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Children (Abolition of Defence of Reasonable Punishment) (Wales) Bill

Bill Summary

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Paper Overview:

This paper provides a summary of the Welsh Government's Children (Abolition of Defence of Reasonable Punishment) (Wales) Bill. It includes a summary provisions of the Bill, and highlights key aspects and documents related to the Bill. It also includes some policy background.



Contents

1. Introduction	1
1.1. Welsh Government’s commitment to change the law in Wales.....	1
1.2. Debates in the Fourth Assembly	1
1.3. Welsh Government’s consultation	2
2. Overview of the Bill.....	3
2.1. The current legal position	3
Criminal Law.....	3
Civil law	4
2.2. Provisions in the Bill	4
2.3. What will not change	4
2.4. An example of how the new law is intended to work	5
2.5. Subordinate legislation	5
3. Explanatory Memorandum and Impact Assessments	6
3.1. Regulatory Impact Assessment	6

4. Assembly scrutiny of the Bill.....	7
5. Stakeholder views	8
6. The law in other countries	8

1. Introduction

On 26 March 2019, Julie Morgan AM, Deputy Minister Health and Social Care, is scheduled to make a statement in Plenary to introduce the **Children (Abolition of Defence of Reasonable Punishment)(Wales) Bill**.

An **Explanatory Memorandum**, including the Regulatory Impact Assessment and Explanatory Notes, has been published with other documents **alongside the Bill**.

The Presiding Officer's Statement on Legislative Competence was **laid** on 25 March 2019 stating that the Bill, in her view, would be within the legislative competence of the National Assembly for Wales.

1.1. Welsh Government's commitment to change the law in Wales

In **June 2016**, then First Minister Carwyn Jones referred to a commitment that had been in the Labour Party election manifesto, and stated that work on 'physical chastisement' 'is being developed at present'. The Welsh Government's Programme For Government '**Taking Wales Forward 2016-2021**' included a commitment to 'seek cross party support for legislation to end the defence of "Reasonable Punishment"'. In **June 2017**, the First Minister set out Welsh Government's legislative programme for the next year, stating:

We stand firm in our commitment to pursuing a change in the law, and we are continuing to work through the legal complexities to develop a Bill to make this a reality. It's important we work with stakeholders to ensure that our legislation delivers the outcomes we want and avoids any unintended consequences. We will therefore **be consulting on our proposals to remove the defence of reasonable chastisement over the course of the next 12 months and intend to introduce a Bill in the third year of this Assembly term. [our emphasis]**

1.2. Debates in the Fourth Assembly

In **October 2011**, Assembly Members approved an Individual Member debate motion which proposed the National Assembly for Wales 'Urges the Welsh Government to bring forward legislation for consideration by the Assembly which would end the availability of the defence of 'lawful chastisement' for an offence of assaulting a child.' 24 Members voted in favour, 13 (mainly Cabinet Members) abstained and 15 Members voted against. Then Deputy Minister for Children and Social Services, Gwenda Thomas, on behalf of the then Welsh Government said 'we believe that hitting children is wrong' and pointed to the focus in the programme

for make physical punishment of children and young people unacceptable through the promotion of positive alternatives. She went on to say:

I do not want to add to the problems of those families who do not have at their disposal the means and necessary skills to parent more positively. I would be fearful of criminalising parents, especially our most vulnerable. A great deal of preparatory work would need to be done to pave the way for legislation of this sort, and we would not be able to bring forward legislation during the term of this Assembly. However, I am **committed to retaining the option of legislating at some future date**, if we cannot achieve the significant change we seek through other means. [our emphasis]

In **February 2014**, an amendment to the ***Social Services and Wellbeing (Wales) Bill***, seeking to end the defence of reasonable punishment, was debated and defeated. Then Deputy Minister for Children and Social Services, Gwenda Thomas, said the **Welsh Government could not support** the amendment as this was not the right Bill, the issue would need to be consulted on before changing the law, and that – at that time – the UK Government would be likely to challenge whether the Assembly had the necessary legislative competence.

A similar amendment to remove the defence of reasonable punishment via the ***Violence against Women, Domestic Abuse and Sexual Violence (Wales) Bill*** in **March 2015 was rejected**. Then Minister for Public Services, Leighton Andrews said that the Welsh Government had **‘taken steps separately from this legislation to begin the process** of moving forward on the issue of ending the defence of reasonable punishment’.

1.3. Welsh Government’s consultation

In January 2018 the Welsh Government published a **range of consultation documents** which it stated was to inform the development of a legislative proposal to remove the defence of reasonable punishment. In August 2018 the Welsh Government published its **Summary of Consultation Responses**.

Other Welsh Government commissioned reports include the following three:

- **Parental attitudes towards managing young childrens behaviour 2017**
- **Parental Physical Punishment Child Outcomes and Attitudes** (2018)
- **Legislating to prohibit parental physical punishment of children** (2018)

2. Overview of the Bill

2.1. The current legal position

The Bill as drafted **does not create a new offence**. Instead it removes a defence to the existing offences of common assault and battery, and the tort of trespass to the person.

[In English and Welsh law, ‘assault’ and ‘battery’ have different meanings. In general terms: Battery’ is the intentional or reckless application of actual unlawful force to the body of another person (e.g. a punch). Assault’ is the apprehension of the possibility of immediate unlawful force (e.g. a face-to-face threat by an adult to punch another adult during a disagreement)]

The defence currently **applies in respect of both the criminal and civil law**.

Criminal Law

Section 58 of the ***Children Act 2004*** means that parents, or adults acting in ‘loco parentis’ in Wales:

- **cannot** use the defence of reasonable punishment if they are charged with wounding, actual bodily harm, grievous bodily harm or cruelty to persons less than 16 years of age.
- **can** use the defence of ‘reasonable punishment’ if they are charged with common assault against a child. **The Bill seeks to remove this defence.**

The Crown Prosecution Services’ **legal guidance on Offences against the Person** incorporating the Charging Standard states that in respect of a charge of common assault ‘the 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.

The Charging Standard also states:

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.

Civil law

In civil law, assault and battery constitute a tort, or civil wrong; the tort of trespass to the person. In addition to removing the availability of the defence in relation to the criminal law, the Bill seeks to remove the availability of the defence in relation to the tort of trespass against the person.

2.2. Provisions in the Bill

The Bill contains one substantive section (section 1).

- Sections 1(1) and 1(2) abolish the defence of reasonable punishment referred to above (in criminal and civil proceedings) in relation to corporal punishment of a child taking place in Wales.
- Section 1(3) of the Bill provides that corporal punishment of a child, taking place in Wales, cannot be justified in any criminal or civil proceedings on the ground that it constituted acceptable conduct for the purposes of any other rule of the common law.

2.3. What will not change

- The EM states that the ‘Bill does not define actions by parents towards their children which would or would not be acceptable once the defence is removed. Removing the defence will not interfere with the principles of the common law, which acknowledge that a parent can intervene physically, for example, to keep a child safe from harm, or help with activities such as tooth brushing.’
- The Bill as drafted does not affect situations in which greater force is used against the child than what would constitute a common-law battery. **The defence of reasonable punishment is not available for such offences**, and so the Bill is not changing the law as far as they are concerned.
- Corporal punishment in schools and other settings involving **education is already prohibited** in section 548 of the Education Act 1996. This position is not changed by the Bill.

2.4. An example of how the new law is intended to work

- The Explanatory Memorandum sets out the Welsh Government’s view that the common law already acknowledges the necessity (and lawfulness) of certain physical interventions carried out by parents, or other adults in the exercise of parental authority in relation to children, even where (but for this acknowledgement) the interventions would constitute assault or battery.

It goes on to say:

The legality of these interventions does not derive from the existence of the defence of reasonable punishment, as they are not intended to constitute physical punishment. This means that certain physical interventions by a parent in relation to a child are permissible even where, in the context of two adults, those interventions would not necessarily be permitted.

An example might be the physical intervention necessary to keep a child safe from harm, such as physically stopping a child from running into a road (as opposed to any physical intervention intended to punish a child for running into a road) or physically restraining a child to keep them from injuring themselves or others. Other examples might be the use of reasonable force to dress a child, or to brush a child’s teeth.

The exercise of parental authority may also require physical interventions which are necessary for the purpose of using alternatives to physical punishment, as a means of encouraging positive behaviour and keeping children safe. This would include, for example, carrying a child to a time out area.

2.5. Subordinate legislation

The Bill contains one provision to make subordinate legislation.

It allows Welsh Ministers in an order made by statutory instrument to provide for when section 1 comes into force and may make transitional, transitional, transitory or saving provision.

3. Explanatory Memorandum and Impact Assessments

The Bill's **Explanatory Memorandum** (EM) is 97 pages long and includes a range of information relevant to the Bill and a set of Explanatory Notes in Annex A. It states:

The Bill will prohibit the physical punishment of children in Wales by abolishing the defence of reasonable punishment.

It goes on to say that 'the overarching objective of the Bill is to protect children's rights by prohibiting physical punishment by parents'.

3.1. Regulatory Impact Assessment

Pages 28-58 of the EM set out estimated costs of implementing the Bill and the methodology for those estimates.

Pages 59-64 of the EM set out information about the impact assessments undertaken on the Bill. Separate impact assessments, including a **Children's Rights Impact Assessment** have been published.

4. Assembly scrutiny of the Bill

The Assembly's Business Committee has referred the Bill for scrutiny to the **Children, Young People and Education (CYPE) Committee**. It also set out an 'illustrative timetable' which currently has a deadline of 19 July 2019 for the CYPE Committee to report on the general principles of the Bill (Stage 1 scrutiny). It will undertake its scrutiny in line with the process set out in the **Guide to scrutiny stages for Public Bills**.

In order to inform its work, the CYPE Committee is due launch a 6 week consultation on 2 April 2019. Further information on the Committee's scrutiny at Stage 1 will be available on the **Bill webpage**.

The Bill will also be subject to oversight and scrutiny from the **Constitutional and Legislative Affairs** (CLA) Committee and **Finance Committee**, which will also report from their own perspectives.

An **Assembly Business Committee illustrative timetable** suggests that the date of Royal Assent, should the Bill reach that stage, would not be until 2020. However, the Bill then gives Welsh Ministers the power to decide when the main provision of the Bill comes into force.

5. Stakeholder views

The Bill is likely to attract significant public interest. There are a wide range of views both in opposition to and in support of a change in the law. These include, amongst others, **Be Reasonable Wales** which opposes a change in the law and **Children Are Unbeatable** which has campaigned to change the current law.

6. The law in other countries

A Welsh Government commissioned report, **Legislating to prohibit parental physical punishment of children**, stated that

As of 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.

In Scotland, the **Children (Equal Protection from Assault (Scotland) Bill** was introduced as private members legislation by John Finnie MSP in September 2018 and is currently being scrutinised by the **Equalities and Human Rights Committee**. Criminal law and Civil law in Scotland have developed differently to England and Wales so direct comparisons cannot always be made.

The Bill aims to remove the defence of ‘reasonable chastisement’ which can be used to justify using physical force on a child and its **Explanatory Notes** set out:

Section 1(2) repeals section 51 (physical punishment of children) of the Criminal Justice (Scotland) Act 2003. [...] The effect, therefore, of section 1 is that a parent, or anyone in charge or care of a child, will no longer be able to claim a defence of reasonable chastisement or justifiable assault if accused of assaulting a child in any proceedings (civil or criminal).

In contrast to the Welsh Government’s Bill the Scottish Act places a duty on Scottish Ministers to promote public awareness and understanding about the effect of the Bill.