

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

Representative organisation (trade union, professional association)

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 If you choose the second or third option, a name is still required, but it will not be published.

The British Psychological Society

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?

Partially 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 Society welcomes the aims of the documents to protect children from assault or physical chastisement as a form of behaviour control. We view the physical punishment of children as morally reprehensible, counter-productive and ineffective. In line with the evidence presented by the Green Party and the NSPCC we recognise that physical punishment of children can cause lifelong harm.

In a published meta-analysis last year in the Journal of Family Psychology (Gershoff and Grogan-Kaylor 1996) sifted through 75 studies, for a total data pool of nearly 161,000 children, and find "no evidence that spanking is associated with improved child behaviour. Furthermore, the analysis finds evidence that spanking is associated with troubling outcomes — like increased aggression, increased anti-social behaviour, and mental health problems later in life. It can also reduce cognitive ability and self-esteem.

The recent findings of the longitudinal analysis developed by Cathy Widom (Widom, Czaja and Dumont, 2015) has indicated that in understanding intergenerational transmission of violence the presence of physical abuse and neglect are critical factors. Childhood neglect was found to have a slightly stronger effect in predicting adult violence in child victims but the authors note the problems of bias in detection in the criminal justice system and an effect caused by focus of the criminal justice system on people from ethnic minorities in the US. There is some concern that an over-focus on one factor such as child physical chastisement will ignore other important factors in the development of psychopathology and criminal behaviour in adults through aversive childhood experiences.

However, our understanding is that there are existing safeguards formed through existing legislation and recommendations of public enquiry such as; the Children and Young People (Scotland) Act 2014 known as Getting it Right for Every Child legislation and guidance, the National Guidance for Child Protection in Scotland (Scottish Government 2014), Social Work Vulnerable Young Person's Procedures used in Glasgow and other local authorities, The Children (Scotland) Act 1995, and the findings of the Victoria Climbié Inquiry (2003). In addition Public Bodies and Third Sector Agencies working with children and families will all have child protection procedures that it will require their employees to work to.

It is our understanding existing legislation elevates the rights of the child and other vulnerable people above those of the adults in the requirements for protection by the state and other public institutions. This is explicit in the GIRFEC legislation.

The recommendation considered in the paper is whether Criminal rather than Civil Law be used to frame this protection, and whether the defence of "reasonable punishment" or "reasonable chastisement" should be removed as a legitimate defence. Some of this discussion focuses on aspects of the law where the society has limited competence in comparison to legally trained respondents. In reading the response the society has focused on the psycho-legal aspects and potential pitfalls to the legislation, legally qualified reviewers may have other suggestions.

There is concern that criminal law can be a crude tool in changing the behaviour of carers and parents. Decision making in the courtroom is complex and there will be numerous constructions and discretionary judgements that cannot easily be legislated away (Kapardis 1997, Hope 2010, Lacey and Zedner, 2012) and although sentencing guidance or legislation could be implemented this does not mean that juries, investigators, and prosecutors will not make discretionary judgements on the acceptability of a child receiving physical chastisement.

Many criminological aspects of the change are not considered in the document. It is assumed that most child abuse including physical chastisement would be considered as "hidden crime" (see Maguire 2012). The majority of criminal acts are not reported and when reported are often disposed of by the use of discretionary powers such as a police caution. It is likely that most offences involving physical assault of children are not reported.

Similarly, placing the adversarial relationship and punishment basis inherent in criminal rather than civil law at the centre of child protection procedures may exacerbate the issue, where families may be less willing to seek help for fear of prosecution. Children often suffer in the Criminal Justice System (Lamb, Hershkowitz, Orbach and Esplin, 2008) and the effects of managing child protection through the criminal justice system may exacerbate these problems. It should be noted that drawing families and children into these systems can cause unintended and unforeseen harm and if specific proposals are developed these should be carefully reviewed.

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

Unsure

Please explain the reasons for your response

The Society believes that it is appropriate for the Criminal Law to afford equal protection to children and remove the defence of "reasonable chastisement" as a legitimate defence against charges of Assault. We recognise that there are a number of other pieces of legislation that offences of assault can be prosecuted under such as Child Cruelty where this defence is not accepted. It is possible this could be achieved through sentencing guidance or bolstering child protection procedures within local government. From the evidence presented on pages 12 and 13 of the document explaining the defence of "reasonable chastisement" it is unclear how often the defence has been used and whether it has been used effectively. It is clear from the evidence presented in the document and in the experience of Practitioner Psychologist working in Children's Services that they would be required to report issues of physical chastisement and this would be grounds for a Child Protection Investigation. This investigation would be supported by existing legislative structures and could lead to the investigation of a crime and potential for prosecution, but there are a number of stages prior to this taking place. It is likely that due to current pressure on resources and the complexities of relationships within families some issues may be difficult to interpret such as when physical force was used within a conflict between a parent and child. It is unknown in the experience of Practitioner Psychologists consulted where the use of force has been from a parent to a child as a form of punishment for the issue to be ignored or the actions of the parent be considered reasonable by the NHS or social services personnel involved.

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?

We believe that current legislative structures and existing child protection mechanisms do help prevent the physical punishment of children. As discussed in the document there is clear direction from the Scottish Government in the current and prior parliaments. However, in resolving this under the current situation families would be directed into specific supports such as parenting programmes (e.g. Positive Parenting Programme (Sanders 2003) implemented in Glasgow, or Incredible Years implemented in Dumbartonshire (Webster-Stratton 2005) or other social care resources such as Multi-systemic therapy. If the issues persisted or the child was felt to be in significant danger the child could be removed from the care of the perpetrator. In many cases reports of physical chastisement would merit the removal of the child. We also recognise that disruption of care relationships is also harmful to children.

The Society is aware from the supporting documentation that there has been recent criticism of the UK and Scotland's attitude to the physical chastisement of children. We recognise the seriousness that current and prior government's commitment to the welfare of children. Given the documentation provided and the concern of international bodies on this issue the change of removing the defence of "reasonable chastisement" would allay potential for international criticism. The change will also provide a clear guide for citizens in Scotland about acceptable practise in childcare.

If the issue is resolved under criminal law this would lead to a more complex process where issues of guilt would need to be established. This may lead to allegations and counter-allegations between parent and child with a number of issues of guilt and responsibility to be resolved. When this is resolved through the courts a decision of disposal and punishment may be made. Within this framework the best interests of the family and child may be lost and any eventual process may disrupt the most critical years of a child's development. As standards of proof will be higher than in civil law the issue may not be resolved although action will be taken under existing structures to protect the child. The focus of GIRFEC legislation is to ensure that the needs of the child and remediation of problems remain paramount above issues of guilt and punishment.

In reviewing the key issue of whether the defence could be removed of "reasonable chastisement" this would present a clear view that using physical force to discipline a child is wrong. The society would support this action as it provides clarity to parents and carers on acceptable standards in the care of children.

The Society also recognises that removing this potential for acceptable physical punishment provides

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clarity on the nature of the society we wish to live in. It provides clear direction for a compassionate and just society.

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?

As stated previously the society would understand that child protection is of pre-eminent concern to the public bodies in Scotland and this is set out in existing legislation and guidance referred to previously. As such children receive protection from physical punishment and there are mechanisms to address and remediate damaging behaviours within families. However, due to the levels of deprivation and need within the population there is disparity between the level of resource and need.

There is concern that the intended legislative process may lead to a move to manage these issues under criminal law. Violent incidents often involve multiple perpetrators and victims, and the perpetrator is often also the victim (Hoyle, 2012). If the issue of child protection is arbitrated through the courts it may be more difficult to provide effective child protection. Irrespective of the defence of "reasonable chastisement" it can be difficult to gain prosecutions even when there is little doubt that a child has been endangered. As such if the level of proof needed to provide criminal conviction is necessary in order to implement child protection procedures it is likely this will decrease the protections afforded to children. Consequently, the Society would not envisage a new piece of legislation that removes civil law protections to be replaced with criminal law.

If the position is entirely about necessitating the punishment of adults for violence to children that is not severe enough to warrant prosecution with Child Cruelty Legislation. This becomes problematic as to whether other evidential standards can be met. It also raises the concern of malicious allegations made by children who may not understand the impact of potential statements. Within the rigidity of criminal law with rules to protect evidence and sanctions for potential false evidence this can further complicate the resolution of these difficulties.

If children are drawn into the courts on a more frequent basis the difficulties in managing evidence from children will need to be addressed. There is extensive psychological literature discussing the difficulties of using evidence from children and the potential difficulties they face in adversarial hearings (Lamb, Hershkowitz, Orbach and Esplin 2008). In a review of cases where the defence was used (Spink and Spink 1999) it is notable that the offences chosen to prosecute took place where there are adult witnesses. The issues of corroboration common to sexual offences, such as rape, or offences where few witnesses are likely to exist. If the perpetrator continues to smack or physically chastise a child when there is no witness the criminal law will not offer protection. Civil law such as GIRFEC and the aspects of the Children (Scotland) Acts will allow the child to be removed and protected.

If the defence was removed, it would be important that this is accompanied by information dissemination to parents and carers to make it clear that the defence is removed and they can be prosecuted for physical punishment of children. Clarity would need to be made on the guidelines and whether the use of moving children is also outlawed.

Page 11: Financial implications

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

Unsure

Please explain the reasons for your response

It is unclear what the provisions of the bill would be and it remains unclear what would be the cost of the implementation of any statutory mechanisms created without properly understanding what they are. If the action of the parliament was to remove the defence of "reasonable chastisement" we would envisage

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some initial costs in prosecution for those who undertake these practises, but this may lead to a reduction of violence evident in Scottish society and thereby create long term cost savings.

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?

Unsure

Please explain the reasons for your response

As stated previously, no bill has been drafted in relation to this, consequently it is difficult for The Society to make any specific comment on this issue.

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

The Society has no comment to make.

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:

Recognising the limits of competence of the society we would respectfully offer the suggestion that amendments to existing legislation be sought to remove the defence of "reasonable chastisement". It would also seem sensible to consider guidelines for prosecutors to prosecute any offence of physical harm to a child as Child Cruelty removing the possible defence. If a Bill is introduced the society would recommend further support and resources be placed into remediation measures to address deficits in parenting practises such as expansion of parenting interventions. We cannot provide more specific comment on a bill which has not yet been drafted.

Page 15: General

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

The Society believes that removing the defence of "reasonable chastisement" to be a progressive and necessary measure. It is positive in projecting a vision of the rights and responsibilities of Scotland to all its citizens.

If further statutory mechanisms are proposed under the proposed but unwritten bill it is important that these are also subject to scrutiny.

It is unclear how often the defence is used and whether it has been used successfully, the society would welcome this evidence being presented by relevant researchers.