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Legislating to Prohibit Parental Physical Punishment of Children

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Summary

- This report explores what might be learnt from countries which have introduced legislation to prohibit parental physical punishment of children. Based on a review of the legislation of, and accompanying research on, relevant jurisdictions, it seeks to identify the factors to be considered when reform proposals are being developed.
- Some types of physical punishment of children by parents or adults acting in loco parentis are lawful in Wales; specifically, parents using moderate disciplinary force may rely upon the defence of reasonable punishment to what would otherwise be a common assault. The law was amended in 2004 in an effort to make it clear that the defence cannot be relied upon as a defence to more serious offences.
- As of 1 May 2018, 53 countries have made the physical punishment of children unlawful. Some countries have abolished the defence of reasonable punishment in their criminal law. Other countries, some of which had first abolished the defence of reasonable punishment, have incorporated into their Civil Codes laws which explicitly prohibit the physical punishment of children by parents. Other countries are considering reform.
- The available evidence supports the view that legislating on physical punishment can contribute to changes in both the attitudes towards, and the use of, physical punishment but that sustained information campaigns and support to parents are also needed for legislation to be effective.
- Reform frequently occurs in advance of a consensus favouring a ban and its use may still be common. Opposition is likely and may continue after reform. Change in the law is often framed within the context of international human rights obligations towards children but other factors, such as the need to secure the welfare of children by providing equal protection from assault to that of adults, may also be very significant.
- The drafting of the law takes a variety of forms. Over-complicated or ambiguous legislation is to be avoided, as it carries the risk of creating confusion. In jurisdictions (like England and Wales) where a decision to pursue prosecution is subject to a public interest test, it could be thought unnecessary to include a provision that minor acts of physical punishment will not be prosecuted. However, as the experience of New Zealand demonstrates, the inclusion of such a provision may allay fears and thus make reform more acceptable.
- Undertaking research to identify patterns of physical punishment prior to reform should facilitate targeted support for parents. Monitoring the impact of the legislation is recommended.

Introduction

This review explores what can be learnt from those countries that have legislated to prohibit the physical punishment of children; and specifically to explore:

- What has been the impact of legislation prohibiting physical punishment; and
- What are the factors which make such legislation (in)effective?

In considering these questions, it offers an overview of the current law in Wales on the defence of reasonable punishment, before reviewing case-studies on three jurisdictions. While the jurisdictions have, as will be seen, different legal systems so that one has to be wary of assuming that provisions can simply be transported from one jurisdiction to another, nevertheless, there are valuable lessons which can be learnt about the process of reform and its impact.

There are differences of opinion about the interpretation and / or impact of many of the laws under consideration, and it is important to note that the interpretation of the existing framework offered here reflects the author's views; the Welsh Government's interpretation was articulated in its recent consultation¹.

Finally, while the review provides a brief analysis of the existing law, it does not consider the arguments for and against reform of the law more generally, nor does it purport to offer legal advice on the drafting of legislation. In addition, it does not consider the issue of the competency of the Welsh Government to legislate on the defence of reasonable punishment.

¹ <https://beta.gov.wales/legislative-proposal-remove-defence-reasonable-punishment> (accessed July 2018)

The Existing Legal Framework

The current Law in Wales

The physical punishment of children by their parents or adults acting in loco parentis (such as grand-parents caring for their grand-child) is lawful in Wales on the same basis as in England (with the exceptions of teachers, child-minders etc. who may no longer use physical punishment as a form of discipline²). Physical punishment is lawful as long as it falls within the ambit of the defence of ‘reasonable punishment.’³ This defence to criminal charges has been limited by section 58 of the Children Act 2004 (included in Annex 1), although the extent to which this has provided clarity is disputed.

The key distinction is between a common assault, which is lawful if done by parents for punishment and an assault occasioning actual bodily harm, which is unlawful. However, the distinction between the two offences has been the subject of sustained criticism for lack of clarity.⁴ As an illustration of the confusion surrounding the effect of the provision one can look to the newspaper headlines and associated coverage which greeted it: “Smack your child and go to jail” (*Daily Mail* 3 November 2004) as against “Parents can smack –if they’re gentle” (*Daily Telegraph* 3 November 2004).

“Actual bodily harm” has been defined by case-law as “any hurt or injury calculated to interfere with the health or comfort of the individual”⁵ or “injury not so trivial as to be wholly insignificant”⁶. However, until very recently the CPS Guidance for Prosecutors placed the bar higher than this when identifying appropriate charges:

“Although any injury that is more than 'transient or trifling' can be classified as actual bodily harm, the appropriate charge will be one of Common Assault where **no injury or injuries which are not serious** occur.” (CPS, 2011)⁷

² Schools Standards and Framework Act 1998, s.131 (extending to nursery schools as well as to children of compulsory school age); National Standards Regulations prohibited smacking by child-minders in 2002 in Wales and 2003 in England.

³ *Hopley* (1860) 2 F & F 202.

⁴ See, for example, Ashworth, (2009), p.129.

⁵ *R v Miller* [1954] 2 QB 282.

⁶ *R v Chan-Fook* [1994] 1 WLR 689.

⁷ See Annex 1 for further details.

The offence of actual bodily harm is generally only to be charged where the injuries are serious and a sentence of more than six months is likely to be imposed following conviction. Given this, one could not be confident of the accuracy of the UK Government's view (stated in a 2007 Review of section 58) that parents might rely upon the defence where punishment results in no more than a temporary reddening of the skin; but not where the injury is more than transient and trifling (Department for Children Families and Schools, 2007, para 56).

Further, an early review by the CPS of the operation of section 58 caused the Joint Committee on Human Rights to conclude that:

“there is evidence to suggest that there have been cases where defendants charged with common assault have been acquitted or the case was discontinued, after running the reasonable chastisement defence. Of those cases, the file review suggests that it was possible that some defendants could have been charged differently. Additionally, there is evidence to suggest that the reasonable chastisement defence may have been put forward in cases where it is not legally available” (Joint Committee on Human Rights, 2007-2008, para 77).

Based on this, the conclusion drawn by the Government following its review of section 58 in 2007 that the law was clear (Department for Children, Families and Schools, 2007, para 56) was at least open to doubt given the flexibility of the distinction between common assault and assault occasioning bodily harm.

In the light of these concerns, the most recent version of the CPS Guidance (CPS, 2018) in relation to the defence of reasonable punishment is to be welcomed. This states clearly: 'unless the injury is transient and trifling and amounted to no more than temporary reddening of the skin, a charge of ABH, for which the defence does not apply, should be preferred.'⁸

Finally, given the fear which is often expressed that removing the defence could lead to increased *compulsory* intervention by the state in family life, it is worth considering the legal threshold for such measures. Under the Children Act 1989, section 31, where an application for a care order is made, it must be established that the child “is suffering or is likely to suffer significant harm” due to the level of care; and, under section 1, that it is in the child's best interests for an order to be made.⁹ In 2009, the Court of Appeal heard an appeal by the local authority against a decision not to make care orders. One of the children, M, told several people that she had been kicked and hit by her parents. In relation to this Lady Justice Hallett stated:

⁸ See Annex 1 for further details.

⁹ While welfare remains the guiding principle in cases coming before the courts, the Social Services and Well-being Act (Wales) 2014 frames the duties of local authorities towards a child when assessing and meeting his or her needs in terms of 'well-being'.

“Reasonable physical chastisement of children by parents is not yet unlawful in this country. Slaps and even kicks vary enormously in their seriousness. A kick sounds particularly unpleasant, yet many a parent may have nudged their child’s napped bottom with their foot in gentle play, without committing an assault. Many a parent will have slapped their child on the hand to make the point that running out into a busy road is a dangerous thing to do. What M alleged, therefore, was not necessarily indicative of abuse. It will all depend on the circumstances.”¹⁰

Commentators have expressed concern that this statement understated what had happened in the family and that the wider message it sends to parents about physical punishment may create further confusion about what is permissible (Hayes, 2010; Keating, 2011).¹¹ That said, what is clear from both the law and its interpretation is that the threshold for compulsory state intervention in family life is (rightly) high to protect parents and children from unwarranted state intervention.

The Human Rights Framework

The UK is a signatory to a number of international Conventions, which impose obligations upon it to uphold the rights of children. Those which are most significant for the purposes of the review are discussed below.

The United Nations Convention on the Rights of the Child

The UK is a signatory to the United Nations Convention on the Rights of the Child (UNCRC). Most of the UK has not incorporated the convention into domestic law. However, in 2011 Wales passed the Rights of Children and Young Persons (Wales) Measure, which brought the UNCRC into law and places a duty upon Welsh ministers to have due regard to the rights of children and young persons as defined by the Convention. Some of the key provisions in the UNCRC are:

“Article 3 The best interests of the child must be a top priority in all decisions and actions that affect children.

Article 4 Governments must do all they can to make sure every child can enjoy their rights by creating systems and passing laws that promote and protect children’s rights.

¹⁰ *Re MA (Care threshold)* [2009] EWCA Civ 853, [40].

¹¹ The decision was reported as “Physically punishing a child with a smack (or a kick) is NOT against the law, says senior woman judge” *The Daily Mail* 1 August 2009.

Article 12 Every child has the right to express their views, feelings and wishes in all matters affecting them, and to have their views considered and taken seriously. This right applies at all times.

Article 37 Children must not ... suffer ... cruel or degrading treatment or punishment. ... They must be treated with respect and care.”

The UN Committee on the Rights of the Child adopted General Comment No. 8 in 2006 on “The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment” (CRC, 2006). This was followed by the UN Secretary General’s Study on Violence against Children which recommended the abolition of all forms of corporal punishment and other degrading forms of treatment (UN, 2006).

Signatories to the Convention are subject to a reporting mechanism to the Committee on the Rights of the Child. The Committee has repeatedly criticised the UK for its failure to remove the defence of reasonable chastisement (for example, CRC (2016), paras. 38-40).

The European Convention on Human Rights

The European Convention on Human Rights (ECHR) was incorporated into Welsh law by the Human Rights Act 1998 although it has been applicable since the Convention came into force in 1953. In the context of the physical punishment of children the key Articles are:

“Article 3 No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 8 (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 ...for the prevention of ... crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 9 (1). Everyone has the right to freedom of thought, conscience and religion ...

(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.”

Article 3 is absolute, such that any punishment or treatment which is deemed “inhuman or degrading” would be considered a violation of this article. Articles 8 and 9, which stipulate a right to respect for private and family life and right to freedom of thought, conscience and religion, can be derogated from in the circumstances identified in (2). In other words, interference with this right can be justified by the need to protect, for example, the health of a child, or to protect his or her rights under Article 3.

Section 58 was enacted following criticism of the common law by the European Court of Human Rights in *A v UK* ((1999) 27 EHRR 611) in which the UK had been found in breach of Article 3 of The ECHR. The court did not rule that all and any physical punishment would amount to a breach but identified the factors to be considered when determining whether the treatment would be regarded as inhuman or degrading.

As promised when the provision was passed, the UK Government undertook a review of its operation in 2007. Responses to the consultation were largely negative; no improvement in the protection of children was reported. Despite this, the review concluded that the law was compatible with the Convention, was clear and need not be changed. As discussed above, given the problematic distinction between common assault and assault occasioning actual bodily harm, this conclusion is unconvincing.

Responding to the UN Human Rights Committee recommendation to abolish the defence of reasonable punishment (CCPR, 2015a, para. 20), the UK Government concluded that the current law is working well, the use of physical punishment is declining and that mild smacking does not constitute violence (CCPR, 2015b, para. 161). The Welsh Government, however, has committed to seeking cross party support for reform (Welsh Government, 2016).

The European Charter of Social Rights

Article 17 of The European Charter of Social Rights states that:

“children and young persons have the right to appropriate social, legal and economic protection. Part 2. With a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities, the Parties undertake ... to take all appropriate and necessary measures designed:... (b).to protect children and young persons against negligence, violence or exploitation.”

In 2004 the Parliamentary Assembly of the Council of Europe adopted a recommendation “that in order to comply with the European Social Charter ... member states must ban all forms of

corporal punishment and other forms of degrading treatment of children” (Council of Europe, 2004, para 1). In 2008 it launched a campaign to ban physical punishment in Europe on the basis that it violates children’s rights, is ineffective as a means of discipline, conveys the wrong message and can cause serious physical and mental harm.

In 2005, the European Committee of Social Rights declared the law of the UK not to be in conformity with Article 17 (ECSR, 2005). Despite the changes made by section 58, the UK was again found not to be in conformity in its subsequent reports (ECSR, 2011; ECSR 2015).

The European Committee of Social Rights has found Belgium, France, Ireland and Slovenia to be in breach of Article 17 in cases brought by APPROACH (Association for the Protection of all Children) (Council of Europe, 2017).

Jurisdictions Which Have Abolished Parental Physical Punishment

As of 1 May 2018, 53 countries have made the physical punishment of children unlawful¹². They range from Sweden, the first country to do so, to Mongolia, Patagonia and Slovenia in 2016 and Lithuania in 2017. The list includes twenty-eight of the forty-seven member states of the Council of Europe. All these countries have their own legal systems and almost all are civil law systems where the law is to be found in Codes. The law in England and Wales has developed in a different way – through a combination of judge-made law (in cases) and statute. This law, whether it is to do with criminal or civil matters (such as family law), is referred to as the common law and thus, ours and other countries’ systems based on our law are common law legal systems. To date only 3 common law jurisdictions have abolished the physical punishment of children: New Zealand, Malta and Ireland.

Some countries have confined reform to removing the defence of reasonable punishment where it existed in their criminal law, which therefore opens up the possibility that parents could be prosecuted for assaults upon their children. This approach has been taken by the 3 common law jurisdictions above.

Other civil law countries have incorporated into their Civil Codes provisions which explicitly

¹² The End Corporal Punishment Organisation (2018) reports that more than 56 more countries are committed to full prohibition. Scotland is one such jurisdiction, where a Bill to remove the parental defence of justifiable assault has recently been published following consultation: see Finnie, (2018) Proposed Children (Equal Protection from Assault) (Scotland) Bill, Summary of Responses http://www.parliament.scot/S5MembersBills/Consultation_summary_physical_punishment.pdf

prohibit physical (and other forms of degrading) punishment. In some instances this follows on from having abolished the defence – a necessary pre-requisite where such laws exist before laws respecting a child’s physical and mental integrity can be incorporated into Civil Codes or (in uncodified systems such as England and Wales) legislation relating to children’s well-being.

Reform is typically achieved by legislation, although not universally (the Supreme Court in Italy, for example¹³). Legislation is often framed within a recognition of children’s rights – often following critical reports from UNCRC or rulings of the Council of Europe, which, as noted above, are committed to the abolition of physical punishment by parents. Ireland is one such country, acting to remove the defence of reasonable punishment in 2015 after being found in breach of Article 17 of the European Charter by the Council of Europe.

The fact that the countries which have reformed their laws on the physical punishment of children have different legal systems means that, as with any comparative study, caution is needed. The more differences there are, the less likely it is that laws can simply be imported into another jurisdiction. However, there are still lessons which can be learnt: for example, in relation to the impact of awareness-raising campaigns.

Removing the defence

Some jurisdictions have legislated to remove the defence of reasonable punishment where it existed (for example, Austria, Ireland and New Zealand). Legislation varies from a simple one-line provision removing the defence to more detailed provisions, which, in order to provide reassurance to parents and opponents fearing an increase in prosecutions, may state that parents still retain the right to use reasonable force to restrain a child from injuring herself or others. The legislation may also state that prosecutions would not be brought for trivial or “inconsequential” acts of physical punishment. In systems with prosecutorial discretion this may be considered unnecessary but was included, for example, in New Zealand (see below) in order to increase the prospects of securing the reform.

¹³ Judge Ippolito, Supreme Court of Cassation, 18 March 1996, deciding that the right of correction which parents have does not include the use of physical punishment. However, physical punishment still appears to be widely used (Lansford et al., 2010) and the status of the reform is somewhat unclear. The decision appears to have enabled Italian governments to state that it has acted to protect children whilst not making any changes to the legal Codes. A court in South Africa has recently held the defence of reasonable chastisement to be unconstitutional although this looks set to be the subject of appeal: *Y.G. v the State* High Court of South Africa, Gauteng Division 19 October 2017.

Prohibiting physical punishment

Other states have amended their Civil Codes to explicitly prohibit the physical punishment of children by parents; some include a prohibition of mental harm as well. In some instances these provisions have followed earlier reforms which removed the defence of reasonable punishment from the criminal or penal law, as, for example, in Sweden (see below) and Finland. Finland removed the defence of lawful chastisement from its Criminal Code in 1969. However, there seemed to be continuing ambiguity about whether the right to use physical punishment remained (Husa, 2011, p.126). Thus further legislation was considered necessary and was achieved by the Civil Code:

“A child shall be brought up in the spirit of understanding, security and love. He shall not be subdued, corporally punished or otherwise humiliated. His growth towards independence, responsibility and adulthood shall be encouraged, supported and assisted” (Article 1.3 of the Child Custody and Rights of Access Act 1983).

Another illustration of this type of ban is provided by Germany:

“Children have a right to a non-violent upbringing. Corporal punishment, psychological injuries and other degrading measures are impermissible” (Bürgerliches Gesetzbuch [BGB] (Civil Code) 2000, § 1631, II).

A more recent illustration combining both types of reform is provided by Spain. It removes the right of parents to administer moderate physical punishment for the purposes of correction and states that parents must exercise their authority with respect for the child’s physical and psychological integrity (First Schedule to Law No. 54/2007 on International Adoption, amending Articles 154 and 268 of the Civil Code).

The process of reform

In jurisdictions where reform has occurred, the use of parental physical punishment is often common and there is not a consensus supporting abolition. For countries which are signatories to international conventions, which, as noted above, impose obligations upon states, children’s rights arguments ought to provide a secure legal basis for reform. But it is clear that other claims or evidence may also be very significant. For example, in Germany the findings of empirical research into the relationship between physical punishment and youth violence and physical punishment and children’s development appear to have been decisive in “overcoming resistance” to reform (Bussman, 2011, p.137). Other welfare arguments, such as the need to protect children from assault by placing them on a par with the protection afforded to adults may be seen as compelling. It is noteworthy that in the recent consultation in Scotland, the

responses which support abolition of the current defence of justifiable assault have drawn on all of the above arguments.¹⁴

Reform is frequently opposed during the passage of legislation. Efforts may be made to water down the measures, as in New Zealand, for example, where one of several rejected amendments would have defined in law a limited number of ways in which physical punishment could be used (see below) and opposition may continue even after implementation. In Finland, for example, despite the apparently clear wording of the 1983 Act, in 1993 the country's Supreme Court had to reiterate that parental physical punishment was an assault (Husa, 2011, p.128). In Sweden opponents took the issue to the ECHR alleging a violation of Article 8 (see below) and in New Zealand both a non-binding citizen's referendum and subsequent Bill attempted to reverse the law (see below).

In the jurisdictions considered in this review the aim of the reform was educational rather than punitive (for example, on Sweden see Janson et al., 2011, p.248; Durrant, 1999) although, of course, the criminal or penal law is available in appropriate cases. As such the change in the law is almost always accompanied by publicity campaigns to ensure that parents both understand the law and are provided with information and support about alternative disciplinary techniques or positive parenting. Effectiveness is thus typically evidenced by shifts in the prevalence of and attitudes towards physical punishment.¹⁵

While research studies are not available for all countries where reform has taken place, there is a substantial body of literature on some of them, most notably on Sweden. As will be seen below, Sweden went to considerable lengths to publicise the change over a sustained period, and very quickly knowledge of the change in the law was widespread. Although shifts in opinion had begun prior to reform, the prevalence and approval of physical punishment has significantly declined subsequently. In Finland where there had been little decline in the use of physical punishment prior to the ban, a study of parents in 2011 reported that 'all parents know that corporal punishment is prohibited by law' (Ellonen et al., 2015, p.410). Acceptance of physical punishment has declined steadily (Husu, 2011; Österman et al., 2014) but more slowly than in Sweden and in 2011 just over 17 per cent of Finnish parents thought it was acceptable to slap a child if he or she made the parent angry (in Sweden the figure was 3 per cent) (Ellonen et al., 2015, p.413). The authors conclude that even in countries with longstanding bans, there may

¹⁴ Finnie, (2018) Proposed Children (Equal Protection from Assault) (Scotland) Bill, Summary of Responses
http://www.parliament.scot/S5MembersBills/Consultation_summary_physical_punishment.pdf

¹⁵ As is pointed out below in relation to New Zealand, how questions in surveys are framed can affect the outcome.

still be further work to be done (Ellonen et al., 2015, p.414).

In Germany, where publicity was not sustained after reform in 2000, knowledge of the status of the law on physical punishment is less widespread (Bussmann et al., 2011, p.307). This is also the case in Austria where no information campaign accompanied reform (Bussmann et al., 2015, p.414). However, in Germany a follow up study does reveal at least a gradual decline in the use of violence and that parenting without violence was the aspiration of more than 90 per cent of parents (Bussmann, 2011, p.138-139).

The conclusion drawn by almost all studies is that corporal punishment bans are associated with declining support for and practice of corporal punishment (Zolotor & Puzia, 2010, p.243) but that it is often in combination with other factors (such as changing social policies) and direct causal connections cannot be proved (Durrant, 1999; D'Souza et al., 2016).¹⁶ Information campaigns which are sustained and repeated are necessary, not only to raise awareness of the change, but also to allay fears about increased risks of prosecution for 'trivial' smacks and fears of increased compulsory intervention in family life.

In contrast, the first European comparative study concluded that in those countries where there is no legal ban but alternative disciplinary techniques are encouraged by publicity campaigns, the use of physical punishment remains widespread (Bussmann et al., 2011, p.319).

Selected Case Studies

Three jurisdictions have been selected for more detailed analysis. These are Sweden, New Zealand and Ireland¹⁷¹⁴. These are selected because they offer valuable insights about the process of achieving reform (the case with all three jurisdictions); there are studies evaluating the impact of reform (the case with both Sweden and New Zealand), and the law in the jurisdictions is based upon English / Welsh law (as is the case with both New Zealand and Ireland). Having said this, as with all comparative studies, one needs to be wary of assuming that any provision can simply be transplanted from one jurisdiction to another without analysis of the wider legal framework within which the specific measure operates.

In each of the following cases studies, the context in which reform occurred is explained; the

¹⁶ A few commentators have challenged the significance of legislation, arguing that declining support for and prevalence of physical punishment are due to more general changes in values in society: for example, Beckett, 2005; Roberts, 2000.

¹⁷ Other countries, such as Australia and Canada, which often one would look to for models of reform, have not yet legislated to prohibit parental physical punishment of children.

form the legislation takes is considered, together with a discussion of follow up studies where they exist.

Sweden

The context

Sweden was the first country to legislate against the physical punishment of children by parents. Because of the length of time since reform and the studies examining its impact it is a significant country to consider. However, as a civil law jurisdiction the purpose of such an examination is not so much to provide a model for reform in common law countries such as Wales, but on the approach to reform and the steps taken to support changes in behaviours.

In 1957 the parental exemption from assault was removed from the Penal Code; although the Parental Code still allowed parents to inflict some level of physical punishment. This was removed in 1966. Despite this it seems that many parents continued to believe that physical punishment was permitted (Janson et al., 2011, p.246).

The Legislation

Thus, in 1979 an explicit ban on parental physical punishment was introduced with almost unanimous support in parliament (Janson et al., 2011, p.247):

“Children are entitled to care, security and a good upbringing. Children are to be treated with respect for their person and individuality and may not be subjected to corporal punishment or any other humiliating treatment” (Parenthood and Guardianship Code, amended 1979, chapter 6.1). (The prohibition on corporal punishment has been repeated in Article 5 of the Instrument of government 2012 - forming part of the Swedish Constitution),

The preparatory documents to the legislation made it clear that the law would not prevent parents acting to restrain their children from causing harm to others or themselves (Leviner, 2013, p.156).

Durrant, one of the leading researchers on the Swedish ban on parental physical punishment has identified three objectives of the 1979 law:

1. to alter public attitudes towards physical punishment;
2. to increase early intervention of children at risk of abuse; and

3. to promote earlier and more supportive intervention in families (Durrant, 1999).

Given that a key aim of the law was educational rather than punishment, the provision was placed in the Parental (Civil) Code (Durrant, 1999; Janson et al., 2011; Leviner, 2013) rather than the Penal Code. Under the Penal Code assault requires the infliction of bodily injury, illness or pain or renders a person powerless or in a similar helpless state (Penal Code, Chapter 3, s.5). The injury, illness or pain must be more than minor and “must not be too mild or brief in duration” (Leviner, 2013, p.157). This means, very significantly, that the ambit of what constitutes a crime is narrower than the ban on physical punishment – so while any form of physical punishment is prohibited under Swedish law, not all of it will be criminal (Leviner, 2013, p.157).

Opposition continued after the Code was amended from those who were fearful that parents would be criminalised, from those who believed it contradicted the Christian faith (Janson et al., 2011, p.247) and from those who argued that it represented an unwarranted interference with family life. One group subscribing to this view brought an application before the ECHR claiming that the ban violated Article 8 (see above section on the Human Rights Framework). The application was rejected by the Committee. The first element to their decision was the fact, as noted above, that the law was contained within the Civil law and thus did not criminalise all physical punishment: “the existence of legislation prohibiting all corporal punishment of children, but which does not provide for any sanctions in this respect, cannot be considered as an interference in the exercise of the parents’ rights to respect for family life”.¹⁸¹⁵ Secondly, the Commission stated:

“the applicants have not shown that the provisions of Swedish law *criminalising*¹⁹ the assault of children are unusual or draconian. The fact that no distinction is made between the treatment of children by their parents and the same treatment applied to an adult stranger, cannot, in the Commission’s opinion, constitute ‘an interference’ with respect for the applicant’s private and family lives since the consequences of an assault are equated in both cases.”²⁰

Accepting the fact that the judgment rested on the lack of criminal sanctions for *all* physical punishment, this latter statement provides some evidence of the direction of travel of the thinking of the ECHR. Arguably, it lends support to the view that passing legislation to equalise the treatment of children and adults (e.g. affording children protection from assault), would not

¹⁸ *Seven Individuals v Sweden*, (1982) 29 DR 104.

¹⁹ Author’s emphasis.

²⁰ At 114.

be considered a violation of Article 8. However, this is open to interpretation.

As the law of 1979 was seen as an educational measure a sustained effort was made to publicise it. There were long-term publicity campaigns, a Ministry of Justice pamphlet was distributed to all households with children (and translated into several languages), debates were held, information was placed on milk cartons and agencies working with children, such as ante-natal clinics, were involved in raising awareness and discussion (Janson et al., 2011).

Follow up studies

The impact of Sweden's reform has been intensively studied over many years. It is generally viewed as having been successful in contributing to changing attitudes towards and use of physical punishment (Durrant, 1999; Ellonen, 2015; Janson et al, 2011; Leviner, 2013; Modig, 2009). Within two years 90 per cent of parents were aware of the ban (Modig, 2009). It is acknowledged that the decline in approval towards and use of physical punishment had begun before the 1979 reform (this leads one author to dispute the impact of the ban on attitudes and use: Roberts, 2000) but that since then there has been a long-term decline in both use of physical punishment and positive attitudes to it. In the 1970s approximately half of children questioned reported being smacked; by the millennium this had fallen to around 14 per cent (Janson, 2011; Leviner, 2013). In a survey in 2011, 92 per cent of parents surveyed believed it was wrong to beat or slap a child (Leviner, 2015) whilst a study by Ellonen revealed that only 3 per cent of parents believed it is "acceptable to slap a child if he or she makes you angry" (Ellonen et al., 2015, p.413). Durrant reports that when physical punishment does take place it is in a milder form (Durrant, 1999).

However, it is important to note that other factors will have contributed to the change, including the expansion of welfare services with children's day care centres, children's clinics and parental courses supporting parents (Leviner, 2013, p.158; Durrant, 1999; Janson et al, 2011). These will also have contributed to achieving the other objectives identified by Durrant, above – of early intervention and support for parents and children.

Substantially increased reporting of assaults upon children to the police has occurred (up by 190 per cent, for example, between 1990-1999) but this is thought to be due to increased readiness to report rather than an increase in abuse (Durrant, 1999; Janson et al., 2011; Leviner, 2013). Claims by one author (Larzelere et al., 1999; Larzelere, 2004; Larzelere, 2005, Larzelere et al., 2013) that there has been an increase in abuse (on the basis that if parents cannot smack they will eventually snap and do more harm) have been rebutted (Durrant, 2005; Durrant, 2011).

The police have to report such cases to social services for investigation. Studies report no

increase in prosecutions of parents for assault (Durrant, 1999; Janson et al., 2011; Leviner, 2013).

Early intervention has increased, not least due to the increased reporting to police, but has been described as “increasingly preventative, voluntary and supportive” (Durrant, 1999). There has not been an increase in compulsory measures against parents, such as removing the child from home (Durrant, 1999; Leviner, 2013). However, at least one researcher suggests more research is needed on the child protection system to “evaluate how the proactive system of support actually works for families reliant on help and support” and queries whether there might be a “blind spot” in this approach in identifying children at risk. She also questions whether the absence of an increase in prosecutions could be a problem if it means that crimes against children are not being taken seriously (Leviner, 2013, p.159).

Finally, there has been some debate around child homicide figures in Sweden and whether there is a decrease in the numbers of children being killed which is associated with the ban on physical punishment (Beckett 2005a; Janson, 2005; Beckett, 2005b). The number of child homicides in Sweden is low and Janson reports that between 1970 and 2000 they decreased between 25-30 per cent. However, 80 per cent of such deaths result from inter-parental conflict, such as disputes over custody where the children may be killed alongside other family members (Janson, 2005, p.1412). Few children die as a result of maltreatment and Janson argues that while “there are reasons to believe that the decline of repeated and severe punishment also decreases the risk of severe intentional injuries and some deaths ... [as] child homicides due to abuse are very few ... decreasing corporal punishment may ...be of marginal importance as a reducing factor of child homicides” (Janson, 2005, p.1413). It is wise, therefore, to be cautious about some of the claims sometimes made by advocates of reform.

New Zealand

The context

New Zealand was the first English speaking country to remove the defence of reasonable punishment. New Zealand’s law was based upon English / Welsh common law:

The Crimes Act 1961, section 59 **Domestic discipline**

(1) Every parent of a child ... is justified in using force by way of correction towards the child, if the force used is reasonable in the circumstances.

Research on the effects of physical punishment and efforts to ban it can be traced back to at least the 1970s. New Zealand was also the subject of critical reports by the UNCRC, the

Government's response to which was to conduct a public information campaign on alternatives to physical punishment (Taylor et al., 2011; Wood et al., 2008).

Research suggests that physical punishment was widespread in New Zealand in the 1970s and 1980s: in one survey, for example, 80 per cent of respondents reported physical punishment by parents during their childhoods, including 45 per cent who reported that an implement was used (Millichamp et al., 2006). It has been stated, however, that there was public concern about the successful use of the defence in cases, for example, where punishment with implements resulted in welts and bruising (Wood et al., 2008, p.69).

The Government did not initiate reform. Instead, it came to Parliament as a Member's Bill in 2005 which would have simply repealed s.59 (Powell, 2012, p.108; Wood et al., 2008, p.176). During its passage it attracted "tumultuous" public and media debate (D'Souza, 2016), more public submissions on the Bill than any other piece of legislation (Powell, 2012, p.108) and demonstrations. Attempts were made to water down the provision: for example, that rather than repealing the defence, it could be amended to limit the ways in which children could be physically punished²¹ or, put another way to stipulate 'how children might be hit' (Wood et al., 2008, p.182).

Eventually, in order to allay fears and to secure reform, a compromise was reached, including amendments which stipulated when force could be used (Wood et al., 2008, p.183; Taylor, 2011) and making the discretion to prosecute explicit. At its third reading the Bill was passed by 113 votes to 8 ((2007) 638 NZPD 9286; Wood et al., 2008, p.186).

Although many of the advocates of reform supported children's rights, it has been commented that the "battle in New Zealand was not fought primarily under the rights banner", (Wood et al., 2008, p.68). Significant factors in the debate included: fears about abuse; protecting children from violence, when the law gave them less protection than adults (Wood et al., 2008, p.65); and the findings of empirical research about the effects of physical punishment and attitudes of children towards it (Taylor et al., 2011, p.185).

Undoubtedly, the legislation has become complicated as a result of the amendments made to pass the legislation and it raises questions as to its use as a model for reform (see Annex 2 to this review for the text of the legislation). In 2010, for example, Chester Borrows a member of the New Zealand Parliament who had initially opposed the Bill but supported it in its amended, final form, stated: 'I think it is written like a dog's breakfast. I think it is ugly, and on the face of it, with all the legalese, it is not easy to understand.' However, he did also add, 'like it or loathe it, it works' (Borrows, (2010) 666 NZPD, page 13822).

²¹ Amendment put forward by Chester Borrows: see further (2007) 638 NZPD 8442.

The Legislation

The Crimes (substituted section 59) Amendment Act 2007 repeals the old section 59 and replaces it with a new section. The purpose of the section is to make better provision for children to live in a safe and secure environment free from violence by abolishing the use of parental force for the purpose of correction.

It then specifies that parents are justified in using force if the force is reasonable for the following reasons: preventing or minimising harm to a child or other person; preventing the child committing what would be a criminal offence; preventing a child engaging in offensive or disruptive behaviour and “performing the normal tasks that are incidental to good care and parenting”.

While there is some justification for making it clear that parents can restrain a child who might be in danger (such as running into a road) or who represents a danger to others (for example, a younger sibling) the provision seems to be a case of legislative overkill. Taken together with section 59(2) the law is potentially ambiguous.

This new sub-section makes it explicit that nothing in the legislation *or the common law* justifies the use of force for the purpose of *correction*. It has been suggested that retention of the word “correction” is problematic as it raises the possibility that smacking / hitting might still be lawful (or claimed by parents to be lawful) if done, not for correction, but to *prevent* a child engaging in any of the behaviour identified above where parents can use force. (Taylor et al., 2011, p.185). That there is potential for confusion here is illustrated by the media’s interpretation of the police guidance issued on the new law (New Zealand, 2007a, cited in Wood et al., 2008): it was interpreted as enabling parents to hit children to prevent them engaging in risky behaviour or criminal or anti-social behaviour (Wood et al., 2008, p.191).

More positively, the inclusion of the italicised phrase in sub-section 2 (above) may be useful in avoiding any doubt that the legislation deals not only with the statutory provision but with the underpinning common-law (Wood et al., 2008, p.84).

The new section 59(4) explicitly includes reference to the police discretion not to prosecute where offence is so inconsequential that there is no public interest in proceeding. This was an amendment added at the last moment to secure ‘a mutually acceptable compromise’, which would enable the Bill to be passed (speech by Chester Borrows (2007) 639 NZPD, page 9286; Wood et al., 2008, p.183). Given that police discretion operates in this way in any event in New Zealand, it is arguably unnecessary and could perhaps be read as denying children equal protection.



Reviews and Follow up Studies

As stipulated in the legislation, reviews were conducted two years after implementation. They concluded that there was no evidence that parents were being subjected to unnecessary state intervention for light smacks and that “parents are being treated as Parliament intended” (Taylor et al., 2011, p.191-192). As required, between 2007 and 2012, the police published six monthly reports to monitor the implementation of the law.²² The first report found no evidence of parents being charged for minor physical punishment (New Zealand Police, 2007b) and that claims concerning increased criminalisation of parents were unfounded. The final report noted increased police attendance at reported events over the five years but otherwise echoed the earlier findings. The report broke incidents down into three categories: smacking (a slap to the legs or buttocks without injury), minor acts of physical discipline (MAPD – a slap with the open hand to any part of the body, including head, without injury) and child assaults (any form of assault resulting in injury). In the final six month review period the police attended 355 incidents. 12 of these were identified as smacking and 31 as involving a MAPD. No prosecutions followed the smacking incidents (9 resulted in warnings). There were nine prosecutions in relation to the MAPD incidents – all but one involving slaps or hits to the child’s head. According to the police files, none of the defendants prosecuted stated that the force used had been reasonable in the circumstances.²³ (New Zealand Police, 2013).

Despite the reviews, opposition continued after reform, with, for example, a non-binding citizen-initiated referendum, which tried to overturn law in 2009 and a Bill which also failed in 2010.²⁴ The Government’s view is that the law is working well and it has no plans to change it (Taylor et al., 2011, p.191).

New Zealand undertook a public information campaign on the new law and alternatives to physical discipline and the Office of the Children’s Commissioner conducted a benchmark survey of attitudes (Office of the Children’s Commissioner, 2008).

Follow up studies have assessed the impact of the reform. A study published in 2016, which undertook a systematic review of several surveys, reported a decline in approval for physical punishment from 89 per cent in 1981, to 58 per cent in 2008, and down to 40 per cent in 2013 (D’Souza et al., 2016). It acknowledges that “attributing causation is complex” and “is likely to be due to a combination of interconnected factors: extensive community action over decades, a

²² The original review period of two years was extended for a further three years.

²³ 252 cases were identified as child assault, 133 resulting in prosecution. Finally, 60 of the 355 incidents were classified as no further action.

²⁴ The Crimes (Reasonable Parental Control and Correction) Amendment Bill 2010.

general shift in values and norms on the acceptability of violence in society, increased awareness of children’s rights, increased salience of childrearing practices due to parent education initiatives, public debate and media reporting of child abuse and law change itself” (D’Souza et al., 2016).

The D’Souza study emphasised that surveys often used different questions to gauge opinion so comparisons have to be seen in that light (D’Souza et al., 2016). Other researchers in New Zealand have also highlighted how important the framing of the questions are, suggesting that the way questions are asked could introduce “differences into people’s apparent level of support versus opposition toward the use of force to discipline children” (Dittman et al., 2013, p.67).²⁵¹⁷

Ireland

The context

Historically, the criminal law of Ireland was based upon the law of England and Wales. This was true of both the offences of assault and battery and the defence of reasonable punishment.

However, a number of reforms have been enacted. In 1997 the common law offences of assault, battery and assault occasioning actual bodily harm were abolished and replaced by two new statutory offences of assault and assault causing harm (Non-fatal Offences Against the Person Act 1997, ss. 2 and 3), ‘harm’ meaning harm to the body or mind and including pain and unconsciousness (s.1). While the wording of the offences has changed, the Irish Law Reform Commission report, which preceded the reform, stated that apart from rolling the offences of assault and battery into one, the common law of assault worked well and would be reproduced in the statute (Irish Law Reform Commission, 1994 cited in O’Sullivan et al 2010, 504).²⁶

Subsequently, in 2001 Ireland legislated to make it:

“an offence for any person who has the custody, charge or care of a child wilfully to assault, ill-treat, neglect, abandon or expose the child, or cause or procure or allow

²⁵ See further, Dittman et al., 2013 and, more generally, Brownlie et al., 2006.

²⁶ It was seen as a consolidating statute, which aimed to bring clarity to the law by using modern, accessible language. Assault is defined as intentionally or recklessly, without lawful excuse, directly or indirectly applying force or causing an impact on the body of another, or causing another to believe on reasonable grounds that he or she is likely immediately to be subjected to any such force or impact without the consent of the other, Also codified (in s. 2(3) is the English common law principle that no offence is committed where ‘everyday contact, such as occurs on busy streets or in crowded places’ occurs (O’Sullivan et al (2010), p504-505).,

the child to be assaulted, ill-treated, neglected, abandoned or exposed, in a manner likely to cause unnecessary suffering or injury to the child's health or seriously to affect his or her wellbeing" (Children Act 2001, s.246).

Ill-treatment includes 'any frightening, bullying or threatening of the child' (s.246(7)).

However, Ireland retained its defence of reasonable punishment. This meant that parents could still plead the defence to charges where the assault did not cause "unnecessary suffering or injury". The law had come under increasing pressure from human rights bodies and domestic campaigners and the Government had declared a commitment to bring about reform at the start of the century. In 2015 there was an adverse ruling by the European Committee on Social Rights that the law was in violation of Article 17 (see above section on the Human Rights Framework); in the same year Ireland legislated to remove defence.

The Legislation

The Children First Act 2015, section 28 amends the Non-Fatal Offences against the Person Act 1997. The provision simply states that "the common law defence of reasonable chastisement is abolished". No new offence is created. The law came into effect in December 2015.

Although the Irish Government had made a commitment to reform to the European Committee on Social Rights, the provision was not included in the original Bill but was introduced as an amendment by a long-standing advocate of reform, Senator van Turnhout. It became a Government amendment at report stage when, following advice from the Attorney-General, the Government formed the view that any legislative measures taken would not be open to challenge in court and would be "legally and operationally sound" (Minister for Children and Youth Affairs, Deputy James Reilly, 2015a).

The aim of the reform was to eliminate corporal punishment and protect children from violence, also taking into account the results of the children's rights referendum (given effect as Article 42A.1 of the Irish Constitution). It "will also send a strong message which ... will lead to a cultural change across society in Ireland that corporal punishment is wrong" (Minister for Children and Youth Affairs, Deputy James Reilly, 2015b). Deputy James Reilly emphasised that the measure "reinforces the developing impetus in parenting practice in Ireland to use positive discipline strategies in the upbringing of children" (Department of Children and Youth Affairs, 2015).

Prior to the reform the Government commissioned a survey on parenting styles, current awareness of the law and attitudes to reform. It revealed that approximately one-third of parents reported using physical punishment in the previous year and that its use was highest among

families where children were classified as having hyperactive or other conduct difficulties. There was confusion about whether it was legal or illegal to smack a child. On the issue of reform 42 per cent of parents thought it should be made illegal, while 34 per cent thought it should remain legal. Overall, no clear support for a change to law emerged. The report concluded, inter alia, that some children are more vulnerable to physical punishment and that their parents may need additional support to enable them to develop additional discipline strategies. Many parents did not see the harm involved in physical punishment and “this highlighted the challenges a legislative ban would bring” (Halpenny et al., 2010, p.3-4).

An attempt was made to secure funding from the EU for a positive parenting campaign after the change in the law but, in the event, TUSLA, the child and family agency responsible for improving well-being and outcomes, has taken on the responsibility for positive parenting work²⁷. TUSLA’s website provides a wide range of sources of information promoting positive parenting.

Follow up Studies

Given that the law has been in force for just over two years, no follow-up studies are available. Jillian van Turnhout, the Bill’s sponsor, has stated that there is anecdotal evidence that parental behavior in relation to physical punishment is changing and that what the reform has achieved is clarity: social workers, for example, can now advise parents definitively that physical punishment is illegal.²⁸

Discussion

A growing number of countries have legislated to prevent the physical (and mental) punishment of children by their parents. Frequently this is a response to international treaty obligations, including the need to comply with Article 3 of the ECHR, but other factors also play a significant part in shaping the reform agenda, such as the need to protect children from violence and the findings of empirical research on the effect of physical punishment and children’s attitudes towards it.

In countries where parental physical punishment has been banned this has occurred in advance of a consensus against its use. The reform process may take years. Opposition is likely and may be framed in terms of parents’ Article 8 rights to respect for private and family

²⁷ Drawn from an email exchange between author and the Director of Policy and Strategy at TUSLA.

²⁸ Email exchange and conversation with Jillian van Turnhout, 14 May 2018.

life. However, as discussed above, there is reason to hope that the support given by the ECHR to equating the legal consequences of an assault upon a child with that upon an adult suggests that such arguments should not prevail. Opposition may continue even after legislation is passed and attempts to reverse the reform may be made.

In countries committed to reform, where its criminal law afforded parents a defence of reasonable punishment, the first step necessary was to abolish this defence. This may well be as far as reform needs to go to secure protection and is the approach which was taken by, for example, Ireland.

Some civil law jurisdictions, where the law is to be found in Codes, have first abolished the defence and then subsequently have incorporated provisions explicitly prohibiting physical (and mental) punishment or other degrading treatment into their Civil Codes. Indeed, the campaigns manual, *Ending Corporal Punishment* recommends this further step in order to send a clear message that children have equal protection with adults (Save the Children Sweden, 2010). Whether countries would wish to take this further incremental step can be considered in the light of studies monitoring the implementation of the removal of the defence. In some countries, of course, without a defence of reasonable punishment, the two-stage process is unnecessary.

The impact of a change in the law is typically assessed by looking at the evidence of a shift in approval and prevalence of physical punishment as a means of discipline. Researchers acknowledge that making direct causal links is difficult and that a number of factors will contribute to changes in attitudes and use. But the evidence does support the conclusion that a decline in approval for and use of physical punishment is associated with legislation prohibiting its use, especially when accompanied by effective and sustained awareness-raising campaigns about the law and other forms of parenting techniques.

By way of contrast, as noted above, in relation to European countries where reform has yet to occur, physical punishment is still common. This also appears to be the case, for example, in Australia. While the government has reported to the Committee of the Rights of the Child that it promotes positive parenting, it has no plans to pass legislation (CRC, 2012) and support for the use of parental physical punishment is still common (if judged by the strong comments posted by readers welcoming the news that the Supreme Court of South Australia had overturned a parent's conviction for assault for slapping his twelve year old child three times on the thigh (Elliot, 2016, reporting the decision in *Police v G, DM* [2016] SASC 39)).

The countries, which have been considered as part of this review, where reforms have taken place, have seen the change in the law as primarily serving an educational function rather than one of punishment. Concern that prosecution rates for parental assaults upon children would

increase have not been borne out by follow up studies, where they exist. Reporting does tend to increase and may lead, as in Sweden for example, to earlier intervention to support families.

It would be premature to conclude that there is a clear association between a decline in child homicides and a ban on physical punishment. Likewise, further research is needed on whether a ban can be associated with a decline in abuse of children more generally.

Increased *compulsory* intervention in the family through care or other similar proceedings is not evidenced. It is also worth repeating the point made earlier in relation to the existing legal framework that the threshold in Wales under the Children Act 1989 is “significant harm”. This is a deliberately high threshold which would not be satisfied on the basis of trivial or minor smacks alone. Proof that it would be in the child’s best interests for him or her to be placed under the care of the state would also be lacking.

Finally, while the review does not aim to give advice about the drafting of laws, there are lessons which might be drawn from it. The New Zealand legislation was passed against a backdrop of continued widespread use of physical punishment and considerable opposition. Their legislation reflects this, and includes provisions designed to smooth the passage of legislation and allay fears by making it explicit that (i) the change did not apply to force used for specified reasons, and that (ii) minor smacks would not be prosecuted. The latter was unnecessary in that it stated what was already a normal part of police discretion in New Zealand (just as it would be with an alleged assault upon an adult). In relation to (i), the provision is convoluted and covers a very wide range of circumstances in which parental force is justified. It may, however, be useful to specify that parents may restrain children from hurting themselves or others. This would require careful drafting to avoid potential ambiguity, such as in relation to the term “correction” - and the phrase “reasonable force” may be similarly problematic. In other words, it needs to be clear that smacking / hitting a child to restrain him or her is not permitted. Overall, legislation should avoid potential ambiguities and being over-complicated.

Conclusion

This review has examined the evidence relating to the impact of legislation prohibiting physical punishment and the factors which make such legislation (in)effective. The evidence reviewed supports the following recommendations:

Before embarking on the reform it is useful to undertake research on the prevalence of parental physical punishment and attitudes towards reform. This may reveal, as in Ireland, that certain



groups may need targeted support when the law is implemented to assist in a move towards non-physical means of discipline and positive parenting. In Wales, the Government has already commissioned a good deal of research in recent years (Prince et al., 2014; Donbavand et al., 2016). This provides valuable insights and may well provide a sufficient basis for action. However, the most recent study does focus on parents of children under five and acknowledges that it does not have enough evidence to say if parents' perceptions of children's behavior is associated with whether they smack or not (Donbavand et al., 2016, p.36). Thus, the Government may wish to consider the possibility that further research might reveal if certain families would benefit from targeted support.

It would be important to monitor implementation, both to understand the impact, and to reassure those who are fearful of the changes. The requirement placed on police in New Zealand to collect and report data has been a significant feature of their approach.

As far as is possible, legislation should be drafted in straightforward terms. Ambiguity needs to be avoided to prevent confusion. Further guidance (for example, on police discretion to prosecute) can be provided and supported by information campaigns.

Finally, legislation alone is unlikely to be sufficient to bring about change. If reform is to be effective, parents and professionals working with families will need clear information about the change together with guidance and support on "positive parenting" using a variety of mediums. The experience of other countries suggests that such awareness-raising efforts need to be sustained.



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Annex 1 – Extract from Existing UK Legislation and Guidance on Parental Physical Punishment

Children Act 2004, Section 58:

- (1) In relation to any offence specified in subsection (2), battery of a child cannot be justified on the ground that it constituted reasonable punishment.
- (2) The offences referred to in subsection (1) are—
 - (a) an offence under section 18 or 20 of the Offences against the Person Act 1861 (wounding and causing grievous bodily harm);
 - (b) an offence under section 47 of that Act (assault occasioning actual bodily harm);
 - (c) an offence under section 1 of the Children and Young Persons Act 1933 (cruelty to persons under 16).
- (3) Battery of a child causing actual bodily harm to the child cannot be justified in any civil proceedings on the ground that it constituted reasonable punishment.
- (4) For the purposes of subsection (3) “actual bodily harm” has the same meaning as it has for the purposes of section 47 of the Offences against the Person Act 1861.¹⁹

CPS, Offences against the Person incorporating the Charging Standard, 2011 (in place until June 2018):

“Although any injury that is more than 'transient or trifling' can be classified as actual bodily harm, the appropriate charge will be one of Common Assault where **no injury or injuries which are not serious** occur.

In determining the seriousness of injury, relevant factors may include, for example, the fact that there has been significant medical intervention and /or permanent effects have resulted. But there may be other factors which are also relevant and

¹⁹ While Northern Ireland has also adopted this provision, Scotland took a different approach: the Criminal Justice (Scotland) Act 2003, s.51 prohibits hitting a child on the head or with an implement or shaking.

these will need to be carefully considered when deciding whether or not the injuries are **serious**. ...

The offence of Common Assault carries a maximum penalty of six months' imprisonment. This will provide the court with adequate sentencing powers in most cases. **ABH should generally be charged where the injuries and overall circumstances indicate that the offence merits clearly more than six months' imprisonment and where the prosecution intend to represent that the case is not suitable for summary trial.**

There may be exceptional cases where the injuries suffered by a victim are not **serious** and would usually amount to Common Assault but due to the presence of significant aggravating features (alone or in combination), they could more appropriately be charged as ABH contrary to section 47 of the Offences Against the Person Act 1861. This would **only** be where a sentence clearly in excess of six months' imprisonment ought to be available, having regard to the significant aggravating features.

However, to reiterate, the presence of such significant aggravating features will not automatically mean that a charge of ABH should be preferred. The key determinant is the likely sentence that the court will pass.”

Factors which indicate greater seriousness include the victim being particularly vulnerable because of personal circumstances and an aggravating factor is that the offence ‘is motivated by, or demonstrates hostility based on the victim’s age’ (Sentencing Council, 2011).

These were replaced in June 2018 (after the drafting of this report) by new guidelines, providing more specific guidance on the defence of reasonable punishment. The key passages are extracted below:

CPS, Offences against the Person incorporating the Charging Standard, 2018:

“Decision making – Common Assault or ABH

Key Points

Common assault should never be charged where the seriousness of the offence merits a charge of Assault Occasioning Actual Bodily Harm (ABH).

As detailed below, a charge of ABH may be appropriate on the basis of aggravating factors relating to seriousness, even where the injuries caused are towards the lower end of the scale...

The starting point in assessing the degree of harm caused is plainly the level of injuries that have resulted. Parliament has determined in simple terms that there should be separate offences reflecting three levels of harm and injury – Common Assault, ABH and GBH.

The degree of harm caused will in many cases be more than just the level of injuries sustained. There will be cases where, although the level of injury may be quite minor, the circumstances in which the assault took place e.g. repeated threats or assaults on the same complainant or significant violence (e.g. by strangulation), make a charge of ABH appropriate rather than one of Common Assault. There should be an assessment of the overall harm caused when deciding on charge and awareness that the level of injury is simply a part of the overall harm.

Features that provide a useful indication of when a charge of ABH may be appropriate are:

- Use of a weapon of a kind likely to cause serious injury;
- A weapon is used and serious injury is caused;
- More than minor injury is caused by kicking or head-butting;
- Serious violence is caused to those whose work has to be done in contact with the public or are likely to face violence in the course of their work;
- Violence to vulnerable people, e.g. the elderly and infirm. ...

Reasonable punishment of a child

Section 58 of the Children Act 2004 has removed the availability of the reasonable punishment defence for parents or adults acting in loco parentis where the accused is charged with wounding, causing GBH, ABH or cruelty to persons less than 16 years of age. However the reasonable punishment defence remains available for parents or adults acting in loco parentis against charges of common assault.

Selection of the charge where “reasonable punishment” may be a defence

In selecting the most appropriate charge, where the likely defence is one of “reasonable punishment (s58 Children Act 2004), regard must be given to the case of *A v UK* (1999) 27 EHRR 611. Unless the injury is transient and trifling and amounted to no more than temporary reddening of the skin, a charge of ABH, for which the defence does not apply, should be preferred.

Reasonableness of the punishment

...[T]he following factors will assist in determining whether the punishment in question was reasonable and moderate:



- the nature and context of the defendant's behaviour;
- the duration of that behaviour;
- the physical and mental consequences in respect of the child;
- the age and personal characteristics of the child;
- the reasons given by the defendant for administering the punishment.”



Annex 2 – Extract from New Zealand’s Legislation on Parental Physical Punishment

Crimes (Substituted Section 59) Amendment Act 2007

Commenced: 21 June 2007

The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Crimes (Substituted Section 59) Amendment Act 2007.

2 Commencement

This Act comes into force one month after the date on which it receives the Royal assent.

3 Principal Act amended

This Act amends the Crimes Act 1961.

4 Purpose

The purpose of this Act is to amend the principal Act to make better provision for children to live in a safe and secure environment free from violence by abolishing the use of parental force for the purpose of correction.

5 New section 59 substituted

Section 59 is repealed and the following section substituted:

59 Parental control

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

preventing or minimising harm to the child or another person;

or (b) preventing the child from engaging or continuing to engage in conduct that amounts to a criminal offence; or

(c) preventing the child from engaging or continuing to engage in offensive or disruptive behaviour; or

(d) performing the normal daily tasks that are incidental to good care and parenting.



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

(3) Subsection (2) prevails over subsection (1).

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

.....

7 Chief executive to monitor effects of this Act

(1) The chief executive must, in accordance with this section, monitor, and advise the Minister on the effects of this Act, including the extent to which this Act is achieving its purpose as set out in section 4 of this Act, and of any additional impacts.

(2) As soon as practicable after the expiry of the period of 2 years after the date of the commencement of this Act, the chief executive must:

(a) review the available data and any trends indicated by that data about the matters referred to in subsection (1); and

(b) report the chief executive's findings to the Minister.

(3) As soon as practicable after receiving the report under subsection(2), the Minister must present a copy of that report to the House of Representatives.

(4) In this section, chief executive and Minister have the same meaning as in section 2(1) of the Children, Young Persons, and Their Families Act 1989.

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