CORPORAL PUNISHMENT

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The laws against cruelty to children in England and Wales endorse the common law defence of 'reasonable chastisement', which allows parents to discipline children using punishment involving physical violence. In this article I will examine the scope of the defence of reasonable chastisement, its conformity with International law and recent attempts to limit and control parents' power in this regard.

Keywords: *corporal punishment, reasonable chastisement, United Nations Convention on the Rights of the Child.*

Introduction

Applying appropriate discipline, in the sense of responding consistently to a child's behaviour, and setting clear boundaries, is part of bringing-up children. A failure to provide guidance and set boundaries is in itself a form of neglect that can be very harmful to a child. On the other hand, discipline that is harsh can be damaging to a child both physically and emotionally (Department of Health, 2000: para 1.1). Current law in England and Wales provides a legal defence for parents to punish their children using physical violence. Those with parental responsibility may lawfully chastise and inflict moderate and reasonable corporal punishment for the purpose of correcting or punishing a child. In July 2004 the House of Lords recommended limiting the occasions in which this defence would be applicable. In this article I will examine the standard of protection which the law in England and Wales affords to children and I will assess whether this standard is compatible with the UK's international obligations. In Canada, Italy and Israel the judiciary have criticised the law on corporal punishment in England and Wales, as has the European Court of Human Rights. I will examine these judgments and consider whether the continued lawfulness of physical punishment is a vestige of an outdated ideology that needs to

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be reformed. I will also consider whether the recent House of Lords compromise on this issue offers any practical protection to children's welfare.

The Law on Corporal Punishment in England and Wales

In England and Wales[2] the protection provided to children by the law on assault and cruelty is qualified by the common law concept of reasonable chastisement, which provides that at common law parents are entitled to administer physical punishment to a child provided it does not escalate beyond reasonable chastisement. Therefore unless the prosecution proves that the punishment went beyond reasonable chastisement, the accused person cannot be convicted of assault. In the case of *R v Hopley*[3] Cockburn J provided a comprehensive test in determining whether or not a punishment is reasonable chastisement. The standard he set was that "*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*." Cockburn J stated that:

> "*… if the punishment be administered for the gratification of passion or rage, if it be immoderate and excessive in its nature and degree or if it be protracted beyond the child's power of endurance or with an instrument unfitted for the purpose and calculated to produce danger to life or limb, in all such cases the punishment is excessive, the violence is unlawful, and if evil consequence to life or limb ensue, then the person inflicting it is answerable to the law…*"

The Children and Young Persons Act 1933 aimed to further clarify the boundaries of 'moderate and reasonable punishment' by prohibiting the carer of a child from wilfully assaulting, ill-treating or neglecting the child in a manner likely to cause the child unnecessary suffering or injury to health.[4] Section 1 of the 1933 Act grants parents a defence against criminal liability; if the parent acts from a reasonable and

[2] The National Assembly for Wales does not have devolved responsibility for the law on physical punishment
[3] (1860) 2 F&F 202
[4] Section 1(1) Children and Young Persons Act 1933

proper belief that corporal punishment is an appropriate disciplinary measure, the courts will not override their discretion as long as the use of force against the child is not inordinate and is not more than is required to achieve the disciplinary goal.

Criticisms of the Defence of 'Reasonable Chastisement'

The parental freedom to physically chastise their children has attracted much international censure. For example the United Nations Committee on the Rights of the Child has been extremely critical of the defence of reasonable chastisement (United Nations Committee on the Rights of the Child, 2002: para 38(b); United Nations Committee on the Rights of the Child, 1995: para 16). The Committee on the Rights of the Child has repeatedly criticised the imprecise nature of reasonable chastisement and the risk of it being interpreted in a subjective and arbitrary manner. The Committee believes that reasonable chastisement allows treatment and punishment of children involving physical and mental violence in breach of Articles 19 and 37 of the United Nations Convention on the Rights of the Child. Article 19 insists that children must be protected from all forms of physical or mental violence, and Article 37 prohibits cruel and degrading treatment and punishment. These provisions of the United Nations Convention extend to children protection from inter-personal violence equal to that which adults enjoy. The United Nations Committee recommends that the UK should "*with urgency adopt legislation ... to remove the reasonable chastisement defence and prohibit all corporal punishment in the family*" (United Nations Committee on the Rights of the Child, 2002: para 36). The Committee on the Rights of the Child has urged the government to promote positive, participatory and non-violent forms of discipline and respect for children's equal right to human dignity and

physical integrity (United Nations Committee on the Rights of the Child, 2002: para 38(b)).

The United Nations Committee on Economic, Social and Cultural Rights, the human rights treaty body which monitors states' progress in implementing the International Covenant on Economic, Social and Cultural Rights, has echoed the opinion of the Committee on the Rights of the Child and recommended that the physical punishment of children in families should be prohibited (United Nations Committee on Economic, Social and Cultural Rights, 2002). The International Covenant on Economic, Social and Cultural Rights guarantees everyone, including children, basic economic, social, cultural and education rights.[5] Article 10 requires special measures of protection for children; "*Special measures of protection and assistance should be taken on behalf of all children and young persons*". The Committee on Economic, Social and Cultural Rights considers corporal punishment as being inconsistent with the fundamental guiding principle of international human rights law enshrined in the preambles to the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights (United Nations Committee on Economic, Social and Cultural Rights, 2002). The preamble of the Universal Declaration of Human Rights asserts, "*Childhood is entitled to special care and assistance*" and the preamble of the International Covenant on Economic, Social and Cultural Rights recognises that "*the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world*". Article 7 of the United Nations International Covenant on Civil and Political Rights similarly prohibits inhuman and degrading treatment, and the treaty implementation body for the Covenant, the

[5] The Covenant was adopted by the UN General Assembly in 1966 and came into effect in the UK in 1976.

Human Rights Committee, has also expressed disquiet at the UK's continued failure to introduce specific legislation banning all corporal punishment of children (Human Rights Committee, 2001a: para 72, 2001b: para. 29).

Thus various United Nations Committees have been active in precipitating moves towards international acceptance of the detrimental effects of physical chastisement of children, advancing strong arguments for the progressive abolition of all forms of physical violence against children. Several institutions of the European Union have also voiced criticism of the defence of reasonable chastisement. In 1985 the Committee of Ministers of the Council of Europe drafted a formal recommendation on violence in the family, to which the UK was a participant, saying among other things that member states should prohibit physical punishment of children.[6] The Committee of Ministers recommended that member states should "*review their legislation on the power to punish children in order to limit or indeed prohibit corporal punishment, even if violation of such a prohibition does not necessarily entail a criminal penalty*". The explanatory memorandum noted that "[*It*] *is the very assumption that corporal punishment of children is legitimate that opens the way to all kinds of excesses and makes the traces or symptoms of such punishment acceptable to third parties*".[7] The Committee of Ministers supported the provision of services to help parents in child rearing[8] and the promotion of public information campaigns on the subject of positive child rearing practices.[9]

The European Committee on Social Rights, which oversees implementation of the European Social Charter, has underlined the Charter's requirement for "*a*

[6] Recommendation R85/4(1985) para 12
[7] At p.14
[8] R90(2) V. 1 3, R92(3) 1.3(c)
[9] R(90)(2) (B(I)(1), R(93)(2)1.2(a)

prohibition in legislation against any form of violence against children, whether at school, in other institutions, in their home or elsewhere."[10] The Committee on Social Rights stated 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*" (European Committee on Social Rights, 2001). In reaching this conclusion the Committee rejected the argument that there is an educational value in the corporal punishment of children that cannot otherwise be achieved.

The European Court of Human Rights and 'Reasonable Chastisement'

The most influential censure of the common law defence of reasonable chastisement came from the European Court of Human Rights in *A v UK*.[11] The European Court of Human Rights decided in *A v UK* that the common law defence of reasonable chastisement undermined the law's ability to protect children's rights. In *A v UK* the applicant, a 9 year old British national, was examined by a paediatrician who found a number of bruises indicating that he had been beaten with a garden cane, applied with considerable force on more than one occasion. It emerged that his stepfather had applied these beatings and he was subsequently charged with assault occasioning actual bodily harm. The stepfather, who did not dispute that he had beaten the boy, contended that this amounted to reasonable punishment, which is a defence to a charge of assault by a parent of a child under English law. The trial judge had advised the jury that the defence of reasonable chastisement should succeed only if the correction was reasonable, he added nothing about how such an evaluation

[10] The European Social Charter is a Council of Europe treaty, signed in 1961, which protects human rights The European Convention on Human Rights guarantees civil and political human rights, whereas the European Social Charter, which guarantees social and economic human rights, is the natural counterpart of the Convention. All 43 member States of the Council of Europe have either signed or ratified the 1961 Charter.

[11] [1998] 27 EHRR 611

might properly be made. The jury acquitted A's stepfather on the basis that his action had amounted to nothing more than reasonable chastisement of the child.

The case was appealed to the European Court of Human Rights, which held that the treatment which the boy had received was sufficiently severe to fall within Article 3 of the European Convention on Human Rights. Article 3 states: "*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*" The European Court ruled that because of the way in which the defence of reasonable chastisement was applied, the law in England had failed to protect the boy from 'inhuman or degrading treatment' in the form of severe beatings. The European Court noted in particular that the English jury did not receive any direction on the relevance of factors such as the age or the state of health of the applicant; the appropriateness of the instruments used in his chastisement; the suffering experienced or the relevance of the defence claim that the punishment was 'necessary' and 'justified'. Accordingly the European Court concluded that the domestic law had failed to provide the applicant with adequate and effective protection against physical punishment, which was in the circumstances degrading within the meaning of Article 3. Moreover it found that the state should be held responsible under the European Convention, since children and other vulnerable individuals in particular were entitled to protection from such forms of ill-treatment. The fact that *A*'s stepfather could legally be found not guilty by a jury clearly signals that the judicial system failed in this regard, therefore the UK was in violation of its obligations under the European Convention of Human Rights.

The European Court failed to assert that physical punishment of children *per se* amounts to a violation of a child's rights under Article 3 (Arthur, 1999). Indeed the Court emphasised that this case "*does not mean that Article 3 is to be interpreted as*

imposing an obligation on States to protect, through their criminal law, against any form of physical rebuke, however mild by a parent of a child."[12] The *A* case merely precludes parents from treating their children in a particularly brutal way. The European Court confirmed that it will depend on the circumstances of each case whether the ill-treatment reaches the level of severity required to infringe Article 3, thus allowing member states to maintain a restricted defence of reasonable chastisement. What the *A* case prohibits is the excessive use of force, 'excessive' indicated by the infliction of lasting physical or psychological harm. Thus where a child has been beaten excessively there is a clear duty on the state to provide adequate judicial protection for the child.

In October 2000 the European Convention on Human Rights became part of domestic law in England and Wales by virtue of the Human Rights Act 1998. The introduction of the Human Rights Act means that courts in England and Wales must take account of Convention cases when deciding domestic issues, and they must develop the common law and interpret Acts of Parliament in line with Convention rights. English courts will now have to take into account European Court thinking on corporal punishment in the home, including the case of *A v UK*, whenever they decide cases involving reasonable chastisement. As a result of this ruling consideration needs to be given to clarifying or changing the law, because the way is now clear for a child to claim that existing legislation, by authorising the use of any form of corporal punishment by parents, is incompatible with the child's rights under Article 3 of the European Convention. This question of the legitimacy of corporal punishment of children by their parents is not unique to England and Wales, many other countries have faced a similar dilemma. A comparative study of the law in some of these

[12] at para. 55

countries may provide interesting insights on this subject. In the next section I will examine recent judicial decisions in Canada, Italy and Israel in which the judiciary rejected the common law defence of reasonable chastisement.

Judicial Criticism of 'Reasonable Chastisement'

In Canada the Ontario Court of Appeal[13] stated that the time had come for the Canadian Parliament to give careful consideration to amending the law which justified the use of 'reasonable force' by parents to discipline their children.[14] Although the Court of Appeal upheld the use of 'reasonable force' by parents and teachers to discipline children as a justifiable limit on the rights of children; nonetheless Justice David McCombs believed that abolition of this defence was necessary in order to provide clear guidance to parents, teachers, law enforcement officials and trial judges, who are vested with the difficult task of deciding sensitive, emotionally-charged allegations of criminality against parents and teachers. Abolishing the defence of 'reasonable force', he believed, would help achieve the desirable objective of ensuring greater uniformity in judicial decisions involving allegations of assault on children.

The Italian Supreme Court was more willing than the Canadian judiciary to prohibit parents from using violence or corporal punishment to discipline their children. In 1996 Italy's Supreme Court issued a decision prohibiting all parental use of corporal punishment.[15] Judge Francesco Ippolito predicted that the judicial

[13] *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* (2002) ONCA c34749

[14] Section 43 of the Canadian Criminal Code RSC 1985 states that "Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances."

[15] *Cambria, Cass*, sez. VI, 18 Marzo 1996 [Supreme Court of Cassation, 6th Penal Section, March 18 1996], Foro It II 1996, 407 (Italy).

abolition of corporal punishment would filter into society as a new norm and create an atmosphere in which the physical chastisement of children would no longer be socially acceptable. Similarly, in January 2000 the Israeli Supreme Court banned all parental corporal punishment.[16] Prior to this decision Israel followed the English common law approach to corporal punishment. In *Dalal Rasi v A.G.*[17] the Israeli court applied the English law as established in *R v Hopley*, Justice Chesin stated that "*Parents are free to impose on their children corporal punishment in order to teach them proper behaviour and discipline.*" However in *Plonit v A.G.* the Israeli Supreme Court held that they could no longer leave open the definition of reasonable chastisement and thus perpetuate compromises that can endanger the welfare and physical well-being of minors.[18] The Israeli Supreme Court ruled that the use of punishment which causes hurt and humiliation can never contribute to the child's personality or education, but instead serves only to damage the child's human rights. Accordingly, the court decided that the corporal punishment of children as a method of education by their parents, is entirely impermissible; "*let it be known that in our society, parents are now forbidden to make use of corporal punishment or methods that demean and humiliate the child as an educational system*."[19] This case concerned an appeal by a mother, convicted of assault and abuse for slapping and striking her two children with shoes and a vacuum cleaner. The mother admitted striking her children with these implements, but denied that her actions constituted abuse, moreover she excused her actions as 'disciplinary measures' imposed on her children "*in order to educate and improve them*."[20] The Court declared the mother's actions

[16] *Plonit v A.G.* Israel Supreme Court, Criminal Appeal 4596/98 54(1)P.D. Plonit is used in Hebrew to keep a female party's name anonymous and safeguard her privacy, similar to Jane Roe in English.
[17] Cr.A. 7/53 7(2) P.D. 790
[18] Cr.A. 4596/98, Roe v. State of Israel, 54(1) P.D. 145. 170
[19] Ibid., 180.
[20] Cr.A. 4596/98, Roe v. State of Israel, 54(1) P.D. 145.

abusive and rejected the parental defence of reasonable chastisement. Maintaining that "*corporal punishment as an educational method not only fails to achieve its goals, but also causes physical and psychological damage to the child, that is liable to leave its mark on him even in maturity*," the Court proclaimed a strict policy against the physical punishment of children and imposed a duty of protection upon the state.

It is difficult to predict if these instructive judgment will influence the English judiciary, however in *Barrett v Enfield LBC*[21] Lord Hutton observed that it is incumbent on courts in different jurisdictions to learn from each other, because they are all straining to achieve a careful analysis and weighing up of all the relevant considerations. What is significant for English courts is that, thus far the common law defence of reasonable chastisement has been criticised by the United Nations Committee on the Rights of the Child, the United Nations Committee on Economic, Social and Cultural Rights, the United Nations Human Rights Committee, the Council of Europe, the European Committee on Social Rights, the European Court of Human Rights and the judiciaries in Canada, Italy and Israel. Despite this overwhelming international disapproval of the defence of reasonable chastisement, the government in England and Wales has been extremely reluctant to abolish it. The government believes that the introduction of the Human Rights Act 1998 absolves it of the need to radically reform the law on corporal punishment (Department of Health, 2000). I will next examine the proposals for reform in England and Wales and assess how adequately they protect children from inhuman and degrading treatment.

[21] [1999] 3 WLR 79, 106

Reform of Corporal Punishment Law in England and Wales

The reform to English law envisaged in the wake of *A v UK* is rather limited. In January 2000 the government published a Consultation Document on the subject of corporal punishment of children, *Protecting Children; Supporting Parents* (Department of Health, 2000). This document expressed the government's adamant belief that making smacking, and other forms of physical rebuke, unlawful is not the way forward, and explicitly ruled out this possibility. Indeed the government's view is that it would be quite unacceptable to outlaw all physical punishment of a child by a parent, "…*the law recognises that there may be occasions when moderate and reasonable physical punishment of a child by a parent may be appropriate"*.[22] However the Consultation Document did propose that the defence of reasonable chastisement be set out on a statutory basis, thus outlining in legislation the factors which should be taken into account by a court when considering whether physical punishment has been moderate and reasonable.[23] The Consultation Document set out three options for ways in which use of the defence of reasonable chastisement might be limited:

(1) Option 1 is for an expansion upon the factors to be taken into account when considering a defence of reasonable chastisement. Under this option courts will need to take various criteria into account when deciding what constitutes reasonable chastisement. Examples of such criteria include the nature and context of the treatment, its duration, its physical and mental effects, where on the body the child was hit, whether implements (such as a slipper, cane, stick or belt) were used to hit the child, the gender, age and state of health of the

[22] Ibid. para 1.3-1.5
[23] Ibid. para 5.1, 5.2

victim, the reasons given for the punishment, how soon after the event it was given, the persons involved and the vulnerability of the child.[24]

(2) Option 2 is to retain the defence of reasonable chastisement for lesser assault charges only. The defence of reasonable chastisement would be restricted so that it may be used only by those charged with common assault, and not by those charged with causing actual bodily harm or more serious assaults. This option would have the effect of harmonising most offences of assault for children and adults in that children would receive exactly the same protection under the law as adults in respect of suffering actual bodily harm and more serious assaults. It would greatly reduce the extent to which the defence of reasonable chastisement may be used.

(3) Option 3 is to clarify and possibly restrict who may claim the defence of reasonable chastisement.

In *R v H (Assault of Child: Reasonable Chastisement)*[25] the Court of Appeal approved Option 1. This case concerned a father who hit his son with a belt across the back several times causing assault occasioning actual bodily harm (bruising), as punishment for not being able and willing to write his name when asked to do so. Rose LJ held that when the jury were considering the reasonableness or otherwise of the physical chastisement of the child, they must consider the nature of the defendant's behaviour, the duration of the punishment, its physical and mental consequences in relation to the child, the age and personal characteristics of the child and the reasons given by the defendant for administering punishment.[26] Rose LJ believed that this was an appropriate and accurate reflection of the current state of the common law in the light of Strasbourg jurisprudence to which the English courts by

[24] Ibid. para 5.6
[25] [2001] EWCA Crim 1024, [2001] 2 FLR 431, CA
[26] at p. 439

virtue of the Human Rights Act 1998 must now have regard. A cursory examination of European case law indicates that the European jurisprudence supports this proposition. As is evident from *Costello-Roberts v UK*[27] not every case of corporal punishment will necessarily involve a breach of Article 3. For punishment to be degrading and in breach of Article 3 it must attain a particular level of severity.[28] The degree of severity is to be judged according to the facts of each case, in particular the nature and context of the punishment.[29] Despite this apparent compliance with European law, the effect of the judgment of *R v H (Assault of Child: Reasonable Chastisement)* is that it is still possible for a jury to return an acquittal where the facts reveal a violation of Article 3.

The United Nations Committee on the Rights of the Child expressed disappointment that no significant action towards prohibiting all corporal punishment of children in the family is being taken (United Nations Committee on the Rights of the Child, 2002: para. 37).[30] The Committee argued that the proposals to limit rather than to remove the reasonable chastisement defence constitute a serious violation of the dignity of the child. Within the UK influential bodies also expressed views similar to the United Nations Committee on the Rights of the Child; the Joint Committee on Human Rights in the UK described the defence of reasonable chastisement as disproportionate, futile and in violation of children's rights (Joint Committee on Human Rights, 2003). The Joint Committee stressed that emphasis should be placed on promoting better parenting skills and helping parents to find methods of getting children to co-operate and behave in an acceptable and appropriate manner, using means other than physical punishment. This might include, for example, keeping the

[27] (1995) 19 EHRR 112, para. 32
[28] *Tyrer v UK* (1980) 2 EHRR 1 para 30
[29] *Y v UK* (1992) 17 EHRR 238, para. 32 of Commission Opinion
[30] Ibid, para. 36

child in, sending the child to his or her room, or stopping the child doing something he or she likes, such as watching television (Joint Committee on Human Rights, 2003: para. 2.7). The House of Commons Health Committee has joined the Joint Committee on Human Rights in recommending that the government abolish the defence of reasonable chastisement (Department of Health, Home Office, 2003). Describing the defence as "*increasingly anomalous*" the Health Committee stated that its removal was needed in order to fully protect children from injury and death. The House of Commons Health Committee was charged with examining the factors that led to the death of Victoria Climbié in 2000. Victoria Climbié was an eight year old child who died of hypothermia and malnourishment after suffering 128 separate injuries inflicted over a period of several months at the hands of her guardians. The committee found that punishment of the child started with 'little smacks' that escalated into abuse and eventually ended in her death. It observed that:

> "*…not all other countries seem to have the same problems with child abuse as Britain does. The experience in Sweden, for example, which has long outlawed the physical punishment of children, is one in which child deaths from deliberate harm by adults are now unknown*."

The Health Committee urged that an outright ban could be educative rather than punitive, such as the compulsory wearing of seatbelts for example. A ban could lead to a cut in assaults on children without a consequent rise in the prosecution of parents. In 2003, prior to the House of Lords considering the issue, the Scottish Executive undertook a review of the defence of reasonable chastisement, therefore an analysis of Scottish proposals in this regard may be instructive.

Reform of Corporal Punishment Law in Scotland

The Scottish Consultation Paper, *The Physical Punishment of Children in Scotland: A Consultation* (Scottish Executive, 2000) was published after the English

paper. The Scottish consultation document also proposes retaining the defence of reasonable chastisement. The Scottish Executive fully accept that harmful and degrading treatment of children can never be justified, however, similar to the view in England, they also believe that an outright ban on physical punishment would not be useful. Thus like their English counterparts, the Scottish proposals are confined to merely providing greater clarification as to what is reasonable chastisement. The Scottish Executive proposed defining reasonable chastisement in statute and explicitly clarifying that physical punishment which constitutes inhuman and degrading treatment can never be justified as reasonable chastisement.[31] They proposed a ban on smacking of children under the age of three years, outlawing the use of implements in disciplining a child of any age, a total ban on blows to the head and a ban on shaking. All of these proposals were incorporated into section 51 of the Criminal Justice (Scotland) Act 2003 except the proposal to ban all corporal punishment of children under the age of three years. This latter proposal was originally included in the Criminal Justice (Scotland) Bill 2002 but was withdrawn at the Committee stage. As it stands the Criminal Justice (Scotland) Act 2003 seems to make the law more certain. For example, it restricts the occasions on which the defence of reasonable chastisement can be used, and consequently improves the protection afforded to children. However the changes to Scottish law, while placing greater restrictions on what is allowed, nonetheless allow parents to preserve the right to chastise their children. Also the Criminal Justice (Scotland) Act 2003 lacks simplicity and clarity. By explicitly stating that activities like hitting with a stick or belt, or blows on the head are not acceptable may send out a message that only mild physical punishment is acceptable. Equally, though, it could send out a message that all physical punishment,

[31] Ibid. para 5.1

except those forms listed, is acceptable and even to be encouraged. For example, a ban on hitting with sticks or belts does not make it clear that physical punishment with a fist or foot is equally detrimental (Office of Law Reform Northern Ireland, 2001).

The reform proposed by the House of Lords

In July 2004 when debating the passage of the Children's Bill 2004 the House of Lords proposed reform of this area of law. The House of Lords rejected a total ban on smacking children and opted instead for a government backed compromise amendment. Under the amendment proposed by Liberal Democrat Lord Lester parents accused of causing actual bodily harm to their children will no longer be allowed to invoke the defence of 'reasonable chastisement'. But the odd light slap or tap will not be criminalized. If this compromise is endorsed by the House of Commons it means that parents will be liable to prosecution if their smacks cause 'mental harm', bruising, scratching or reddening of the skin.

Although the House of Lords reform is a welcome move in the right direction, many of the criticisms of the Criminal Justice (Scotland) Act 2003 are equally applicable. While the House of Lords proposal will limit the use of physical punishment it still sends out a dangerous message that it is legally acceptable to assault a child; a message that is contrary to the European Social Charter. Similar to the Scottish Criminal Justice Act, the House of Lords proposal also lacks the clarity which an outright ban on the physical punishment of children would bring. This amendment is substituting one area of confusion for another. The current defence of reasonable chastisement leaves it for a jury to decide what is reasonable. The House of Lords amendment leaves police, lawyers and prosecutors with the task of deciding

when hitting is hurting a child, physically and mentally. How is a parent to know what degree of force to use? An outright ban on physical punishment would be easier to police than the halfway house proposed in Lord Lester's amendment. Also making the visibility of bruising the test of whether a smack has been too hard is unfair as different children bruise in a different way, some children bruise quite easily, other children may only bruise after a severe smack. Thus the Lester amendment contains many of the same practical difficulties as the present law.

The English Consultation Paper, the Scottish Criminal Justice Act 2003 and the House of Lords amendment represent a missed opportunity to widen the protection afforded to children, as there is no proposal to abolish the use of physical punishment against children.

Conclusion

It is hypocritical and ineffective of our society to protest against child abuse while its laws continue to licence the beating of children in the name of reasonable chastisement. Once a society declares that the use of violence against children is legitimate it is difficult to then convince every parent in that society that only an arbitrarily set degree of violence is appropriate and have them consistently abide by that limit, especially in times of anger or stress (Newell, 1989). All discipline should be positive, and children should be taught pro-social values and behaviour, including non-violent conflict resolution skills (Brandon, 1996). Sweden, Finland, Denmark, Norway, Austria, Italy, Cyprus, Latvia, Croatia, Germany and Israel have explicit bans on physical punishment by parents and all other carers. Is it credible that British children are so much more unruly than Austrian, Croatian, Danish or Norwegian children and can only be reared by assistance of punitive assaults?

All justification of an assault on a child should be removed, thereby putting the child in exactly the same position as adults in respect of the law. A law specifically banning physical punishment of children by their parents need not have criminal sanctions attached. Such reform would provide children with greater protection; ensure the law is clear, simple and workable, so that parents know where they stand; equalise the position between adults and children, giving both equal protection under the law; send out a clear message about what behaviour is unacceptable in families; assist in bringing up children in a society free from violence and teach them non-violent ways of settling their disputes; and bring the law into full compliance with the Human Rights Act 1998 and other international law obligations (Office of Law Reform Northern Ireland, 2001). Parents would still be able to make use of all the defences already codified in the criminal law. Thus, for example, the prosecution has discretion not to go to trial in the absence of the public interest. Similarly, the criminal law contains the 'de minimis' defence which may also be used to prevent the imposition of criminal liability for routine physical contact between a parent and child.

The existence of a law prohibiting physical punishment of children would signal the unacceptability of physical punishment and could help to influence social attitudes and encourage the use of alternatives to physical punishment (Department of Health, 2000: para 2.12). If the changes to the law prove to be as minimal as the various proposals to date suggests they will neither introduce real clarity into the law, nor protect children from gratuitous physical abuse.

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