treatment.

While it explicitly prohibits corporal punishment and reflects common phraseology found in international human rights treaties, the under-developed nature of this statute leaves many potential loopholes.

Distinction must be drawn, also, from instances where definitions with respect to injury to children was done clumsily and there is too much latitude for interpretation, such as the qualifying term 'seriously' in the Ireland, Children First Act 2015 §2 which defines 'harm' to children as:

- (a) assault, ill-treatment or neglect of the child in a manner that seriously affects or is likely to seriously affect the child's health, development or welfare, or
  - (b) sexual abuse of the child,
- whether caused by a single act, omission or circumstance or a series or combination of acts, omissions or circumstances, or otherwise;

This qualifying term may result in too high a level of harm be established to trigger a breach of the prohibition.

4. In practice, prosecutions for assault among adults in Scotland are not brought where the assault does not involve significant violence or injury, unless the circumstances are considered special. Common sense and discretion in prosecutions resulting from the proposed bill must also be instrumental to securing broader societal acceptance of a prohibition and ensuring societal change. This should not merely be a matter of policy but incorporated into legislation to avoid unnecessary confusion. A good example of this can be found in the New Zealand Crimes Act 1961 (as amended and in force from June 2007) §59(4) Parental control:

(4) To avoid doubt, it is affirmed that the Police have the discretion not to prosecute complaints against a parent of a child or person in the place of a parent of a child in relation to an offence involving the use of force against a child, where the offence is considered to be so inconsequential that there is no public interest in proceeding with a prosecution.

This is also deemed as having been crucial to Sweden's successful campaign in 1979 where the educational pamphlet distributed to every home highlighted that 'it goes without saying that you can still snatch a child away from a hot stove or open window if there is a risk of its injuring itself.'

The bottom line is that clarity will enable the legislation and subsequent enactment to prevail in conditions more favourable than those that have been plaguing the enforcement of domestic violence laws in recent years.

5. This is a notably sensitive issue across Scotland and the UK. The proposed bill will no doubt generate concerns about it resulting in an unwanted intrusion of the government in family affairs and enabling the use of criminal law against parents who are doing what they believe is the best for their children. It must be made very clear in the proposed bill and any accompanying documents that the purpose of this law is to set a high standard for the protection of children's rights and child wellbeing in Scotland, bringing it in line with International Human Rights Law and recommendations. It is not a law aimed at criminalising or prosecuting parents.

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

6. As noted in the consultation, while different studies suggest a decline in the use of physical punishment in Scotland, and thus evidence of a cultural shift in this sense, the data suggests that it is still used by a significant number of parents (pp. 16-17). Legislative change alone cannot be the catalyst for wider changes in both societal attitudes and behaviours. Essential to effecting legislation prohibiting corporal punishment in the home is and accompanying policy outlining and implementing large-scale education programmes. As was the case in Sweden in 1979, the government must be willing to follow-through with effective education.

7. We strongly support the policy recommendations from 2015 report commissioned by the Children and Young People's Commissioner and others (Equally Protected: A review of the evidence on the physical punishment of children, p. 40), and in particular that:

- a. Legislation should be accompanied by large-scale information and awareness campaigns to inform the population of the merits of positive parenting and harm caused by physical punishment. These should be aimed at different levels: individuals, communities and the whole population.
- b. It is important to support parents in using positive parenting strategies, through providing information via different channels (GP's, health visitors, schools, mass media) as well as through offering parenting programmes.

Respectfully submitted,

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