

Consultation on Physical Punishment in the Home - Response of the Northern Ireland Human Rights Commission

1. Introduction

The Northern Ireland Human Rights Commission welcomes the opportunity to respond to the current consultation. The Commission's response to this document is informed by a number of matters:

- the relevant standards in international human rights law;
- the Commission's strategic plan¹ which identifies children as one of a number of vulnerable groups requiring additional rights protection in Northern Ireland;
- the Commission's commitment to strive for clarity and accessibility in the law (the current lack of clarity in the law governing physical punishment of children is unacceptable to the NIHRC);
- the Commission's consultation document on a Bill of Rights for Northern Ireland² which proposes the establishment of significant additional rights for children in Northern Ireland. As will be explained below, our proposals include the right of the child to physical integrity;
- the requirements of section 75 of the Northern Ireland Act 1998;
- the Commission's support for the *Global Campaign for an End to Corporal Punishment*.

The UN Committee on the Rights of the Child has stated that legal reform alone is not sufficient to end physical punishment of children. In addition, states must put in place a comprehensive system of support services and information for parents and families designed to develop good parenting skills. As we believe that there are other organisations and individuals better placed than us to comment on this issue our response will focus mainly on the need for compliance with relevant international human rights standards.

2. International Human Rights Standards

The consultation document provides a helpful summary of the relevant requirements of international human rights standards. The Commission takes no issue with the analysis provided. We would, however, stress the following points:

- **The evolving jurisprudence of the European Convention on Human Rights**
Current case law of the European Court of Human Rights requires the UK to reform its law on the physical punishment of children. It does not necessarily require that the physical punishment of children be outlawed in all situations. However, the European Convention on Human Rights is a living document which must be interpreted in light of prevailing legal and social conditions. The evolving interpretation of Article 3 of

¹ *Strategic Plan of the Northern Ireland Human Rights Commission 2000-2002* states that in all of the Commission's advice to the Government and the Assembly it will "bear in mind the need to promote and realise children's rights, the rights of persons who have a disability and the rights of ex-prisoners." NIHRC 2000. p.22

² *Making A Bill of Rights for Northern Ireland*, September 2001 ISBN 1 903681 18 9 p.67

the Convention is reflected in the case-law of the European Court which, over a period of time, has found in cases coming from the UK that physical punishment is incompatible with the Convention in the following situations: as a punishment in criminal courts; in the juvenile justice system; in state schools and in private schools.

To date the Strasbourg Court has confined its comments on physical punishment in the home to those in *A v UK*, namely, that the defence of reasonable chastisement is insufficiently precise to provide adequate protection for Article 3 rights. The Court's current view is that physical punishment can, but does not always, amount to inhuman and degrading treatment. In cases involving children the Court has increasingly relied upon the standards of the UN Convention on the Rights of the Child as an interpretative tool. The continuing evolution of the Court's jurisprudence in this regard may well lead the Court in the future to determine that **any** physical punishment of a child breaches Article 3.

Attempts to argue that the use of physical punishment breaches other Convention rights, such as the right to privacy and family life under Article 8 and the right to freedom from discrimination in the exercise of other Convention rights under Article 14, have yet to be properly tested.³

- **UN Standards require that physical punishment be outlawed**

Irrespective of the future direction of the jurisprudence of the ECHR, there are other international human rights standards which *today* bind the UK to guarantee the right to physical integrity for children. While the rights enshrined in the UN Convention on the Rights of the Child and in the UN's International Covenant on Civil and Political Rights do not form part of domestic law, they none the less give rise to obligations for the UK under international law which require it to guarantee the rights therein.

- **UN Standards also require that all persons be entitled to the equal protection of the law**

Article 26 of the UN's International Covenant on Civil and Political Rights states:

"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Any reform of the law, which falls short of a removal of the defence of reasonable chastisement, would preserve an unjustifiable discrimination in the law on the grounds of age. The UN Human Rights Committee, which monitors compliance with the ICCPR, has also recently expressed concern at the UK's failure to outlaw the use of physical punishment against children.

- **Forthcoming examination of the UK by the UN Committee on the Rights of the Child**

³ While the applicant in *Av UK* argued a breach of article 8 and article 14 rights the Court found it unnecessary to examine these arguments once a breach had been established under Article 3.

The UK will be examined on its most recent periodic report under the UN Convention on the Rights of the Child later this year. The UN Committee on the Rights of the Child has made it clear that the defence of reasonable chastisement is not compatible with Articles 3, 19 and 37 of the Convention. During the January 1995 examination of the UK Report the Committee clearly expressed an expectation that the UK would take steps both to reform the law and to develop public awareness and education. The Northern Ireland Human Rights Commission is clear that in order to fully meet its obligations under international human rights law, the UK must outlaw the physical punishment of children in the home. The NIHRC will be expressing this view in the background submission it plans to make later this year to the UN Committee, in advance of the examination of the UK Report.

- **International Trend towards an absolute ban on physical punishment**

While the Strasbourg Court has yet to interpret Article 3 of the Convention as requiring an end to all physical punishment of children, the Committee of Ministers of the Council of Europe has made a recommendation to this effect. In a 1985 Recommendation on Violence in the Family⁴ (to which the UK was a party) the Committee of Ministers recommended that member states should prohibit physical punishment.

3. Clarity and accessibility in the Law

One of the Commission's objectives is to work for clarity and accessibility of the law. The law currently governing the physical punishment of children lacks clarity.

The European Court of Human Rights in the case of *A v UK*⁵ found, *inter alia*, that UK domestic law, with its defence of "reasonable chastisement", was not sufficient to protect the applicant. In particular, the Court found that the UK law did not give guidance as to the factors judges and juries should apply when assessing whether the punishment in question amounted to inhuman or degrading treatment under Article 3 of the ECHR.

A subsequent decision of the English Court of Appeal⁶ found that the pre-existing law on reasonable chastisement should be developed by the courts to take *A v UK* into account. The Court recommended that in addition to the factors identified by the Strasbourg Court, namely: "the nature and context of the treatment; its duration; its physical and mental effects and, in some instances, the sex, age and state of health of the victim," courts should also take into account the reasons given by the defendant for administering the treatment. The NIHRC supports the argument identified on p.41 of the consultation document that the addition of this further factor "places a gloss on the *A v UK* factors which changes their meaning."

Uncertainty is increased by the failure to make publicly available the charging standards which guide the prosecution service as to how to match the injury inflicted to the appropriate charge. These charging standards are not publicly available in either

⁴ Recommendation R 85/4

⁵ [1998] 2 FLR 959

⁶ *R v H (Reasonable chastisement)* Court of Appeal, Criminal Division, judgment of 25 April 2001, *The Times* 17 May 2001.

Northern Ireland or in England and Wales. In addition, in Northern Ireland the position is less certain again as, unlike in England and Wales, the criteria used by the DPP to determine whether a prosecution would be in the public interest are not publicly available.

It is expected that a Bill will be introduced in to the Scottish Parliament in the spring designed to clarify the law on physical punishment. The Bill is based upon the Scottish Executive's proposals of September 2001⁷ which were taken forward in a recent White Paper⁸. The proposals are:

- a total ban on blows to the head, shaking and the use of implements;
- a ban on the use of physical punishment of children up to and including the age of two;
- a ban on the use of physical punishment in childcare centres, by childminders and in non publicly funded pre school centres;
- setting out in statute the factors courts must take into account when determining whether punishment was "reasonable"; and
- parents will set the ground rules for discipline in the home to include babysitters and nannies. However, as stated above, the corporal punishment of children under three years will be prohibited.

While the NIHRC welcomes the total ban on physical punishment of children up to three years of age in Scotland we are clear that full implementation of the UK's obligations under international human rights law requires a total ban on the physical punishment of **all** children.

4. The Commission's Bill of Rights Proposals

General Interpretation

The Commission has proposed a number of general interpretative clauses designed to guide the interpretation of the more detailed clauses in its proposed Bill of Rights for the protection of the rights of children. These include the requirement that in all actions concerning children, whether undertaken by public or private institutions, individuals or bodies, courts of law, administrative or legislative authorities, the best interests of the child shall be the paramount consideration. In addition we propose that public bodies shall carry out their functions in relation to children in accordance with the provisions of the UN's Convention on the Rights of the Child. In this context, public bodies would include the courts, which would have to give due weight to the standards of the UN Convention in all matters relating to children.

The Family

The Commission proposes the principle that every child should grow up in a stable and safe family environment.⁹ We have sought views in our consultation document as

⁷ See Research Note RN00/11 (revised) *Physical Chastisement of Children*, The Scottish Parliament Information Centre, 6 September 2001.

⁸ See *Making Scotland Safer*, White Paper, 13 December 2001, available on the Scottish Executive website: <http://www.scotland.gov.uk>

⁹ As regards the construction and enforcement of this principle the Commission has invited views as to whether or not it is appropriate to formulate it as a right for children or, as in the second formulation, as an obligation on state authorities.

to whether state support for children to enable them to grow up in a stable, safe and loving family environment should be framed as a positive right or as a state obligation.

Protection rights

The Commission's draft Bill of Rights proposes the following protection rights for children:

- “1. Every child has the right to be protected from all forms of physical, emotional or mental violence, inhuman or degrading treatment or punishment, injury or abuse, neglect or negligent treatment, bullying, maltreatment or exploitation, including sexual exploitation or abuse.*
- 2. Such protection shall include the taking of all necessary legislative, administrative, social and educational measures, the establishment of effective programmes for the identification, reporting, referral and investigation of such abuse and for the care and treatment of victims, and the independent monitoring of those programmes.”*

These clauses are a development of Article 19 of the UN Convention on the Rights of the Child with the basic principle expressed as a right for every child rather than an obligation on state authorities. Of most relevance to the current consultation is paragraph 1 of the clause, which states that “every child has the right to be protected from all forms of physical...violence...”. The Commission's proposal is based upon the language of Article 19 of the UN Convention and upon its interpretation by the UN Committee on the Rights of the Child. The Commission's draft Bill of Rights therefore clearly proposes an end to the physical punishment of children. This proposal would serve to translate the relevant international human rights standards into domestic law and would ensure that these standards, which the UK has already signed up to, would be enforceable before domestic courts.

Equality

The Commission has proposed a general equality clause as follows:

- “Everyone is equal before and under the law and has the right to equal protection and equal benefit of the law. Equality includes the full and equal access to and enjoyment of all rights and freedoms.”¹⁰*

This clause is based not only upon Article 26 of the UN International Covenant on Civil and Political Rights but also draws upon best international practice in national constitutions such as those of South Africa and Canada.

5. Section 75 of the Northern Ireland Act 1998

Section 75 of the Northern Ireland Act 1998 requires all designated public authorities to have due regard to the need to promote equality between the different groups set out in section 75. For present purposes the most relevant are people of different ages and people with and without dependants.

An essential component of the section 75 duties is the requirement to consult with those affected by the proposed change in policy or legislation. The Commission

¹⁰ *Op cit* no. 2 at p.30

therefore welcomes the preparation of materials specifically designed to facilitate consultation with children and young people and trusts that an imaginative and dynamic programme of consultation has been undertaken, specifically targeted at the needs of children and young people.

6. The Global Initiative to End Corporal Punishment of Children

In June 2001 the NIHRC formally decided to support this position which already had the support of the UN High Commissioner for Human Rights.¹¹ This is further evidence of the Commission's public commitment to the need for the removal of the defence of reasonable chastisement from our law.

7. The Commission's preferred options for law reform

The consultation document poses a number of questions at pp.40-47 regarding the nature of the necessary reform to the law. These concern both choices for the reform of the defence of reasonable chastisement and duties for reform of family law to include a statement of rights and responsibilities.

Reform of the Defence of Reasonable Chastisement

As is clear from the comments above, the Northern Ireland Human Rights Commission recommends that in order to meet fully its obligations under international human rights law the UK must remove the defence of reasonable chastisement. The Consultation document (p.44) highlights the fact that in some countries where such an approach has been adopted uncertainty as to the practical application of the law has remained. Parents and others have been left in a state of uncertainty as to when they might be prosecuted. As such an approach relies on prosecutorial discretion we recommend that it be accompanied by a requirement to publish both the charging standards and the criteria used by the prosecution to decide when a prosecution might be in the public interest.

Reform of family law

In addition to reform of the defence of reasonable chastisement the consultation document outlines at pp.45-47 the possibilities for enacting a statement of rights and responsibilities which would not have any sanctions attached to it. The Commission agrees that there could be merit in such a statement designed to help parents and children know where they stand. At this time the Commission takes no position in response to questions 6 and 7 on p. 47 as regards the legal effect of such a statement nor as regards where it might be located within family law. As regards its content, we would stress the need for the statement to be fully reflective of the relevant international human rights standards contained in the UN Convention on the Rights of the Child. It is possible that the Commission may revisit the detail of this proposal in its ongoing work on the Bill of Rights for Northern Ireland.

Northern Ireland Human Rights Commission January 2002

¹¹ See Minutes of the 30th Meeting of the NIHRC, 11 June 2001, available at <http://www.nihrc.org/files/minutes30a.htm>