



COMMISSIONER FOR HUMAN RIGHTS

COUNCIL OF EUROPE



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MEMORANDUM

by Thomas Hammarberg
Commissioner for Human Rights of the Council of Europe

Following his visits to the United Kingdom
5-8 February and 31 March-2 April 2008

Issue reviewed:
Corporal punishment

Executive Summary

Commissioner Thomas Hammarberg and his delegation visited the United Kingdom from 5 to 8 February and from 31 March to 2 April 2008. In the course of these visits the Commissioner held discussions with State authorities and non-governmental organizations on certain human rights issues, including corporal punishment. Among the State authorities contacted was Mr. Ed Balls, Secretary of State (Department for Children, Schools and Families). The Commissioner focused during both his visits on the following major issues relating to corporal punishment, commented on in detail in the present Memorandum:

Laws on corporal punishment in the UK

The Commissioner is very concerned about section 58 of the Children Act 2004 in *England and Wales*, which reflects the availability of the “reasonable punishment” defence for parents charged with common assault, removing use of the defence from those charged with more serious assaults (actual and grievous bodily harm, wounding, etc). In *Northern Ireland*, the law is similar to that for England and Wales. In *Scotland*, section 51 of the Criminal Justice (Scotland) Act 2003 introduced the concept of “justifiable assault” of children, defining hitting with implements, blows to the head and shaking to be unjustifiable. The Commissioner emphasises that laws allowing the definition of “justifiable assaults” and “reasonable punishments” on children are not compliant with international human rights standards. That children, uniquely, should have *less* protection under the criminal law from assault is additionally discriminatory and unimaginable, given children’s obvious special vulnerability.

Review of Section 58 process

The Commissioner welcomed the review of section 58 in 2007 commissioned by the Department for Children, Schools and Families, which included a broad public consultation on discipline and physical punishment and a review of some other evidence. The Commissioner was surprised to find out that, when it issued the results of the review the Department concluded that the law would be retained in its present form “in the absence of evidence it is not working satisfactorily”.

The Commissioner notes that the Department appears to have overlooked or dismissed the overwhelming response to the broad consultation which was in favour of banning physical punishment of children and for children to enjoy the same rights to protection as adults. In contrast to the views expressed by professionals view and those of the UK’s four Children’s Commissioners, the Government appears to feel that a complete ban on corporal punishment would be a step too far in relation to intervention in family life: “... unless there are clear reasons to intervene, parents should be able to bring up their children as they see fit”¹. The Commissioner also regrets that international human rights obligations were not an explicit part of the formal review of Section 58.

Law reform and recommendation

During his missions the Commissioner noted that there is acceptance among Government ministers that legislation to completely remove the “reasonable punishment” defence in England, Wales and Northern Ireland, has become inevitable. In this regard the Commissioner welcomes the change in language when talking about corporal punishment and notes that the government now “does not condone smacking”. Without a change in the law, however, this position of not condoning smacking lacks credibility.

The Commissioner notes that since his visits to the UK, the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child have both recommended that the UK should prohibit all corporal punishment. This is the third such recommendation from the Committee on the Rights of the Child; the Committee urges the

¹ *Review of Section 58 of the Children Act 2004*, Department for Children, Schools and Families, para. 55

UK to “prohibit as a matter of priority all corporal punishment in the family, including through the repeal of all legal defences, in England and Wales, Scotland, and Northern Ireland ...”(CRC/C/GBR/CO/4, para. 42). **Therefore the Commissioner recommends that the “reasonable punishment” defence should be removed completely by amendment to section 58 of the Children Act 2004 for England and Wales and to article 2 of The Law Reform (Miscellaneous Provisions) (Northern Ireland) Order 2006. He also recommends that section 51 of the Criminal Justice (Scotland) Act 2003 should be reformed similarly to remove the concept of “justifiable assault” of children and ensure that the criminal law applies equally to assaults on children.**

The UK authorities’ response is appended to the present Memorandum.

A. Introductory remarks

1. This Memorandum is based on two visits to the United Kingdom by the Commissioner for Human Rights (the Commissioner) on 5-8 February and 31 March-2 April 2008, during which he held discussions with State authorities and non-governmental organizations on certain human rights issues.² On 1 April the Commissioner spoke with Mr. Ed Balls, Secretary of State (Department for Children, Schools and Families). This Memorandum deals with the aspects of the visits relating to corporal punishment in the United Kingdom.
2. It should be noted that the Commissioner already exchanged detailed correspondence on this topic with the Department during 2007/8. This memorandum builds on this correspondence and discussion. The memorandum also takes into account the UK’s reporting to, and examination by international and regional human rights mechanisms as well as the lengthy and continuing supervision by the Committee of Ministers of a 1998 European Court judgment (*A v UK*, a case that involves the protection of children, as particularly vulnerable individuals, from degrading punishment in breach of article 3). The Commissioner notes that this process is still outstanding after almost a decade.
3. A majority of the Council of Europe member states have either achieved full prohibition or publicly committed themselves to introduce legislation to prohibit all corporal punishment of children, in line with international and regional human rights standards outlined below³. Full prohibition has so far been achieved by 18 member states, with at least 7 others committed to doing the same within the near future. The UK belongs to a minority of member states which have neither achieved full prohibition of corporal punishment nor committed themselves publicly to it. Its laws actually persist in allowing parents and some other carers to justify some level of violence as ‘reasonable’ when it is regarded as discipline.

B. Prevalence of corporal punishment in the UK

4. It appears that the UK Government has not commissioned research which would provide a near-accurate measure of the prevalence of physical violence against children in the family since the mid-1990s, when the Department of Health commissioned a large-scale “Community Study of Physical Violence to Children in the Home and Associated

² During his first visit the Commissioner was accompanied by his Advisor Mr. Dennis Van Der Veur and his Personal Assistant Ms Sandra Ferreira; during his second visit the Commissioner was accompanied by his Advisors Mr. Nikolaos Sitaropoulos and Mr. Dennis Van Der Veur.

³ See also *The right not to be hit: also a children’s right*, CommDH/IssuePaper(2006)1Rev; Revised January 2008.

Variables”.⁴ However, the Commissioner has received summaries of other more recent information, made in submissions by the National Society for the Prevention of Cruelty to Children (NSPCC) to the Council of Europe’s Committee of Ministers.

5. Figures from 2006-2007, received from the national child helpline, ChildLine, show that 14,561 children were counselled about physical abuse. 88% of these children had been assaulted by a family member (33% by mothers, 29% by fathers and 11% by both parents). Sufficient data was supplied by 5,262 of the children to record that of these callers, 52% mentioned being hit with an object, 24% experienced “wounding” and 45% being bruised.
6. The Commissioner also received information from ChildLine Scotland⁵ which shows that in the period April 2006 to March 2007 almost 4,900 of the children and young people who called ChildLine Scotland were being physically abused. 42% of the 3,600 children whose main concern was being physically abused gave ChildLine fairly detailed information about their abuse. Of this group 52% said they were hurt with the use of an object, 33% had bruising and 14% were wounded. The organisation comments: “Plainly, all this punishment/treatment would be found to breach article 3. This does not give us any comfort that changes in legislation in Scotland have improved the experiences for our children, in fact numbers of children and young people being hurt in this way and talking to ChildLine Scotland have increased.”
7. A major UK retrospective study, commissioned by the NSPCC, interviewing young people aged 18 to 24 about their childhood (a large random probability sample), assessed seven per cent of the sample as having experienced serious physical abuse by parents or carers, 14% as experiencing intermediate abuse, and three per cent as having “cause for concern”. A fifth of the whole sample reported that they had experienced injury on at least one occasion as a result of the treatment they received. This was most often bruising, but small proportions reported other injuries including head injuries, broken bones and burns. Inevitably, retrospective studies of this kind do not record assaults in early childhood.⁶
8. A nationally representative survey of parents, children and discipline across Britain, for the Economic and Social Research Council, revealed in 2003 that 9% of parents reported using “severe” physical punishment.⁷
9. The Commissioner concludes that further and regular research is needed to measure progress towards the elimination of violence against children. But it is clear from these studies that a very large number of children across the UK are suffering punishment which breaches their rights, including their right to protection from degrading punishment under article 3 of the European Convention.

C. International human rights framework and standards

10. Almost all other international and regional treaty monitoring bodies have strongly confirmed in a variety of ways that the corporal punishment of children is not compatible with fundamental human rights principles and legal obligations. Within the United Nations

⁴ The 2007 study into the views of parents which formed part of the Review of section 58, referred to below, was not a prevalence study.

⁵ A submission made to the Committee of Ministers in February 2008 by Children First (previously the Royal Scottish Society for the Prevention of Cruelty to Children).

⁶ Cawson, P. et al (2000) *Child Maltreatment in the United Kingdom: a Study of the Prevalence of Abuse and Neglect*, NSPCC.

⁷ Economic and Social Research Council, Ghate, Hazel and Creighton (2003) *National Study of Parents, Children and Discipline in Britain*, 2003, ESRC.

system this includes the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Discrimination against Women and the Committee against Torture. Members of the Human Rights Council are taking an equally clear position in the new universal periodic review process.

11. The Committee on the Rights of the Child has interpreted the CRC as requiring prohibition and elimination of all corporal punishment “however light” since it started to examine states’ reports in 1993. Article 19 requires protection from “all forms of physical and mental violence” while in the care of parents and others. Article 37, echoing article 3 of the ECHR, requires protection from torture or other cruel or degrading treatment or punishment.
12. In its General Comment No. 8, issued in June 2006, the Committee emphasises that eliminating violent and humiliating punishment of children, through law reform and other necessary measures, is “an immediate and unqualified obligation” of states parties. Referring to article 19, it notes: “There is no ambiguity: ‘all forms of physical or mental violence’ does not leave room for any level of legalised violence against children...”⁸
13. The Committee provides a broad definition of corporal punishment in its General Comment: “The Committee defines ‘corporal’ or ‘physical’ punishment as any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light. Most involves hitting (‘smacking’, ‘slapping’, ‘spanking’) children, with the hand or with an implement - a whip, stick, belt, shoe, wooden spoon, etc. But it can also involve, for example, kicking, shaking or throwing children, scratching, pinching, biting, pulling hair or boxing ears, forcing children to stay in uncomfortable positions, burning, scalding or forced ingestion (for example, washing children’s mouths out with soap or forcing them to swallow hot spices). In the view of the Committee, corporal punishment is invariably degrading. In addition, there are other non-physical forms of punishment that are also cruel and degrading and thus incompatible with the Convention...” (para. 11).
14. In applying its consistent interpretation of the CRC to the United Kingdom, in successive concluding observations on the State’s first and second reports under the CRC in 1995 and 2002, the Committee has recommended complete removal of the traditional “reasonable chastisement” defence to give children full protection. In 2002, the Committee strongly criticized the UK’s retention of the defence and recommended that the UK “with urgency adopt legislation throughout the State party to remove the ‘reasonable chastisement’ defence and prohibit all corporal punishment in the family and in any other contexts not covered by existing legislation.” The Committee stated that any attempt to limit rather than remove the defence would “... not comply with the principles and provisions of the Convention ... since they constitute a serious violation of the dignity of the child ... Moreover, they suggest that some forms of corporal punishment are acceptable and therefore undermine educational measures to promote positive and non-violent discipline”.⁹
15. Other international human rights Treaty Bodies have increasingly echoed the Committee on the Rights of the Child in condemning all corporal punishment within their respective mandates. The Committee on Economic, Social and Cultural Rights did so in its concluding observations on the fourth report of the UK under the International Covenant on Economic, Social and Cultural Rights, recommending prohibition of all corporal punishment in the family and referring to “the principle of the dignity of the individual that provides the

⁸Committee on the Rights of the Child, General Comment No. 8, The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment, para. 18

⁹Committee on the Rights of the Child, concluding observations on the UK’s second report, 9 October 2002, CRC/C/15/Add.188

foundation for international human rights law”.¹⁰ Recently, the Committee on the Elimination of Discrimination against Women, considering the fifth and sixth periodic reports of the UK, also “note[d] with concern that corporal punishment is lawful in the home and constitutes a form of violence against children” and recommended its legislative prohibition.¹¹

16. The UK has been one of the first states to have its human rights record reviewed under the “Universal Periodic Review” process at the Human Rights Council. The Commissioner notes that other countries raised the issuing of banning all corporal punishment during the review and three are recorded as recommending it in the Report of the Working Group on the UPR¹².
17. The UN Secretary-General’s Study on Violence against Children, which reported to the General Assembly in 2006, included the key messages that no violence against children is justifiable; that children should never receive less protection than adults and that all violence is preventable. The Commissioner notes with appreciation that the UK was a major contributor to funding the Study. The Study urges all States to move quickly to prohibit all forms of violence against children – including all corporal punishment – suggesting a deadline of 2009. The importance of prevention is emphasized: “The first purpose of clear prohibition of violence is educational – to send a clear message across societies that all violence against children is unacceptable and unlawful, to reinforce positive, non-violent social norms.” Importantly, the Study underlines the importance of obtaining and responding to the testimonies and experiences of children themselves. Paulo Sérgio Pinheiro, the Independent Expert for the Study, urges all UN member states to “... act now to end children’s skepticism about adult promises. Children are tired of being told they are the future. They want to see us fulfil our promises in the present, and enjoy their right to be protected from violence today.”
18. The Council of Europe has a long history of seeking to protect children from corporal punishment in a range of settings, from the judgments of the European Court of Human Rights in the 1970s, 1980s and 1990s, recommendations of the Committee of Ministers from 1985 and decisions of the European Committee of Social Rights from 2001. In 2004, the Parliamentary Assembly affirmed that: “any corporal punishment of children is in breach of their fundamental right to human dignity and physical integrity. The fact that such corporal punishment is still lawful in certain member states violates the equally fundamental right to the same protection as adults...”. The Assembly urged Europe to become a “corporal punishment-free-zone for children”.
19. The Council is now pursuing its initiative against all corporal punishment, in particular through the transversal project “Building a Europe with and for Children”, aiming for universal prohibition, the promotion of positive, non-violent parenting and general awareness-raising on children’s rights. On 15 June, the Council of Europe launched a pan-European initiative against corporal punishment of children.
20. Corporal punishment was first considered and condemned by the European Commission and Court of Human Rights during the 1970s (in the Isle of Man’s penal system for juveniles), and then in decisions and judgments successively condemning corporal punishment in schools, including private schools, in the UK during the 1980s and 1990s.
21. In 1998 the Court issued its first judgment on parental corporal punishment, *A v UK*, which requires the state to provide children as vulnerable individuals with adequate protection,

¹⁰ Committee on Economic, Social and Cultural Rights, concluding observations on fourth report of UK under the International Covenant on Economic, Social and Cultural Rights, E/C.12/1/Add.79, 17 May 2002, para. 36.

¹¹ CEDAW/C/GBR/CO/6, 18 July 2008.

¹² A/HRC/WG.6/1/GBR/4, 16 April 2008.

including effective deterrence, against degrading punishment in breach of article 3. The European Commission of Human Rights, in its report on the case (A v UK, one of the last cases to be considered by the previous two-tier system of Commission and Court¹³) and also the Court in its judgment, referred to the standards of the Convention on the Rights of the Child (CRC); the Commission referred to the Committee on the Rights of the Child's concluding observations on the UK's first report (1995).

22. Since 2000, the European Committee of Social Rights (ECSR), monitoring compliance with the European Social Charter and the Revised Social Charter (the latter not as yet ratified by the UK), has also become concerned about the legality and persistence of corporal punishment. In a 2001 general observation, which referred to the jurisprudence of the Committee on the Rights of the Child and also to the A v UK judgment, the ECSR held "that article 17 [of the Charters] requires a prohibition in legislation against any form of violence against children, whether at school, in other institutions, in their home or elsewhere..." The Committee also noted that it "does not find it acceptable that a society which prohibits any form of physical violence between adults would accept that adults subject children to physical violence."¹⁴
23. In its conclusion on a report from the UK in 2005 the Committee noted "that corporal punishment within the family is not prohibited. It further notes...that the defence of 'reasonable chastisement' still exists and the State has taken no significant action towards prohibiting all corporal punishment of children in the family. Therefore, it considers that since there is no prohibition in legislation of all corporal punishment in the home, the situation is not in conformity with Article 17 of the Charter."¹⁵
24. The ECSR has also issued decisions on a series of collective complaints concerning inadequate prohibition of corporal punishment. In its most recent decision, on a second complaint against Portugal, the Committee clarified: "To comply with article 17, states' domestic law must prohibit and penalise all forms of violence against children, that is acts or behaviour likely to affect the physical integrity, dignity, development or psychological well being of children. The relevant provisions must be sufficiently clear, binding and precise, so as to preclude courts from refusing to apply them to violence against children. Moreover, states must act with diligence to ensure that such violence is eliminated in practice."¹⁶

D. Law on corporal punishment in the UK

25. In England and Wales, section 58 of the Children Act 2004 includes the availability of the "reasonable punishment" defence for parents charged with common assault, removing use of the defence from those charged with more serious assaults (actual and grievous bodily harm, wounding, etc). There has also been a revision of the Charging Standard for offences of assault; this is guidance, not legislation, for Crown Prosecutors.
26. Responsibility for the criminal law is not devolved to the National Assembly for Wales. The Commissioner understands that the Welsh Assembly Government has expressed strong support for full removal of the reasonable punishment defence to give equal protection.¹⁷

¹³ Report of the Commission, adopted 18 September 1997, para. 52

¹⁴ European Committee of Social Rights, general observation regarding articles 7 (para. 10) and 17, Conclusions XV-2, Vol. 1, General Introduction, page 26

¹⁵ European Committee of Social Rights, Conclusions XVII-2, July 2005

¹⁶ World Organisation Against Torture (OMCT) v. Portugal, complaint No. 34/2006, Decision on the Merits, paras. 19 – 21.

¹⁷ The Commissioner was sorry that his timetable on this occasion did not allow him to visit Scotland, Northern Ireland and Wales and meet with representatives of government and NGOs.

27. In Northern Ireland, the law is similar to that for England and Wales, established through The Law Reform (Miscellaneous Provisions) (Northern Ireland) Order 2006, article 2. The Commissioner notes that the introduction of this law is currently under judicial review in an action brought by the NI Commissioner for Children and Young People.
28. In Scotland, section 51 of the Criminal Justice (Scotland) Act 2003 introduced the concept of “justifiable assault” of children, defining hitting with implements, blows to the head and shaking to be unjustifiable. Courts have to consider a list of factors in determining whether a particular assault is “justifiable”. The Commissioner understands that while the UK Government retains overall responsibility for fulfilling its human rights obligations, responsibility for this area of law is devolved to the Scottish Parliament. The Commissioner emphasises that a law allowing the definition of “justifiable assaults” on children is not compliant with the human rights standards set out above, a position he knows is shared by Scotland’s Commissioner for Children and Young People.

E. Review of section 58 of the Children Act 2004

29. In 2004, when what became section 58 was being debated in Parliament in relation to England and Wales, the responsible Minister promised that the Government would review the practical consequences of section 58 and seek parents’ views on “smacking” children. An alternative provision which would have removed the equal protection defence completely was heavily defeated: the majority (Labour) political party insisted its members vote against this proposal, applying what is known in Parliament as “a three-line whip”.
30. The Department for Children, Schools and Families carried out the review of section 58 in 2007, which included a broad public consultation, a poll of parental opinion, in-depth research with a small group of children and young people into their overall views on discipline and physical punishment and a review of some other evidence. The Commissioner has studied the various reports. He is concerned to note that, while the Review report includes a short section on “The International Context”, there was no serious attempt to consider the human rights implications of section 58.
31. When it issued the results of the review, in October 2007, the Department stated that the law would be retained in its present form “in the absence of evidence it is not working satisfactorily”. However, in doing so it appears to have overlooked or dismissed the overwhelming response to the broad consultation. The Department’s own overview of the results states: “Respondents generally felt that section 58 of the Children Act 2004 had made little positive impact on children, families and those working with them. It was considered that section 58 has not improved legal protection in cases of alleged assault by their parents. Many respondents felt that the only way to protect children is to ban physical discipline outright”. The overview also confirms: “Most commented that the legal position on the physical punishment of children is confusing for both parents and professionals and makes it difficult to make sound judgments of potential child abuse incidents. (...) The general opinion of researchers was that changes to the law have not deterred parents from using unacceptable levels of physical punishment in bringing up their children (...). It was felt that as a result, agencies find it difficult to send clear messages about discipline to parents... most respondents considered the legal position relating to the physical punishment of children to be widely misunderstood by those working with children and families (...). Some respondents were concerned that changes to the law may have had a discriminatory effect on children that had different skin tones. It was feared that black children would be more at risk of not receiving the protection they need because a mark

might not show up as easily as on a white child (...) An overwhelming majority called for children to enjoy the same rights to protection as adults”.¹⁸

32. The Department points out in its report of the review, reasonably enough, that people responding to the consultation are self-selecting and not necessarily representative, and may be taking part in organised lobbying.¹⁹ But it would be fair also to point out that the “Children are Unbeatable!” Alliance²⁰ includes over 400 organisations and many individuals campaigning for equal protection for children. Opposition to prohibition of all corporal punishment, as has been the case in some other Council of Europe Member States, appears to come from minority Christian groups who believe they have a biblical right or even duty to chastise their children physically. While everyone has freedom of religious belief, such beliefs cannot be allowed to lead to actions which breach others’ fundamental rights to physical integrity and human dignity.
33. As part of the Review, the Government also commissioned limited research with children, although not about law reform. A summary of the results states: “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”.²¹ The Commissioner has also seen innovative research carried out by Save the Children and other NGOs into children’s views on this issue across the UK²²: they confirm the significant hurt which smacking causes children, in particular young children.
34. The Commissioner welcomes the Review process but regrets that the consultation with children about their experience of violence in the home was extremely limited. The Commissioner is also surprised at the emphasis given to the views of parents, ascertained through questions put in “Omnibus” polls by Ipsos MORI. These found that “at the current time, the majority of parents (both current and ever) think that the law should allow parents to smack children”. The survey suggests that in general most parents believe there are more effective methods for managing children’s behaviour than smacking, and that there has been some change in attitudes to smacking, with – positively – younger parents tending to hold more negative opinions about smacking than older parents. Nevertheless,

¹⁸ Department for Children, Schools and Families, Section 58 of the Children Act 2004 Review (consultation): analysis of responses to the consultation document, overview, page 3. All the Review documents are at <http://www.dfes.gov.uk/publications/section58review/index.shtml>.

¹⁹ *Review of Section 58 of the Children Act 2004, Department for Children, Schools and Families, 2007, para. 20*

²⁰ The NGO Alliance, “Children are unbeatable!”, including more than 400 organisations, has been campaigning for equal protection for children (complete removal of the “reasonable punishment” defence) since 1998. It includes, notably, the National Society for the Prevention of Cruelty to Children (NSPCC) and all the major children’s organisations, the Royal College of Paediatrics and Child Health and organisations representing all elements of child protection, etc.

²¹ *Review of Section 58 of the Children Act 2004, Department for Children, Schools and Families. para. 35; see also: A Study into Children’s Views on Physical Discipline and Punishment, prepared for DCSF and COI by Sherbert Research, October 2007.*

²² *It hurts you inside — children talking about smacking*, Carolyne Willow and Tina Hyder, National Children’s Bureau and Save the Children UK, *It’s a HIT, not a “smack” - a booklet about what children think about being hit or smacked by adults*, Goretti Horgan, Save the Children Northern Ireland, 2002. *It doesn’t solve anything - A report on the views of children and young people about the use of physical punishment*, Elizabeth Cutting, Save the Children in Scotland, 2001. *Listen Up! Children Talk: About Smacking*, Anne Crowley and Cea Vulliamy, Save the Children Programme in Wales, 2002.

the survey concludes that around half of all parents think “it is sometimes necessary to smack a naughty child and many say they have smacked at least one of their children”.²³

F. UK Government’s current policy

35. The Commissioner understands from the conclusions of the report of the section 58 Review that the UK government “does not condone smacking and believes that other methods of managing children’s behaviour are more effective”. However, the Government appears to feel, in contrast to the overwhelming professional view and that of the UK’s four Children’s Commissioners, that removing the defence completely would be a step too far in relation to intervention in family life: “... unless there are clear reasons to intervene, parents should be able to bring up their children as they see fit”.²⁴
36. The Commissioner notes that international human rights obligations were not an explicit part of the formal review of Section 58. In relation to the relevant human rights standards, the UK Government has stated that it regards the current law as adequate to meet its obligations under the Convention on the Rights of the Child. In correspondence with the Commissioner, the responsible Minister wrote in July 2007 in relation to the CRC: “Although the Convention rights have not been incorporated into our domestic legislation, there are no grounds for questioning the compliance of English law under that Convention. The UN respect contracting states’ rights to retain their own national systems and legal rules and to implement their obligations accordingly, and proportionately...”.²⁵ However, Articles 26 and 27 of the Vienna Convention on the Law of Treaties 1967, accepted by the UK, state: “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith”.
37. The Council of Europe’s Committee of Ministers is still supervising the execution of the judgement in the case of *A v UK* ^{26 27}. In relation to this case, a submission made to the Committee of Ministers by a NGO in February 2008 provides details of new sentencing guidelines, including on assaults against children, issued by the Sentencing Guidelines Council²⁸. These guidelines suggest that courts may consider, as a mitigating factor in sentencing, “circumstances where the defendant has been charged with an assault occasioning actual bodily harm and the court finds as fact that the defendant only intended to administer lawful chastisement to the child, and the injury that was inflicted was neither intended nor foreseen by the defendant.”
38. While of course the Commissioner accepts that courts may consider as a mitigating factor in sentencing the fact that an injury inflicted was neither intended nor foreseen by the defendant, he finds it strange that a specific mitigating factor for parents who “only” intended to administer lawful chastisement is proposed. It suggests a trivialising of physical punishment and indicates a widening of the influence of the “reasonable punishment” defence into cases involving serious injury.

²³ *A study into the views of parents on the physical punishment of children for the DCSF*, Ipsos MORI Social Research Institute, October 2007, summary of findings, page 3.

²⁴ *Review of Section 58 of the Children Act 2004*, Department for Children, Schools and Families, para. 55

²⁵ Letter from Kevin Brennan, Parliamentary Under-Secretary of State, DCSF, to Commissioner, 11 July 2007.

²⁶ The UK government interprets the ECHR as not requiring a total ban on corporal punishment and this has been the position in the *A v UK* case. The 1998 judgement found the UK had failed to provide adequate protection from corporal punishment; this included a failure to provide an effective deterrence. If the law permits children to be hit, then clearly there can be no effective deterrence.

²⁷ The Ministers Deputies decided to resume consideration of this case at the latest at their 1035th meeting (16-18 September 2008).

²⁸ Sentencing Guidelines Council, *Overarching Principles: Assaults on children and cruelty to a child, Definitive Guideline*, March 2008.

G. Other UK views on corporal punishment policy

39. In January 2006, the UK's four Children's Commissioners issued a joint statement calling for urgent legislation: "Children have the same right as adults to respect for their human dignity and physical integrity and to equal protection under the law, in the home and everywhere else. There is no room for compromise, for attempting to define 'acceptable' smacking. This has been confirmed by United Nations and Council of Europe human rights monitoring mechanisms, and by the Westminster Parliamentary Joint Committee on Human Rights. The UK has been told repeatedly since 1995 that to comply with its human rights obligations, the reasonable punishment defence must be removed completely in all four countries of the UK".
40. The Commissioner notes that the UK's Parliamentary Joint Committee on Human Rights has also expressed its view that: "We do not think that the very clearly expressed views of the Committee on the Rights of the Child can be ignored. As the only body charged with monitoring compliance with the obligations undertaken by States in the Convention on the Rights of the Child, its interpretations of the nature and extent of those obligations are authoritative. In our view, the Committee has consistently made clear that corporal punishment of children is a serious violation of the child's right to dignity and physical integrity, and that states must both introduce a legislative prohibition of such punishment at the same time as measures for educating the public about the negative consequences of corporal punishment. In the light of this, we do not consider that there is any room for discretion as to the means of implementing Article 19 Convention on the Rights of the Child as interpreted by the Committee on the Rights of the Child: it requires the reasonable chastisement defence to be abolished altogether."²⁹
41. The Commissioner also notes that in a very recent report, on the Use of Restraint in Secure Training Centres, the Joint Committee was concerned at the Government's apparent lack of respect for the interpretation of the CRC by the Committee on the Rights of the Child in its General Comments, including its General Comment No. 8 on corporal punishment: "We regard these comments as being fundamental to an understanding of the State's obligations under the UNCRC".³⁰

H. Conclusions and recommendations

1. As international and European human rights treaty bodies have reiterated, respect for human dignity and physical integrity are the foundation of human rights. Maintaining a law which allows some level of violence to be justified as punishment or discipline is not in compliance with human rights. That children, uniquely, should have *less* protection under the criminal law from assault is additionally discriminatory and unimaginable, given children's obvious special vulnerability. It is inconceivable that any Member State would defend less legal protection from assault for any other population group – women, people with disabilities, elderly people. Children are more dependent and defenceless in relation to adults and need more rather than less protection.
2. More or less universal traditional acceptance of violent discipline has clouded and delayed acceptance of the need for law reform and other measures to eliminate it. But now that the issue and its human rights implications have become highly visible and children's own testimonies and experiences are being taken seriously, there can be no excuse for further delay.

²⁹ Joint Committee on Human Rights, 19th Report of 2003-4 Session, *Children Bill*, HL Paper 161, HC 537, 21 September 2004, para. 156.

³⁰ Joint Committee on Human Rights, 11th report of session 2007-2008, *The Use of Restraint in Secure Training Centres*, HL Paper 65, HC 378, 26 February 2008, para. 30

3. The Commissioner appreciates that there are concerns about implementing law reform in the best interests of children. But given the strong support for reform expressed by the organisations representing those working in child protection, it is plain that these concerns can be met. The Committee on the Rights of the Child provides detailed guidance on this in its General Comment No. 8, which the Commissioner commends - for example: "The principle of equal protection of children and adults from assault, including within the family, does not mean that all cases of corporal punishment of children by their parents that come to light should lead to prosecution of parents. The *de minimis* principle - that the law does not concern itself with trivial matters - ensures that minor assaults between adults only come to court in very exceptional circumstances; the same will be true of minor assaults on children. States need to develop effective reporting and referral mechanisms. While all reports of violence against children should be appropriately investigated and their protection from significant harm assured, the aim should be to stop parents from using violent or other cruel or degrading punishments through supportive and educational, not punitive, interventions..."³¹
4. The Commissioner believes that there is acceptance among Government ministers that legislation to completely remove the "reasonable punishment" defence in England, Wales and Northern Ireland (and similar reform in Scotland) and thus to give children equal protection under the law on assault, has become inevitable, given the strong human rights arguments and overall progress across Europe. The Commissioner welcomes the change in language when talking about corporal punishment and notes that the government now "does not condone smacking". Without a change in the law, however, this position of not condoning smacking lacks credibility. Such reform would be in line with the Government's overall aim to improve children's well-being.
5. The Commissioner recommends:
 - a. That the "reasonable punishment" defence should be removed completely by amendment to section 58 of the Children Act 2004 for England and Wales and to article 2 of The Law Reform (Miscellaneous Provisions) (Northern Ireland) Order 2006;
 - b. That section 51 of the Criminal Justice (Scotland) Act 2003 should be reformed similarly to remove the concept of "justifiable assault" on children and ensure that the criminal law applies equally to assaults on children;
 - c. That governments throughout the UK should develop an awareness and education programme on children's rights to protect and promote positive parenting without violence. Also, children should be informed of their right to protection from all forms of violence and told about the services and assistance, including of a confidential nature, that are available to them.

³¹ General Comment No. 8, para. 40

Appendix

Following his visit to the United Kingdom on February 5 – 8 and 31 March to 2 April 2008

Issues reviewed: Corporal Punishment

The United Kingdom (UK) Government and devolved administrations are fully committed to the United Nations Convention on the Rights of the Child (UNCRC). This is reflected in the importance given to policies and actions to improve the lives of children and young people across the UK. The Government's aim is for the UK to be the best place in the world to grow up, and the UK Government and each of the devolved administrations all have strategies that put children at the heart of the agenda. The UNCRC has an important role to play in achieving this: many initiatives over the last few years have the principles of the UNCRC as their basis. Promoting the safeguarding and welfare of children and young people, including protecting them from violence, abuse and neglect, is central to this. The UK Government and devolved administrations have taken a range of measures, including strengthening the law, to give greater protection to children.

In addition the Human Rights Act 1998 came into force fully on 2 October 2000. The Act enshrines the European Convention on Human Rights (ECHR) in UK law. Since its enactment, the Human Rights Act has made the rights set out in the Articles of the ECHR enforceable in the UK courts.

Part I. Corporal Punishment

A. Introductory remarks

3. The UK Government and devolved administrations do not accept that the term violence is appropriate for the level of physical punishment for which the defence of reasonable punishment is available in English or Northern Irish law or for which the defence of justifiable assault is available in Scots law.

B. Prevalence of corporal punishment in the UK

Paragraphs 4 to 9

The 2007 review of Section 58 of the Children Act 2004 included a survey of parental opinion on smacking. 1,822 parents across England and Wales took part in the survey which was designed to give a good, statistically representative sample, and which included information on the incidence of smacking. The sample reflects the population in England and Wales in terms of region and area types, and respondent demographics.

The unacceptable behaviour reported to Childline and the other organisations referred to in the Commissioner's report would be covered by the current law which precludes

‘physical abuse’. There is legislation in place to deal with these sorts of cases – including any treatment which would constitute a breach of Article 3.

C. International human rights framework and standards

Paragraphs 10-24

The UK Government and devolved administrations note the Commissioner’s comments, and would highlight that the European Court of Human Rights (ECtHR) has not condemned corporal punishment per se. It did not decide in the A case that all physical punishment is contrary to Article 3. Nor has it done so since.

In relation to the point made about Article 17 of the European Social Charter the UK Government would point out that the view taken by the ESCR is inconsistent with the view taken by the ECtHR which as noted above has not condemned physical punishment per se. The UK Government does not accept that punishment for which the defence of reasonable punishment is available in England, Wales and Northern Ireland (and for which the equivalent defence of justifiable assault is available in Scotland) constitutes violence within the meaning of Article 17. The UK Government supports human rights, does not tolerate criminal violence against children and has taken steps to strengthen its child protection measures across a range of policy areas, as have the devolved administrations. The UK Government will address the concerns of the ESCR when it next reports on Article 17 in 2010.

D. Laws on corporal punishment in the UK

25. It is correct that prosecutors’ guidance is not contained in legislation. However, prosecutors in England & Wales, Northern Ireland and Scotland are required by the UK’s Human Rights Act 1998 to make decisions on the charging and prosecution of offences in accordance with the European Convention on Human Rights. In addition, all domestic courts and tribunals determining questions which have arisen in connection with a Convention right must take into account judgments of the ECHR. The Charging Standards on offences against a person acknowledge the additional vulnerability of children.

The Crown Prosecution Service have been monitoring use of the defence of reasonable punishment since summer 2007. There has been no case of the defence being used during that period.

27. The High Court in Northern Ireland rejected all the Commissioner’s* complaints and ruled that Article 2 is ECHR compliant. The Commissioner is appealing.

Guidance was issued to prosecutors in September 2006, providing that the vulnerability of the victim is to be taken into account when deciding what to charge and the level of the charge.

28. Guidance was issued to prosecutors in Scotland by the Crown Office and Procurator Fiscal Service prior to the commencement of section 51 of the Criminal Justice (Scotland) Act 2003, drawing prosecutors’ attention to the terms of this section and the

* Northern Ireland Commissioner for Children and Young People [footnote added by Coe]

decision of the ECtHR in *A v. UK*, and providing advice on prosecution. The UK reiterates that the European Court in *A v. UK* did not rule that all assaults on children violate the ECHR.

E. Review of section 58 of the Children Act 2004

29. The amendment tabled in the House of Commons which would have banned smacking was rejected by 424 votes to 75.
31. The UK Government would like to highlight that the Review did not have evidence that Section 58 was not working satisfactorily. Many respondents set out their objections to physical punishment, but did not offer evidence that supported their view that section 58 had not increased protection for children. The UK Government received insufficient evidence about the practical consequences of section 58 to justify a change in the law. The UK Government can assure the Commissioner that the Department did not overlook or dismiss the response to the broad consultation. It listened very carefully and analysed closely all the information it obtained, before considering it in the round. It was a very open process. The results were published and the scope of the Review itself went beyond the ministerial commitment. It also included a survey of children and young people, and a series of field visits.
32. The UK Government notes that the Children are Unbeatable! Alliance includes a large number of organisations and individuals. However, the survey of parents' views on physical punishment, conducted as part of the Review of section 58, which indicated that almost 70 per cent of parents were opposed to a complete ban, was designed to provide a good statistically representative sample of parents. There were a few responses to the consultation element of the Review from a small number of minority religious groups which supported physical punishment, in some cases even arguing for a return to the position prior to 2004. However these do not lead or drive the opposition to a total ban and there is no evidence that they have much influence on views among the population as a whole.
34. The UK Government is grateful that the Commissioner welcomes the Review process. The survey of children and young people was conducted because the Department believed that it was important to find out their views, and this decision took the Review beyond the scope of the ministerial commitment.

F. Current policy

38. The revised sentencing guidelines for England and Wales do not undermine the increased protection afforded by Section 58. They identify the aggravating and mitigating features to be considered in sentencing. The UK Government does not accept that the fact that a mitigating factor for parents can be that their intention was to administer lawful punishment suggests a trivialising of physical punishment. The Sentencing Guidelines recognise the need for a proportionate punishment. In essence, the Sentencing Guidelines are applying ordinary standards of what is a proportionate punishment where culpability is considered in terms of what the parent intended and foresaw.

G. Other views on corporal punishment policy

40. The UK Government would point out that at paragraph 154 of that Report the UK Parliamentary Joint Committee on Human Rights said 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 on its face leaves a degree of discretion to states to decide what type of measures, or combination of measures, to adopt to protect children from violence.” (Para 154, 19th Report of the Parliamentary Joint Committee on Human Rights (2004))
<http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/161/16102.htm>.

H. Conclusions and recommendations

Paragraphs 1-4

The UK Government and devolved administrations do not accept that the low level of physical punishment for which the defence of reasonable punishment (or justifiable assault in Scotland) can be used, constitutes violence. Children’s vulnerability is acknowledged by the revision of the Charging Standard and by the guidance to prosecutors in Scotland. In England, Wales and Northern Ireland an injury which would lead to a charge of common assault against an adult, would in most circumstances be charged as actual bodily harm or higher if the injury was inflicted against a child, for which the defence of reasonable punishment is not available, and the Human Rights Act 1998 and the Code of Prosecutors requires prosecutors to apply the Charging Standard compatibly with the ECHR. In Scotland the guidance to prosecutors makes it clear that any case involving an assault on a child should be prosecuted in one of the higher courts (which can in turn impose longer sentences). As a public authority the prosecution service must act compatibly with Convention rights in terms of the Human Rights Act 1998.

UK Government ministers do not accept that legislation to completely remove the defence of reasonable punishment is inevitable. Scottish Ministers similarly do not accept that legislation to completely remove the defence of justifiable assault is inevitable. The UK Government’s position has been made clear in correspondence with the Commissioner and by the Secretary of State for Children, Schools and Families, Ed Balls MP, at his meeting with the Commissioner in April 2008.

- 5a. The UK does not consider that removal of the 'reasonable punishment' defence (or “justifiable assault” defence in Scotland) is the right approach to the issue of physical punishment of children by their parents. They believe that it is neither necessary nor appropriate, nor that it is required by the ECHR.

The UK is opposed to a total ban on the physical punishment of children because they believe that the current position ensures that the law gives children sufficient protection without unnecessarily criminalising parents who give their children a mild smack. Section 58 of the Children Act 2004 strengthened the legal protection of children by limiting the availability of the defence of 'reasonable punishment' for acts of actual bodily harm, grievous bodily harm and cruelty. The defence is now applicable only to cases charged as common assault. In addition, changes made to the Charging Standard on offences against the person mean the law acknowledges the additional vulnerability of children. The amendments mean that any injury which would lead to a charge of common

assault against an adult would in most circumstances be charged as actual bodily harm or higher if committed against a child, charges for which the defence of reasonable punishment is not available. The Human Rights Act 1998 requires prosecutors to apply the Charging Standard compatibly with the ECHR, and domestic courts and tribunals to take into account jurisprudence of the ECtHR when determining a question which has arisen in connection with a Convention right.

It is very relevant in this context that the Review of section 58 in 2007 found that a majority of parents did not believe that smacking should be banned outright. The UK Government believes that to do this would represent inappropriate interference in family life, and that the current position strikes the right balance.

Section 58 of the Children Act 2004 now means that the defence of 'reasonable punishment' is not available for any act capable of breaching Article 3 of the European Convention on Human Rights. Conduct charged as common assault would not attain a level of severity such that it falls within Article 3.

Legislative provision mirroring that in England and Wales has been made in Northern Ireland, accompanied by guidance to prosecutors. The Human Rights Act 1998 requires prosecutors to act compatibly with the ECHR, and domestic courts and tribunals to take into account jurisprudence of the ECtHR when determining a question which has arisen in connection with a Convention right. The United Kingdom therefore believes it has a Convention-compliant system, and it is only the appeal in the judicial review proceedings in Northern Ireland which justifies the case of *A v UK* remaining open.

- 5b. In Scotland section 51 of the Criminal Justice (Scotland) Act 2003 provides that the defence of justifiable assault is not available for any act capable of breaching a child's article 3 rights. Therefore the Scottish Executive's position is that the law in Scotland is compliant with the ECHR. The court must apply a specific test when determining whether the punishment was reasonable (or "justifiable assault"). S. 51 (1) and s. 51 (2) of the Criminal Justice (Scotland) Act 2003 list the factors to which the court must have regard when determining whether the punishment was "justifiable assault". These factors are: the nature of what was done, the reason for it and the circumstances in which it took place; its duration and frequency; any effect (whether physical or mental) which it has been shown to have had on the child; the child's age; the child's personal characteristics (including sex and state of health) at the time the thing was done; and such other factors as it considers appropriate in the circumstances of the case. These criteria reflect the criteria that the European Court has set out in its case law to assess whether the ill-treatment falls within the scope of Article 3. S. 51 (3) provides that a blow to the head, shaking or the use of an implement can never be justifiable. Guidance was issued to prosecutors by the Crown Office and Procurator Fiscal Service prior to the commencement of section 51 of the Criminal Justice (Scotland) Act 2003 drawing prosecutors' attention to the terms of this section to provide advice on prosecution.

The Human Rights Act 1998 requires prosecutors in England and Wales and Northern Ireland to apply the Charging Standard compatibly with the ECHR and requires prosecutors in Scotland to act compatibly with Convention Rights. The Act also requires domestic courts and tribunals to take into account jurisprudence of the ECtHR when determining a question which has arisen in connection with a Convention right. The UK Government therefore believes the UK has a Convention-compliant system, and it is only

the appeal in the judicial review proceedings in Northern Ireland which justifies the case of A v UK remaining open.

- 5c. The position of the law in relation to physical punishment of children in England and Wales by their parents has been brought to the attention of the public through the public debate and extensive publicity at the time the Children Act 2004 was enacted. Directors of Children's Services were also informed of the publication of the Review of section 58 of the Children Act 2004 in 2007, and were asked to circulate this information to relevant staff working with children and parents. Crown Prosecutors were reminded of section 58 and the Charging Standard in a policy bulletin issued in 2007 and asked to remind the courts, juries and defence lawyers of these changes. Following the section 58 Review, guidance was issued to all police, in particular those in Child Abuse Investigation Units, reminding them of section 58 and the related material in the Charging Standard.

The UK Government has invested significant resources since 2006 in helping parents to access behaviorally-based parenting courses which have a proven record of helping parents to manage their children's behaviour more effectively and without resorting to physical punishment. Over £250m more will be invested between 2008 and 2011. A National Academy for Parenting Practitioners has been set up to work with the parenting workforce to improve the quality and supply of parenting support, with a clear mission to expand the use of these evidence-based programmes. These programmes specifically address parental smacking in the context of sessions focused on teaching and practicing alternative approaches. 'Parent Know How' has been established to provide advice and guidance to parents and 'Parentline Plus' provides a telephone helpline for parents.

In Scotland, the Scottish Executive have issued an information booklet, 'Children, Physical Punishment and the Law' which explains the law in simple terms, details support services, and encourages positive discipline and parenting. There continues to be regular demand for the booklet; since 2004 over 700,000 copies have been distributed to schools, GP surgeries, social work departments etc. and are available in minority languages.

The Scottish Executive has a number of policies and programmes that provide support for parenting, including funding for a range of parenting programmes. The Early Years Framework, which will be launched in autumn 2008, will see a focus on delivering improved outcomes for children and families. It will focus on intervening early to support vulnerable parents and strengthen family capacity to break cycles of inequality, deprivation and ill-health, and tackle social problems before they develop.

The Scottish Executive, in support of Article 42 of the UN Convention on the Rights of the Child which states that Governments should make the Convention known to adults and children has developed a 5 year action plan, in conjunction with key partner agencies, on specific pieces of work to raise awareness of children's rights. In March 2008 the Scottish Executive worked with Scotland's Commissioner for Children and Young People to produce information for young people about the UN Convention on the Rights of the Child. These information booklets (one for primary school age and one for secondary school age children) and posters have been distributed across Scotland with over 200,000 copies sent out so far to all schools, as well as youth groups and out of school care networks. The booklets contain details of services for young people such as the Young Scot helpline and the Scottish Child Law Centre.

Northern Ireland has published 'Top Tips for Parents' which informs parents that the law on physical punishment has been changed and that if a parent harms his/her child through physical punishment the defence of reasonable punishment will now only be considered if the harm caused is minor. It is sent to parents via schools and to new parents via health visitors and promotes positive parenting as an alternative. This was launched with another booklet 'Top Tips for Parenting Teenagers' and a positive parenting campaign in October 2007. A 'Young Citizen's Passport' is also available and covers the change to the law and the fact that parents are being encouraged to use non-physical forms of discipline and positive parenting.

Across the UK considerable importance is already attached to informing children about what to do if they experience violence and how they can access help. Examples of current work include the £30m investment which the Government is making to support the modernisation, integration and expansion of the listening services run by the NSPCC across the United Kingdom. These include Childline and the Child Protection helpline. In English schools, Personal, Social and Health Education (PSHE) and Citizenship in particular provide opportunities for considering behaviours and responsibilities to others and PSHE helps provide the information and skills needed to access support services. A comprehensive programme of work has also been introduced in England to raise awareness of bullying in schools and information has been made available to young people about where they can go for help if they are experiencing bullying. Peer mentoring pilots are also helping young people to support each other.

The Scottish Executive is also committed to supporting those who work directly with children and young people to help them tackle bullying effectively. To achieve this they have established *respectme* (www.respectme.org.uk), the national anti-bullying service to provide advice, information and training to schools, local authorities and community organisations.

In Northern Ireland an anti-bullying forum has been established to share best practice, disseminate information and develop and co-ordinate joint initiatives. This helps to ensure that schools and organisations working with children and young people have appropriate strategies to prevent and deal with bullying behaviours. It has developed a three year anti-bullying strategy including promoting good practice, developing parental partnerships, website development and an annual anti-bullying week.