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Y Dirprwy Weinidog Iechyd a Gwasanaethau Cymdeithasol
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Llywodraeth Cymru
Welsh Government

Our ref : MA L JM 451 19

Mick Antoniw AM
Chair
Constitutional and Legislative Affairs Committee
National Assembly for Wales
Cardiff Bay
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18 June 2019

Dear Mick

I would like to thank the Constitutional and Legislative Affairs Committee for their scrutiny of the Children (Abolition of Defence of Reasonable Punishment) (Wales) Bill to date.

During the evidence session I undertook to write to confirm the burden of proof in a criminal trial for battery following the removal of the defence, this is set out in Annex A. I have also taken the opportunity to address two other points that arose during the session, namely consideration of civil-based legislation and why ECHR considerations were not set out in the legislative competence section of the Explanatory Memorandum.

I trust the attached information is helpful.

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

Annex A:

Burden of proof in a criminal trial for battery following the removal of the defence

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

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.

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.”*

I thought it would also be helpful to add the following points:

Civil-based legislation

Suzy Davies AM asked about *“leaving the criminal law as it is and introducing some new civil-based legislation to try and achieve the same culture change”*.

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.

Explanatory memorandum and ECHR article 8

There was a question about why the legislative competence section of the Explanatory Memorandum did not contain more information on the Human Rights analysis.

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.