

Cynghrair o sefydliadau sy'n ceisio diwygio'r gyfraith i rhoi'r un amddiffyniad i blant ag sydd gan oedolion rhag ymosodiad a hyrwyddo disgyblaeth gadarnhaol di-drais

An alliance of organisations seeking legal reform to give children the same protection under the law on assault as adults and promoting positive non-violent discipline

Section 58: Why it needs to go now

What is wrong with Section 58?

Section 58 undermines child protection because:

- Research shows that, because it is ineffective in changing long-term behaviour, some parents escalate from 'mild' smacking to serious assaults;
- It permits an arbitrary level of violence which invades children's physical integrity, making it a potential pathway to more serious physical or sexual abuse;
- professionals working with families are unable to deliver clear messages that hitting and hurting children is not allowed;
- children do not complain about something they are told is permitted and justified;
- those witnessing violence to children have no confidence in either intervening themselves or reporting it to the authorities;
- parents are receiving confusing messages about the legitimacy of hurting their children;
- Section 58 fails to protect children from painful, dangerous, humiliating or frequent assaults and sends them the message that hitting people is acceptable.

What is 'Section 58'?

Section 58 of the Children Act 2004 permits the defence of "reasonable punishment" for a common assault on the child. Any parent or person acting *in loco parentis* may use the defence of "reasonable punishment", regardless of parents' wishes in the matter, so long as they are not specifically prohibited from doing so by other legislation.¹

The defence is not available for injuries which cause actual bodily harm (ABH). The Crown Prosecution Charging Standard advises that where the victim is a child or vulnerable adult, a common assault may be changed to ABH "where an assault causes any...injuries... other than reddening of the skin, [though] the injury [must] be more than transient and trifling."²

The previous UK Government argued that this law together with the new charging standard effectively outlaws everything beyond a light slap. Aside from it being a breach of children's rights, we do not believe that it is possible for the law to draw a line between acceptable and

¹ Following concern about legal assaults in Madrassas, Sir Roger Singleton recommended that the defence be limited to members of the child's household (which includes parents' sexual partners, nannies, lodgers, step-parents, private foster-carers, relatives etc). Sir Roger Singleton *Physical punishment: improving consistency and protection* (2010) <http://www.education.gov.uk/publications//eOrderingDownload/DCSF-00282-2010.pdf>

² Crown Prosecution Service, *Offences against the person, incorporating the Charging Standard*, guidance October 2009 http://www.cps.gov.uk/legal/l_to_o/offences_against_the_person/#P73_2396

unacceptable forms of physical punishment. There are many harmful forms of physical punishment which nonetheless fall within the current definition of common assault and for which the section 58 defence could be raised.

Common assaults potentially include punishments which cause pain or humiliation but not injury, for example forcing children to maintain painful positions, making them eat unpleasant things or even, according to Court of Appeal judges, giving them a kick.³ In addition, assaults that risk serious injury but do not actually cause it, such as blows to the head, ears, kidneys or genitals, are common assaults not ABH. Nor can frequency change a common assault to ABH, so children can be smacked many times a day with impunity. In short, as an attempt to draw a line between acceptable and unacceptable forms of physical punishment, section 58 plainly fails.

Prevalence studies show that most children in the UK experience physical punishment and that an alarming number suffer serious assaults from their carers.⁴ However, there have been virtually no prosecutions involving Section 58. In 2007 the Crown Prosecution Service (CPS) reviewed the small number of cases in which physical punishment was involved after section 58 had come into force.⁵ Of seven cases, all involved serious assaults like punches or slaps around the head and all the defendants avoided conviction. A second survey found that there had been no recorded cases at all involving Section 58 between 2007 and 2009.⁶ It is clear that it is alarmingly difficult to get a conviction in British courts for assaults inflicted in the name of physical punishment.

Isn't there other legislation to deal with such serious assaults?

It could perhaps be argued that this sort of mistreatment would be prosecuted under section 1 of the Children and Young Persons Act 1933. The section provides that anyone over the age of sixteen responsible for a child under that age is guilty of an offence if he “wilfully assaults, ill-treats, neglects, abandons, or exposes him, or causes or procures him to be assaulted, ill-treated, neglected, abandoned, or exposed, in a manner likely to cause him unnecessary suffering or injury to health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement).” However it should be noted that section 1 does not create an offence of strict liability so the prosecution has to prove a deliberate or reckless act or failure and that the Crown Prosecution Service has also noted that the “reasonable punishment”

³ *MA v Swansea*, Court of Appeal 31 July 2009, Case No B4/2009/1068 (The Court accepted that the three year-old child had been kicked, pushed and slapped on the side of her face but held that these were not necessarily unlawful activities, given the defence, and did not constitute significant harm).

⁴ See, for example, Nobes G and Smith M (1997), *Physical punishment of children in two-parent families*. *Clinical Child Psychology and Psychiatry*, 2(2), 271–281; Ghate D, Hazel N, Creighton S, Finch S and Field J (2003), *The national study of parents, children and discipline in Britain: key findings*, ESRC; Cawson P, Wattam C, Brooker S and Kelly G (2000), *Child maltreatment in the United Kingdom: a study of the prevalence of child abuse and neglect*, NSPCC, and ChildLine annual analyses of calls showing consistently high levels of physical assaults within the home.

⁵ <http://www.cps.gov.uk/publications/research/chastisement.html>

⁶ A. against the United Kingdom Judgment of 23 September 1998, Revised Memorandum of August 28 2008 (“Memorandum”) prepared by the Department for the Execution of Judgments of the European Court of Human Rights in the light of the developments since the adoption by the Committee of Ministers of Interim Resolution ResDH(2004)39 on 2 June 2004; CM/Inf/DH(2008)34; paragraphs 75-76

defence, though not available for section 1 offences can nonetheless be put forward as explanation for the action.⁷

In any event, since implementation of section 58, the CPS has reported a handful of cases where the defence was raised and the defendant acquitted or discharged, but there has not been a single case (to our knowledge) where a common assault of a child has been successfully challenged as “unreasonable” punishment.⁸ This is hardly surprising given a perpetrator does not have to prove the case; rather the onus is on the prosecution to prove that a punishment was not reasonable or did not constitute common assault. Moreover, as regards assaults which do reach the level of actual bodily harm, their effective prosecution has been significantly undermined by the publication in 2008 of new sentencing guidelines on assaults on children. These state that when a child receives an injury but the parent intended “nothing more than lawful chastisement,” they should get a light sentence, and if it can be shown that the injury was also not reasonably foreseeable, an absolute discharge should be considered.⁹

Even the UK Government’s own publication “*Being a Parent in the Real World*” (produced under the last government) acknowledges that a common assault may rise to an unacceptable level of severity. The box explaining the law on smacking tells parents that any punishment causing “injuries” is unlawful, but then states: “It is also important to be aware that even if a parent causes no actual injury to a child, some acts such as shaking a child, dragging a child by their hair, using a belt, cane, slipper or other implement may not be accepted by the courts as ‘reasonable punishment.’” It thus confirms that the “reasonable punishment” defence may be available for such unacceptable punishments and might, indeed, also be accepted by a court or jury.

‘But smacking isn’t violence anyway ... ‘

Physical punishment was an acceptable part of parenting for so long that it is often argued that it is not violence. A husband’s right to strike his wife, or an employer his servant, was previously regarded in a similar way. Today, if one adult smacks another it is regarded as violence. Smacking people is already ‘banned’ as an assault, but Section 58 means that the ban doesn’t need to apply when the assault is against a child.

Child deaths where physical punishment and reluctance to intervene has been a factor

Almost all cases of serious physical abuse (which are of course already illegal) involve physical punishment. **Victoria Climbié’s** case did. **Peter Connolly’s** case did. The case of **Yaseen Ali** did.

⁷ For example *Stone’s Justices’ Manual* 2009 5-80, footnote 6 comments that “a genuine lack of appreciation through stupidity or personal inadequacy will be a good defence” – a defence that could undoubtedly be deployed by many parents in such cases. *Reasonable chastisement research report*, Crown Prosecution Service, July 2007.

⁸ CPS 2007 report and A. against the United Kingdom Judgment of 23 September 1998, Revised Memorandum of August 28 2008 (“Memorandum”) prepared by the Department for the Execution of Judgments of the European Court of Human Rights in the light of the developments since the adoption by the Committee of Ministers of Interim Resolution ResDH(2004)39 on 2 June 2004; CM/Inf/DH(2008)34. In one civil case, *MA v Swansea* (2009) EWCA Civ 853, the Court of Appeal upheld the lower courts finding that parents kicking their child and slapping her on her face did not constitute significant harm. This led to tabloid headlines such as “Physically punishing a child with a kick is NOT against the law.”

⁹ *Overarching principles: Assaults on Children and Cruelty to a child, Definitive Guidelines*, Sentencing Guidelines Council, February 2008, paragraphs 13 and 14

Yaseen was a seven year-old living in Cardiff who was beaten to death by his mother because he was not able to memorise the Koran. The recent serious case review noted:

“A teacher noticed an injury to Yaseen’s hand that was a result of physical chastisement at home and although this was brought to the attention of the senior member of staff with designated responsibility for safeguarding it was never reported to children’s services or to the police.”¹⁰

If all “physical chastisement” had been illegal, the designated staff member might have felt obliged to report the injury to social service, Yaseen’s mother might have received help for her escalating behaviour and Yaseen might have survived.

As well as these well-known cases, examples include:

Heidi Koseda (died 1984) Four year-old beaten and starved to death by mother’s boyfriend, who was punishing her for "being greedy"

Kimberley Carlile (1986) Four year-old imprisoned and beaten by her stepfather for "being naughty" and refusing to accept him as her new father

Liam Johnson (1987) Three year old beaten to death by his father, Robert Johnson. Johnson’s girlfriend later said, "He was so powerful that when he smacked his sons he sometimes knocked them off their feet."

Sukina (1988) Five year old beaten to death by her father because she was unable to spell her name, first with a ruler, then plastic tubing and finally with a kettle flex. As she was dying she told her father she was sorry.

Leanne White (1992) Three year-old beaten to death by her mother and her boyfriend. A neighbour reported Leanne’s screams and the boyfriend saying, "If you do that again, I’ll thrash you."

Lauren Wright (2000) Six year-old beaten to death by her stepmother. People in her village had seen her being hit, but felt powerless to intervene.

Carla Nicole Bone (2002) 13 month-old murdered by her mother’s boyfriend, who was "disciplining" her for refusing to walk. He told the police it started with "not-excessive smacks... It was the way I was brought up. It never did me any harm."

Kieran Edwards (2007) 21-month year-old who died after being shaken and struck by his stepfather because he was "messing about and struggling"

¹⁰ Cardiff Local Safeguarding Board, Serious Case Review Yaseen Ali 2013

UK Government Review of Section 58 (2007) and views of organisations supporting families and safeguarding children

Organisations and professionals involved in safeguarding children and supporting families are calling for removal of this defence now.

In 2007 the previous UK Government undertook a review of the impact of section 58. Of the 1,405 respondents, including many organisations and professionals working with families in poverty or under pressure, only 1% felt that children's legal protection had been improved by the new law. When asked to what extent the law deterred parents from using "unacceptable" levels of physical punishment, the majority of respondents in all categories (including parents/relatives and police/legal professionals) except faith groups felt that section 58 had no deterrent effect. On helping and supporting parents, 66% felt that the law had not assisted this work at all and only 5% felt the law *had* assisted it.¹¹

Responses to the review including the following:

"Physical punishment is not acceptable and should not be tolerated. This message has to be put across to parents as clearly as possible and not fudged as it is under section 58... The parents who continue to use physical punishment without getting 'caught' are the ones who need to be targeted by a public education campaign to teach them more effective strategies for disciplining their children... Section 58 undermines our promotion of positive discipline – we have to sit on the fence by not condoning the actions but wanting to maintain our contact with the parents in the hope that our advice will encourage them to change their habits." **(Parentline Plus)**

"In this country it is illegal to hit another adult, even to punish them for a crime or misdemeanour. The FPI believes that giving people who are smaller and weaker fewer rights to protection in this regard is unacceptable. The argument that parents have a 'right' in their own home to discipline their children as they choose, in other words that parents have proprietorial rights over children and a consequent right to hit them, recalls arguments that were once used in relation to husband and wives." **(Family and Parenting Institute)**

"Section 58 has added confusion in this area, for families and for those working with them. The only clear message it has provided is that "smacking" is still lawful... We are also concerned that some parents may have picked up from the media that while smacking remains lawful, they must be careful not to "mark" their children. This could actually lead to more dangerous forms of physical punishment – shaking, hitting round the head and so on...We feel Ministers are under-estimating the huge value of clear law as an educational tool and a foundation for child protection and for the promotion of positive non-violent child-rearing." **(Community Practitioners and Health Visitors Association)**

¹¹ DCSF (2007), *Section 58 of the Children Act 2004 Review (consultation): Analysis of responses to the consultation document*

“Are we teaching perpetrators to become more skilled in physical abuse, perfecting the art of not leaving bruises? ... Section 58 compromises good practice and conversely, in some cases, encourages adults to be more clandestine making physical abuse harder to detect and prove.” **(British Association of Social Workers)**

“Section 58 dangerously encourages parents committed to physical punishment, or those with the intention of harming children, to use forms of it which although highly dangerous, do not leave marks on victims. In addition, the specific vulnerability of black and African Children needs to be highlighted. This is simply because black skin pigmentation and tone does not easily show bruising and marks unless extreme force is applied. Section 58 therefore hampers protection for children of black and African origin.” **(Afruca - Africans Unite Against Child Abuse)**

“The NSPCC’s study of the prevalence of child abuse and neglect in the UK found that while the majority of parents used lighter forms of physical punishment, a significant number do not. There are hundreds of thousands of children who are growing up in families where they are smacked regularly and heavily, and the culture of violence in these families needs to be tackled as a priority.” **(NSPCC)**

“Many of our members advised that parents do not know how to discipline their child and so they continue to draw on their own experience and perpetuate the learned behaviour from their childhood. Some know that they should not smack but don’t know what else to do and either resort to smacking or ‘giving in’ to the child. With education and information on behaviour management (toddler taming) this cycle can be broken... This, however, needs to be backed by a clear and consistent message to remove confusion currently in existence.” **(Royal College of Nursing)**

“The lack of clear leadership by the government that any form of physical punishment of a child is unacceptable makes the task of those working with parents much harder. Parents who believe ‘smacking has a place in disciplining children’ feel justified in continuing this detrimental aspect of child behaviour and ever more resistant to attending parenting courses.” **(Family Links)**

“Our experience is that parents in general wish to have alternative strategies to the use of violence in enabling them to parent their children and readily accept using the effective alternatives available once these have been explained and learned ... Introduction of a change in the law should be accompanied by a creative public health education campaign in a similar way to the smoking ban... Just as there has been resistance to the smoking ban, there is bound to be resistance to a violence ban. However, freedoms to act which damage others and damage society must be subject to the rule of law, which is then applied sensitively and proportionately.” **(Coram Family)**

“Physical punishment is often used as a means to silence children. Removing the defence that section 58 provides would make it easier for children to identify abusive behaviour towards them... The law does not have eyes and ears into the homes of every child but it can send out a very clear message that hitting children is wrong: a message

that children need to hear, so they can speak up about being abused and hurt.” (**The Children’s Society**)

Has section 58 in any way improved the lives of children?

When the law was enacted there was considerable publicity which was almost invariably accompanied by headlines along the lines of “Carry on smacking!” (some literally used this headline). *The Sun*, for example, provided diagrams showing parents where and how they could hit their children, which included confusing and contradictory statements by two experts (for example one expert said caning was illegal and another expert contradicted this; one said hitting on the head was illegal and the other not; as regards “pulling a child by the ear” both experts expressed the hope that this practice was unlawful, though this hope is not correct)¹². The initial message to parents was thus a confusing one, but not one that discouraged the use of physical punishment.

The most obvious concerns about Section 58 are not about its application in the courtroom, but that the very existence of the defence:

- puts children at risk and disregards their rights as human beings
- deters intervention
- makes the task of everyone working in child protection much more difficult
- undermines policy on domestic violence, equality and human rights, and
- prevents the delivery of a clear and safe message to parents.

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¹² The Sun, July 7 2004