

Who Cares? Scotland www.whocaresScotland.org

Consultation Response to Children (Equal Protection from Assault) (Scotland) Bill

July 2017



Who Cares? Scotland [WC?S] is an independent advocacy and campaigning organisation working with care experienced people. We provide direct advocacy to care experienced young people, as well as opportunities for national and local participation. WC?S aims to provide looked-after young people in Scotland with knowledge of their rights. We strive to empower them to positively participate in the formal structures they are often subject to solely because of their care experience. At WC?S we utilise the voice of the care experienced population of Scotland to inform everything we do as an organisation.



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¹ Credit - Council of Europe

1. 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.

WC?S are fully supportive of the proposal.

It is unacceptable that Scotland, a country that aims to be the best place in the world for children to grow up², gives the least legal protection to the most vulnerable members of our society and allows parents the defence of claiming they were using 'reasonable chastisement' if charged with assaulting their child.³

While some people believe physical punishment is an effective means of disciplining and educating a child, attitudes towards the physical punishment of children are changing and its prevalence declining. This may be the result of the growing body of evidence that shows physical punishment to be an ineffective and damaging form of discipline.⁴ Indeed, the research suggests physical punishment should not even be cited as a form of parental discipline due to its proven ineffectiveness. Over recent decades a vast body of research has revealed negative links between physical punishment and child development, relationships and health and wellbeing.⁵

There is a robust evidence link between physical punishment and childhood aggression, antisocial behaviour and delinquency.⁶ Unsurprisingly, physical punishment can have serious and long-lasting effects on children's emotional and mental health. Physical punishment and physical abuse are part of a continuum of violence, it is impossible to separate the two, other than by degree.⁷ Statistics reveal that 90% of children enter the care and protection system due to experiencing abuse and neglect.⁸ Now that we know that there is no such thing as a loving smack⁹, the best way to protect children from the escalation of physical punishment to abuse is to remove the legal defence which prevents children receiving equal protection from assault.

From a children's rights perspective, it is also clear that children deserve to be granted equal protection from assault. Reforming the law to remove a defence which allows physical punishment of children is regarded an obligation under international law by European and UN human rights monitoring bodies. The UK Government's ratification of the UNCRC in 1991 is testament to the fact that children require greater protection of their human rights due to the unequal power balance between children and adults. In ratifying, the state accepted the obligation in international law to give effect to all the rights set out in the UNCRC, including article 19, which states:

*'State 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,***

² Scottish Government, The best place to grow up Debate, 14/03/13.

³ See Section 12 of the Children and Young Person's (Scotland) Act 1937 and Scottish Law Commission (1992)

⁴ Heilmann, Kelly, Watt, 2015. Equally Protected? A review of the evidence on the physical punishment of children.

⁵ See review of evidence in Heilmann, Kelly, Watt, 2015. Equally Protected? A review of the evidence on the physical punishment of children.

⁶ Ibid.

⁷ Bunting L, Webb MA, Healy J (2008): The 'smacking debate' in Northern Ireland – messages from research. Northern Ireland Commissioner for Children and Young People.

⁸ SCRA, 2016. Online Statistics.

⁹ Heilmann, Kelly, Watt, 2015. Equally Protected? A review of the evidence on the physical punishment of children.

*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 had the care of the child.*¹⁰

The importance of removing the defence of “reasonable chastisement” was emphasised in the United Nations Committee on the Rights of the Child’s general comment No. 8 (2006) and the Committee has called on the UK in 1995 and again the UK and devolved nations 2002, 2008 and most recently in 2016 to give children equal protection from assault. WC?S urges that this call does not go unanswered yet again.

The proposed legal change would not create a new offence but simply remove an antiquated defence. WC?S believes that alongside information and awareness campaigns and adequate support for parents the change would be smooth and wholly positive for all children in Scotland.

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

Please explain the reasons for your response.

No. WC?S believes that children need to be given the same level of legal protection from violence as adults. Legislative change sends a significant message to the public however, legal prohibition of physical punishment alone is not enough. WC?S believes that prohibition should be accompanied by large scale information and awareness campaigns to inform the public of the dangers of physical punishment and provide information and support to parents in using positive parenting strategies.

In countries which have prohibited physical punishment of children there have been clear and accelerated declines in its use.¹¹ Legislative change has symbolic value which cannot be matched by an education and information campaign alone. WC?S believes it is important that MSPs in the Scottish Parliament use the passing of the proposed bill as an opportunity to raise issues aligned with the use of physical punishment to the attention of the public and demonstrate that children’s equal protection from violence is an a-political issue.

In addition, achieving the aims of this proposal via a Bill in the Scottish Parliament would avoid the possibility that this issue could end up in court. The Opinion of Senior counsel written by Janys Scott QC for the Children’s Rights Strategic Litigation Working Group on Equal Protection suggests a case could be brought on the grounds that this defence is a violation of human rights. Ensuring that the aims of the proposal are achieved by the Scottish Parliament in a proactive and forward-thinking manner would be preferable to a reactive policy change necessitated by a court decision.

3. 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?

International Attitudes

There is ‘an overwhelming international condemnation of the current legal framework in Scotland’ and there have been several calls for legal reform.¹² For Scotland to be seen by other states as the best place in the world to grow up, the abolition of physical punishment is a necessary step.

¹⁰ United Nations (1989): United Nations Convention on the Rights of the Child (UNCRC). Geneva: United Nations.
<http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

¹¹ Bussmann K-D, Erthal C, Schroth A (2011): Effects of Banning Corporal Punishment in Europe: A Five-Nation Comparison. In: JE Durrant, AB Smith (editors). Global Pathways to Abolishing Physical Punishment: Realizing Childrens Rights.

¹² Heilmann, Kelly, Watt, 2015. Equally Protected? A review of the evidence on the physical punishment of children.

While it is important to remain cautious when drawing comparisons between other countries and give regard to the differing sociohistorical contexts, we can still learn from the positions and actions of other states. In many countries, including Scotland, the prevalence of physical punishment is declining and public attitudes are shifting towards viewing physical punishment as unacceptable and as being unhelpful.¹³ However, this should not lead to complacency in Scotland, as in many countries the decline in the use of physical punishment has been accelerated by legislative change which prohibits its use. Evidence also clearly suggests that legislation passed in combination with public awareness campaigns leads to a marked change in public attitudes.¹⁴ For example, in Sweden, which banned physical punishment in 1979 alongside large-scale nationwide awareness campaigns which have continued over generations, one study showed that 93% of parents agrees that non-violent childrearing is the ideal.¹⁵ Therefore, the prohibition of all physical punishment of children in Scotland is likely to lead to a dramatic reduction in its use, alongside changing public attitudes moving in the direction of clear sustained support for the prohibition.

Accordance with Human Rights

Such examinations by human rights bodies concluding in a call for reform include:

- The Committee on the Rights of the Child, which has called on the UK to prohibit as a matter of priority all corporal punishment in the family, including through the repeal of all legal defences, in England and Wales, Scotland, and Northern Ireland'.¹⁶ The UK, and more recently the devolved administrations, has been urged by the Committee multiple times to give children equal protection from assault, in 2016, 2008, 2002 and in 1995.
- The importance of removing the defence of "reasonable chastisement" was also emphasised in the Committee on the Rights of the Child's general comment No. 8 (2006).
- The Human Rights Committee following the seventh periodic report of the UK in 2015 called for 'practical steps, including through legislative measures... to put an end to corporal punishment in all settings, including the home... and repeal all existing legal defences across the State Party's jurisdiction.'¹⁷
- The Council of Europe has adopted a Recommendation calling for Europe to become a "corporal punishment-free zone". The campaign, "Raise your hand against smacking" aims to provide member states with awareness raising material to promote the abolition of corporal punishment and encourage positive, non-violent parenting. As of July 2017, 31 of the 47 Council of Europe member states have now achieved full prohibition of corporal punishment in all settings, including the home.¹⁸

The notion of 'parental opinion' has had a prominent role in recent debates on physical punishment in the UK.¹⁹ However, the focus needs to be realigned with the rights of the child. While this should not mean

¹³ Heilmann, Kelly, Watt, 2015. Equally Protected? A review of the evidence on the physical punishment of children.

¹⁴ Ibid.

¹⁵ Bussmann K-D, Erthal C, Schroth A (2011): Effects of Banning Corporal Punishment in Europe: A Five-Nation Comparison. In: JE Durrant, AB Smith (editors). Global Pathways to Abolishing Physical Punishment: Realizing Childrens Rights.

¹⁶ United Nations Committee on the Rights of the Child (2008): Consideration of reports submitted by States parties under Article 44 of the Convention. Concluding observations: United Kingdom Of Great Britain And Northern Ireland. United Nations. <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC.C.GBR.CO.4.pdf>

¹⁷ United Nations Human Rights Committee (2015): Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland. United Nations. <http://daccessdds-ny.un.org/doc/UNDOC/GEN/G15/182/29/PDF/G1518229.pdf?OpenElement>

¹⁸ Council of Europe. <<https://www.coe.int/en/web/children/corporal-punishment>>

¹⁹ Brownlie, Julie and Anderson, Simon (2006), Beyond Anti-Smacking, rethinking child-parent relations.

completely side-lining parents views we must focus on the power imbalance between children and adults as doing so will allow for positive change and demonstrate a genuine support of children's rights. It has been highlighted by the Children and Young People's Commissioner Scotland that the debate around equal protection for children is often focused around a mythical 'right' to discipline children through the use of physical punishment.²⁰ However, it is important to note that the concept of a right to private family life protected by Article 8 of the European Convention on Human Rights encompasses the importance of personal dignity, autonomy and physical and psychological integrity. In other words, the protection from all types of harm and violence from outside and within the family unit.²¹ It is the duty of the state to ensure that Article 8 is upheld for children as well as adults and this duty must be performed with action not passivity.

Positive Parenting

Care experienced children and young people frequently tell us that there was violence in their family home. They may have experienced violence through witnessing parental domestic abuse or through personal experience of abuse. It is the duty of the state and indeed all citizens to protect children and young people from all forms of violence and to keep them safe. This duty is made more complex when there remains a perceived level of reasonable violence.

In Scotland, there were 2,723 children on the child protection register on 31st July 2016. While concerns recorded at each case conference of children on the child protection registers are often multiple in number, a common concern is physical abuse which was recorded as a concern at 20% of case conferences.²² While we cannot know the numbers of parents who moved from physical punishment to physical abuse we can know that it is among a range of important risk factor for childhood abuse. Research shows that physical punishment carries a 'serious risk of escalation into injurious abuse and maltreatment.' The use of physical punishment deemed legal has been linked to increased risks of severe physical abuse including injury requiring medical attention during an infant's first year of life and referral to Child Protection Services.²³

It is important to understand the reasons that families might use physical punishment and to recognise that while the reasons are likely to have changed over generations due to shifting cultural values the imbalance of power in a parent-child relationship persists. WC?S believes that removing the defence of 'reasonable chastisement' will prompt the rethinking of the nature of caring relationships. Research shows that physical punishment is used by parents as a result of their own feelings not just their child's behaviour.²⁴ Most parents who smack do not do so out of a positive conviction that the practice is beneficial and useful but out of frustration and a sense that they have no other methods for 'regaining control.'²⁵ For Scotland to be a caring nation, parent-child relationships must be supported to thrive. We know that care experienced children and young people often feel regret and sometimes anger that not

²⁰ Adamson, Bruce. 2017. Children's rights and physical punishment. The Journal. [online] <http://www.journalonline.co.uk/Preview/1023499.aspx#.WWx8RlgrLIV>

²¹ Liberty. Article 8 Right to a private and family life. [online] <https://www.liberty-human-rights.org.uk/human-rights/what-are-human-rights/human-rights-act/article-8-right-private-and-family-life>

²² Scottish Government, 2017. Children's Social Work Statistics Scotland 2015/16. [online] <http://www.gov.scot/Publications/2017/03/6791/0>

²³ Heilmann, Kelly, Watt, 2015. Equally Protected? A review of the evidence on the physical punishment of children.

²⁴ Brownlie, Julie and Anderson, Simon (2006), Beyond Anti-Smacking, rethinking child-parent relations

²⁵ Brownlie, Julie and Anderson, Simon (2006), Beyond Anti-Smacking, rethinking child-parent relations

enough was done to improve and preserve their familial relations.²⁶ Providing children with equal protection from all forms of violence could, alongside an education campaign and further parenting support for those who feel that they would benefit from it, help improve family life for many and work alongside other prevention and intervention methods for others.

Happy and Healthy Citizens

As mentioned above, physical punishment, as with all violence against children, can have serious long term detrimental effects on children's mental, emotional and physical health. The report commissioned by NSPCC Scotland, Children 1st, Barnardo's Scotland and the Children and Young People's Commissioner Scotland found the effects of physical punishment on child health and development to be wholly negative;

- in 42 out of 55 studies physical punishment predicted increased aggression and anti-social behaviour over time,
- clear and consistent evidence for reciprocal effects – physical punishment exacerbating initial problem behaviour which in turn leads to harsher physical punishment,
- evidence suggesting that there is a link between physical punishment and child emotional and mental health problems such as depressive symptoms and anxiety.²⁷

4. 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?

WC?S does not believe there to be any fundamental disadvantages.

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

Please explain the reasons for your response (if you are of the view that there will be different overall impacts for different groups please specify in your comments)

We would recommend that an equality impact assessment is undertaken to assess the overall impact on protected groups under the Equality Act.

8. Do you consider that the proposed bill can be delivered sustainably, i.e. without having likely future disproportionate economic, social and/or environmental impacts?

If you wish to discuss this consultation response, please get in touch.

Carly Edgar, 1000 Voices Manager: cedgar@whocaresscotland.org

David Faith, Policy and Learning Coordinator:
dfaith@whocaresscotland.org

²⁶ WC?S, 2017. Response to Consultation on the New National Health and Social Care Standards. [online] <https://www.whocaresscotland.org/publications>

²⁷ Heilmann, Kelly, Watt, 2015. Equally Protected? A review of the evidence on the physical punishment of children.