

Report on the Children (Abolition of Defence of Reasonable Punishment) (Wales) Bill

August 2019



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August 2019



About the Committee

The Committee was established on 15 June 2016. Its remit can be found at:
www.assembly.wales/SeneddCLA

Committee Chair:



Mick Antoniw AM

Welsh Labour
Pontypridd

Current Committee membership:



Suzy Davies AM

Welsh Conservatives
South Wales West



Carwyn Jones AM

Welsh Labour
Bridgend



Dai Lloyd AM

Plaid Cymru
South Wales West

The following Member was also a member of the Committee during this inquiry.



Dawn Bowden AM

Welsh Labour
Merthyr Tydfil and Rhymney

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1. Introduction

On 25 March 2019, the Deputy Minister for Health and Social Services introduced the Children (Abolition of the Defence of Reasonable Punishment) (Wales) Bill.

The Committee's remit

- 1.** The remit of the Constitutional and Legislative Affairs Committee (the Committee) is to carry out the functions of the responsible committee set out in Standing Order 21¹ (with the exception of Standing Order 21.8²) and to consider any other constitutional, legislative or governmental matter within or relating to the competence of the National Assembly or the Welsh Ministers, including the quality of legislation.
- 2.** In our scrutiny of Bills introduced in the National Assembly, our approach is to consider:

- matters relating to the competence of the National Assembly, including compatibility with the European Convention on Human Rights (ECHR);
- the balance between the information that is included on the face of the Bill and that which is left to subordinate legislation;
- whether an appropriate legislative procedure has been chosen, in relation to the granting of powers to the Welsh Ministers, to make subordinate legislation; and
- any other matter we consider relevant to the quality of legislation.

Introduction of the Bill

- 3.** On 25 March 2019, the Children (Abolition of Defence of Reasonable Punishment) (Wales) Bill³ (the Bill), and accompanying Explanatory Memorandum (EM), was introduced by Julie Morgan AM, the Deputy Minister for Health and Social Services (the Deputy Minister).

¹ National Assembly for Wales, *Standing Orders of the National Assembly for Wales*, March 2018

² Functions under Standing Order 21.8 are the responsibility of the *External Affairs and Additional Legislation Committee*

³ Available on the National Assembly's [website](#)

4. The National Assembly's Business Committee referred the Bill to the Children, Young People and Education Committee on 5 March 2019, and set a deadline of 19 July 2019 for reporting on its general principles.⁴

5. On 22 May 2019, following a request from the Children, Young People and Education Committee, the Business Committee agreed that the Stage 1 reporting deadline be extended to 2 August 2019.⁵

6. We took evidence from the Deputy Minister at our meeting on 3 June 2019.⁶

Background

7. The EM accompanying the Bill states:

"The Bill will remove the common law defence of reasonable punishment so it is no longer available in Wales to parents or those acting in loco parentis as a defence to assault or battery against a child."⁷

8. The Bill is intended to "help protect children's rights by prohibiting the use of physical punishment, through removal of this defence".⁸

9. The EM also states:

"The Bill supports the adoption of positive parenting styles and contributes to several of the national wellbeing goals under the Well-being of Future Generations (Wales) Act 2015..."⁹

10. The Bill does not create a new offence or cause of action, rather section 1(1) abolishes the defence of reasonable punishment in relation to corporal punishment of a child taking place in Wales. "Corporal punishment" in this context means any battery¹⁰ carried out as a punishment. The Bill abolishes the

⁴ Business Committee, Report on the timetable for consideration of the Children (Abolition of Defence of Reasonable Punishment) (Wales) Bill, March 2019

⁵ Business Committee, Revised timetable for consideration of the Children (Abolition of Defence of Reasonable Punishment) (Wales) Bill, May 2019

⁶ CLA Committee, 3 June 2019, Record of Proceedings (RoP) [2]

⁷ Explanatory Memorandum, paragraph 1.1

⁸ Explanatory Memorandum, paragraph 1.5

⁹ Explanatory Memorandum, paragraph 3.56

¹⁰ A "battery" for these purposes means the intentional or reckless application of unlawful force to the body of another person. This would include a punch, but it may also include what might be considered more minor incidences of physical contact, such as a pat on the shoulder. Whether this would constitute a battery would depend on the circumstances of the case.

defence for both the criminal and civil law. Abolishing the defence does not interfere with existing principles of common law that acknowledge the necessity (and lawfulness) of certain physical interventions carried out by parents or other adults in loco parentis (e.g. holding back a child from running into the road). In addition to abolishing the defence, section 1(3) of the Bill provides that corporal punishment of a child taking place in Wales cannot be justified in any civil or criminal proceedings on the ground that it constitutes acceptable conduct for the purposes of any other rule of the common law. The Explanatory Notes to the Bill state that:

“Abolition of the defence of reasonable punishment, without more, might leave open the possibility of a person attempting to defend the use of punishment on the basis of its being generally acceptable in the course of ordinary life. For instance, a person might seek to argue that it is acceptable in the course of everyday life to smack a child, just as it is acceptable to brush a child’s teeth. The wording in subsection (3) has been included to avoid this possibility.”¹¹

11. The EM notes that “removing the defence of reasonable punishment has been the subject of debate in the Assembly since the early years of its existence”.¹²

12. The Welsh Government’s Programme for Government, *Taking Wales Forward 2016-2021*¹³, included a commitment to “seek cross-party support for legislation to end the defence of ‘Reasonable Punishment’”, and in June 2017 the then First Minister confirmed the Welsh Government’s intention to introduce a Bill “in the third year of this Assembly term”¹⁴.

13. In January 2018, the Welsh Government consulted on its legislative proposal to remove the defence of reasonable punishment.¹⁵ The Welsh Government did not consult on a draft Bill.

14. The EM notes there has been a shift in attitudes, with fewer parents and guardians of young children supportive of physical punishment in 2017.¹⁶ It also states:

¹¹ Explanatory Notes, paragraph 30

¹² Explanatory Memorandum, paragraph 3.4

¹³ Welsh Government: *Taking Wales Forward 2016-2021*

¹⁴ Welsh Government statement on the Legislative Programme, 27 June 2017

¹⁵ *Legislative Proposal To Remove The Defence Of Reasonable Punishment, January 2018*

¹⁶ Explanatory Memorandum, paragraph x

“Research suggests physical punishment is no more effective than non-physical approaches to discipline. There is no compelling evidence against the proposal to remove the defence of reasonable punishment. The majority of researchers in the field make the judgement that all physical punishment under all conditions is potentially harmful to children.”¹⁷

¹⁷ Explanatory Memorandum, paragraph xi

2. Legislative Competence

The Welsh Government is satisfied that the Bill is within the legislative competence of the National Assembly.

General

15. We considered this Bill under the reserved powers model of legislative competence, as set out in Section 108A of the *Government of Wales Act 2006* (the 2006 Act).

16. The Welsh Government is satisfied that the Bill is within the legislative competence of the National Assembly. Paragraphs 2.1 and 2.2 of the Explanatory Memorandum set out the Welsh Government's position.

17. In her statement on legislative competence¹⁸, the Llywydd, Elin Jones AM, stated that (in her view) the provisions of the Bill would be within the legislative competence of the National Assembly for Wales.

18. We asked the Deputy Minister to outline her views about legislative competence and why she believed that the Bill is within the National Assembly's legislative competence. The Deputy Minister said:

“I’m confident that this Bill is within competence. Prior to the introduction of the Bill, I received the Llywydd’s view that it was within competence, and, of course, the Bill does relate to the matter of parental discipline, which is devolved to the Assembly. The basis for the legislative competence is set out in the explanatory memorandum. It was through the Wales Act 2017, which specifically said that parental discipline was devolved to the Assembly.”¹⁹

19. We also raised a specific issue regarding section 1(3), which makes reference to the common law. We asked the Deputy Minister what steps had been taken to ensure that the Bill did not inadvertently capture elements of common law, which were not intended to be captured by the Bill or that may not be within the legislative competence of the National Assembly. The Welsh Government legal adviser accompanying the Deputy Minister said:

¹⁸ Presiding Officer’s Statement on Legislative Competence: Children (Abolition of Defence of Reasonable Punishment) (Wales) Bill, 25 March 2019

¹⁹ Constitutional and Legislative Affairs (CLA) Committee, 3 June 2019, RoP [5]

“That section, that wording, was specifically included to make sure that a person couldn’t still rely on the defence by the back door, so that they couldn’t say that smacking their child was acceptable conduct. (...)

From all the research we’ve done, I’m not aware that it’s going to capture anything that it shouldn’t. It was just about making sure that the common law doesn’t develop in a way that undermines the purpose of the Bill.”²⁰

- 20.** We also asked the Deputy Minister if she had held any discussions with the UK Government about any issues or concerns around the Bill. The Deputy Minister told us:

“We’ve had quite a lot of discussions with the UK Government. Obviously, because it is devolved, there’s not an absolute requirement to do that, but we have been discussing with them. We’ve had discussions with the relevant Whitehall departments during the development of the Bill. Meetings have been held with the Home Office and with the Ministry of Justice, which haven’t raised any concerns in relation to our proposals. The Ministry of Justice were also involved in the development of the justice impact assessment, and there has been exchange of correspondence between Welsh Ministers and UK Government Ministers.”²¹

Human rights

- 21.** To be within the legislative competence of the National Assembly, section 108A(2)e) of the 2006 Act requires all provisions of a Bill to comply with the European Convention on Human Rights (ECHR).

- 22.** Paragraph 2.3 of the Explanatory Memorandum states:

“It is considered that the provisions are compatible with convention rights and European Union (EU) law.”

- 23.** We asked the Deputy Minister whether she had given consideration to any human rights issues that may relate, in particular, to balancing the rights of the child to be protected and those of the parents to discipline a child. The Deputy Minister said:

²⁰ CLA Committee, 3 June 2019, RoP [19] and [21]

²¹ CLA Committee, 3 June 2019, RoP [7]

“We’ve given a great deal of thought, obviously, to the human rights issue and how you balance these rights and, as you say, ultimately it’s a question about how to find a balance between the rights of the child as well as the parents, who enjoy rights under article 8. Basically, the Parliamentary Joint Committee on Human Rights’ nineteenth report in 2003-04 did not consider that there was any disproportionate interference with family life that should prevent the defence being abolished, and the UN Committee on the Rights of the Child, I think it was as recently as 2016, actually urged again abolition of the reasonable punishment defence. I think this is very helpful, obviously, in proportionality terms because it shows that such bodies consider that nothing less than the absolute abolition of the reasonable punishment defence will do.”²²

24. We pursued this matter with the Deputy Minister and asked her to clarify whether it was the Welsh Government’s view that article 8 of the ECHR is engaged but that the evidence in support of the Bill justifies interference in that article. The Deputy Minister told us:

“Well, the rights are not absolute. We believe that action can therefore be taken that does interfere with them, provided that interference is justified. And the legitimate aim of this legislation is to protect the rights and freedoms of others, who are children, basically. We’re trying to protect their rights and freedoms. Our view is that we are able to justify interference as a proportionate means of reaching a legitimate aim.”²³

25. In the EM there is not a specific reference to article 8, or any other articles of the ECHR, or any reference to an assessment of interfering with that article or any others, in the EM. We asked if there was a reason for this. The Welsh Government legal adviser said:

“In the explanatory memorandum, we concentrated on the structural competence and what we’ve been given under the Wales Act rather than the human rights considerations because we’ve covered a lot of that in the impact assessments.”²⁴

26. In a follow-up letter to us, the Deputy Minister said:

²² CLA Committee, 3 June 2019, RoP [9]

²³ CLA Committee, 3 June 2019, RoP [14]. See also [151] and [152]

²⁴ CLA Committee, 3 June 2019, RoP [12]

“The 14th November 2018 letter to you from the former First Minister Carwyn Jones AM confirmed that ‘due to the change to reserved powers and there no longer being a need to refer to conferred subjects, the legislative competence section of Explanatory Memoranda in the future are more likely to accord with the statement in the Fees Bill (Renting Homes (Fees etc.) (Wales) Act) Explanatory Memorandum’.

In the case of the Children (Abolition of Defence of Reasonable Punishment) (Wales) Bill the Equality Impact Assessment explicitly addresses article 8 as well as other relevant articles of the European Convention on Human Rights.”²⁵

27. The Equality Impact Assessment (EIA) is published on the Welsh Government’s own website.²⁶ A link to all the relevant Welsh Government impact assessments is provided in the EM.²⁷ The EIA states:

“This Equality Impact Assessment explores the positive impacts and how potential negative impacts could be mitigated including ensuring parents in protected groups are aware of the legislation and are signposted to advice, support and information.”²⁸

28. The EIA’s commentary on Human Rights and UN Conventions references article 8 of the ECHR, along with articles 3, 9 and 10. It provides answers to questions relating to the positive or negative impacts of the Bill, the reasons for the Welsh Government’s decision, and how negative Impacts may be mitigated against.

Our view

29. We note the evidence in relation to matters of legislative competence from the Deputy Minister. We also note that the Llywydd has stated that, in her view, the provisions of the Bill would be within the legislative competence of the National Assembly for Wales. We further note the information relating to legislative competence provided in the EM and in the letter we received from the Deputy Minister following our evidence session.

²⁵ Letter from the Deputy Minister, 18 June 2019

²⁶ Children (Abolition of Defence of Reasonable Punishment) (Wales) Bill: integrated impact assessments

²⁷ Explanatory Memorandum paragraph 9.1

²⁸ Welsh Government Equality Impact Assessment

30. While we welcome the Deputy Minister's responses to the questions we posed in relation to the Bill's compatibility with human rights and the further information provided to us in correspondence, we wish to make an important point, which was also made in our report on the Renting Homes (Fees etc.) (Wales) Bill.

31. Recommendation 2 of that report stated that the Welsh Government should ensure information regarding legislative competence provided in its Explanatory Memoranda contains sufficient detail to ensure transparency and to enable effective scrutiny of Bills.

32. Legislative competence is determined not only by reference to whether a Bill, or a provision of a Bill, relates to a reserved matter. Amongst other things, an assessment of legislative competence also requires an assessment of whether the Bill is compatible with the rights set out in the European Convention on Human Rights.

33. For that reason, we believe that Welsh Government Explanatory Memoranda should include a fuller explanation of the assessments undertaken in relation to human rights. Specifically regarding this Bill, we believe the EM should have included more detail on the assessment undertaken regarding articles 3, 8, 9 and 10 of the ECHR.

34. In expressing this view, we note that the Welsh Government has undertaken the required impact assessments for the Bill. However, we do not believe that making those assessments available on its own website, without an appropriate level of commentary within the EM which is laid before the National Assembly, is sufficient.

35. In reiterating the point we made in our report on the Renting Homes (Fees etc.) (Wales) Bill, we are not seeking to attempt to undermine assessments of legislative competence made by the Welsh Government. As the National Assembly committee responsible for monitoring legislative matters relating to the competence of the Assembly or the Welsh Ministers, our approach to scrutiny is a way of ensuring these matters are laid out in a coherent, transparent and accessible way.

3. General observations

The need for legislation

- 36.** The Welsh Government considers that the Bill “brings Wales in line with recommendations of the UN Committee on the Rights of the Child”.²⁹
- 37.** In a written statement accompanying the introduction of the Bill, the Deputy Minister stated:
- “The Children (Abolition of the Defence of Reasonable Punishment) (Wales) Bill will seek to protect children’s rights in relation to the duty set out in article 19 of the UNCRC – the right to protection from all forms of violence.”³⁰
- 38.** The EM notes that research has suggested that attitudes towards the way children and young people are being disciplined are “already changing”.³¹
- 39.** The EM states:
- “The intended effect of the Bill, combined with an awareness-raising campaign and support for parents, is to bring about a further reduction in the use and tolerance of the physical punishment of children in Wales.”
- 40.** We asked the Deputy Minister for her views on whether the Bill was necessary. She told us:
- “Certainly, I do think that it does warrant taking up the time that we have taken up, and the Bill is not about the number of times the defence has been used in this country, it’s about culture and behaviour change, helping to protect children’s rights and sending a clear message that physically punishing children is not acceptable in Wales. So, we feel that it’s very important that this legislation is brought in, along with an information campaign, and also with support for parents, and it’s the three things together, basically, that we think will mean that

²⁹ Explanatory Memorandum, paragraph 3.38

³⁰ Welsh Government: [Written statement: Introduction of the Children \(Abolition of the Defence of Reasonable Punishment\) \(Wales\) Bill](#)

³¹ Explanatory Memorandum, paragraph x

there'll be less physical punishment of children in Wales. So, that's our aim: to stop the physical punishment of children in Wales."³²

41. The Deputy Minister wrote to the Children, Young People and Education (CYPE) Committee on a number of matters during Stage 1.³³ In these letters, the Deputy Minister confirmed that:

- the Welsh Government has not been able to establish a baseline of the number of referrals relating to reasonable punishment received by social services departments using existing data³⁴;
- the figure of 274 cases of reasonable punishment, referenced in the EM, may not have been isolated to incidences of physical punishment and could be part of a wider set of issues such as neglect and abuse³⁵.

42. The Police and the Crown Prosecution Service (CPS) are non-devolved (or reserved authorities³⁶). In addition, there are a number of restrictions on the National Assembly's legislative competence in schedules 7A and 7B of the 2006 Act which mean that the Bill is not able to make specific provision about how a person who administers reasonable punishment to a child is subsequently dealt with by the criminal justice system. We asked the Deputy Minister whether she was concerned that the effectiveness of the Bill may be undermined because she would not be able to direct the work and decisions of the CPS. The Deputy Minister said:

"Well, we've had very close, good working relationships with the CPS. The previous Minister met with the CPS, I've met with the CPS, and they've been working very closely with the officials. (...) So, I don't really

³² CLA Committee, 3 June 2019, RoP [24]

³³ [Letter to the Children, Young People and Education Committee, 5 April 2019](#); [Letter to the Children, Young People and Education Committee and Finance Committee, 31 May 2019](#)

³⁴ Letter to the Children, Young People and Education Committee, 5 April 2019

³⁵ Letter to the Children, Young People and Education Committee and Finance Committee, 31 May 2019

³⁶ Paragraph 8(3) of Schedule 7B to GOWA 2006 provides that the following are reserved authorities; a Minister of the Crown, a government department or any other public authority apart from a "devolved Welsh authority". A list of devolved Welsh authorities is provided in Schedule 9A to GOWA. Section 157A of GOWA also provides that a "devolved Welsh authority" includes a public authority whose functions are exercisable only in relation to Wales and are wholly or mainly functions that do not relate to reserved matters.

see any problem there, and they haven't raised any problems with us either."³⁷

43. We also asked the Deputy Minister whether she had given consideration to introducing civil-based legislation, rather than adopting the approach she has taken in the Bill. She told us:

"... we did discuss—well, the officials did discuss—whether there was any other way of doing it, but we felt that, once you've got that defence there, that will mean that there is always a defence for using physical punishment against a child. So, we couldn't really see any other way, other than actually removing it, and that is very strongly supported by, well, virtually all the professions who work with children, that it does need to actually go, because otherwise anybody can use it."³⁸

44. The Welsh Government legal adviser added:

"A specific civil process wasn't considered, no. The plan has been to—. We saw it as we either remove the defence in criminal law, or we don't, and we do just a behaviour change campaign. There wasn't another option."³⁹

45. In a follow-up letter to us, on the subject of introducing civil-based legislation to try and achieve the same culture change, the Deputy Minister said:

"This course of action would not fulfil the aim of the legislation in helping to protect children's rights by giving children legal protection from physical punishment, as the defence would still exist in criminal law. In addition, those working in unregulated settings would still be able to rely on the defence if they used physical punishment – unlike in regulated settings where physical punishment is already prohibited.

Detailed information setting out why the legislation is necessary is included in paragraphs 3.37 to 3.56 of the Explanatory Memorandum alongside the Equality Impact Assessment, the Children's Rights impact assessment and the Justice Impact assessment."⁴⁰

³⁷ CLA Committee, 3 June 2019, RoP [26]

³⁸ CLA Committee, 3 June 2019, RoP [138]

³⁹ CLA Committee, 3 June 2019, RoP [145]

⁴⁰ Letter from the Deputy Minister, 18 June 2019

Impact assessments

46. The Welsh Government has carried out a Regulatory Impact Assessment (RIA) for the Bill. A summary of the RIA is included in Chapter 6 of the EM.

47. Chapter 9 of the EM contains a brief summary of impact assessments required when bringing forward new legislation. In addition to the RIA, and as mentioned earlier in the report, the Welsh Government has carried out a Children's Rights Impact Assessment, an Equalities Impact Assessment, and a Justice Impact Assessment.

Justice Impact Assessment

48. Paragraphs 9.18 and 9.19 of the EM provide that “issues with identifying appropriate data to provide a baseline of current cases” has led to information compiled in New Zealand being used. The EM notes that “there are limitations in using this data arising from key differences between the two countries”.⁴¹

49. We asked the Deputy Minister whether she had concerns that the reliance on the data from New Zealand may affect the reliability of the findings of the Justice Impact Assessment. The Deputy Minister responded:

“Well, the New Zealand data is the nearest we can get, because although—I think it’s 54—countries now have abolished the defence, there are only a few countries that are very close to our jurisdiction, and New Zealand is one of the major ones. And also, the other countries—Ireland, for example—didn’t do any data monitoring before they passed their Bill, which was passed by means of an amendment, and so there was no baseline of data there. In Ireland, they hadn’t gathered any of the information.

And so I think it is perfectly acceptable to use New Zealand, because that’s the nearest we’ve got. So, we are using the New Zealand data but, obviously, we are taking into account some of the differences between New Zealand and our country—for example, population size, age difference, because they’re looking at a different age range. So, we’re taking all those considerations into account.”⁴²

⁴¹ Explanatory Memorandum, paragraph 9.19

⁴² CLA Committee, 3 June 2019, RoP [108] and [109]. See also [110] to [116]

50. In a letter to the Chairs of the CYPE and Finance Committees, the Deputy Minister provided additional detail on this matter.⁴³

Balance between what is on the face of the Bill and what is left to subordinate legislation

51. The Bill contains a single power for the Welsh Ministers to make subordinate legislation, which is set out in Table 5.1 in the EM.⁴⁴

52. The delegated power takes the form of an Order, subject to no scrutiny procedure, which will appoint the date on which the provisions of the Bill come into force. As set out in Table 5.1, the Order may make transitional, transitory or saving provision in connection with the coming into force of a provision in the Bill.

53. We asked the Deputy Minister what assessment was undertaken before it was determined that the single order-making power in the Bill should not be subject to an Assembly scrutiny procedure. The Deputy Minister said:

“As I understand it, the Welsh Government’s long-standing position is not to apply a procedure to commencement Orders, and we didn’t really see any reason to adopt a different approach in this Bill.”⁴⁵

54. The Welsh Government legal adviser added:

“Our position is that the commencement Orders under section 1 will already have been scrutinised by the Assembly during the scrutiny process, and any related transitional provisions will address the issue of when the change in law should take effect, not whether the law should be changed, which is why we think ‘no procedure’ is the correct procedure. And we also worry that, if it was negative procedure and there was an annulment, it might cause confusion. Especially because we’re changing the criminal law, we want it to be clear that, when the law changes, it’s changed, and the possibility that that Order might then be annulled might cause further confusion, which is why we prefer the ‘no procedure’ Order-making power.”⁴⁶

⁴³ Letter to the Children, Young People and Education Committee and Finance Committee, 31 May 2019

⁴⁴ Explanatory Memorandum, paragraph 5.1

⁴⁵ CLA Committee, 3 June 2019, RoP [88]

⁴⁶ CLA Committee, 3 June 2019, RoP [92]

55. The legal adviser went on to say:

“Section 2 will come into force on Royal Assent, along with section 3, and section 1 is really the substantive clause, the operative clause, so we don’t want that to come into force until after a period of time, once the implementation has occurred. And I believe that any concerns about that Order could be put to the Minister in the Senedd if Members wanted to, so there is still opportunity for challenge of that Order, even if it’s ‘no procedure’. And I believe that position was the position taken with the recent Legislation (Wales) Bill that this committee considered, and agreed that, for that Bill, ‘no procedure’ for that commencement Order was the right route, and we believe that that’s the same for this Bill.”⁴⁷

56. Within the context of the Bill containing a single order-making power that will enable the Welsh Ministers to do other things (so long as they are transitory, transitional or saving) when bringing section 1 of the Bill into force, we asked the Deputy Minister for her views on the inclusion of the words “and for connected purposes”⁴⁸ within the long title. The Deputy Minister said:

“We do not intend to bring forward any amendments, and the connected purposes are the parts of section 1 that refer, for example, to amending the Children’s Act 1989, which I think is section 1(5), and it’s for covering those sort of issues. No intention of taking the Bill any further.”⁴⁹

Our view

57. We acknowledge the information within the Explanatory Memorandum and the Minister’s evidence with regard to the need for the Bill.

⁴⁷ CLA Committee, 3 June 2019, RoP [96]

⁴⁸ Every Bill has a long title and a short title. The long title is set out at the beginning of the Bill and begins “An Act of the National Assembly of Wales to ...”. It consists of a single sentence, divided if necessary by semi-colons, into various limbs, each of which deals with a principal purpose of the Bill. With large and complex Bills, it is common for the long title to end with a form of words such as “and for connected purposes”. A connected purpose is something that the Bill does that is not sufficiently distinct to merit a limb to itself, but which does not fall entirely within one of the preceding limbs.

⁴⁹ CLA Committee, 3 June 2019, RoP [104]

58. We also acknowledge the evidence from the Minister in relation to the baseline data used by the Welsh Government when undertaking impact assessments ahead of the introduction of the Bill.

59. We note that the Bill contains one delegated power, that will bring into force the substantive provision in the Bill (section 1) by way of an order. While we are content with the balance between what is on the face of the Bill and what is left to subordinate legislation, we note that section 2(3) of the Bill enables that order to make transitional, transitory or saving provision and, further, that it will not be subject to a scrutiny procedure in the National Assembly.

60. Given the nature of the Bill, and the proposed implementation date, the use of the commencement power should be considered carefully under Standing Order 21.7 by our successor committee in the Sixth Assembly.

61. We also believe that the comments regarding the approach to determining the scrutiny procedure assigned to the one delegated power in the Bill are unfortunate. An assessment of the appropriate scrutiny procedure should be based on sound principles, rather than the likelihood of whether regulations made using the negative procedure may be annulled.

62. Finally, our predecessor Committee's report, *Making Laws in Wales*⁵⁰, recommended that there should be a presumption in favour of publishing draft Bills. We echo these comments for the reasons highlighted in that report and consider it to be good legislative practice. While we note that the Welsh Government consulted on its legislative proposal to remove the defence of reasonable punishment, this does not, in our view, amount to the full and thorough consultation which could and should have been conducted on such a significant matter of social policy.

⁵⁰ CLA Committee, *Making Laws in Wales* report, October 2015

4. Specific observations

The role of the Crown Prosecution Service

63. The CPS, as the principal public prosecuting service for England and Wales, provides charging advice in more serious or complex cases based on the *Code for Crown Prosecutors* and prosecution guidance. The *Charging Standard on Offences Against the Person* (the Charging Standard Guidance)⁵¹ provides advice about the selection of the charge where reasonable punishment may be a defence, in addition to advice about factors to take into account to assist in determining the reasonableness of the punishment.

64. The EM states:

“The CPS is aware of the Welsh Government’s intention to remove the defence of reasonable punishment and agrees that, if the Bill to remove the defence is passed, the Charging Standard will need to be amended to make it clear the defence no longer applies in Wales.”⁵²

The Charging Standard Guidance

65. We suggested to the Deputy Minister that the CPS could have been expected to have started work on revised draft guidance relating to the Charging Standard, in anticipation of this Bill becoming law. We asked her whether she had had sight of any draft guidance. The Deputy Minister said:

“No, but we’ve discussed the fact that they will be changing the draft guidance. They say this is something that they regularly update all the time. They don’t see it as a big issue and they will be changing it when the time comes.”⁵³

66. We asked when the draft guidance would be available, given its importance for delivering the Bill’s objectives. The Deputy Minister said:

“I think you’re absolutely right; that is going to be the key to the success, that it’s all carefully prepared for and that the structures are in place. That’s what the officials have been working very hard to absolutely

⁵¹ [Offences against the Person, incorporating the Charging Standard | The Crown Prosecution Service](#)

⁵² Explanatory Memorandum, paragraph 3.23

⁵³ CLA Committee, 3 June 2019, RoP [28]

ensure. And I think the good working relations with the CPS has been absolutely crucial. They're absolutely aware of everything we're doing, they're in support of what we're doing, and they see providing a change in the guidance as an everyday sort of thing that they do all the time.”⁵⁴

67. We asked the Deputy Minister if there was anything preventing the Welsh Government and the CPS from providing us with draft guidance before Stage 3 scrutiny proceedings on the Bill take place. The Deputy Minister said:

“Well, I haven’t discussed that about whether they would have any draft guidance, but on the implementation group, all these issues will be discussed, and there are going to be sub-groups of the implementation group to look specifically at different areas, and I would imagine that this would be one.”⁵⁵

68. She added:

“I think you’re aware that we don’t plan to introduce this Bill very swiftly; that we are thinking of probably as much as a two-year implementation period before the actual implementation. So, there is quite a lot of time. We are deliberately doing this in order to make sure that we’ve got time to work out all these things.”⁵⁶

69. We also asked the Deputy Minister whether Welsh Government officials had given consideration to the changes that may be made to the existing guidance. While the Deputy Minister told us that she had not had any discussions,⁵⁷ the Welsh Government policy adviser accompanying the Deputy Minister said:

“We have had discussion with a range of stakeholders, including the CPS, and as the Deputy Minister has said, they are fully on board with the principle of the Bill. They recognise that their guidelines and guidance will need to change. They need to balance, as we all do, what’s proportionate to be completed ahead of the proposed change in the law and what would then be taken forward after a change in the law, provided, of course, that that’s passed by the Senedd. So, they’re not wanting to overly pre-empt the will of the Senedd and the will of the Assembly. They are fully aware that changes will need to be made

⁵⁴ CLA Committee, 3 June 2019, RoP [30]

⁵⁵ CLA Committee, 3 June 2019, RoP [32]

⁵⁶ CLA Committee, 3 June 2019, RoP [34]

⁵⁷ CLA Committee, 3 June 2019, RoP [39]

and they have and will be planning that into their work plan, should we achieve Royal Assent.”⁵⁸

70. In her letter to us following our evidence session on the Bill, the Deputy Minister stated:

“The Charging Standard on Offences Against the Person is regularly updated to reflect changes in law and practice. It was amended following the change in the law resulting from section 58 of the Children Act 2004, which outlines that the defence of reasonable punishment would no longer be available for charges of actual or grievous bodily harm or child cruelty. The Crown Prosecution Service agree that the Charging Standard will require further updating to address the removal of the defence of reasonable punishment in Wales. There are operational issues to be agreed and resolved by the Implementation Group before the Standard can be updated.”⁵⁹

Burden of proof

71. We raised with the Deputy Minister issues relating to the burden of proof in a criminal trial for battery following the removal of the defence. The Welsh Government legal adviser told us that the burden of proof would be “exactly the same as it is now”. She said:

“... we’re talking about the existing offences of assault and battery, so there should be no change to the standards or the burdens of proof. They’re exactly the same as they are now.”⁶⁰

72. In her letter of 18 June 2019, the Deputy Minister provided further clarification:

“In a criminal trial the Crown will bear the legal burden of proving the offence against the defendant (if they fail to do so the defendant is acquitted). The defendant will often bear an evidential burden in relation to defences he/she wishes to run. The evidential burden does not oblige the defendant to prove the particular defence but simply to raise evidence of the defence and it is the Crown that has the legal

⁵⁸ CLA Committee, 3 June 2019, RoP [40]. See also [41]

⁵⁹ Letter from the Deputy Minister, 18 June 2019

⁶⁰ CLA Committee, 3 June 2019, RoP [50]. See also [51], [53] and [65]

burden to prove beyond reasonable doubt that the defence is not applicable on the facts. (...)

During the evidence session to the Children Young People and Education Committee on the 6 June, Barry Hughes Chief Crown Prosecutor for Wales was asked about this matter. He explained that 'There's no change whatsoever to the burden of proof, nor to the standard of proof' he went on to say that 'if we remove the defence of reasonable chastisement ... it doesn't alter the basic responsibility of the prosecution, which is to establish its case beyond a reasonable doubt. And if the defence raise an argument and say, "Well look, that was a lawful act; I was only doing what I thought was reasonable in the circumstances", it's for the Crown to disprove that to the criminal standard which is beyond a reasonable doubt'.⁶¹

Diversionary schemes and the use of cautions

73. Paragraph 16 of the EM states:

"There are a number of out of court disposals which the police can use to respond to offences in a proportionate way."

74. It adds that it is anticipated that dependent on the circumstances of the case, cautions and community disposals may be offered to parents as an alternative to prosecution.

75. The EM states that the Welsh Government is exploring the use of community resolutions in conjunction with a diversion scheme which could provide advice and support on positive alternatives to provide discipline for children.⁶²

76. A caution will form part of a person's criminal record and may be referred to in future legal proceedings and revealed as part of a DBS standard or enhanced criminal record check. A community resolution would not form part of a person's criminal record but may still be disclosed (as "non-conviction data") as part of an enhanced DBS check, if a chief officer of a police force considers it relevant to the application and that it ought to be disclosed.

⁶¹ Letter from the Deputy Minister, 18 June 2019

⁶² Explanatory Memorandum, paragraph 24

77. We asked the Deputy Minister if consideration had been given to the way in which the use of cautions operate in New Zealand, as a way of diverting people away from court proceedings. The Deputy Minister said:

“We have been thinking of specific diversion schemes. This is something that we have discussed with the police. And, as part of the implementation group, one of the sub-groups will be looking at diversion, in order to avoid the points that you’re making in terms of—. As you say, a caution is to avoid court. It will take some time to develop a diversion scheme, which is, again, why we want to have the two years, so that we’ve got plenty of time to look at that. But, yes, that is something we’ve looked at, yes.”⁶³

Inclusion of transitional provisions

78. In Scotland, the Children (Equal Protection from Assault) (Scotland) Bill includes transitional provisions on the face of the Bill, which make it clear that the abolition of the defence applies only after the section abolishing it comes into force; i.e. it has no retrospective effect. We asked the Deputy Minister what consideration has been given to including equivalent provision on the face of the Bill. The Deputy Minister told us:

“Scotland’s proposed legislation to remove the defence is a private Member’s Bill, as you know probably, not a Government Bill, and they operate a different justice system to us. And they have concluded that there is a need for transitional provisions on the face of their Bill, which we believe are not necessary for our Bill. The Bill will not apply retrospectively, and that is the situation—it will not apply retrospectively.”⁶⁴

Consolidation of legislation

79. At the same time that we considered the Bill, we also scrutinised and reported on the Legislation (Wales) Bill, proposed by the Welsh Government.⁶⁵ One key purpose of the Legislation (Wales) Bill is to facilitate and encourage the effective consolidation of Welsh law.

⁶³ CLA Committee, 3 June 2019, RoP [124]

⁶⁴ CLA Committee, 3 June 2019, RoP [98]

⁶⁵ CLA Committee, Legislation (Wales) Bill, Stage 1 report, March 2019

80. Within this context, we asked the Deputy Minister why the opportunity had not been taken to look to consolidate the provisions set out in this Bill with existing, related provisions in the Education Act 1996. The Deputy Minister said:

“Yes, well we think the punishment in the education setting is different from the punishment in the home. There’s quite a wide difference in it.”⁶⁶

81. The Welsh Government legal adviser added:

“We wanted to make sure that you could, for example, carry your child to the time-out step for parental discipline to still take place. (...)

And we think there’s an important difference between the school context and general parenting that justifies a different approach, which is why we didn’t go down the—we did think about it—Education Act 1996 route.”⁶⁷

Implementation, and post-implementation review

82. As referenced earlier in the report (see paragraph 68), the Deputy Minister intends for there to be two year lead-in period before the legislation (if passed) is implemented. The Deputy Minister told us:

“I think we’re looking at precedents such as the organ donation Bill, which had a two-year lead-in period. And it does seem that the best success we can hope for from the Bill is if we do have a period of time when there’s a big information period, when we’ve got the implementation group grasping all the details of the Bill, and you need a good period of time for that and, of course, developing even more support for parents. So, we’re saying up to two years from the date of commencement, and I think that seems quite reasonable.”⁶⁸

83. In relation to a review of the Bill, post-implementation, the Deputy Minister told us:

“... we propose to have an independent body to come in to carry out surveys to track public awareness of the changes in legislation. We want to look at the changes of attitudes towards physical punishment of

⁶⁶ CLA Committee, 3 June 2019, RoP [80]

⁶⁷ CLA Committee, 3 June 2019, RoP [81] and [85]

⁶⁸ CLA Committee, 3 June 2019, RoP [102]

children, and the prevalence of parents reporting that they use physical punishment. (...)

So, the data collection will continue following commencement to monitor the impact of the Bill. And it will be reviewed and monitored over time. (...) we will be reaching a wide range of stakeholders in the implementation group. And I will update the Assembly as appropriate, whenever data or evaluation evidence is going to be published.”⁶⁹

84. The Welsh Government policy adviser added:

“What we have done, through the implementation group, which has already met quite recently, is we have discussed who needs to be involved on that particular work stream and which aspects of that are going to be about delivery and which aspects of that are about consultation. (...) we’re very clear that implementation, data collection, monitoring and evaluation is extremely important and an extremely important element of this Bill, so it’s factored into the planning and the timeline.”⁷⁰

Our view

85. We note the evidence from the Deputy Minister regarding the role of the Crown Prosecution Service and its importance for delivering the Bill’s objectives.

86. We acknowledge the views of the Deputy Minister and agree with her that revised CPS Charging Standard Guidance and any related guidance (e.g. out-of-court disposals) will be key to meeting the Welsh Government’s objective of helping to protect children’s rights by prohibiting the use of physical punishment, through the removal of the reasonable punishment defence.

87. For that reason, we believe a draft version of the revised Guidance should be made available to Assembly Members for consideration alongside scrutiny of the Bill.

Recommendation 1. The Deputy Minister should work with the Crown Prosecution Service and make available to Assembly Members the revised Charging Standard Guidance and any associated guidance in draft format ahead of Stage 3 proceedings on the Bill.

⁶⁹ CLA Committee, 3 June 2019, RoP [128] and [129]

⁷⁰ CLA Committee, 3 June 2019, RoP [132]

88. We welcome the evidence from the Deputy Minister regarding diversionary schemes.

89. We acknowledge the evidence from the Deputy Minister as to why an opportunity had not been taken to look to consolidate the provisions set out in this Bill with existing, related provisions in the Education Act 1996.

90. We note the Deputy Minister's intention as regards the commencement of the substantive provision in the Bill that will abolish the common law defence of reasonable punishment.

91. We also note the Deputy Minister's intention regarding a post-implementation review of the Bill. In order to ensure such a review takes place we believe the Bill should require the Welsh Ministers to evaluate its effectiveness in delivering the policy objectives. We note that some Welsh Acts include such provisions requiring post-implementation evaluation, for example the Agricultural Sector (Wales) Act 2014 and the Public Health (Minimum Price for Alcohol) (Wales) Act 2018.

Recommendation 2. The Bill should be amended to require the Welsh Ministers to:

- undertake a post-implementation evaluation of the Bill, within three years of the legislation coming into force, and
- report the findings of such an evaluation to the National Assembly.