

This document relates to the Children (Equal Protection from Assault) (Scotland) Bill (SP Bill 38) as introduced in the Scottish Parliament on 6 September 2018

Children (Equal Protection from Assault) (Scotland) Bill

Policy Memorandum

Introduction

1. As required under Rule 9.3.3 of the Parliament's Standing Orders, this Policy Memorandum is published to accompany the Children (Equal Protection from Assault) (Scotland) Bill introduced in the Scottish Parliament on 6 September 2018. It has been prepared by the Non-Government Bills Unit on behalf of John Finnie MSP, the member who introduced the Bill.

2. The following other accompanying documents are published separately—

- statements on legislative competence by the Presiding Officer and John Finnie MSP, the member who introduced the Bill (SP Bill 38–LC);
- a Financial Memorandum (SP Bill 38–FM);
- Explanatory Notes (SP Bill 38–EN).

3. This Policy Memorandum has been prepared by Non-Government Bills Unit on behalf of John Finnie MSP, the member who introduced the Bill, to explain the policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

Policy objectives of the Bill

4. The aim of the Children (Equal Protection from Assault) (Scotland) Bill is to help bring to an end the physical punishment of children by parents and others caring for or in charge of children.

This document relates to the Children (Equal Protection from Assault) (Scotland) Bill (SP Bill 38) as introduced in the Scottish Parliament on 6 September 2018

5. The Bill gives children equal protection from assault by abolishing the defence of reasonable chastisement that parents (or others caring for or in charge of children) can use to justify the use of physical force to discipline a child. A person charged with assault of a child will therefore no longer have the defence (in either criminal or civil proceedings) that the use of force constituted “reasonable chastisement” or “justifiable assault”.

6. A further objective of making this change to the law is to drive behaviour change in Scotland, which is currently out of step with most of Europe and many other parts of the world on this issue. It is expected that the Bill will prompt parents and others caring for or in charge of children who use physical punishment to join other parents in using other, less harmful, methods of parenting, and help to redefine what is acceptable in terms of the punishment of children.

Background

Definitions

Physical punishment

7. The United Nations Committee on the Rights of the Child defines corporal or physical punishment as—

“... any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light. Most involves hitting (“smacking”, “slapping”, “spanking”) children, with the hand or with an implement - a whip, stick, belt, shoe, wooden spoon, etc. But it can also involve, for example, kicking, shaking or throwing children, scratching, pinching, biting, pulling hair or boxing ears, forcing children to stay in uncomfortable positions, burning, scalding or forced ingestion (for example, washing children’s mouths out with soap or forcing them to swallow hot spices). In the view of the Committee, corporal punishment is invariably degrading.”¹

¹ The United Nations Committee on the Rights of the Child. Forty-second session, Geneva, 15 May-2 June 2006 - general comment no. 8 (2006). Available at:

<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsqIkirKQZLK2M58RF%2f5F0vF1b6rTFNjw4eY3W5adlOu>

This document relates to the Children (Equal Protection from Assault) (Scotland) Bill (SP Bill 38) as introduced in the Scottish Parliament on 6 September 2018

8. This definition was also used for a research study published in November 2015, commissioned by the NSPCC Scotland, Children 1st, Barnardo's Scotland, and the Children and Young People's Commissioner Scotland, entitled "Equally Protected? A review of the evidence on the physical punishment of children" (referred to in this Memorandum as the Equally Protected Report²). In this Memorandum the terms "corporal punishment" and "physical punishment" are used in accordance with this definition.

Parent

9. In this Memorandum, "parent" is used to refer to any parent (biological, step or adoptive) and to any other adult who is (at the relevant time) caring for or in charge of children.

Historic and current law in Scotland

10. The common law in Scotland allows parents to use some forms of physical punishment. The common law is that if a parent strikes a child as a means of punishment, and if that punishment is reasonable, then it would not constitute an assault. In determining whether or not the punishment is "reasonable" the courts are likely to have regard to (a) the nature of the punishment inflicted; (b) the effect on the child; and (c) the age of the child. This defence to a charge of assault is usually known as "reasonable chastisement". If a parent's conduct exceeds what is reasonable, then the defence would not apply and the offending conduct would constitute an assault.

11. Section 12 of the Children and Young Persons (Scotland) Act 1937 made it an offence for a person with parental responsibilities for a child or young person under the age of 16 to "wilfully assault" that child or young person "in a manner likely to cause him unnecessary suffering or injury to

[DfZp1GdKUZ8oRYHJyiPeOS%2bcQ90I8KHM75DD7B5IIMbhIZPgDtB5J7OmNi%2boP0erF](https://www.nspcc.org.uk/globalassets/documents/research-reports/equally-protected.pdf).

² Equally Protected? A review of the evidence on the physical punishment of children (November 2015). Anja Heilmann, Yvonne Kelly and Richard G Watt. Available at:

<https://www.nspcc.org.uk/globalassets/documents/research-reports/equally-protected.pdf>.

This document relates to the Children (Equal Protection from Assault) (Scotland) Bill (SP Bill 38) as introduced in the Scottish Parliament on 6 September 2018

health”³. However, the section 12 offence was expressly stated not to affect the rights of parents to administer punishment.

12. In 1994, the stepfather of a 9-year old boy (A) was prosecuted in England for repeatedly beating him with a cane. At the end of the trial, the stepfather was acquitted on the basis that the jury found the punishment to have been reasonable. However, A appealed to the European Court of Human Rights (ECtHR), which found in 1998 that the child’s human rights had been breached and that the UK was responsible for this and had failed to adequately protect the child⁴. This ruling led to changes being made in all parts of the UK to strengthen the law on the physical punishment of children. In Scotland, where there had also been court cases in which the physical punishment imposed on the children concerned was judged not to have been reasonable, those changes were made in the Criminal Justice (Scotland) Act 2003⁵.

13. The criteria which the 2003 Act set, to guide what may constitute a “justifiable assault”, reflect the ruling in the A v the UK case.

14. Section 51 of the 2003 Act altered the legal position in Scotland (limiting the common law) by prohibiting hitting a child with an implement, hitting them on the head, or shaking them. It also put into statute common law principles about the factors a court must have regard to when considering whether an assault on a child, in exercise of a parental right or a right derived from having charge or care of a child, was justifiable. These are—

- the nature of what was done, the reason for it and the circumstances in which it took place;
- its duration and frequency;

³ Children and Young Persons (Scotland) Act 1937 (c.37), section 12. The “wilfully assault” wording has subsequently been amended (by section 51(5) of the 2003 Act). Available at:

<https://www.legislation.gov.uk/ukpga/Edw8and1Geo6/1/37/section/12>.

⁴ A. v. the United Kingdom (application no. 25599/94; details available at: http://www.cirp.org/library/legal/A_v_UK1998/).

⁵ Criminal Justice (Scotland) Act 2003 (asp 7), section 51. Available at: <https://www.legislation.gov.uk/asp/2003/7/section/51>.

This document relates to the Children (Equal Protection from Assault) (Scotland) Bill (SP Bill 38) as introduced in the Scottish Parliament on 6 September 2018

- any effect (whether physical or mental) which it has been shown to have had on the child;
- the child's age; and
- the child's personal characteristics (including, in particular, sex and state of health) at the time the thing was done.

15. The concept of “justifiable assault” referred to in section 51 of the 2003 Act did not involve the creation of any new defence to a charge of assault. Under the existing common law the reasonable chastisement of children by their parents is not regarded as assault. What section 51 does do is to require the courts to have regard to the criteria set out above in considering whether conduct amounts to assault or is in fact justifiable on the basis that it was reasonable physical punishment applied in exercise of a parental right (or an equivalent in the case of a person taking care or charge of a child). Any prosecutions would continue to be under the common-law offence of assault. The limits set by the 2003 Act on what may qualify as a “justifiable assault” apply in the context of the physical punishment of a child by a parent.

16. Section 51 doesn't deal with the situation where an “assault” on children and adults alike may be justified in other settings, e.g. the situation where physical force is required in administering emergency medical treatment or surgery.

17. Statute law has prohibited the use of a justifiable assault defence in other, comparable settings. The Scottish case of *Campbell and Cosans v UK* (1982) (4 EHRR 293)⁶ led to the statutory ban on corporal punishment in Scotland's schools. That can now be found in section 16 of the *Standards in Scotland's Schools etc. Act 2000* which excludes its use relative to school education.

18. Legislation has outlawed the use of corporal punishment in certain contexts other than at school, e.g. foster care and kinship care agreements further to the *Looked After Children (Scotland) Regulations 2009* (S.S.I. 2009/210) and also in respect of a “provider of day care of children, child minding or a child care agency” within the meaning of the *Social Care and*

⁶ *Campbell and Cosans v UK* (1982) (4 EHRR 293). Details available at: <http://www.worldlii.org/eu/cases/ECHR/1982/1.html>.

This document relates to the Children (Equal Protection from Assault) (Scotland) Bill (SP Bill 38) as introduced in the Scottish Parliament on 6 September 2018

Social Work Improvement Scotland (Requirements for Care Services) Regulations 2011(S.S.I. 2011/210).

Law in the rest of the UK

19. In other parts of the UK, as is the case in Scotland, whilst there are restrictions on the physical punishment of children (largely attributable to the 1998 ECtHR ruling), such punishment is not completely prohibited.

20. In England and Wales there is a defence of “reasonable punishment” which can be used in any allegations of assault, which has the effect of legalising some forms of physical punishment. Section 58 of the Children Act 2004⁷ restricted this defence in cases relating to the statutory offences of wounding and grievous bodily harm, actual bodily harm or cruelty to persons under 16, stating that battery of a child cannot be justified on the grounds of reasonable punishment. It also states that battery of a child causing actual bodily harm cannot be justified as reasonable punishment in civil proceedings. The Crown Prosecution Service amended its Charging Standard on offences against the person as a result. A review of section 58 published in 2007 by the UK Government’s Department for Children, Schools and Families states—

“... any injury sustained by a child which is serious enough to warrant a charge of assault occasioning actual bodily harm cannot be considered to be as the result of reasonable punishment. Section 58 and the amended Charging Standard mean that for any injury to a child caused by a parent or person acting in loco parentis which amounts to more than a temporary reddening of the skin, and where the injury is more [than] transient and trifling, the defence of reasonable punishment is not available.”⁸

⁷ Children Act 2004 (c 31). Available at:
<http://www.legislation.gov.uk/ukpga/2004/31>.

⁸ Department for Children, Schools and Families (2007). Review of Section 58 of the Children Act 2004. Available at:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/344503/Review_of_Section_58_of_the_Children_Act_2004.pdf.

This document relates to the Children (Equal Protection from Assault) (Scotland) Bill (SP Bill 38) as introduced in the Scottish Parliament on 6 September 2018

21. The Welsh Government has recently consulted (the consultation ended on 2 April 2018) on removing the defence of reasonable punishment which is contained in the Children Act 2004⁹.

22. In Northern Ireland there are very similar provisions to those in England and Wales. The Law Reform (Miscellaneous Provisions) (Northern Ireland) Order 2006¹⁰ effectively enacted section 58 of the Children Act 2004 in Northern Ireland.

Law in other parts of Europe and the world

23. The UK is one of only six EU Member States¹¹, out of 28, in which the physical punishment of children remains legal. When the 2003 Act was passed, only 13 states/territories in the world had prohibited physical punishment of children. Since then, a further 47 states/territories have implemented a change in the law, clearly illustrating that a global shift in approach and attitude is taking place.

24. Sweden was the first country to prohibit the physical punishment of children, in 1979. In the 39 years since, many other states/territories have followed Sweden's lead, and now 53 countries (states rather than territories) across the world have prohibited corporal punishment in all settings. Along with 22 members of the EU, and other European countries such as Norway and Iceland, there are countries from Africa, Asia, South America and Central America. New Zealand has also prohibited the use of physical punishment in all settings. The most recent (since 2015) states/territories to introduce a full prohibition include the Republic of Ireland, Peru, Greenland, Mongolia, Montenegro, Paraguay, Slovenia, Benin, Aruba (territory of the Netherlands) and Lithuania.

⁹ Welsh Government (2018). Legislative proposal to remove the defence of reasonable punishment. Available at: <https://beta.gov.wales/legislative-proposal-remove-defence-reasonable-punishment>.

¹⁰ The Law Reform (Miscellaneous Provisions) (Northern Ireland) Order 2006. Available at: <http://origin-www.legislation.gov.uk/nisi/2006/1945/made>.

¹¹ EU countries without a full prohibition on the physical punishment of children are: Belgium, Czech Republic, France, Italy, Slovakia and the UK.

This document relates to the Children (Equal Protection from Assault) (Scotland) Bill (SP Bill 38) as introduced in the Scottish Parliament on 6 September 2018

25. The Global Initiative to End All Corporal Punishment of Children¹² (an organisation launched in 2001) states on its website that at least a further 56 states/territories have expressed a commitment to a full prohibition being introduced, including India, Pakistan, Mexico, Thailand, South Africa, Afghanistan and Turkey.

26. Other than the UK, states/territories that don't have a full prohibition in place, and haven't committed to full prohibition, include Italy, Iran, Iraq, Russia, China and all states/territories of the USA, Canada and Australia.

27. A small minority of states/territories in the world have no prohibition of the physical punishment of children in any setting, including Singapore, Guyana, Mauritania, Nigeria, Botswana, Tanzania, Somalia, Saudi Arabia, Malaysia, Dominica, Barbados, St Vincent and the Grenadines, Grenada and the State of Palestine.

28. The Global Initiative to End All Corporal Punishment of Children states on its website that only 10% of the world's children are fully protected from physical punishment, with 10% not protected at all, and the remaining 80%, the vast majority, protected in some settings (such as schools) but not all (such as at home).

29. The developmental psychologist Elizabeth Gershoff, of the University of Texas at Austin, has published several reports and articles on this issue over the past 15 years. In 2008 she published the report: Physical Punishment in the United States: What Research Tells Us About Its Effect on Children¹³. Part of that report, looking at countries which have changed the law, noted—

“In most of these countries, these laws appear in the civil law, not the criminal law; the two exceptions are New Zealand and Portugal, both of which have passed the bans under criminal law. While there is no criminal defence for the use of physical punishment in the [in 2008]

¹²The Global Initiative to End All Corporal Punishment of Children. Available at: <http://www.endcorporalpunishment.org/>.

¹³ Gershoff, E. T. (2008). Report on Physical Punishment in the United States: What Research Tells Us About Its Effects on Children. Columbus, OH: Centre for Effective Discipline. Available at: <http://www.nospank.net/gershoff.pdf>.

This document relates to the Children (Equal Protection from Assault) (Scotland) Bill (SP Bill 38) as introduced in the Scottish Parliament on 6 September 2018

24 countries with full bans, the bans did not create a new crime of “spanking.” Rather, all assaults of people are treated similarly, whether of children or adults. These laws are not aimed at prosecuting parents, but at setting a clear standard of caregiving. Discretion is applied when decisions are made regarding charging and prosecution, just as it is in the case of assaults against adults; the best interests of the child are a primary consideration in such decisions. The primary purpose of these bans is to protect children by sending an unambiguous message that hitting them is not allowed.”

Harm caused by physical punishment

30. More is known and understood than ever before about child development, the importance of relationships in a child’s early years and what this means for the long-term health of individuals, communities and society.

31. It is important, not just for those bringing up children but for wider society, to ensure that parents set clear boundaries, provide children with consistent and effective guidance, and help them learn acceptable and appropriate behaviours. Physical punishment is often cited as a form of parental discipline. However, discipline and physical punishment are not the same. Discipline can be achieved through a range of techniques, which do not require the physical punishment of a child.

32. A robust body of international evidence shows that rather than showing children the right way to behave, physical punishment can instead make children’s problem behaviour worse and can lead to a vicious circle of escalating conflict. The evidence shows that this has consequences both for individual families and for Scotland’s public health as a whole. Physical punishment damages children’s well-being and results in increased levels of violence in our communities.

33. Internationally, the use of physical punishment is increasingly regarded as unacceptable. The UN is clear that legal provisions which allow any level of violent punishment of children are not compatible with the United Nations Convention on the Rights of the Child (UNCRC) and ought to be repealed. The UN is leading a global move to end the physical punishment of children in an effort to change attitudes and cultural norms across the world.

This document relates to the Children (Equal Protection from Assault) (Scotland) Bill (SP Bill 38) as introduced in the Scottish Parliament on 6 September 2018

34. The case for giving children equal protection from assault is demonstrated by—

- the overwhelming published evidence which shows that physical punishment is likely to be physically and/or emotionally damaging to children and is an ineffective means of improving children's behaviour;
- the fact that Scotland is one of only a handful of European countries which still permits some physical punishment of children;
- the increasing number of countries around the world which have introduced, or announced plans to introduce, a prohibition of physical punishment in all settings;
- the growing consensus amongst parents and children and young people that children are entitled to expect equal protection from assault; and
- by continuing to allow children to be subjected to physical punishment, and not offering the same protection as adults, Scotland is not complying with the terms of the UNCRC and is at odds with policy and recommendations by the UN and the Council of Europe.

35. The case for change in Scotland is well articulated in the Equally Protected report. The Foreword of the report¹⁴, written by Professor Sir Michael Marmot, of University College London, states—

“A positive start in life provides the foundations for good health and wellbeing. A supportive, nurturing and loving family environment is particularly important in early childhood to encourage and enable children to develop and reach their full potential. Wider society has a key role in protecting children through the creation of supportive conditions for families to flourish. Unfortunately, in Scotland and across the UK many children do not have the best start in life. For many children, physical punishment is still part of their upbringing.

¹⁴ Equally Protected? A review of the evidence on the physical punishment of children (November 2015). Anja Heilmann, Yvonne Kelly and Richard G Watt. Foreword by Professor Sir Michael Marmot. Available at: <https://www.nspcc.org.uk/globalassets/documents/research-reports/equally-protected.pdf>.

This document relates to the Children (Equal Protection from Assault) (Scotland) Bill (SP Bill 38) as introduced in the Scottish Parliament on 6 September 2018

This is despite the fact that physical punishment violates children’s human rights according to the UN Convention on the Rights of the Child.”

36. And he goes on to make two clear and unequivocal statements—

“The international evidence could not be any clearer – physical punishment has the potential to damage children and carries the risk of escalation into physical abuse”; and

“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.”

37. The Report also outlines the growing evidence which shows that physical punishment is detrimental to both childhood and adult outcomes, and is related to an increased risk of maltreatment of children. It identifies 74 studies and two articles on the subject, published since 2005 and states—

“There is strong and consistent evidence from good-quality research that physical punishment is associated with increased childhood aggression and antisocial behaviour ... Moreover, there is fairly consistent evidence for a link between childhood physical punishment and adult aggression or antisocial behaviour, suggesting that the effects of increased aggression among children who were subjected to physical punishment carry over into adulthood ... Physical punishment also affects children’s emotional and mental health. There is good evidence that the experience of physical punishment is related to depressive symptoms and anxiety among children ... Other negative outcomes of physical punishment include parent-child conflict, adult mental illness and adult substance abuse ... One argument that is brought forward again and again is that physical punishment is not harmful in the context of an otherwise loving and warm family environment. However, the majority of studies that tested this hypothesis found that the harmful effects of physical punishment were the same even when levels of maternal warmth were high – the ‘loving smack’ might be a myth.”

38. In relation to an increased risk of maltreatment, the Report states—

This document relates to the Children (Equal Protection from Assault) (Scotland) Bill (SP Bill 38) as introduced in the Scottish Parliament on 6 September 2018

“A link between physical punishment and child maltreatment was consistently supported in the reviewed literature. Physical punishment carries a worrying and serious risk of escalation into injurious abuse and maltreatment. The evidence supports the notion that physical punishment and physical abuse are part of a continuum of violence, differing only by severity or degree.”

Scottish policy development

39. The Scottish Parliament debated physical punishment during the passage of the 2003 Act. At that time the Parliament did not favour an outright prohibition of the physical punishment of children. Instead, the Parliament supported the option of prohibiting certain activities, and setting criteria to follow in all other instances of alleged assault where a parental physical punishment defence was used.

40. In the 15 years since the 2003 Act was passed, the Scottish Government’s policies on children have been further developed and strengthened. For example, the current Scottish Government’s work in this area is underpinned by its Getting It Right for Every Child (GIRFEC)¹⁵ policy, key parts of which were translated into law via the Children and Young People (Scotland) Act 2014¹⁶. GIRFEC features eight indicators of wellbeing, one of which is: “Safe: Protected from abuse, neglect or harm at home, at school and in the community.” GIRFEC states—

“Every child and young person has the right to be, and feel, safe and protected from any avoidable situation or acts of commission or omission by others that might affect their wellbeing. Such as: being physically, sexually or emotionally harmed in any way; being put at risk of physical, sexual or emotional harm, abuse or exploitation.”

¹⁵ Scottish Government. Getting it right for every child (GIRFEC). Details available at: <http://www.gov.scot/Topics/People/Young-People/gettingitright>.

¹⁶ Children and Young People (Scotland) Act 2014. Available at: <http://www.legislation.gov.uk/asp/2014/8/contents/enacted>.

This document relates to the Children (Equal Protection from Assault) (Scotland) Bill (SP Bill 38) as introduced in the Scottish Parliament on 6 September 2018

41. Relevant Scottish Government Ministers have made a number of statements on this issue in recent years¹⁷, confirming that the Scottish Government—

- does not support the physical punishment of children and does not consider that physical punishment of children is effective; and
- agrees that the physical punishment of children in any form can set the wrong example, is not an effective way to teach children discipline, can damage their wellbeing and is likely to be detrimental either physically or emotionally.

42. The Ministers' statements signal recognition by the Scottish Government that physical punishment has the potential to harm children and young people and is ineffective as a means of modifying a child's behaviour.

43. The current law in relation to physical punishment appears in contrast to the policy direction the Scottish Government had taken in previous years towards children and young people. To date, there have been many positive developments, including the introduction of Children's Rights and Well-being Impact Assessments (CRWIA)¹⁸ and the introduction of a Scottish Government Bill in March 2018 to raise the minimum age of

¹⁷ Scottish Government answer to Question S4W-29200 (10 February 2016). Available at:

http://www.scottish.parliament.uk/S4_ChamberDesk/WA20160210.pdf;
Scottish Government answer to Question S4W-29203 (10 February 2016).

Available at:

http://www.scottish.parliament.uk/S4_ChamberDesk/WA20160210.pdf;
Scottish Government answer to Question S4W-29202 (10 February 2016).

Available at:

http://www.scottish.parliament.uk/S4_ChamberDesk/WA20160210.pdf;
Scottish Parliament, Official Report, 8 November 2016. Available at:
http://www.parliament.scot/parliamentarybusiness/report.aspx?r=10610&mode=html#iob_97574.

¹⁸ Scottish Government. Children's Rights. Details available at:
<https://beta.gov.scot/policies/human-rights/childrens-rights/>.

This document relates to the Children (Equal Protection from Assault) (Scotland) Bill (SP Bill 38) as introduced in the Scottish Parliament on 6 September 2018

criminal responsibility in Scotland from 8 to 12 years.¹⁹ Providing children and young people with equal protection from assault would be a further example of Scotland embracing children and young people as citizens in their own right and upholding the principles of the UN Convention on the Rights of the Child (UNCRC).

44. After the consultation closed on this Bill, the Scottish Government announced as part of its Programme for Government that it would “support John Finnie MSP’s legislative proposals to remove the existing defence for parents and outlaw all forms of physical punishment.”²⁰

45. There are also a growing number of organisations and professional bodies calling for an end to physical punishment. Along with the Equally Protected report commissioning organisations (NSPCC Scotland, Barnardo’s Scotland, Children 1st, Children and Young People’s Commissioner Scotland), in 2016 the General Assembly of the Church of Scotland voted in favour of seeking an end to the physical punishment of children and removing the defence of justifiable assault. Interestingly, the Church of Scotland had previously opposed such a move, during the passage of the 2003 Act. The end of physical punishment is also supported by the Scottish Directors of Public Health²¹, the Royal College of

¹⁹ Age of Criminal Responsibility (Scotland) Bill. SP Bill 29, Session 5 (2018). Available at:

<http://www.scottish.parliament.uk/parliamentarybusiness/Bills/107986.aspx>.

²⁰ Scottish Government (2017). A Nation With Ambition: The Government’s Programme for Scotland 2017-18 (page 81). Available at:

<http://www.gov.scot/Resource/0052/00524214.pdf>.

²¹ Scottish Directors of Public Health Group (2012). Comments on the proposed Children’s Services

Bill Edinburgh: Scottish Directors of Public Health. Available at:

<http://www.gov.scot/Resource/0040/00406557.pdf>.

This document relates to the Children (Equal Protection from Assault) (Scotland) Bill (SP Bill 38) as introduced in the Scottish Parliament on 6 September 2018

Paediatrics and Child Health²², and a wide coalition of non-Government organisations (as part of the Children are Unbeatable Alliance²³).

Evidence of a cultural shift

46. In November 2015, NSPCC Scotland, Barnardo's Scotland, Children 1st and the Children and Young People's Commissioner Scotland published the Equally Protected report.²⁴ This report brought together the findings of a wide range of international studies relating to the prevalence and impact of physical punishment on children and young people's well-being since 2005. The report states that although evidence about the extent of physical punishment in the UK is scarce, there is reason to believe that physical punishment of children is still used by some parents in Scotland. The report identifies two key evidence sources for Scottish data on this issue: the Growing up in Scotland (GUS)²⁵ study, and the Millennium Cohort Study²⁶ (MCS). These longitudinal studies have provided several sets of data on the use of physical punishment in Scotland between 2005 and 2013. Some of the notable statistics from these reports include—

- 58% of parents said they smacked children aged 5, and 48% of parents said they smacked children aged 7 (GUS, 2012-13);
- 56% of children aged 7 said they were smacked by their parents when they did something wrong (MCS, 2006-08);

²² Royal College of Paediatrics and Child Health (2009). Position Statement on corporal punishment. Available from:

[http://www.rcpch.ac.uk/sites/default/files/asset_library/Policy and Standards/Policy Documents/Corporal Punishment Policy Nov09.pdf](http://www.rcpch.ac.uk/sites/default/files/asset_library/Policy%20and%20Standards/Policy%20Documents/Corporal%20Punishment%20Policy%20Nov09.pdf).

²³ Children are Unbeatable Alliance. Details available at:

<http://www.childrenareunbeatable.org.uk/#>.

²⁴ Equally Protected? A review of the evidence on the physical punishment of children (November 2015). Anja Heilmann, Yvonne Kelly and Richard G Watt. Available at:

<https://www.nspcc.org.uk/globalassets/documents/research-reports/equally-protected.pdf>.

²⁵ Growing up in Scotland study. Details available at:

<http://growingupinscotland.org.uk/>.

²⁶ Millennium Cohort Study. Details available at:

<http://www.cls.ioe.ac.uk/page.aspx?siteid=851>.

This document relates to the Children (Equal Protection from Assault) (Scotland) Bill (SP Bill 38) as introduced in the Scottish Parliament on 6 September 2018

- 34% of the responding parents of children aged 4 said they had ever used smacking (GUS, 2006-07);
- 16% of the responding parents of children aged 2 said they had ever used smacking (GUS 2007-07);
- 84% of the responding parents of children aged 4 said that smacking was not very, or not at all, useful (GUS 2007-08);
- 87% of the responding parents of children aged 2 said that smacking was not very, or not at all, useful (GUS 2007-08); and
- 42% of parents of 3-4 year olds, and 30% of parents of 1-2 year olds agreed with the statement “it may not be a good thing to smack, but sometimes it is the only thing that will work” (GUS, 2005-06).

47. The Equally Protected report compared this data with a 2002 representative survey of 692 parents in Scotland²⁷ which showed that 77% had used physical punishment in the previous year. It found that the use of physical punishment in Scotland appears to be decreasing, and that public opinion on the issue, which has historically shown a majority against making physical punishment against the law, is also shifting.

48. Data collected on a UK wide basis show a decline in the use of physical punishment. The NSPCC conducted two surveys, one in 1998 and one in 2009²⁸, which show the use of all forms of physical punishment decreasing. For example, in 1998, 61% of young adults aged 18-24 reflecting on childhood experiences reported being smacked on the leg,

²⁷ Anderson S, Brownlie J, Murray L (2002): Disciplining Children: Research with Children in Scotland. Edinburgh: Central Research Unit, Scottish Executive. Available at: https://www.researchgate.net/profile/Simon_Anderson7/publication/237487347_Disciplining_Children_Research_with_Parents_in_Scotland/links/573b397008ae9f741b2d7c0d/Disciplining-Children-Research-with-Parents-in-Scotland.pdf.

²⁸ Radford L, Corral S, Bradley C, Fisher HL, Bassett C, Howat N, Collishaw S (2011): Child abuse and neglect in the UK today. London: NSPCC. Available at: <https://www.nspcc.org.uk/globalassets/documents/research-reports/child-abuse-neglect-uk-today-research-report.pdf>.

This document relates to the Children (Equal Protection from Assault) (Scotland) Bill (SP Bill 38) as introduced in the Scottish Parliament on 6 September 2018

arm or hand, compared with 43% of those asked in 2009; and regular physical punishment was reported by 10% in 1998 and only 3% in 2009.

49. However, whilst it is encouraging to see some trends which suggest a decline in the use of physical punishment in the home, all of these data sets suggest that there is still significant use of physical punishment in Scotland and across the rest of the UK.

Children and young people's views of physical punishment

50. The Children and Young People's Commissioner Scotland commissioned questions on physical punishment in the 2016 Ipsos MORI Young People in Scotland survey²⁹. This survey sought the views of over 1,500 secondary school pupils across Scotland. Key findings included—

- over half of pupils felt it was not OK for parents to physically punish children;
- younger pupils were more likely to say it was not OK for parents to physically punish children;
- 62% of pupils felt that physical punishment could be harmful to children; and
- 65% of pupils think that there should be help for parents to find alternatives to physical punishment.

51. In 2016, the Scottish Youth Parliament consulted 72,744 young people across Scotland to inform their future work priorities. Eighty-two percent of young people responding agreed with the statement 'All physical assault against children should be illegal'³⁰.

Informing people of the change in the law

52. The member considers it important that people across Scotland are made aware of this change in the law and what it means for them and the

²⁹ Ipsos MORI, Results from Young People in Scotland survey (2016) (unpublished).

³⁰ Scottish Youth Parliament Manifesto 2016-2021. Available at: https://d3n8a8pro7vhmx.cloudfront.net/scottishyouthparliament/pages/283/attachments/original/1457781662/Lead_The_Way_Manifesto.pdf?1457781662.

This document relates to the Children (Equal Protection from Assault) (Scotland) Bill (SP Bill 38) as introduced in the Scottish Parliament on 6 September 2018

Bill therefore places a duty on Scottish Ministers to take such steps as they consider appropriate to promote public awareness and understanding of the Bill.

53. Although how this is done will be for Ministers to decide, it might, for example, include a Scotland-wide publicity campaign, aimed at parents and carers, promoting a move towards non-physical methods of child discipline. The Scottish Government might also want to take the opportunity to ensure that children and young people are aware of their own rights as part of the awareness raising duty.

Provision of education and support

54. Although the Bill does not contain specific provision requiring the Bill to be supported by programmes of support and education for parents, children and professional services, the member fully expects that appropriate education and support will be available for those who need it.

55. As the Bill does not involve a radical departure from current Scottish Government policy, the member is confident that appropriate resources and mechanisms for delivering required education and support are already in place. However, this education and support will need to be amended and updated as a result of the Bill. As the Scottish Government has publically supported the aims of the Bill, the member is confident that it will ensure, via liaison with local authorities, that education and support is available and appropriate.

Monitoring

56. The member believes that there is value in monitoring the effectiveness of the Bill and has had contact with the UN Committee on the Rights of the Child and other groups with a view to them reporting on progress in future years. The Scottish Government may also wish to monitor the impacts of the Bill.

Consultation

57. The member carried out a consultation exercise on a draft proposal³¹, lodged on 11 May 2017, which ran from 12 May to 4 August 2017. There

³¹ John Finnie MSP (12 May 2017). Children (Equal Protection from Assault) (Scotland) Bill Consultation document. Available at:

This document relates to the Children (Equal Protection from Assault) (Scotland) Bill (SP Bill 38) as introduced in the Scottish Parliament on 6 September 2018

were 660 responses³² to the consultation and a summary³³ of those responses was published along with his final proposal.

58. Eighty-four responses (13% of the total number) were from organisations and the remaining 576 (87% of the total number) were from individuals.

59. A majority of respondents to the consultation (493, 75%) were supportive of the proposal, including 78 of the 84 organisations which responded. The fully supportive organisations included: children's, family and women's charities and groups; parental organisations; local authorities; human rights organisations; health bodies (including NHS Scotland and regional NHS groups); social work organisations; a church group; police and legal bodies; universities and research groups; equality groups; and a political organisation. Three organisations were partially supportive: NHS Orkney, Orkney Islands Council, and the British Psychological Society.

60. There was strong support for arguments made in the consultation paper, including that—

- children should have the same rights as adults in being protected from all assault;
- physical punishment is not effective and can lead to long-lasting emotional and physical difficulties and damage;
- a change to the law is required to stimulate and ensure that the required behaviour and societal changes take place; and that
- the proposal is required to ensure Scotland complies with human rights legislation and obligations and to meet the Scottish Government's ambition for Scotland to be the best country in the world to grow up in.

http://www.scottish.parliament.uk/S5MembersBills/John_Finnie_Final_Consultation_Document_pdf.pdf.

³² Add link to responses.

³³ John Finnie MSP (24 October 2017). Children (Equal Protection from Assault) (Scotland) Bill Consultation summary document. Available at: http://www.scottish.parliament.uk/S5MembersBills/Consultation_summary_physical_punishment.pdf .

This document relates to the Children (Equal Protection from Assault) (Scotland) Bill (SP Bill 38) as introduced in the Scottish Parliament on 6 September 2018

61. A minority of respondents (166, 25%) were opposed to the Bill, including six organisations (out of 84 that responded). Three of these were Christian bodies (the Scottish Christian Party, the Christian Institute, and CARE for Scotland), one was ThisDadDoes.com (a website/blog about fatherhood run by an individual) and two were anonymous.

62. Reasons given for opposing the proposal included that—

- smacking is not the same as assault or abuse and should not be considered as such;
- the current law is sufficient to protect those at risk;
- state interference in private family life is not welcome or needed;
- physical punishment is effective in loving families and environments; and
- without physical punishment as an option for discipline and guidance, society will suffer negative consequences as a result of unruly children not having learnt right and wrong and boundaries of behaviour.

63. A large majority of those opposed to the proposal cited their belief in the Bible and their Christian faith as part of the reason for their opposition.

Alternative approaches

64. The member could have decided to try to deliver the policy by either seeking to create a new criminal offence of physically punishing a child or by not pursuing any legislative change but seeking to work with the Scottish Government and the relevant professional services to deliver education and support that would stimulate the required behaviour change.

65. However, the member considered that a new specific criminal offence was not necessary as, once the defence of “reasonable chastisement” for parents (or others caring for or in charge of children) was abolished, there would be sufficient legal protection in the law. The member is also seeking to ensure that all people in Scotland have the same protection in law from physical punishment, and did not feel that creating a new specific offence would best achieve that.

66. The member also considered that seeking to change behaviour without changing the law would be ineffective, inconsistent and confusing

This document relates to the Children (Equal Protection from Assault) (Scotland) Bill (SP Bill 38) as introduced in the Scottish Parliament on 6 September 2018

for all involved, as supported by evidence from other parts of the world (see other parts of this Memorandum).

Why legislation is required

67. Parental attitudes towards physical punishment are changing, but they are doing so slowly. At the same time, evidence of the harmful effects of physical punishment is growing and becoming more compelling. As it is now acknowledged that any form of physical punishment has the potential to be damaging to children, any form of physical punishment continues to be legal in Scotland, then we are knowingly exposing children to harm.

68. The evidence from countries where physical punishment is no longer permitted suggests that it is legislative change that has proved to be the catalyst for wider changes in both societal attitudes and behaviours.

69. In Scotland, there are several recent examples of where legislation has been used as a means of facilitating attitudinal change. The ban in smoking in public places, for example, has ensured that children (and adults) are protected from the harmful effects of passive smoking outside the home. A primary intention behind the legislation was to improve public health and to bring about a change in behaviour.

70. Similarly, the primary intention of this proposal will be to provide children with the same protection as adults in relation to assault, and to provide clarity under the law. If the current legal defences available to a parent (or a person in charge of or who cares for a child) administering physical punishment are removed, then any cases of assault brought forward and heard by the courts would be likely to be subject to the same – or broadly similar – considerations as an alleged assault on an adult.

71. While there is some evidence that changes to the law in countries that no longer permit the use of physical punishment has led to increases in reporting of alleged offences, there is no evidence that this has led to significant numbers of prosecutions or convictions³⁴. The same evidence

³⁴ Boyson R, Thorpe L (2002): Equal protection for children. An overview of the experience of countries that accord children full legal protection from physical punishment. London: National Society for the Prevention of Cruelty to Children. Available at:

This document relates to the Children (Equal Protection from Assault) (Scotland) Bill (SP Bill 38) as introduced in the Scottish Parliament on 6 September 2018

sources indicate that changing the law has led to an increased awareness of the need to support parents in finding suitable alternatives to physical punishment.

72. Parents have already indicated that they would welcome support to move away from the use of physical punishment³⁵ and it is acknowledged that any legislative change in Scotland would need to be accompanied by a widespread public information campaign and the provision of family support.

73. The member's policy is therefore clearly focussed on legislating to discourage the physical punishment of children by parents (and others with charge or care of a child) by abolishing the defence of "reasonable chastisement" or "justifiable assault", ensuring that children have the same protection from assault as adults.

Effects on equal opportunities, human rights, island communities, local government, sustainable development etc.

Equal opportunities

74. There are many examples of the law treating adults and children differently, and affording them different rights and/or protections, and these are almost always justifiable as they offer children additional and vital

http://www.respectworks.eu/fileadmin/website/downloads/equalprotectionforchildren_wdf48095.pdf;

Council of Europe (2007): Abolishing corporal punishment of children - Questions and answers. Available at:

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168046d05e>;

Government Offices of Sweden and Save the Children Sweden (2009): Never Violence – Thirty Years on from Sweden's Abolition of Corporal Punishment. Available at:

<http://www.government.se/contentassets/6bfb214c582448b6ace4d32978361577/never-violence---thirty-years-on-from-swedens-abolition-of-corporal-punishment>.

³⁵ Growing up in Scotland study. Details available at: <http://growingupinScotland.org.uk/>.

This document relates to the Children (Equal Protection from Assault) (Scotland) Bill (SP Bill 38) as introduced in the Scottish Parliament on 6 September 2018

protection in various circumstances. However, the current law, which allows children, but not adults, to be lawfully physically punished is an example of discrimination in law based on age which is not justifiable. Providing equal protection to children in this regard is fundamental to the Bill's policy and desired outcomes. The Bill will therefore successfully address this age inequality and help Scotland become, and be seen as, a fairer and more equal society.

75. The Bill will help to protect all children from physical punishment, including any child with identified characteristics protected in law by the Equality Act 2010 (race, disability, sex, gender re-assignment, age, religion and belief and sexual orientation).

76. The member considers that children who fall within some of the identified characteristic groups set out above may be particularly vulnerable as they may be subject to physical punishment as a direct result of that characteristic. This is a view shared by the UN Committee on the Rights of the Child. For example, children who identify as lesbian, gay, bisexual, or transgender (LGBT) may face physical punishment from parents who do not accept or understand that identification. This may also be relevant to situations where children become involved in interracial relationships or become pregnant and/or parents. It will also protect children of parents of all religions and faiths equally, regardless of what a parent believes is permissible because of their own religious beliefs.

77. A full Equalities Impact Assessment (EQIA) will be carried out and sent to the committee(s) to which the Bill is referred by the parliamentary Bureau for scrutiny at Stage 1 of the parliamentary process.

78. The following characteristics have been identified as being particularly affected—

Age

79. The Bill will promote and safeguard the health and well-being of children by ensuring they are afforded the same right to protection from assault as adults. Ensuring that children have the same rights and protection as adults is at the heart of the Bill. Currently, some forms of physical punishment of a child by an adult are lawful. The same actions, were they to be carried out by an adult on another adult, would be regarded

This document relates to the Children (Equal Protection from Assault) (Scotland) Bill (SP Bill 38) as introduced in the Scottish Parliament on 6 September 2018

as an assault. Bringing an end to the concepts of reasonable chastisement and justifiable assault will end an unjustified aged-based inequality which currently exists in law in Scotland.

80. There is evidence to suggest that parents physically punish younger children more than older children and that the use of such punishment diminishes as children get older (see the Equally Protected report). Introducing a prohibition would therefore redress this inequality, and ensure that all children had equal protection under the law.

81. A Children's Rights and Well-being Impact Assessment will be carried out by Dr Susan Elsley³⁶, a writer, researcher, policy analyst and development facilitator with a focus on children and young people, following a recommendation by Children 1st. This assessment should help ensure that the impact of the legislation is fully explored so that measures can be put in place to mitigate any negative impacts the Bill may have upon children.

Gender

82. Physical punishment may have different impacts for boys and girls. As well as being painful and upsetting, corporal punishment can also be degrading and humiliating, and lead to potential emotional difficulties. Evidence indicates that boys are more likely to be physically punished than girls, so changing the law would redress gender inequalities in this regard. Section 51(1)(e) of the Criminal Justice (Scotland) Act 2003 suggests that a child's sex should be taken into account when assessing whether an assault is 'justifiable'. This may reflect an unconscious bias (e.g. that it is worse to physically punish a girl than a boy). See the Equally Protected report for more details.

83. As stated above, children who identify as transgender may be particularly vulnerable as they may be subject to physical punishment as a direct result of that characteristic. The Bill will therefore provide added protection for such children.

³⁶ See details of Dr Elsley's background and work on her website: <http://www.susanelsley.com/>.

This document relates to the Children (Equal Protection from Assault) (Scotland) Bill (SP Bill 38) as introduced in the Scottish Parliament on 6 September 2018

84. The member also believes that the Bill could have a positive impact on helping to reduce instances of domestic abuse, and cycles of violence in the home, by reducing instances, and acceptance, of violence in the home. This may particularly have a positive effect on women and girls, who disproportionately suffer from domestic violence.

85. In April 2018 the Scottish Government and COSLA published a joint strategy entitled: “Equally Safe: Scotland’s strategy for preventing and eradicating violence against women and girls”³⁷. The strategy emphasises the prevention and eradication of all forms of violence against women and girls, and also acknowledges that, as gender based violence can also be perpetrated against men and boys, its measures all applicable to all such violence. The current law, which permits some forms of physical punishment of children by parents, is therefore not consistent with the aims of the Equally Safe strategy. The Bill will ensure that all children are equally protected from assault, and that the law is consistent with the aims of the strategy.

Religion or belief

86. Evidence suggests that the frequency and severity of physical punishment may vary depending on different religious and cultural norms, precedents and beliefs. Therefore changing the law would provide clarity and ensure consistency in the law for children belonging to all cultural and religious groups.

87. Many of those who responded to the consultation and were opposed to the proposal explained that the reason for their opposition was due to their Christian faith and belief in the Bible. Some suggested that the Bill would discriminate against them because of their religious beliefs, by preventing them from following specific religious teachings and instruction.

Race

88. Although some studies conducted in the USA have identified ethnicity as another factor in the prevalence and instances of corporal punishment

³⁷ Scottish Government and COSLA (April 2018). Equally Safe: Scotland’s strategy for preventing and eradicating violence against women and girls. Available at: <http://www.gov.scot/Resource/0053/00534791.pdf>.

This document relates to the Children (Equal Protection from Assault) (Scotland) Bill (SP Bill 38) as introduced in the Scottish Parliament on 6 September 2018

(as noted in a review of the global evidence on the physical punishment of children conducted in Northern Ireland, published in the report “The ‘Smacking Debate’ in Northern Ireland”) there is no evidence that race is a factor in physical punishment in Scotland.

89. However, as with other protected characteristics, changing the law would provide clarity and ensure consistency in the law for children of all races.

Disability

90. As highlighted by UNICEF UK in its response to the Member’s consultation, a research study published in 2013³⁸ (which used UNICEF data on more than 45,000 2-9 year olds from 17 countries) found that children with disabilities were more likely experience physical punishment, and severe physical punishment, than children without disabilities. Also, the study showed that caregivers of children with disabilities were more likely to believe that they needed to use physical punishment than caregivers of children without disabilities.

91. While it is not clear to what extent this may be relevant in Scotland, the Bill would ensure that disabled children will be equally protected, which may reduce any current inequalities, should they exist.

92. The member considers it is important that full consideration is taken of the effect of the prohibition of the use of physical punishment on adults and children with a disability and that this is reflected in the education and support provided to parents, and in the updating of guidance and training of the various professionals involved. Issues such as the difference between restraint and punishment will be important to consider and for all involved to understand.

³⁸ Hendricks, C. et al (2014), "Associations between Child Disabilities and Caregiver Discipline and Violence in Low- and Middle-Income Countries".

This document relates to the Children (Equal Protection from Assault) (Scotland) Bill (SP Bill 38) as introduced in the Scottish Parliament on 6 September 2018

Human rights

93. Addressing the current failure to best protect the human rights of children in Scotland is fundamental to the policy of the Bill and its desired outcomes.

94. The failure to prohibit the physical punishment of children in Scotland, and the UK as a whole, has been criticised by several international human rights bodies, including the United Nations (including by its Committee on the Rights of the Child) and the Human Rights Council. Scotland's available justifiable assault defence has also been singled out for criticism. There is clear guidance from these organisations that the physical punishment of children contravenes children's rights and is inextricably linked to other forms of violence.

United Nations

95. The UN Convention on the Rights of the Child (UNCRC)³⁹ was ratified by the UK in 1991 and states in Article 19—

“States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.”

96. The implementation of the UNCRC is monitored by the UN Committee on the Rights of the Child, which is a scrutiny body of international experts⁴⁰. The Committee holds countries that have ratified the Convention to account. It examines the record of individual countries in promoting and safeguarding children's rights. It also produces General Comments, which are documents designed to aid the interpretation of the UNCRC. General Comment number 820 (published in 2006) concerns “The

³⁹ The United Nations Convention on the Rights of the Child (1990). Available at: http://www.unicef.org.uk/Documents/Publication-pdfs/UNCRC_PRESS200910web.pdf.

⁴⁰ Committee on the Rights of the Child. Details available at: <http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx>.

This document relates to the Children (Equal Protection from Assault) (Scotland) Bill (SP Bill 38) as introduced in the Scottish Parliament on 6 September 2018

right of the child to protection from corporal punishment and other cruel or degrading forms of punishment” and states—

“There is no ambiguity: “all forms of physical or mental violence” does not leave room for any level of legalised violence against children.”

And also states—

“The Committee is issuing this general comment 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.

Addressing the widespread acceptance or tolerance of corporal punishment of children and eliminating it, in the family, schools and other settings, is not only an obligation of States parties under the Convention. It is also a key strategy for reducing and preventing all forms of violence in societies.”

In 2006, the UN Secretary-General’s Study on Violence against Children⁴¹ recommended full prohibition of all corporal punishment of children, in all settings, in all states. In 2016 the UN Committee on the Rights of the Child called on all administrations in the UK to prohibit the use of corporal punishment as a matter of priority (this was the fourth time that the UK was called upon to do so, previous recommendations having been made by the UN Committee on the Rights of the Child in 1995, 2002 and 2008).

97. In relation to the legal position in the United Kingdom, in its Concluding Observations on the UK’s fifth periodic report, the Committee on the Rights of the Child urged the UK, including all devolved administrations, to—

⁴¹ United Nations Secretary-General’s Study on Violence against Children. Available at: https://www.unicef.org/violencestudy/reports/SG_violencestudy_en.pdf.

This document relates to the Children (Equal Protection from Assault) (Scotland) Bill (SP Bill 38) as introduced in the Scottish Parliament on 6 September 2018

“Prohibit as a matter of priority all corporal punishment in the family including through the repeal of all legal defences, such as “reasonable chastisement.”⁴²

98. In 2015, the UN Human Rights Committee published a report⁴³, on the UK’s performance in relation to the International Covenant on Civil and Political Rights, in which it stated—

“The Committee remains concerned that corporal punishment is still not fully outlawed in the home and certain educational and alternative care facilities in the United Kingdom and in almost all British Crown dependencies and overseas territories. It is also concerned about the lack of an explicit prohibition on corporal punishment in the home and about the existing legal defences of “reasonable punishment” in England, Wales and Northern Ireland and “justifiable assault” in Scotland.”

The State party should take practical steps, including through legislative measures where appropriate, to put an end to corporal punishment in all settings, including the home, throughout United Kingdom and all Crown dependencies and overseas territories, and should repeal all existing legal defences across the State party’s jurisdiction. It should encourage non-violent forms of discipline as alternatives to corporal punishment, and should conduct public information campaigns to raise awareness about its harmful effects.”

99. This Bill will address the concerns of the UN and ensure full adherence to the UNCRC.

⁴² UN Committee on the Rights of the Child (2016). Concluding Observations on the UK’s fifth periodic report, paragraph 41. Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGBR%2fCO%2f5&Lang=en

⁴³ United Nations Human Rights Committee (2015). Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland. Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/GBR/CO/7&Lang=En.

This document relates to the Children (Equal Protection from Assault) (Scotland) Bill (SP Bill 38) as introduced in the Scottish Parliament on 6 September 2018

European convention on human rights

100. The European Convention on Human Rights (ECHR) has been a catalyst for the move across many parts of Europe to prohibit physical punishment, particularly Article 3 which states that “no one shall be subjected to torture or to inhuman or degrading treatment or punishment”. Unlike other articles of the ECHR, exceptions or derogations from Article 3 are not permitted. 32 out of 47 Council of Europe member states have now achieved the full prohibition of corporal punishment in all settings.

101. The member considers the Bill to be crucial in affording children their rights to be free from inhuman or degrading punishment or other ill-treatment under Article 3, and other international human rights treaties including the UNCRC. In abolishing the reasonable chastisement defence, the Bill seeks to protect children from the harm and ill-treatment that can result from their physical punishment. The Bill aims to protect the physical and moral integrity of children, matters which are at the heart of the absolute prohibition in Article 3.

102. As stated earlier, the UK lost a case at the ECtHR in 1998 when a child appealed a case of physical punishment and the Court found that the child’s Article 3 rights had been breached and that the UK was responsible for this and had failed to adequately protect the child. The UK, as a signatory to the ECHR, was obliged to amend its law into line with the ruling. The changes made in the 2003 Act reflect the ruling in the *A v the UK* case in 1998. The Court in that case recognised that the effective protection of vulnerable persons, including children, from treatment or punishment falling within Article 3 requires the deterrent effect of the criminal law. In ensuring that children are protected from the law of assault in the same way as adults, the Bill is in pursuit of that requirement and the positive obligations on states to protect individuals from ill-treatment or punishment that is contrary to Article 3.

103. Janys M Scott QC produced an opinion, at the request of Clan Childlaw, as to whether the current law in Scotland is open to challenge as a violation of the ECHR.⁴⁴ The opinion concluded that—

⁴⁴ Opinion of Senior Counsel re the legality of Scots Law on the physical punishment of children (2017). Janys M Scott QC. Available at:

This document relates to the Children (Equal Protection from Assault) (Scotland) Bill (SP Bill 38) as introduced in the Scottish Parliament on 6 September 2018

“... there are strong legal reasons to support further consideration of the law relating to physical punishment of children, given the position under Articles 3 and 8 of ECHR, the influence of UNCRC and the legislative commitment to keeping under consideration steps which would secure better or further effect in Scotland of the UNCRC requirements.”

104. The recent ECtHR decisions in *Tlapak and others v Germany* and *Wetjen and others v Germany* (both decisions of 22 March 2018) are particularly significant in that the Court effectively endorsed statutory bans on all forms of the corporal punishment of children. They also underlined the need to ensure that bans on the corporal punishment of children be enforced in such a way that they are effective and not just theoretical. At paragraphs 90 and 91 of the *Tlapak* decision the Court stated—

“In order to avoid any risk of ill-treatment and degrading treatment of children, the Court considers it commendable if member States prohibit in law all forms of corporal punishment of children ... The Court notes that member States should enforce legal provisions prohibiting corporal punishment of minors by proportionate measures in order to make such prohibitions practical and effective and not to remain theoretical.”

105. Some of those opposed to the prohibition of physical punishment have cited ECHR Articles 8 (private and family life) and 9 (freedom of thought, conscience and religion) as potentially protecting the right for parents to decide how best to punish their children, including the use of physical punishment.

106. Article 8 is, unlike Article 3, qualified, and states—

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

“2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for

http://www.togetherscotland.org.uk/pdfs/Legal_Opinion_Janys_Scott_QC.pdf.

This document relates to the Children (Equal Protection from Assault) (Scotland) Bill (SP Bill 38) as introduced in the Scottish Parliament on 6 September 2018

the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

107. Article 9 is also qualified, and states—

“1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

“2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”

108. Whether the Bill’s abolition of the reasonable chastisement defence could amount to an interference with a person’s Article 8 or Article 9 rights falls to be assessed on the circumstances of the individual affected together with relevant case law. Even if such an interference were held to exist, it is the member’s view that the Bill’s provisions are necessary in order to protect the rights and freedoms of children. In pursuance of that legitimate aim, the Bill’s provisions are regarded as proportionate measures. Given the fundamental importance of protecting children from inhuman or degrading punishment or other ill-treatment, it is considered that an appropriate balancing of rights has been achieved.

Island communities

109. The Bill should have no significant impacts specific to island communities.

Local government

110. The Bill is expected to have an impact on social work and health services provided by local authorities in Scotland. The cost implications are set out in the Financial Memorandum. Impacts on local authorities are expected to occur in two main areas. Firstly, there are the impacts associated with investigating alleged instances of children being physically punished, and secondly there is the provision of appropriate support and education to families.

This document relates to the Children (Equal Protection from Assault) (Scotland) Bill (SP Bill 38) as introduced in the Scottish Parliament on 6 September 2018

111. However, given that current Scottish Government and local authority policy is not supportive of physical punishment and is focussed on educating and supporting parents in other parenting methods, and given that the Bill simplifies the law regarding physical punishment, the removal of the “reasonable chastisement” defence is not expected to have a negative impact on the provision of family support services or any other aspect of local government service delivery.

Sustainable development

112. The member considers that the Bill can be delivered sustainably as it requires no unsustainable financial or other resource input to implement and maintain, will make a positive social contribution, and has no negative environmental impacts. The member also considers that the Bill will make a positive long-term impact on sustainable development. Well-being and future proofing are central parts of sustainable development and the Bill should improve the well-being of children and lead to positive outcomes for children, parents, families and Scottish society as a whole.

113. A fundamental aspect of sustainable development is ensuring that economic, cultural and political systems do not favour some people while harming others. Continuing to allow the physical punishment of children by retaining legal defences would tacitly encourage a form of discipline which can harm children physically and emotionally and which is not equal, as there is no legal justifiable assault of adults.

114. The Bill supports a range of United Nations Sustainable Development Goals (SDG) including—

- SDG 3: Good health and well-being;
- SDG 5: Gender equality;
- SDG 10: Reduced inequalities; and
- SDG 16: Peace, Justice and Strong Institutions.

115. Children growing up with less physical and emotional trauma should have a positive overall benefit on society. As such the Bill should make a positive contribution to the sustainable development of Scottish society in the years ahead.

This document relates to the Children (Equal Protection from Assault) (Scotland) Bill (SP Bill 38) as introduced in the Scottish Parliament on 6 September 2018

116. Encouraging parents to move away from physical punishment to more positive and less damaging means of discipline and guidance should therefore help to address basic human needs, such as being safe, feeling loved and part of a family, and having high levels of esteem (both self-esteem and esteem for others), and also improve the wellbeing of children, parents, and family units, addressing issues such as physical and mental health and having good, respectful relationships between family members.

117. There is no robust evidence from the many countries and territories which have prohibited physical punishment that indicates any disproportionate economic, social and/or environmental impacts. In fact, the pace of change across the world in recent years, following the first prohibition in Sweden in 1979, would suggest a clear absence of unsustainable outcomes. The member is also of the view, given the mounting evidence on the harm caused by physical punishment that leaving the law as it is may lead to unsustainable consequences.

Transitional arrangements

118. There may be instances of physical punishment which took place before the Bill comes into force and which are in the process of being investigated and/or prosecuted when the Bill comes into force, or which are investigated and/or prosecuted after the Bill comes into force. These acts would therefore have taken place when the legal defence of reasonable chastisement was still available.

119. The Bill therefore makes it clear that the change to the law applies only to instances of physical punishment that occur after the Bill comes into force. The Bill's abolition of the reasonable chastisement defence (and its repeal of section 51 of the 2003 Act) do not apply to instances of alleged assault occurring prior to the Bill coming into force. Therefore, for an act committed before the Bill comes into force, the common law right of parents (or others caring for or in charge of children) to use physical force to discipline a child would still apply and a person charged with assault of a child will still have the available defence that the use of force constituted "reasonable chastisement" or "justifiable assault".

120. As well as clarifying this, the Bill also gives a power to Scottish Ministers to make such further transitional, transitory or saving provisions

This document relates to the Children (Equal Protection from Assault) (Scotland) Bill (SP Bill 38) as introduced in the Scottish Parliament on 6 September 2018

as they consider necessary and appropriate. This power is considered necessary to allow flexibility when it comes to implementation of the Bill.

Commencement

121. It is important that appropriate steps are taken to make parents and children fully aware of the forthcoming change in the law before the Bill comes into force. It is also important that the Scottish Government, local authorities and the various professional services involved have appropriate time to ensure that the necessary supporting measures are put in place and understood before the Bill comes into force, to help ensure that the Bill is successful and effective.

122. However, it is also important that the Bill is brought into force as soon as is practically possible and that the enactment of the Bill is not delayed unduly.

123. The Bill therefore provides that the provisions relating specifically to the abolition of the reasonable chastisement defence (and the repeal of section 51 of the 2003 Act) come into force after a 12 month period from Royal Assent, whilst provisions relating to awareness raising and regulation making powers come into force on the day after Royal Assent.

This document relates to the Children (Equal Protection from Assault) (Scotland) Bill (SP Bill 38) as introduced in the Scottish Parliament on 6 September 2018

Children (Equal Protection From Assault) (Scotland) Bill

Policy Memorandum

© Parliamentary copyright. Scottish Parliamentary Corporate Body

Information on the Scottish Parliament's copyright policy can be found on the website -

www.parliament.scot

Produced and published in Scotland by the Scottish Parliamentary Corporate Body.

All documents are available on the Scottish Parliament website at:

www.parliament.scot/documents