

Spare the rod: Why the law on corporal punishment needs to be reformed

Despite repeated recommendations from international treaty bodies that the UK prohibit corporal punishment in all forms and in all settings, the UK government has resisted, asserting that although they “do not condone any violence towards children [...] a mild smack does not constitute violence”¹. While the UK has prohibited corporal punishment in schools across all jurisdictions, it has retained a principle that some forms may be acceptable in the home. In England and Wales, a parent charged with common assault of their child can raise the common law defence of “reasonable punishment”, with comparable provisions in Scotland² and Northern Ireland³. This leaves the UK as one of only five EU member states that has not committed to a ban on all forms of physical punishment⁴.

In this paper, I first hold that the current law fails to adequately protect children from violence, and is consequently not compliant with international obligations. Second, I hold that there are risks of significant harm associated with even mild corporal punishment. In consequence, I conclude that reform to remove the “reasonable punishment” defence from English law would be a desirable, practical and useful course of action.

History of the law

The earliest reference to “reasonable punishment” in English law dates back to Dalton’s 1690 edition of ‘The Country Justice’⁵:

¹ United Kingdom (2014). The Fifth Periodic Report to the UN Committee on the Rights of the Child. UN Committee on the Rights of the Child.

² Section 51 of the Criminal Justice (Scotland) Act 2003 outlines defence of “justifiable chastisement”. Cases involving blows to the head, shaking, or the use of an implement are excluded, as well as those occasioning actual bodily harm.

³ Article 2 of the Law Reform (Miscellaneous Provisions) (Northern Ireland) Order 2006 outlines defence of “reasonable punishment”. Cases occasioning malicious wounding, or actual bodily harm are excluded.

⁴ Heilmann, A., Kelly, Y., & Watt, R. G. (2015). Equally Protected? A review of the evidence on the physical punishment of children. University College London, Department of Epidemiology and Public Health, London.

⁵ quoted by Lord Thomas of Gresford, HL Deb 05 July 2004 vol 663 c530

“Assaults and Batteries be for the most part contrary to the Peace of the Realm, and the Laws of the same, yet some [people] are allowed to have a natural, and some a civil Power (or Authority) over others; so that they may (in reasonable and moderate manner only) correct and chastise them for their Offences, without any imputation of breach of the Peace”.

This subsequently appears as a common law defence in 1860, with Cockburn J providing a test in *R v Hopley* [1860]⁶: “By the law of England, a parent [...] may for the purpose of correcting what is evil in the child inflict moderate and reasonable corporal punishment, always, however, with this condition, that it is moderate and reasonable.”

In 1933, this was formalised in statute, through the Children and Young Persons Act. Section 1 outlines the sanctions to be imposed on a person over sixteen years of age who causes a child unnecessary suffering or injury to health, yet s1(7) explicitly states that “nothing in this section will be construed as affecting the right of any parent, teacher, or other person having the lawful control ... of a child ... to administer punishment to him”, thereby setting up “punishment” and causing “unnecessary suffering or injury” as separable and mutually exclusive. By this law, an adult is entitled to cause injury to a child that would otherwise be a criminal offence, if in the name of punishment.

In 1961, the UK signed the European Social Rights Charter⁷, which requires “a prohibition in legislation against any form of violence against children, whether at school, in other institutions, in their home or elsewhere”⁸, and in 1985, the Council of Europe issued a formal recommendation that member states should “review their legislation on the power to punish children in order to limit or indeed prohibit corporal punishment, even if violation of such a prohibition does not necessarily entail a criminal penalty”.

⁶ *R v Hopley* [1860] 2F&F 202

⁷ The European Social Charter is a Council of Europe treaty protecting social and economic rights, the counterpart to the European Convention on Human Rights, which guarantees civil and political rights.

⁸ ECSR, Conclusions XV-2, Vol. 1, General Introduction

In consideration of the Children Bill 1989, in light of 1985 Council of Europe recommendations and the recent passage of legislation banning corporal punishment in four Scandinavian countries⁹, an amendment was proposed which would repeal s1(7) of the Children and Young Persons Act 1933¹⁰. However, the amendment was opposed and withdrawn, with the opposition citing the importance that “the well-understood and well-supported parental right [to physical punishment of children] should not be thought to be nullified by the offence provisions of Section 1”¹¹.

The inadequacy of English law at this time is well-illustrated by *A v UK* (1998)¹². This case reached the ECHR after a stepfather admitted to repeatedly beating his stepson with a stick, yet was found not guilty of assault occasioning actual bodily harm, having argued that it was “necessary and reasonable since A was a difficult boy who did not respond to parental or school discipline”. The ECHR ruled that “the law did not provide adequate protection to the applicant against treatment or punishment contrary to Article 3 [...] and should be amended”.

A 2001 endeavour to define more precisely what constitutes “reasonable” punishment did little by way of clarification. Rose LJ’s jury direction in the Court of Appeal, “to consider the nature and context of the defendant's behaviour, its duration, its physical and mental effects on the child, the age and personal characteristics of the child, and the defendant's reasons for the punishment”¹³, placed some constraints on interpretation of the defence by jurors, but left the legitimacy of the defence, when applied within these constraints, intact.

⁹ Norway (1987), Sweden (1979), Denmark (1985; updated in 1997) and Finland (1983)

¹⁰ HL Deb 16 March 1989 vol 505 c409

¹¹ Lord Chancellor James Mackay, *ibid*

¹² *A v United Kingdom* [1998] 2 F.L.R. 959 (ECHR), 23 September 1998

¹³ *R v H (Assault of Child: Reasonable Chastisement* [2001] EWCA Crim 1024, [2001] 2 FLR 431, CA

Current statutory position

Following recommendations by several parliamentary committees¹⁴, Section 1(7) of the Children and Young Persons Act 1933 was eventually repealed by section 58 (5) of the Children Act 2004. Section 58 was introduced by Lord Laming to meet the requirements of the ECHR after *A v UK* (1998)¹⁵, but failed to heed demands for full prohibition, instead opting to impose additional constraints on the “reasonable punishment” defence. These constraints are as follows: where an adult is charged with any of the following offences, “battery of a child cannot be justified on the ground that it constituted reasonable punishment”:

- i) Section 18 and 20 of the Offences against the Person Act 1861 – wounding and assault causing grievous bodily harm (GBH)
- ii) Section 47 of the Offences against the Person Act – assault occasioning actual bodily harm (ABH)
- iii) Section 1 of the Children and Young Person Act – cruelty to persons under 16

Therefore, Section 58 defines what may be deemed “reasonable” punishment as anything less than ABH; that is, any offence charged as Common Assault under Section 39 of the Criminal Justice Act 1988.

Analysis of the law

The law fails to protect children from violence

This statute is insufficient to protect children from harm at the hands of their caregivers. Section 58 functions to prevent a parent charged with serious physical wounding from raising the defence of reasonable punishment. Where serious physical wounding occurs,

¹⁴ Joint Committee on Human Rights in the UK, and the House of Commons Health Committee

¹⁵ *A v United Kingdom* [1998] *op cit*.

however, punishment is almost always self-evidently unreasonable. The statute, in this sense, serves only to restrict the use of the defence where it would be unsuccessful. Nothing is offered to help navigate more contentious, marginal cases.

The law must be considered alongside the updated sentencing guidelines released in 2008. These state that where the victim of common assault is a child, this should be taken as a sufficiently aggravating factor that the assault should more appropriately be charged as ABH, unless the injury amounted to no more than “temporary reddening of the skin” and the injury is “transient and trifling”.¹⁶ However, in the case where a defendant is charged with ABH, but the court finds as fact that the defendant was intending only lawful chastisement, and did not foresee or intend the resulting injury, even acknowledging that this is not a lawful defence, the guidelines say that “such a finding of fact should result in a substantial reduction in sentence and should not normally result in a custodial sentence”. Additionally, they advise that “Where not only was the injury neither intended nor foreseen, but was not even reasonably foreseeable, then a discharge might be appropriate”.¹⁷

Through contradictory sentencing guidelines, the current statutory position engenders ambiguity about which actions are permitted. Although common assaults that cause injury to a child are likely to be charged as ABH, the sentencing guidelines undermine section 58, in allowing intention of reasonable chastisement to be a mitigating factor for the sentence. Additionally, the defence remains available for punishment that causes pain but not injury, that causes deep humiliation, and that risks injury but does not actually cause it. The perils of the latter are illustrated in the rejected appeal of the children’s guardian to reopen care proceedings where there had been findings of fact that at least one of the children in the household had been kicked and beaten by the parents in the name of reasonable

¹⁶ "Review of Section 58 of the Children Act 2004". Department for Children, Schools and Families. October 2007.

¹⁷ Overarching principles: Assaults on Children and Cruelty to a child, Definitive Guidelines, Sentencing Guidelines Council, February 2008, p6, paras 13-14

punishment¹⁸. The children were not protected by the Family court, with the judge ruling the evidence insufficient to infer “significant harm”¹⁹, nor would they have been by the Criminal Court, as the physical assaults the children were subjected to did not result in bruises or injuries, and as such the parents would be protected by section 58.

More broadly, once the defence is raised, the burden of proof is on the prosecution to ascertain that the punishment was not reasonable. When corporal punishment so often takes place behind closed doors, it is a near-impossible task for prosecutors to determine what has actually taken place, in order to debate its reasonableness. This is reflected in the fact that there have been very few cases involving section 58, and even fewer successful prosecutions. A review by CPS in 2007 of all the cases involving physical punishment since the passage of section 58 revealed that there were twelve prosecutions between 2004 and 2007, none of which returned a conviction, even though not one of these cases concerned “mild smacking”, the only type of punishment s58 was intended to protect²⁰. The scarcity of prosecutions involving section 58 is testament to the fact that a law that should protect children from common assault is near-impossible to enforce.

Ambiguity in the law leads not only to parents not knowing what behaviour is legitimate, but also to inconsistent sentencing by judges, as illustrated by a recent case in the Court of Appeal²¹. The Court overturned an 18-month custodial sentence that had been imposed for four offences of child cruelty occurring over an eight-year period, truncating the sentence at on the grounds that the original sentence did not reflect the nature of the specific incidents, in which only one had resulted in physical harm. The sentencing judge had taken the starting point to be a 3-year sentence, considering the aggravating features of the

¹⁸ MA v Swansea, Court of Appeal 31 July 2009, Case No B4/2009/1068

¹⁹ Likelihood of “significant harm” is the threshold criteria used in Family court for the making of a Care or Supervision Order.

²⁰ Department for Children, Schools and Families, *op. cit.*

²¹ R v R [2012] EWCA Crim 2122

children's ages, and the limited remorse of the mother. However, the appeal judge additionally considered the emotional trauma in the appellant's own background, reducing the starting point to 18 months. The current law and the accompanying guidelines insufficiently guided both those expected to abide by it, and those adjudicating the transgressions.

Corporal punishment is harmful to children

While the law precludes the defence being applied to cases of assault occasioning actual bodily harm, it fails to recognize the evidence that even mild corporal punishment harms children's social and emotional development. The most widely cited study on its effects²² found that "mild" physical punishment (of the kind protected under section 58) was indeed associated with more immediate compliance, but also lower levels of moral internalisation, lower quality of the parent-child relationship, poorer mental health in childhood and adulthood, higher levels of aggression and antisocial behaviour in childhood and adulthood, and increased risk of being a victim of physical abuse.

Moreover, parental use of corporal punishment models aggressive behaviour and violent conflict resolution, leading to increased aggression in the child²³, particularly in children under the age of six²⁴. This feeds into a reciprocal and escalating cycle; the smacking engenders aggressive behaviour, which elicits increasingly prevalent and severe physical discipline from the parents. In this way, the use of smacking can quickly escalate to physical abuse. This risk of escalation is evidenced in two well-known cases; for both

²² Gershoff, E. T. (2002). Corporal punishment by parents and associated child behaviors and experiences: a meta-analytic and theoretical review. *Psychological Bulletin*, 128(4), 539-579. This meta-analysis exclusively included longitudinal studies (to strengthen inferences of causality) and excluded studies incorporating more severe physical punishment that amounted to child abuse.

²³ Larzelere, R. E. (1986). Moderate spanking: Model or deterrent of children's aggression in the family? *Journal of Family Violence*, 1(1), 27-36.

²⁴ Eron, L. D., Huesmann, L. R., & Zelli, A. (1991). The role of parental variables in the learning of aggression. In D. Pepler, & K. Rubin (Eds.), *The Development and Treatment of Childhood Aggression* (pp. 169-188). Hillsdale, N.J.: Lawrence Erlbaum Associates.

Victoria Climbié and Peter Connolly (Baby P) what started as mild smacking escalated to torture and murder. A recent analysis confirms that smacking is associated with negative outcomes even when not combined with more abusive treatment, but that being smacked does significantly increase the likelihood of experiencing abusive treatment²⁵.

Research has also debunked the myth of the “loving smack” (that smacking in an otherwise loving environment is not harmful). Studies have shown that the relationship between smacking and aggressive behaviour in the child prevails even in contexts of high maternal warmth.²⁶

In summary, research finds that corporal punishment is no more effective than non-violent discipline, and may cause short- and long-term harm. The permitted level of violence puts children at risk, and as such the law fails to meet its international obligation under the CRC to “take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence”²⁷. This is confirmed in the Committee’s General Comment on corporal punishment: ‘There is no ambiguity: “all forms of physical or mental violence” does not leave room for any level of legalised violence against children’²⁸.

Ultimately, the ambiguity in current law leaves children vulnerable. By maintaining the defence of “reasonable punishment”, yet failing to define it in statute, the lawmakers leave the definition for judges to determine on a case-by-case basis. While this may allow for flexibility for the judiciary, it is irresponsible with regard to a lay person. How is a parent to know what constitutes reasonable punishment? Are they to be expected to trawl through case

²⁵ Gershoff, E. T., & Grogan-Kaylor, A. (2016). Spanking and child outcomes: Old controversies and new meta-analyses. *Journal of Family Psychology*, 30(4), 453-469.

²⁶ Lee, S. J., Altschul, I., & Gershoff, E. T. (2013). Does warmth moderate longitudinal associations between maternal spanking and child aggression in early childhood? *Developmental Psychology*, 49(11), 2017-2028.

²⁷ UN General Assembly. (1989). Convention on the Rights of the Child. United Nations, Treaty Series, 1577, p3, Article 19(1)

²⁸ UN Committee on the Rights of the Child. (2007). General Comment No.8 (2006): The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment. Geneva: United Nations. p. 6

law to determine the boundaries of legal discipline? We should not shy away from defying outdated ideologies, and enshrining principles of child protection into our statutes.

Proposal for reform

Pursuing simplicity and clarity, I propose the full removal of the reasonable punishment defence. This is consistent with the sentiment of the existing law and charging standards, yet removes ambiguity.

The wording of the proposed amendment should mirror that used in the abolition of corporal punishment in schools. The School Standards and Framework Act section 131(1) states that “Corporal punishment given by, or on the authority of, a member of staff to a child [...] cannot be justified in any proceedings”. Regarding the use of corporal punishment in the home, there must be a clear and unambiguous statement that “Battery of a child cannot be justified in any proceedings on the grounds that it constituted lawful punishment”, as proposed by Baroness Finlay of Llandaff in Amendment No. 106 to the Children Act 2004²⁹.

Additionally, I would support the proposed inclusion of a further clause to clarify the available defences to battery of a child: “(2) Battery of a child is not unlawful if the act amounts to the use of reasonable force in order to— (a) avert an immediate danger to the child or any other person; (b) avert an immediate danger to property; or (c) prevent the commission of a crime, or an act which would be a crime if the child had reached the age of criminal responsibility”.³⁰ This makes explicit the availability of existing defences to assault of self-defence, defence of another and defence of property. Inclusion of 2(c) pays homage to the defence of preventing the commission of a crime³¹, extending it to behaviour that “would be a crime if the child had reached the age of criminal responsibility”.

²⁹ HL Deb 05 July 2004 vol 663 c518

³⁰ *ibid.*

³¹ Section 3 of the Criminal Law Act 1967

This is not creation of a new criminal offence. Indeed, the existence of the defence in fact *decriminalised* what would ordinarily be considered criminal behaviour if committed by one adult against another, serving to license those who regularly hit their children. Removing the defence may deter perpetration of more severe child abuse if there is no prospect that the abuse could be defended as “reasonable punishment”.

Suggestions of such a reform have raised fears that this would lead to an increase in prosecutions of benevolent parents. In a survey carried out in 2004, 71% responded that they would support the amendment if it “would not lead to parents being prosecuted for trivial or minor acts of physical punishment”³². Yet, one need only look to international precedent to see that this is unlikely to be the case³³. Decisions to prosecute would follow existing procedures, driven by the public interest, and the threshold for intervention by child protection services would remain the same. In the same way that an adult who lightly slaps another adult would be unlikely to be prosecuted, such trivial claims would be considered a waste of court time and resources. Indeed, in countries who have legislated to fully prohibit corporal punishment there is significantly lower incidence of it, and such punishment is viewed as less justified³⁴. Much like the introduction of seat belt laws³⁵, the reform of the law would be primarily educative, rather than punitive.

The impetus behind the legal change would primarily be promotion of attitudinal change regarding violence towards children. The law is a powerful tool for setting standards, and we should not shy away from using it thus. This amendment would serve to enshrine in

³² Ipsos MORI. (2008). *Exploring public attitudes to a complete ban on smacking children*. Children Are Unbeatable! Alliance.

³³ Durrant, J. (2000), A Generation Without Smacking: the impact of Sweden’s ban on physical punishment, Save the Children

³⁴ Bussmann, K. D. (2009), The Effect of Banning Corporal Punishment in Europe: A Five-Nation Comparison, HalleWittenberg: Martin-Luther-Universität

³⁵ The Motor Vehicles (Wearing of Seat Belts by Children in Rear Seats) Regulations 1989 No. 1219

English law the unshakeable principle that there is no excuse for violence against children.

Conclusion

This reform is desirable: it updates the law to reflect developing psychological understanding and social norms, in doing so protecting children from violent discipline that is both ineffective and harmful, and bringing England into compliance with international human rights obligations. It is practical: a simple amendment that reduces ambiguity, setting clearer standards of behaviour for parents and clearer guidelines for the judiciary. It is useful: comparing countries that have and have not prohibited corporal punishment, there is strong evidence that public education campaigns on non-violent parenting are significantly more effective when there is concurrent legal reform³⁶.

Essentially, this reform is about extending to children the same protections that have been granted to all other persons in our society. Baroness Finlay of Llandaff quoted a 9-year-old child in the House of Lords in 2004: "A big person should not hit a small person, not anyone, ever." When put in such simple terms, the case against this reform seems ludicrous. We extend protection from violence to the elderly, to the disabled, and to the sick; it is time we extended the same right to our country's children.

Word Count: 2992 words

³⁶ Boyson, R. (2002), *Equal Protection for Children: An overview of the experience of countries that accord children full protection from physical punishment*, London: National Society for the Prevention of Cruelty to Children