

# **The Children Bill: The Lester amendment**

The Government's complex proposals  
to change the law on smacking

Why parents will be plunged into fear and confusion



CHRISTIAN INFLUENCE IN A SECULAR WORLD

The Christian Institute

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## Our concerns

### The public overwhelmingly back smacking

The vast majority of people endorse the use of smacking. A government study by the Office for National Statistics found that 88% of people in the UK say it is "sometimes necessary to smack a naughty child".<sup>1</sup> These figures are not in dispute even from those who wish to see smacking made a criminal offence. Penelope Leach, the leading anti-smacking campaigner, readily accepts research showing 90% of children are smacked by their parents.<sup>2</sup>

Parents should have the right to reasonably chastise their children. But there is all the difference in the world between smacking and beating.

Anti-smacking campaigners claim a ban on smacking would reduce child abuse and would teach children themselves not to be violent. But in Sweden, where smacking was outlawed in 1979, rates of physical child abuse and criminal assaults by minors against minors have increased at least five- or six-fold since the smacking ban.<sup>3</sup>

### Our concerns about the Government proposals

The Government has accepted an amendment to the Children Bill which it believes does not ban smacking. Several aspects of the Government's proposals will make no difference at all to ordinary loving parents. But other changes could plunge parents into fear and confusion.

The Government has adopted the very proposals which were condemned by the Crown Prosecution Service (CPS) four years ago. They expressed concerns that under such proposals the law could not be applied consistently.

We fear that there will be inconsistent application of the law as prosecutors and social workers take different views on the meaning of the law in different parts of the country. We fear that innocent parents will be prosecuted.

It is already the case that when children have an accident and sustain an injury many parents fear that they will be accused of child abuse. Some parents are reluctant to take their child to a GP or to hospital because they fear the children being taken away from them by the authorities. More fear and confusion amongst parents could increase the risk that some children will not be given the medical treatment they need.

Many parents have been falsely accused of child abuse. In the Cleveland and Orkney scandals children were forcibly removed from the homes of their innocent parents. Considerable damage was done to the children and parents involved. How tragic it would be if such incidents were repeated in individual families as a result of this Children Bill.

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<sup>1</sup> Reproduced in Annex A of 'Protecting Children, Supporting Parents', Consultation Document, Department of Health, January 2000

<sup>2</sup> Leach, P, *The Physical Punishment of Children*, NSPCC, 1999, page 6

<sup>3</sup> See Larzelere, R E PhD, *Sweden's smacking ban: more harm than good*, Families First/The Christian Institute, 2004, p.14

## An overview of the changes

### The current defence of reasonable chastisement

A person *technically* commits a common assault if they intentionally touch another person.

Doctors commit a common assault every time they examine their patients, but the law gives them a defence – they act as a doctor. In the same way a parent *technically* commits an assault every time they smack their child, but the law gives them the defence of reasonable chastisement. This parental defence currently applies to other more serious offences.

Under the existing law a parent can use a reasonable chastisement defence if charged with any of the following offences:

- Wounding (s 18 Offences Against the Person Act 1861)
- Grievous bodily harm (s 20 Offences Against the Person Act 1861)
- Cruelty to a person under 16 (includes wilful assault) (s 1(1) Children and Young Persons Act 1933)
- Actual bodily harm (s 47 Offences Against the Person Act 1861)
- Common assault or battery (s 39 Criminal Justice Act 1988)

Appendix 1 sets out the law in more detail.

### The proposed legal changes

The Government is proposing to make two legal changes.

- To make the parental chastisement defence *only* available for common assault
- To change the prosecution rules so as to narrow the definition of common assault

On 5 July during the Lords stages of the Children Bill the Government supported a New Clause (currently Clause 49), moved by Lord Lester of Heme Hill to *remove the defence in all cases except common assault*.

During the debate on the amendment the Attorney General let it be known that the Government intends to change the prosecution rules. In effect these changes would narrow the definition of common assault and greatly widen the definition of actual bodily harm. The reasonable chastisement defence would be available for common assault but not for actual bodily harm.

### The effect of the changes

Removing the parental chastisement defence from

- wounding,
- grievous bodily harm or
- cruelty

should not make any difference in practice. The reason for this is that it is highly unlikely in such cases that any court would ever accept the legitimacy of such a defence.

According to legal opinion, removing the defence from actual bodily harm (ABH) is likely to be much more problematic for ordinary parents.

In 2000 the Crown Prosecution Service (CPS) argued that it would be wrong to remove the defence from ABH.<sup>4</sup> The problems arise from the fact that ABH covers a spectrum of injuries some of which at the lower end of the spectrum overlap with common assault. For example a very minor bruise could be charged under either offence.<sup>5</sup>

The (CPS) reasoned that the “prosecutor’s choice of charge should not limit the availability of the defence”. The CPS also commented that the change was unnecessary.<sup>6</sup>

His Honour Judge D. Elgan Edwards, Chairman of the Criminal sub-committee of the Council of HM Circuit Judges said “*Sometimes the distinction between common assault and ABH is a fine one and if the defence was restricted to the former might lead to overcharging, i.e. charging the more serious offence to seek to remove the reasonable chastisement defence.*”<sup>7</sup>

## The detailed changes

### Lord Lester’s Amendment to the Children Bill

The amendment now forms clause 49 of the Bill. It is a freestanding clause. No other part of the Bill addresses reasonable chastisement.

#### 49 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 (c. 12), omit subsection (7).

When moving his new Clause, Lord Lester explained that his amendment would mean that “*Any assault occasioning actual bodily harm to a child will not be justified as constituting a reasonable punishment. That will put children on the same basis as adults in such cases.*” He said it would also “*repeal the archaic and anomalous Section 1(7) of the 1933 Act, which allows parents to claim that acts of wilful assault that cause suffering to a child are reasonable punishment.*”<sup>8</sup>

He also explained “*I do not believe that parents should be criminalised for administering a light disciplinary smack because it is technically a battery.*”<sup>9</sup>

<sup>4</sup> See paragraph 3.5 to the summary attached to the Letter from Karen Kneller, CPS Policy Directorate to Department of Health Consultation Team, 27 April 2000

<sup>5</sup> See paragraph 3.2 to the summary attached to the Letter from Karen Kneller, CPS Policy Directorate to Department of Health Consultation Team, 27 April 2000

<sup>6</sup> See paragraphs 3.5 and 3.6 to the summary attached to the Letter from Karen Kneller, CPS Policy Directorate to Department of Health Consultation Team, 27 April 2000

<sup>7</sup> See Question 3 paragraph 56 Department of Health Analysis of Responses to the 2000 Consultation *Protecting Children, Supporting Parents*

<sup>8</sup> Lords Hansard, 5 July 2004, Col. 524

<sup>9</sup> Lords Hansard, 5 July 2004, Col. 524

## **The changes to the prosecution rules**

In supporting Lord Lester's amendment the Attorney General said it would operate in tandem with new charging standards to be issued by the Director for Public Prosecutions.

At present "grazes, scratches, abrasions, minor bruising, swelling, superficial cuts or a black eye" can be charged as common assault. In future such injuries will be prosecuted under the more serious charge of actual bodily harm (ABH) for which there will be no parental defence.

The Attorney General explained:

*"The revised charging standard will include guidance that where serious aggravating features exist, cases in which the level of injuries would usually lead to a charge of common assault, could more appropriately be charged as actual bodily harm. Such serious aggravating features would include the vulnerability of the victim, such as when they are a child assaulted by an adult. The effect of that pending change is that even minor assaults by a parent on a child, where grazes, scratches, abrasions, minor bruising, swelling, superficial cuts or a black eye are caused, will normally be charged as assault occasioning actual bodily harm.*

*However, given the publicity over the weekend and this morning, I should make it clear that reddening of the skin where it is merely transitory will usually still be charged as common assault. That is because the definition of "actual bodily harm" requires the injury to be more than transient. Where the reddening subsists for hours or days, that may suggest a charge of actual bodily harm.*

*That change, in combination with the amendment in the name of the noble Lord, Lord Lester, would have the effect that the defence of "reasonable chastisement" could not normally be relied upon where any injury that was more than transitory was caused. In my view, legally, the Lester amendment would have the effect of preventing harm to children without criminalising parents for minor disciplinary steps.<sup>10</sup>*

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<sup>10</sup> Lords Hansard, 5 July 2004, col. 563-564

## **Flaws in the Government's proposals**

### **1. Parents will be plunged into fear and confusion**

The effect of the amendment, combined with the new charging standards, will be to confuse parents, police and prosecutors.

Even from the Attorney General's speech, it is clear that there is a great deal of scope for confusion as to what is and will not be lawful.

The Chairman of Kent Police Federation says that the new proposals have the "*potential for disaster*".<sup>11</sup>

The fear and confusion amongst parents will be exacerbated by the fact that the margin for error has greatly decreased and the custodial penalty massively increased by ten fold.

A mother who makes a mistake about the precise interpretation of the law could face very serious consequences. If she commits actual bodily harm the maximum penalty is five years in prison. But what is currently common assault (maximum penalty 6 months in jail) is in some cases now to become actual bodily harm.

The position is further confused by the Attorney General's "reddening of the skin" test. Some children have skin which reddens very easily. Black children have skin which is not so easily seen to redden.

The proposals offend against the principle of certainty in the law. What is the distinction between ABH and common assault so that parents know when they have crossed the boundary from one to the other?

### **2. Courts will be forced to adjudicate on private family life**

Judges will have to make rulings on the intricacies of disciplinary techniques. For example, is it appropriate to smack on the back of the legs? Could a series of smacks over a period of time that do not produce any bruising or reddening be considered actual bodily harm or even cruelty?

### **3. The scope for false allegations is massively increased**

It will be extremely easy to make false allegations against parents under the Government's proposals.

It will be extremely easy to make a serious criminal allegation against a parent whose child slips and bruises himself by accident. How much harder it will be in practice for a parent to argue that a bruise was the result of an accident.

Many loving parents already fear unjust accusations being made against them by neighbours or social workers. These new proposals will add to their concern.

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<sup>11</sup> <http://www.kentpolfed.org.uk/publications/040716.Htm>

#### **4. Prosecutions will inevitably rocket**

Unless the new prosecution rules are selectively ignored there will be a considerable increase in prosecutions. There are two reasons why this is bound to be the case. First the parental defence will no longer be available for ABH. Secondly the threshold of conduct triggering ABH has been lowered considerably.

#### **5. New rules will lead to 'overcharging'**

The change of law will result in prosecutors going for the greater offence of ABH (where the defence is not available) in order to secure a conviction.

#### **6. Parental behaviour could become more abusive**

Professor Robert Larzelere has studied the position in Sweden where child abuse rates rose following the ban on smacking. He concludes that the ban is widely flouted and that the legal change does not appear to have affected the use of physical punishment.

Whilst the *number* of parents who smack may not have altered Professor Larzelere does believe that the *frequency of use* of physical punishment may have declined.

This, he suggests, may be one reason why the child abuse rates have increased: "For example, parents may have become less inclined to use a mild physical sanction when they are still in control and more likely to use physical punishment when 'upset enough'. This could easily increase the risk of child abuse"<sup>12</sup>

#### **7. The law could easily be misrepresented**

Many health visitors and social workers wrongly assert that smacking is already banned. If a social worker believes that all smacking, however, minor, is child abuse, then the new changes can easily be misrepresented by those who wish to see all smacking made a criminal offence.

#### **8. Un-elected officials & judges will make the law**

It should be Parliament which makes the law. Using prosecution guidance the Attorney General is effectively changing the law on what constitutes actual bodily harm through the prosecution rules. He could change the guidance again to make it even more restrictive. It will be left to un-elected judges to create precedents to establish new laws on parental discipline.

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<sup>12</sup> See Larzelere, R E PhD, *Sweden's smacking ban: more harm than good*, Families First/The Christian Institute, 2004, p.7

## Appendix 1: The current offences

### Offence

<b>Wounding (s 18 Offences Against the Person Act 1861)</b>	To constitute a wound the continuity of the whole skin must be broken. Internal rupturing of blood vessels is not enough. Nor is it wounding if only the outer skin is broken but the inner skin remains intact. <sup>13</sup>
<b>Grievous bodily harm (s 20 OAPA 1861)</b>	The words "grievous bodily harm" are given their ordinary and natural meaning i.e. "really serious bodily harm". GBH may cover cases where there is no wounding e.g. a broken bone but with no break to the skin. It includes serious psychiatric injury. <sup>14</sup>
<b>Cruelty to a person under 16 (s 1(1) Children and Young Persons Act 1933)</b>	This is an offence committed by a person over 16 with responsibility for a person under that age who "wilfully assaults, ill-treats, neglects, abandons or exposes him .. in a manner likely to cause unnecessary suffering or injury to health". <sup>15</sup>
<b>Actual bodily harm (s 47 OAPA 1861)</b>	This is an assault or battery that causes any injury which 'calculated to interfere with the health or comfort' of the victim. <sup>16</sup> The harm need not be really serious. Minor bruising may suffice. It is not limited to physical injury. Psychiatric injury is included. <sup>17</sup>
<b>Common assault or battery (s 39 Criminal Justice Act 1988)</b>	An assault is any act which causes someone to fear immediate and unlawful personal violence. A battery is an act by which unlawful personal violence is inflicted. The assault or battery may be intentional or reckless. 'Violence includes any unlawful touching of another, however slight'. <sup>18</sup>

<sup>13</sup> Smith & Hogan, *Criminal Law*, Tenth Ed., LexisNexis, 2002, p.439

<sup>14</sup> Smith & Hogan, *Criminal Law*, Tenth Ed., LexisNexis, 2002, p.439-440

<sup>15</sup> Section 1(1) Children and Young Persons Act 1933 cited in *Blackstone's Criminal Practice*, 1999, Para B2.101, page 178

<sup>16</sup> *Miller* [1954] 2 QB 282 cited in *Blackstone's Criminal Practice*, 1999, Para B2.19, page 152

<sup>17</sup> Smith & Hogan, *Criminal Law*, Tenth Ed., LexisNexis, 2002, p.436-437

<sup>18</sup> Smith & Hogan, *Criminal Law*, Tenth Ed., LexisNexis, 2002, p.411-412