



Briefing provided by the Children's Commissioner for Wales: January 2018

Legislative Proposal for removal of the defence of "reasonable punishment"

On 27th June 2017, the First Minister restated the Welsh Government's intention to seek cross party support for legislation to remove the defence of reasonable punishment, as part of his statement on the government's legislative priorities for the year ahead. The consultation that has now been launched in January 2018 is the legislative proposal for the removal of this defence, and it provides an opportunity to shape that legislation as it develops.

The stated policy aim of the proposal is to support children's rights by prohibiting the use of physical or corporal punishment. This is to be achieved through the removal of the defence of reasonable punishment, in relation to a charge of common assault in the criminal courts.

Removing this defence would mean that children in Wales will have the same protection against common assault in law as adults have. It will also ensure that Wales is fully compliant with Article 19 of the United Nations Convention on the Rights of the Child (UNCRC), which requires the State to take all necessary and appropriate measures to safeguard children.

There has been a lot of misinformation put forward during previous debates about this topic but here are the facts about this proposal:

- It does not create any new criminal offences;
- There will be no new individual policing of families or changes to social services' thresholds for intervention;
- The changes do not seek to criminalise parents;
- It will not affect ordinary parenting acts that involve physical contact, such as brushing teeth or hair, or pulling a child to safety from a car or fireplace;
- Children in Wales will be afforded the same legal protection as adults and their rights under the UNCRC will be upheld.

The consultation document explains carefully and in detail the research evidence on the negative effects of smacking and the positive impact of authoritative parenting styles that do not include physical or corporal punishment. It should provide considerable reassurance to anyone who may be concerned about the implications of a change in the law that this proposal is justified and proportionate.

Whilst it cannot be said that no parent will ever be prosecuted for assaulting their child, it is simply scaremongering to say that large numbers of parents will face prosecution as a result of this proposal. There has not been this effect in any of the 53 countries that have passed similar laws – including countries like ours such as New Zealand and Ireland. Prosecution will



not go forward unless it is in the child's best interest and the public interest, and the evidential thresholds are met, as is already the case for this and all other criminal offences.

Instead, the removal of the defence of "reasonable punishment" will accelerate a cultural change that is already taking place in Wales. Fewer parents than ever resort to smacking these days. Changes in the law have led to other huge cultural changes in Wales, from making drink driving and not wearing a seat-belt unacceptable, to the development of much more positive attitudes to same sex relationships.

This proposal would mirror what has already been achieved in the Republic of Ireland in 2015 and uphold children's rights here in Wales. A private members bill is also being put forward in Scotland on this subject.

I have set out below some frequently asked questions, with the aim of addressing some of the queries or misconceptions that are often raised in relation to this topic. The aim of this briefing is to provide some clear information and facts, independent of the Welsh Government's proposals, to inform and contribute to the ongoing debate that will shape this legislative change.

I look forward to engaging with you throughout the development of these proposals.

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Contents

1. Why is the defence of reasonable punishment being removed in Wales?.....	4
2. What does the current law say?	5
3. Who will be affected if the defence of reasonable punishment is removed in Wales?	5
4. If the defence of reasonable punishment is removed, will this mean that parents will be prosecuted or 'criminalised'?	6
5. Will this change in the law prevent a parent from protecting their child, for example stopping them from stepping out into the road?.....	7
6. What about parents' rights?	8
7. What will be the impact of the change in law on public services?.....	9
8. What are the alternatives when my child will not listen to me?.....	10
9. What should I do if I have more questions on this topic?	10



FREQUENTLY ASKED QUESTIONS

1. Why is the defence of reasonable punishment being removed in Wales?

Welsh Labour and Plaid Cymru both included legislation to remove the defence of reasonable punishment in their 2016 Assembly election manifestos. This proposal is the first step in bringing forward that commitment.

Removal of this criminal law defence is directly related to children's rights under the UNCRC. In Wales, due regard for children's rights has been directly brought into law through the Rights of Children and Young Persons (Wales) Measure 2011. Commitment to children's rights requires more than just words however; the state is required to take action to protect children's rights and this proposal is a clear example of this. At present children have less protection in law against common assault than adults due to the existence of this defence. This is a fundamental breach of their rights to be treated equally and kept safe from harm, which is why the defence is proposed to be removed. This will make all people in Wales, including children, equal in law.

There is an increasing body of evidence showing that physical or corporal punishment is not effective and is potentially harmful to children; yet it is still legal. There is evidence from a number of studies, including longitudinal studies, which indicate a relationship between the use of physical punishment and increased childhood aggression and anti-social behaviour. There is also evidence that more frequent physical punishment in one year is significantly related to more frequent child anti-social behaviour in the next year. Children who are smacked frequently are more likely to be reported as having difficult behaviours, including being over-active, and defiant.¹

Physical or corporal punishment has already been prevented by law in settings such as schools, but remains available to a parent or an adult acting as a carer or guardian "in loco parentis".

Attitudes to parenting practices in Wales have been changing over the years. In 1998, 88% of adults polled believed that it was sometimes necessary to smack a naughty child; however, by 2015, this figure had dropped significantly to 24%. Removing the defence of reasonable punishment will encourage parents in their use of more positive parenting techniques which are proven to be more effective.

¹ Please do not hesitate to contact us for further information on the study evidence.



The UN Committee on the Rights of the Child has concluded on three separate occasions over the last 15 years that the UK Government and the devolved nations are in breach of children's rights by allowing the defence of reasonable chastisement to remain in force. This legislative proposal will fulfil our obligations under international human rights law.

2. What does the current law say?

A smack, as in physical force used in contact by one individual against another, is an assault. It does not matter whether that smack is on a child or an adult, nevertheless it is an assault and potentially can lead to prosecution.

However, parents or those acting 'in loco parentis' are currently able to rely on a defence of reasonable punishment, against a charge of common assault. This means that if they were to hit their child in the context of a "punishment" but it did not leave a mark or caused no injury (or no serious injury), then they would be entitled to claim that this was a "reasonable punishment". If this defence is accepted, they would not be convicted of the offence.

In any case, this will require a subjective judgment; there is no agreed 'list' of actions that would or would not be classified as "reasonable". This creates a grey area in the law, as it is not immediately clear what would be "reasonable" in any given circumstances. Removal of the defence would create greater clarity for professionals and for parents, as it would no longer be acceptable to hit a child in any circumstances.

There is no corresponding legal defence to hitting an adult. The only defences available to a charge of common assault for hitting an adult are consent or self-defence. These two defences would remain unaffected by these proposals.

The defence of reasonable punishment applies solely in common assault cases in the criminal courts; it is not applicable to social services or family court proceedings.

3. Who will be affected if the defence of reasonable punishment is removed in Wales?

All children in Wales would be protected by law from physical or corporal punishment in all circumstances. It would also apply to any child visiting Wales.



4. If the defence of reasonable punishment is removed, will this mean that parents will be prosecuted or 'criminalised'?

The defence of reasonable punishment is only applicable to a charge of common assault. This proposal is simply removing this defence; there is **no new criminal offence being created**. As such, the criteria upon which the Police and Crown Prosecution Service investigate and make charging decisions in relation to physical or corporal punishment will not change.

The Code for Crown Prosecutors states that a decision to prosecute any type of case can only be taken after a two-stage test has been satisfied; i) the evidential stage and ii) public interest. The evidential test requires prosecutors to be satisfied that there is sufficient evidence to provide a "realistic prospect of conviction" against each suspect on each charge. A case which does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be.

In every case where there is sufficient evidence to justify a prosecution, prosecutors must then go on to consider whether or not a prosecution is required in the public interest, which includes the best interests of the child themselves. In some cases the prosecutor may be satisfied that the public interest can be properly served by offering the offender the opportunity to have the matter dealt with by an out-of-court disposal rather than bringing a prosecution. This second stage also requires prosecutors to consider whether a charging decision would be proportionate. The two stage test will not be altered under these proposals, and the best interests of the child will remain a paramount consideration in applying the test, as required by the Children Act 1989 and the UNCRC.

53 countries around the world have already prohibited physical punishment and there has been no evidence of increased prosecution of parents in these countries following the change in law.



5. Will this change in the law prevent a parent from protecting their child, for example stopping them from stepping out into the road?

The offence of Common Assault is committed when a person either assaults another person or commits a battery. (A battery is committed when a person intentionally and recklessly applies unlawful force to another.)

The term “unlawful force” is important here. Force is inflicted intentionally, and requires a direct action. Preventing a child from going into danger, such as stepping into a busy road or touching a hot surface does not require the infliction of force, and is a different sort of action entirely. Those actions therefore do not fall within the definition of an assault and never have done. A deliberate smack to a child may however be classed as an assault if it is inflicted with unlawful force.

Police, prosecutors, criminal lawyers, judges and social workers rely on established principles and case law which recognise this difference, and they would regularly apply these principles to the circumstances of each case or situation they deal with. The actual definition of an assault will not be changed by these proposals so it will not be widened to include anything which is not already considered to be an assault.

As Children’s Commissioner for Wales, it is my statutory role to ensure that children’s rights are being safeguarded and promoted, and so I want to ensure that children in Wales are kept safe. Actions such as stopping a child from going into danger are designed to do exactly that and would not fall within the definition of common assault.



6. What about parents' rights?

All children in Wales are protected by the provisions of the UNCRC. The Welsh Government is proposing to remove the reasonable punishment defence in Wales, to ensure that children are protected from harm and able to realise their full potential.

The rights under the UNCRC are what is known as “absolute” or “unqualified rights” which means that they apply to all children under the age of 18, regardless of their circumstances, and cannot be overridden.

In the UK there are also rights that apply to all people under the Human Rights Act 1998, which brings into UK law the European Convention on Human Rights (ECHR). The ECHR is unaffected by Brexit and will remain in force unless or until the Human Rights Act were to be repealed by the UK Government. Article 8 of the ECHR affords all people with the right to privacy and family life; however this is what is known as a “qualified right”. The Human Rights Act permits the State to make laws that *potentially* interfere with qualified rights, provided that the interference is justifiable in a modern and democratic society. Any proposals need to be necessary and proportionate and have a legitimate aim, in order to be justified. It is this provision that allows Governments to make laws prohibiting domestic violence for instance, and to provide for children to be taken into care for their protection, if this is in their best interests and the relevant thresholds are met. Technically this is an interference with Article 8 rights, but this is justified by the legitimate aim of protection of the victim or the child.

Whilst parents can and should be able to choose how they wish to bring up their children, children also have fundamental and unqualified rights to be protected, which is why the removal of the defence is being proposed. It is a proportionate response to the balancing exercise between the rights of all people, with a legitimate aim of keeping children safe from harm.

The proposal is part of a much wider package of measures the Welsh Government is taking to support children and their parents. Support for parents at all levels will continue to be provided, including the positive parenting campaign, and delivered by partners in local government, health, education, social services, social justice and the third sector.

Universally accessible services include services provided by the Family Information Services, GPs, health visitors and midwives. In addition more targeted interventions, such as Flying Start and Families First will continue to offer support and advice to parents.

The proposals include non-regulated educational settings like Sunday schools and madrassas, so are not solely aimed at parents.



7. What will be the impact of the change in law on public services?

The Police, the Crown Prosecution Service and Social Services already receive and investigate reports of children being physically punished, and they determine these on a case by case basis, looking at all of the circumstances and taking into account the child's best interests.

At present the defence of reasonable punishment requires a subjective judgment to be exercised by the Police and CPS, in determining what is "reasonable" in the case. Removal of this defence would mean that there is more clarity in the criminal law for both parents and professionals. It is clearly understood that it is not acceptable to hit an adult under any circumstances, and the same should be the case for children.

Even when a parent *has* hit their child, this would still not automatically result in them being charged and prosecuted; as noted above there are a number of considerations to be worked through. Public service agencies will continue to work together and refer parents to the most appropriate avenue in order to gain help and support with any challenges that they might be facing.

Social services' remit will not change as a result of these proposals and neither will the threshold for initiating child protection procedures or taking a child into care. A child has to be at risk of suffering or have suffered *significant harm* as a result of the actions of their parents in order for child protection work or care proceedings to be issued in the family court. There is a wealth of case law on what is meant by 'significant', but it has to be more than trivial or unimportant, having regard to any associated trauma and the potential emotional or psychological consequences of the harm. In any case taken to the family court it is for the Judge to determine whether or not the harm is significant. It is then a separate decision as to whether or not the child should be removed from their parents' care; this does not automatically follow.

As of 6th April 2016, social workers and other professionals ("relevant partners") are under a duty to inform the local authority if they have reasonable cause to suspect that a child in their area is at risk of abuse or neglect, or is in need of care and support (Section 130 of the Social Services and Well-being (Wales) Act 2014). There is a similar duty to report where adults are suspected to be at risk of abuse or neglect, in Section 126. However this does not automatically mean that social services will intervene. The local authority will, as they currently do, consider the nature of the report and the circumstances, and apply their usual thresholds for assessments and/or signposting to appropriate support services.



8. What are the alternatives when a child will not listen?

It is often stated that smacking a young child is the only way to get them to listen, as it is not possible to rationalise their behaviour or ensure that they understand in any other way. However, an adult with severe learning difficulties or suffering from dementia may not be able to understand an explanation or have a reasoned discussion about their behaviour either. It is completely unacceptable both legally and cultural to smack an adult in any circumstances, including an adult with learning difficulties or dementia. It is therefore difficult to justify smacking a child for the same reasons, particularly as a young child is inherently vulnerable by virtue of their physical size and development and their limited ability to express their own views.

Positive Parenting techniques and support will be promoted by the Welsh Government alongside this legislative proposal, as it is recognised that children need boundaries and parents may want advice and support on alternatives to physical punishment. These techniques are considered to be more effective than smacking a child as well as not causing them physical and/or emotional harm. The consultation includes a question about support for parents, carers and guardians.

9. What should I do if I have more questions on this topic?

The consultation period runs until 2nd April 2018 so there is time to engage with the consultation process. This is the first step towards the introduction of a legislative proposal so there will further opportunities to engage as the legislation develops.

If you have any questions or wish to discuss this briefing in more detail, please feel free to contact me or my Head of Policy and Public Affairs, Rachel Thomas. Rachel is a qualified solicitor with experience of representing both parents and local authority children's services in care and private law proceedings.

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