# Review of Section 58 of the Children Act 2004

department for
children, schools and families

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by the Secretary of State for Children, Schools and Families
by Command of Her Majesty

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# Executive Summary

1. Section 58 of the Children Act 2004 limited the use of the defence of reasonable punishment so that it could no longer be used when people are charged with offences against a child such as causing actual bodily harm or cruelty to a child.

2. The then Minister for Children, during the passage of the Children Act 2004, gave a commitment that the Government would review the practical consequences of section 58 and seek parents' views on smacking.

3. This report sets out the results of that exercise. The Government has carried out a consultation, parental survey, children and young people's survey and sought additional supporting evidence. The findings from the review are that:

   a. Smacking is becoming a less commonly used form of discipline as more parents recognise that there are more effective and acceptable methods of disciplining children;

   b. Whilst many parents say they will not smack, a majority of parents say that smacking should not be banned outright. Many organisations however support legislation to ban smacking;

   c. The police have discretion to deal with cases as they consider appropriate. Factors taken into account include the evidence available, the public interest and the best interests of the child, as well as the legal position including section 58;

   d. There appears to be a lack of awareness across different audiences about the scope and application of the law.

4. Our analysis of the evidence leads us to conclude that:

   a. It is clear that section 58 has improved legal protection for children by restricting the use of the reasonable punishment defence in court proceedings;

   b. It is not clear whether section 58 has had any significant practical consequences for those working with children and families day to day, but there are no reported significant practical problems with its operation;

   c. The Crown Prosecution Service's Charging Standard has clarified the boundary between what constitutes common assault and what constitutes assault occasioning actual bodily harm;

   d. Attitudes and behaviour amongst parents are changing, with younger parents less likely to use smacking as a method of discipline than older parents.

5. In response, the Government:

   a. Will retain the law in its current form in the absence of evidence it is not working satisfactorily. The law allows the police and prosecutors to act in the best interests of children, and section 58 prevents the use of the defence of reasonable punishment in any proceedings for an offence of cruelty to a child or assault occasioning actual bodily harm against a child or inflicting grievous bodily harm against a child;

   b. Will do more to help with positive parenting. Parents know their children best and are best placed to teach them how to behave, but the Government accepts that parenting is complex and parents should be made aware of the variety of techniques they can use to manage their children's behaviour;

   c. Welcomes the bulletin issued by the Crown Prosecution Service to all their staff reminding them of section 58 and where appropriate reminding them to bring it to the attention of courts, juries, and defence lawyers; and will ask the CPS to continue to monitor the situation with regard to the use of the reasonable punishment defence;

   d. Recommends that the police take similar action to the CPS and remind staff of section 58, particularly staff in Child Abuse Investigation Units.

# Introduction

6. Section 58 of the Children Act 2004 says:

### 58 Reasonable punishment

(1) In relation to any offence specified in subsection (2), battery of a child cannot be justified on the ground that it constituted reasonable punishment.

(2) The offences referred to in subsection (1) are—

(a) an offence under section 18 or 20 of the Offences against the Person Act 1861 (c. 100) (wounding and causing grievous bodily harm);

(b) an offence under section 47 of that Act (assault occasioning actual bodily harm);

(c) an offence under section 1 of the Children and Young Persons Act 1933 (c. 12) (cruelty to persons under 16).

(3) Battery of a child causing actual bodily harm to the child cannot be justified in any civil proceedings on the ground that it constituted reasonable punishment.

(4) For the purposes of subsection (3) "actual bodily harm" has the same meaning as it has for the purposes of section 47 of the Offences against the Person Act 1861.

(5) In section 1 of the Children and Young Persons Act 1933, omit subsection (7).

7 Section 58 arose from an amendment proposed by Lord Lester of Herne Hill during the passage of the Children Act 2004. Ministers voted in its favour in Parliament on a free vote. The Rt Hon Margaret Hodge MP, then Minister for Children, made a commitment to review the practical consequences of section 58 (known as clause 56 during the passage of the Bill), two years after its commencement. She also made a commitment to seek the views of parents about smacking:

*"I can give a clear commitment that two years after clause 56 comes into effect we will review the practical consequences of those changes to the law, and will also seek parents' views about smacking. We will lay a copy of the results before Parliament."*[1]

8. Following the change in the law, the Crown Prosecution Service amended the Charging Standard on offences against the person, in particular the section dealing with common assault. The Charging Standard now states that the vulnerability of the victim, such as being a child assaulted by an adult, should be treated as an aggravating factor when deciding the appropriate charge. Injuries that would usually lead to a charge of "common assault" now

1 Hansard, 2nd November 2004, Column 263

should be more appropriately charged as "assault occasioning actual bodily harm" under section 47 of the *Offences against the Person Act 1861* (on which charge the defence of reasonable punishment is not now available), unless the injury amounted to no more than temporary reddening of the skin and the injury is transient and trifling.

## Geographical Scope

9. Section 58 applies to both England and Wales, as does this review. It has been undertaken by the UK Government's Department for Children, Schools and Families, with input from other Government Departments and from the Welsh Assembly Government. The Welsh Assembly Government has a firmly held view that the defence of 'reasonable punishment' should be removed. This view was reiterated by the Welsh Assembly Government's Minister for Children in her response to the consultation which was part of this review. It should be noted that the conclusions contained in this review report are those of the UK Government.

## The Legal Effect of Section 58

10. The legal effect of section 58 is to remove the defence of reasonable punishment to any charge of assault occasioning actual bodily harm, wounding or grievous bodily harm under the Offences Against the Person Act 1861, or to a charge of cruelty to a child under the Children and Young People's Act 1933. The defence of reasonable punishment dates from 1860, when its characteristics were spelled out in judicial remarks (the phrase did not appear in statute). Chief Justice Cockburn stated: "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." It was left to the courts or juries to decide what is "moderate and reasonable" in the view of an ordinary person in any particular case, and this will therefore vary over time as people's views alter. This meant that from 1860 to 2004, a parent charged with a crime relating to an assault on their child could raise the defence of reasonable punishment. Following the enactment of section 58, the defence of reasonable punishment cannot be used unless the defendant is charged only with common assault, the victim is a child and the defendant is the parent of the child or a person acting *in loco parentis*.

11. Therefore any injury sustained by a child which is serious enough to warrant a charge of assault occasioning actual bodily harm cannot be considered to be as the result of reasonable punishment. Section 58 and the amended Charging Standard mean that for any injury to a child caused by a parent or person acting *in loco parentis* which amounts to more than a temporary reddening of the skin, and where the injury is more that transient and trifling, the defence of reasonable punishment is not available.

## The International Context

12. This issue has attracted international attention to the UK position in particular since the judgment of the European Court of Human Rights (ECtHR) in the case of *A v UK 1998*. This case arose from the trial before the English courts in 1994 of a stepfather who had beaten his nine-year old stepson (*"A"*) with "a garden cane applied with considerable force on more than one occasion". The stepfather was charged with assault occasioning actual bodily harm. It was not disputed by the defence that the stepfather had caned the boy on a number of

occasions, but it was argued that these had been acts of "reasonable chastisement". The jury, by a majority verdict, acquitted the applicant's stepfather.

13. *A* applied to the ECtHR, asking them to find a violation of Article 3 of the European Convention on Human Rights (ECHR), which provides:

*"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."*[2]

14. It was the Court's view that UK domestic law did not at the material time provide adequate protection to the applicant against treatment or punishment contrary to Article 3. The Government accepted in the Court proceedings that the law failed to provide adequate protection to children and should be amended. The Government is obliged under the ECHR to abide by the judgment, which was passed to the Committee of Ministers of the Council of Europe to supervise its execution. The Committee can keep cases open until it considers the Court's judgment has been satisfactorily executed.

15. Since the judgment, Parliament has passed the Human Rights Act 1998, under which courts or tribunals determining questions which arise in connection with an ECHR right must take into account any judgments of the ECtHR. Parliament has also enacted the Children Act 2004, section 58 of which removed the availability of the reasonable punishment defence completely from cases charged as assault occasioning actual bodily harm, grievous bodily harm, or cruelty to a child.

16. The Government has consistently argued that section 58 of the Children Act 2004, coupled with revised guidance to prosecutors, form the necessary and appropriate response to the Court's judgment in England and Wales. The Government's argument is that the defence of reasonable punishment is no longer available for any act capable of breaching a child's Article 3 rights. The Government considers that all measures necessary to implement the judgment have been adopted. However, the Committee of Ministers has not yet closed its supervision of A v UK.

17. The Parliamentary Joint Committee on Human Rights (JCHR) concluded in 2004 that "there is no present incompatibility"[3] between English law, as amended by section 58, and rights under the ECHR, but it also observed that "there is a risk that in a future case the European Court of Human Rights will find that the continued availability of the reasonable chastisement defence to the offence of common assault is in breach of a child's right to dignity and personal integrity under Article 3, their right to physical integrity under Article 8, and/or their right not to be discriminated against compared to adults in relation to their enjoyment of those rights on grounds of their age. No such incompatibility exists at present, however".[4]

2 Available at http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf, page 3

3 Para.143, 19th Report of the Parliamentary Joint Committee on Human Rights (2004)

4 Ibid.

18. Some observers also draw attention to the United Nations Convention on the Rights of the Child (UNCRC) in this context. The UNCRC has not been incorporated into UK law, but the Government believes that section 58 is compatible with the UK's obligations under that Convention, and that the UNCRC respects contracting states' rights to retain their own national systems and legal rules. However, the UN Committee on the Rights of the Child said in their concluding remarks in their 2002 report on the UK: "The Committee is of the opinion that the Government's proposals to limit rather than to remove the 'reasonable chastisement' defence do not comply with the principles and provisions of the Convention and the aforementioned recommendations, particularly since they constitute a serious violation of the dignity of the child. Moreover, they suggest that some forms of corporal punishment are acceptable, thereby undermining educational measures to promote positive and non-violent discipline"[5]. But the Parliamentary Joint Committee on Human Rights has observed that "We accept that there is nothing on the face of the CRC which requires states to ban corporal punishment in the family. We also accept that Article 19 [of the UNCRC] on its face leaves a degree of discretion to states to decide what type of measures, or combination of measures, to adopt in order to protect children from violence".[6]

5 CRC/C/15/Add.188, 2002, P. 9 (available at http://daccessdds.un.org/doc/UNDOC/GEN/G02/453/81/PDF/G0245381.pdf?OpenElement)

6 Para.154, 19th Report of the Parliamentary Joint Committee on Human Rights (2004)

# Evidence for the Review

19. The Government made a commitment to review the practical consequences of section 58, and to seek parents' views on smacking. To that end, evidence was gathered in four ways:

    a. A public consultation document published on 15th June 2007, asking for evidence from practitioners and others about how section 58 has worked in practice;

    b. A survey of a statistically representative sample of parents conducted by Ipsos MORI, seeking views about methods used by parents to manage behaviour; circumstances in which smacking may have been used; incidence of smacking; perceived effectiveness of smacking and its acceptability; and whether the law should allow smacking;

    c. Research into the views of children and young people, conducted through the Central Office for Information. 64 children aged 4-16 were interviewed in depth about their views on discipline and physical punishment, in groups of two and four. The COI commissioned Sherbert Research, an independent market research agency which specialises in qualitative research among children and young people, to conduct this research;

    d. Additional evidence, comprising a report from the Crown Prosecution Service on the use of the defence of reasonable punishment, and field visits conducted by Department for Children, Schools and Families officials to discuss the implications of section 58 in detail with the members of local police forces, social services, and the Crown Prosecution Service.

## Consultation

20. The Department published a consultation document on 15th June 2007 asking for evidence from practitioners, organisations, parents, and others about the practical effects of the change to the law. 1405 responses were received by the closing date (10th August). 831 respondents were parents, with the other groups of respondents being other individuals, charities, health professionals, teachers, social workers, faith groups, Local Safeguarding Children Boards, local authorities, and police. A detailed report on the consultation is available (see last page) as an annex to this report. It should be noted of course that people responding to the consultation are self-selecting and therefore views are not necessarily representative of the population as a whole, for example as they may be taking part in organised lobbying.

21. Despite the explicit request in the consultation for evidence to be submitted about the operation of section 58, very little actual evidence was offered. The majority of respondents offered their principled opinions about physical punishment. The key messages from the consultation were:

    a. A substantial majority of respondents said that section 58 has not improved legal protection for children, and a majority of respondents believe all physical discipline should be banned outright;

b. Respondents who gave a view said their had been little change in practice of those working with children and families in considering incidents of alleged assault of children by parents;

c. In the view of many respondents, the legal position on physical punishment is not well understood by parents and those working with children and families. (This is borne out by some of the detailed responses which clearly indicate a lack of understanding of what the law is);

d. Many respondents said that agencies struggle to give advice to parents because while they would advise not using smacking at all, section 58 is seen as legalising and legitimising smacking.

22. The Association of Chief Police Officers believe that cases serious enough to have warranted charges of assault occasioning actual bodily harm, inflicting grievous bodily harm or cruelty to a child would have been investigated as expected anyway in the absence of section 58. However, they also say that whilst section 58 and the Charging Standard provide some boundary to what constitutes reasonable punishment, it is welcome that there is discretion for police and other agencies when considering how to proceed with a case. (This is supported by the findings from field visits – see below.) Whilst this discretion is welcomed by the police, it may be a key reason for the lack of understanding reported by respondents. This discretion includes the general public interest test to be applied by all police and prosecutors in all cases, not just those relating to section 58.

23. The Crown Prosecution Service said that section 58 has increased legal protection for children as the availability of the defence of reasonable punishment has been restricted.

24. Many organisations including the NSPCC, Save the Children, 11 Million, the Children's Rights Alliance for England, and others as part of the Children are Unbeatable! Alliance, responded calling for smacking to be banned. These organisations argued that physical punishment is never acceptable; that all physical punishment needs to be banned in order for the UK to meet its international obligations; and that confusion about what the law says makes it difficult for professionals to work with parents. 16 parliamentarians (cross House and party) wrote arguing that smacking should be banned and saying the UK needed to do so in order to meet its international law obligations. In addition, 44 Members of Parliament wrote to Ministers forwarding or summarising correspondence from their constituents on the subject of smacking during the consultation period. Of these 41 presented views in favour of retaining the law as it currently stands.

25. Several local authorities and Local Safeguarding Children Boards responded with views saying the law needed reforming, on the grounds both that children needed protecting, and that the lack of understanding of the law made it difficult for practitioners to work with parents. Several said that giving positive parenting messages was difficult because, in response to the advice, parents would often cite the law allowing them to smack.

26. The Royal College of Nursing and the Royal College of Paediatrics and Child Health (RCPCH) both responded that physical punishment of children should be banned. The RCPCH said that section 58 had made it difficult for paediatricians to give consistent advice to parents because RCPCH advice is that corporal punishment should not be used as a form of discipline and that other methods are always preferable and likely to be more effective.

They argued that the best way of encouraging consistently good practice in child discipline would be to make it clear to parents that any kind of physical punishment is counterproductive and less effective than other methods.

## Parental Survey

27. The department commissioned Ipsos MORI to carry out a survey of parental opinion on smacking. 1,822 parents (including both those with children who still live at home (1204) and those whose children have left home (618)) across England and Wales took part in the survey which was designed so as to give a good, statistically representative sample. The key areas explored were: methods used by parents to manage behaviour; circumstances in which smacking may have been used; incidence of smacking; perceived effectiveness of smacking and its acceptability; and whether the law should allow smacking. The report of the survey which was supplied by Ipsos MORI to the Government is available (see last page).

28. The key messages from the parental survey are:

    a. Smacking is one of the less common methods used by parents to manage their children's behaviour;

    b. Parents' attitudes towards smacking have shifted over time – smacking is less likely to be used by parents whose children are currently under 18 than those whose children are now adults, and younger parents tend to hold a more negative view of smacking;

    c. Around half of parents think it is sometimes necessary to smack a naughty child, and many say they have smacked at least one of their children;

    d. The majority of parents think the law should allow parents to smack their children.

29. There is often a clear correlation between age of respondent and views on smacking. Generally, older parents are more likely to smack to manage behaviour than younger parents, whereas younger parents are more likely to use methods such as "the naughty step". 24% of respondents report using or having used smacking to manage behaviour, similar to 26% who say they use or have used the naughty step. However, 7% of parents aged 15-24 use or have used smacking compared with 44% of those aged 65+ (and the percentage rises steadily for all the ages in between), whereas 38% of 15-24 year old parents have used the naughty step compared to 5% of 65+ year old parents, and similarly the numbers fall steadily in between.[7] Other comparators in the survey show similar age-related correlations.

30. The Office of National Statistics survey conducted for the Department of Health in 1998 found that 88% of respondents agreed it is sometimes necessary to smack naughty children. In the parental opinion survey conducted for this review, 52% of respondents agree it is sometimes necessary to smack a naughty child.[8] This also suggests changing attitudes over time.

7 Ipsos MORI, *A Study into the Views of Parents on the Physical Punishment of Children*, 2007, P. 5

8 The respondents in 1998 were from an all-adults sample rather than just parents.

31. 59% of parents agree that the law should allow parents to smack their children, and 67% disagree that there should be a complete ban on smacking their children.[9] So even though only 24% of parents use or have used smacking, a much larger proportion believe the law should not prevent them from doing so. And again, this is correlated with age: the older the parent, the more likely they are to support the law allowing smacking.

32. Among those who disagree that it is sometimes necessary to smack a naughty child, 30% still agree that the law should allow parents to smack their children and 45% disagree that there should be a complete ban. Even among those who think it is always wrong to smack a child and say that they will not do it, 24% agree that the law should allow parents to smack their children and 34% disagree that there should be a complete ban (note these are two separate questions).[10] This supports furthermore the view that even though many parents disagree with smacking as a method of discipline, many of those do not think the law should prevent parents from smacking.

## Children and Young People Survey

33. In depth research was conducted through the Central Office of Information, with 64 children aged 4-16 across a variety of locations and social groups in England and Wales. COI commissioned Sherbert Research, an independent market research agency, which specialise in qualitative research among children and young people, to conduct this research. The children discussed the issues in groups of 4 or 2 friends or groups of 2 siblings – this was to help create intimate, relaxed and confidential environments where children felt able to discuss personal experiences.

34. Around two-thirds of children reported having been smacked at some point, with children being smacked more often when they are younger. But these figures are not statistically representative.

35. Many children accepted that discipline and punishment were an important part of growing up and whilst it was often unpleasant it was necessary. However, most felt that smacking was out of place in modern childhood, and that other punishments were more effective in bringing about reflection, changing behaviour and supporting good and close relationships with parents. Whilst smacking was the most feared form of punishment, it was the emotional distress and humiliation that can be caused by smacking, rather than any physical pain, which children feared.

36. Children felt that methods such as restricting access to television, toys and so forth were more effective than smacking as they were longer lasting, inconvenienced them more, and gave them time to reflect. Smacking was often associated with parents being out of control, not setting a good example, and not supporting communication between parent and child. Some children felt smacking sent a message which conflicted with messages about tolerance and respect in society. Some thought smacking had been banned.

9 Ipsos MORI, *A Study into the Views of Parents on the Physical Punishment of Children*, 2007, P. 18
10 Ipsos MORI, *A Study into the Views of Parents on the Physical Punishment of Children*, 2007, P. 19
11 Available at http://www.cps.gov.uk/Publications/research/chastisement.html

## Additional Evidence

### *CPS Report*

37. The Crown Prosecution Service carried out a study earlier this year into the use of the reasonable punishment defence[11]. They asked 8 CPS areas to fill out a questionnaire about cases of child abuse, and also asked all 43 CPS areas to send in details of cases where the reasonable punishment defence was raised during the timeframe. The review was not exhaustive, but it identified 12 cases between January 2005 and February 2007 when the defence had been used and resulted in acquittal or discontinuance. Of these 12, there were: 4 where it was explicitly used as a defence to a charge of common assault; 4 where the defendant had been charged with common assault, did not explicitly use the defence but where it may have been a factor in acquittal or discontinuance; and 4 where reasonable punishment was put forward by the defence despite the fact that it did not constitute a legal defence to the charge of child cruelty. To place that sample size in context, there were 836 proceedings in Magistrate's Courts against defendants facing charges relating to cruelty or neglect of children in England and Wales in 2005.

38. There is therefore evidence to suggest that the defence has been raised where it should not have been available. There is clearly nothing to prevent any issues being raised in mitigation by the defence on other charges, but since the project was carried out the CPS has issued a policy bulletin to all CPS staff reminding them of the changes brought about by section 58 and the revised charging standard, and reminding prosecutors to inform courts, juries and defence lawyers that following section 58 of the Children Act 2004 the defence of reasonable punishment is not available unless the defendant is the child's parent or an adult acting *in loco parentis*, and the charge is one of common assault.

### *Field Visits*

39. Officials from the Department for Children, Schools and Families have carried out 8 in-depth interviews in 3 different geographical areas with police, children's social care professionals, and prosecutors to investigate in detail the impact that the change in the law has had on their practice.

40. The evidence gathered in these interviews indicates that overall it is felt that the change in the law has made little difference to these professionals' day to day practice, and that further altering the law on reasonable punishment would also make little difference. This is because:

    a. From a children's social care perspective, the tests of whether to get involved with a child and family are around the needs of the child and whether the child is at risk of significant harm, not about the criminal law. Issues about offences and defences are not part of their role but the role of police and the courts. The social care role is to work with the family and support the welfare of the child, intervening if necessary. However, as with other professional groups, some social workers who believe that parents should not smack their children think that, were the defence of reasonable punishment to be removed for charges of common assault, they would find it easier to work with parents as they would be able to give them the message that smacking has been banned;

11 Available at http://www.cps.gov.uk/Publications/research/chastisement.html

b. According to police offers who were interviewed, the police would take into account a wide range of factors when deciding how to proceed with a case. If an assault is reported to them, and there is a lasting mark, it will be recorded as assault occasioning actual bodily harm in line with the Charging Standard. However, they will often proceed by talking to the parents about how their actions are unacceptable and could lead to a criminal record, and referring them back to children's social care where appropriate. They will not always take further action if it is clear that the injury is relatively minor and the parent has understood their actions. The police must, in deciding whether or not to recommend a charge (responsibility for charging now rests with the CPS), take into account public interest and the interests of the child. And very often proceeding with a case will be contrary to the child's interests, where a court case and conviction would lead to a criminal record and might increase the risk of family breakdown or financial hardship. This general approach means that police can focus on serious cases of abuse, and the use of discretion should in no way be taken to imply that the police are not properly proceeding with such cases. However, if the police use their discretion not to pursue the case further, for instance by explaining the fault of the parents' actions to them and referring the case to social care, then the police will be left with an unsolved crime. Police officers interviewed argued that it is important that the performance management system of the police does not lead to perverse incentives which result in increases in inappropriate entrances to the criminal justice system.

c. From the prosecutors' perspective, so much is taken into account when deciding to prosecute that to isolate one issue is extremely difficult. Whether or not a case is prosecuted will depend on a number of factors and the individual facts of the case. However, in order for a case to be prosecuted it must meet two tests – there must be evidence to suggest a reasonable likelihood of conviction and it must be in the public interest. The removal of the defence must, in every case where it would otherwise have been used, make conviction more likely, so theoretically more cases may be prosecuted. In addition, prior to section 58 it is possible that even in very serious cases of assault, the defence could have put forward a case based on reasonable punishment, and a jury could have accepted this argument and found them not guilty. This can no longer happen as the court will be made aware that this defence is not available.

41. In conclusion, in determining how to deal with a case, a great deal depends on the discretion of the police and prosecutors, their judgment as to what is reasonable and what is best for the child, and all the other surrounding factors. This is affected by section 58 to a certain extent but there are many other issues to take into account. Section 58 does of course come into play in the court when it does alter the factors that can be taken into account by a jury, or by magistrates.

# Analysis

42. The current legal position is clear and appropriate, but can be difficult to understand. It is neither correct nor incorrect to say that "smacking is legal". Assault is a criminal offence. But a parent who is prosecuted for common assault after smacking a child can raise the defence of reasonable punishment. With this in mind, charging parents with common assault because they smacked their children, and prosecuting them, will rarely meet the necessary tests for prosecution: the evidential test (a conviction will be unlikely because of the availability of the defence) and the public interest test. Therefore the police and CPS will not take action in every case of smacking, even though the offence of common assault has been committed. They have discretion to deal with cases where children have come to harm, where the injury is likely to be severe enough to warrant a charge of assault occasioning actual bodily harm, and where the defence of reasonable punishment is not available. In dealing with suspected or likely harm to children, the police will be considering the way forward jointly with children's social care as part of child protection procedures.

43. It is clear that section 58 has improved legal protection for children. Respondents that said it had not done so did not offer evidence for this view, instead explaining their belief that all physical punishment of children is unacceptable. Whilst the Government notes that many people believe that legal protection should be increased further, it does not accept that legal protection has not been increased by section 58. It is a fact that a jury could previously have accepted a defence of reasonable punishment in response to a charge of assault occasioning actual bodily harm or inflicting grievous bodily harm, and now they cannot. Were for instance the case of the boy A to come to court since the enactment of section 58, the jury would have taken into account that the defence of reasonable punishment was not available to the accused and applicant's stepfather might well therefore have been found guilty. The response to the consultation from the Crown Prosecution Service said that section 58 has increased legal protection. The Parliamentary Joint Committee on Human Rights said in 2004 "There is no doubt that the restriction of the scope of the reasonable chastisement defence by the new clause 49[12] would prevent an acquittal in the future on identical facts to those in *A v UK:* by virtue of clause 49(2)(b), the defence of reasonable chastisement would not be available to a defendant charged with causing actual bodily harm under s. 47 Offences Against the Person Act 1861."[13]

44. It is not clear whether section 58 has had any significant practical consequences for those working with children and families day to day, but there are no reported significant practical problems with its operation. The legal effect of section 58 operates at the level of the courts and therefore has most effect on courts and the CPS. On the other hand social workers and other practitioners working with children and families take an objective view of whether a child might need help or is at risk of significant harm and will decide whether or not to

12 At the time of this statement, what became section 58 was called clause 49.
13 Para.134, 19th Report of the Parliamentary Joint Committee on Human Rights (2004)

engage with that family based on those criteria, not whether or not the criminal law has been broken. Section 58 has not affected the thresholds for social care involvement.

45. The Charging Standard has clarified the boundary between what constitutes common assault and what constitutes assault occasioning actual bodily harm. It takes into account the particular seriousness of an adult assaulting a child. However, it means that the police sometimes have to record as assault occasioning actual bodily harm a crime which is not perceived as being particularly serious, best dealt with by children's social care rather than the criminal justice system, and which previously would have been recorded as common assault. If the police decide in their discretion not to pursue the case further, but instead to explain the fault of the parents' actions to them and refer the case to social care, then the police will be left with an unsolved crime. It is important that the performance management system of the police does not lead to perverse incentives, resulting in parents entering the criminal justice system inappropriately and against the best interests of the child.

46. There are very few cases that come to court where the defence of reasonable punishment is put forward. This may be because very few cases where the defence is available are prosecuted. In order for the defence to be available, three conditions have to be satisfied. The charge must be common assault, the defendant has to be the parent of the victim or acting *in loco parentis* to the victim, and the victim has to be a child. Very often, where these conditions are likely to be satisfied, the case will not be prosecuted but instead will be dealt with by the police and social care by other means where this is considered by them to be in the best interests of the child. The report produced by the CPS indicated that in a very few cases the defence of reasonable punishment was put forward where it was not available. In response the CPS has issued a bulletin to all staff reminding them of section 58 and asking them where appropriate to bring it to the attention of courts, juries, and defence lawyers.

47. Attitudes and behaviour among parents are changing according to the survey of parental opinion. Younger parents are less likely to use smacking as a method of discipline than older parents. Conversely, younger parents are more likely to use methods such as "the naughty step" than older parents. In the parental survey 52% of respondents agreed it is sometimes necessary to smack a naughty child, compared with the Office of National Statistics survey conducted for DH in 1998 which found that 88% of respondents[14] agreed it is sometimes necessary to smack naughty children. If this trend continues, then it is likely that smacking will become an increasingly unpopular method of disciplining children. In the parental survey, only a small proportion (28%) of those parents who say they use or have used smacking believe it has had the most effect on their child's behaviour compared with other methods. This equates to 7% of parents overall. However, even though many parents will choose not to smack their children, and few believe that smacking is an effective form of behaviour management, the majority believe the law should allow them to do so. Many children interviewed for the Children and Young People survey feel that smacking is out of place in modern childhood, and that other punishments are more effective in bringing about reflection, changing behaviour and supporting good and close relationships with parents.

48. Much of the evidence gathered suggests that there is a lack of understanding about the law. Many seem to think that section 58 explicitly allows physical punishment, or conversely that it prevents parents from smacking their children.

14 The respondents in 1998 were from an all-adults sample rather than just parents.

49. Some of the evidence submitted suggests that some practitioners such as paediatricians and social workers, who want to advise parents not to smack their children, find it difficult because of the legal position. It seems that practitioners who tell parents that they shouldn't smack their children sometimes struggle to get this message across because although the reasonable punishment defence is restricted by section 58, it is still allowed in some cases and this can be used by parents as a justification for smacking. Some practitioners are concerned that this leaves the door open not just to mild smacking but to more severe punishment that would in fact not be covered by the reasonable punishment defence.

# Conclusions

50. The law protects children from abuse and harm. Someone who harms or injures a child will be subject to the processes of the criminal justice system. It is important that the law, parents and services, are clear about this. The Government has strengthened the mechanisms for tackling abuse and neglect and tightened the law in a number of areas, including for example those around sexual offences, to ensure that actions which harm children are proscribed and punished. Our drive to promote child welfare will continue. And part of that requires us to have a system which acts in the child's best interests – one where parents are not unnecessarily criminalised.

51. This review has looked at part of that legal framework – the restriction of the defence of reasonable punishment to charges of common assault. While section 58 has made a difference in principle, and in practice, to those cases – relatively few – which are brought to court, it has not made a significant difference to the day-to-day practice of social workers and to a certain extent of the police. The legal position is not popular among those who responded to the written consultation. But we have on the whole found that section 58 does what it is intended to do: it provides a clear restriction on the use of the reasonable punishment defence which can be put into practice by the CPS and courts. The CPS research suggests practice in the courts needs to be tightened up and the CPS is taking steps to do so.

52. The law needs to give adequate protection for children and the surrounding system should operate fairly and in the best interests of the child. And we believe that it does. It is clear from the evidence that police have discretion to deal with cases as they consider appropriate, taking into account factors including evidential issues, the public interest and the best interests of the child. Therefore, the Government concludes that the law should not be changed.

53. Through the enactment of section 58, the UK has met its international obligations by ensuring that the law gives adequate protection to all people from "inhuman or degrading treatment or punishment" as required by Article 3 of the European Convention on Human Rights. If someone is charged with a crime which is serious enough to have caused "inhuman or degrading treatment or punishment", then the defence of reasonable punishment is not available to them.

54. Smacking is becoming a less commonly used form of discipline as more parents recognise that there are more effective and acceptable methods of disciplining children. Whilst many parents say they will not smack, the majority of parents think the law should allow parents to smack their children.

55. We do not agree that the best way to get across messages to parents about methods of discipline is to remove the defence of reasonable punishment from all charges of assault. The Government does not condone smacking and believes that other methods of managing

children's behaviour are more effective. But we do not believe that the state should intervene in family life unnecessarily – unless there are clear reasons to intervene, parents should be able to bring up their children as they see fit.

56. The law is clear. But there appears to be a lack of understanding about precisely what the law allows and does not allow. The law does not permit anyone deliberately or recklessly to cause injury to a child which is more than transient and trifling. It is important that parents understand the law so that they can bring up their children in the most effective way they see, and not live in unreasonable fear of being subject to criminal investigation. It is important too that practitioners, particularly social workers, understand the law and are honest with parents about its effect, while giving whatever advice and recommendations they think best to help parents bring up their children effectively.

# Next Steps

57. The Government has fulfilled its commitment to review the practical consequences of section 58, and has sought parents' views on smacking. In response to the evidence submitted, the Government:

    a. Will retain the law in its current form in the absence of evidence it is not working satisfactorily. The law allows the police and prosecutors to act in the best interests of children, and section 58 prevents the use of the defence of reasonable punishment in any proceedings for an offence of cruelty to a child or assault occasioning actual bodily harm against a child or inflicting grievous bodily harm against a child;

    b. Will do more to help with positive parenting. Parents know their children best and are best placed to teach them how to behave, but the Government accepts that parenting is complex and parents should be made aware of the variety of techniques they can use to manage their children's behaviour;

    c. Welcomes the bulletin issued by the Crown Prosecution Service to all their staff reminding them of section 58 and where appropriate reminding them to bring it to the attention of courts, juries, and defence lawyers; and will ask the CPS to continue to monitor the situation with regard to the use of the reasonable punishment defence;

    d. Recommends that the police take similar action to the CPS and remind staff of section 58, particularly staff in Child Abuse Investigation Units.

**The evidence gathered for the review** can be accessed via the following web address:
www.dcsf.gov.uk/publications/section58review

This incorporates:

The Section 58 Review Consultation Document

The Section 58 Review Consultation Report

A Study into the Views of Parents on the Physical Punishment of Children, Ipsos MORI

A Study into Children's Views on Physical Discipline and Punishment, Central Office of Information/Sherbert Research ltd

**In addition, the CPS Report into the Use of the Defence of Reasonable Chastisement is available at:**
http://www.cps.gov.uk/Publications/research/chastisement.html

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