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## **'Hands-Off Parenting?' -- Towards A Reform Of The Defence Of Reasonable Chastisement In The UK**

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*This article reviews the law relating to the defence of reasonable chastisement in the UK, analysing the impact of European and international jurisprudence thereon.*

### **I Introduction**

The UN Committee on the Rights of the Child has consistently advocated removing from national laws any right physically to chastise children. Partially in light thereof, the June 2003 reports of the Commons Select Committee on Health and the Joint Parliamentary Committee on Human Rights recommended abolishing the defence of reasonable chastisement within England. However, the subsequent Green Paper published by the government ignored these recommendations, failing to address the issue.<sup>1</sup>

This article will review the law in the area, analysing the impact of European and international jurisprudence thereon. Although England is the principal focus of this article, comparisons with other jurisdictions (primarily in the UK) facilitate a critical appraisal of the salient laws. The limitations on the exercise of the defence which have been developed to date will be considered, before an analysis of the mounting national and international pressure is provided. Factors influencing policy in the UK will be considered before conclusions are drawn.

First, it is intended to place the contemporary debate in its historical context by setting out below a brief precis of the evolution of the defence of reasonable chastisement, the invocation of which exonerates the perpetrator from what would otherwise be an assault on a minor.

### **II Reasonable chastisement as a defence**

There is nothing novel in national law permitting the physical chastisement of children. Laws concerning physical chastisement used to be considerably broader, with wives and, earlier, servants and slaves, being subjected to legitimate physical abuse. Of course now slavery is proscribed and women have acquired rights giving them equal status to that of men. Domestic violence is subject to criminal law, with no 'reasonable chastisement' defence. The legal treatment of assaults on children, however, has merely been modified.

Support for the right of parents to chastise their children can be found in a number of ancient religious texts. Pertinently, given England's legal history, the Bible, Proverbs 13, verse 24, states that 'he that spareth his rod hateth his son'. Centuries later, this passage is still reflected in the common law. Although children are no

longer regarded as the property of their parents, they lack the legal status enjoyed by adults. By necessity, children do not enjoy full legal rights from birth. Rather they have evolving rights in accordance with their mental capacity, age and maturity. Parents and guardians have legal responsibility for their children's care and upbringing and, in furtherance thereof, exercise reasonable disciplinary functions. Children are thus subject to control by their parents or primary carers and, in their weaker legal position, they are inherently vulnerable to abuse.

A right to discipline a child is a fundamental parental right benefiting both the parent and the child, when exercised appropriately. Polarisation of societal attitudes arises when the discipline dispensed is corporal in nature. Although there are criminal sanctions for physical punishment,<sup>2</sup> those exercising parental rights may rely on the defence of reasonable chastisement.<sup>3</sup> Traditionally, similar approaches are taken elsewhere in the UK and, indeed, the world. For example, in Scotland, the traditional right of a parent to chastise his or her child is discussed by the institutional writers<sup>4</sup> and in recent case-law.<sup>5</sup> In the seminal English case of *R v Hopley*,<sup>6</sup> Chief Justice Cockburn reflected upon the common law position: moderate and reasonable chastisement may be used to correct what is evil in a child but such punishment should be neither excessive nor protracted.<sup>7</sup> One hundred and thirty-five years later, the Law Commission's consultation paper, *Consent in the Criminal Law*, upheld this position, concluding that 'unless any particular technical difficulty is brought to our notice in relation to this common law defence as it now stands, we are likely to have no recommendations for law reform to make in this regard'.<sup>8</sup> This statement followed a comprehensive comparative review of salient provisions.

It is evident that parents retain a prima facie right to use appropriate physical punishment as a method of disciplining their children. However, although the existence and continuance of a parent's right to discipline his or her child has not been questioned, the very scope of the defence of reasonable chastisement has been increasingly subject to review.

### **III Limiting the scope of the defence**

From its inception, the defence of reasonable chastisement has not been unfettered. Limitations have been imposed by courts upholding the common law. More recently, essentially in response to international developments, further reforms have been introduced through statutory intervention.

In respect of the common law, factors were identified in the nineteenth century as limiting the reasonableness of chastisement. These included situations when punishment was administered 'for the gratification of passion or of rage', the excessive duration of the punishment, and the use (if at all) of implements.<sup>9</sup> This guidance has stood the test of time. Given this common law position, the jurisprudence of the European Court of Human Rights and European Commission of Human Rights has been particularly instrumental in prompting revision of the law. Limitations have emerged in two areas: punishment of children by their parents and by third parties. Progress on the latter has been significant.

#### ***A Punishment of children by third parties***

Judicial corporal punishment in the Isle of Man prompted the initial examination in *Tyrer v United Kingdom*<sup>10</sup> of corporal punishment under the *European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (European Convention)*. Three strokes of the birch was imposed as a sentence on a 15-year-old boy convicted of assault occasioning actual bodily harm. According to the European Court of Human Rights (European Court), such judicial corporal punishment amounted to institutional violence,<sup>11</sup> and thus an assault on Tyrer's dignity and physical integrity. Having regard to the surrounding factors, an infringement of Article 3 of the European Convention was upheld by the European Court, following the opinion of the European Commission. The court identified a number of factors to be considered when determining the effect of any given incidence of physical punishment, including the nature and context of the punishment, the method of its execution and the personal characteristics of the victim. These factors proved instrumental in settling future complaints. After the *Tyrer* decision, other 'institutional'

settings have been examined by the European Court for compatibility with Article 3 of the European Convention. Corporal punishment in state schools was questioned in the Scottish case of *Campbell and Cosans v UK*,<sup>12</sup> the use of the 'tawse'<sup>13</sup> being in point. Although the court concluded that the level of humiliation and degradation experienced by potential recipients was insufficient to infringe Article 3, section 47 of the *Education (No 2) Act 1986* soon afterwards removed the right of teachers in state schools in England and Wales<sup>14</sup> to chastise physically children. Following the case of *Costello-Roberts v United Kingdom*,<sup>15</sup> the legislators' attention turned to private schools, with section 131 of the *School Standards and Framework Act 1998*<sup>16</sup> extending the prohibition to all schools. Again, no actual violation of Article 3 had been found by the European Commission or European Court in that case, the meted punishment not reaching the required threshold of severity.

Limiting the application of the defence has been an incremental process. Following proscription in schools, the National Assembly for Wales proceeded to adopt regulations prohibiting corporal punishment in all forms of day care.<sup>17</sup> This was followed in England. After the biennial review of the professional standards of childminders, the Department for Education and Skills announced that, from autumn 2003, childminders and those with responsibility for day-care provision (for children under 8 years) would be precluded from using physical chastisement.<sup>18</sup> This revision to the national guidelines operates irrespective of parental consent thereto, standardising the legal position of childminders, nursery staff and teachers. Interestingly this move signifies a reversal of government policy, following 2 years of intensive lobbying to reverse the decision of the then Secretary of State for Education (David Blunkett) that childminders should continue to be allowed to administer corporal punishment in accordance with parental wishes.<sup>19</sup> Today the situation is clear: any physical assault on children under eight in regulated day care may not be justified by raising the defence of unreasonable chastisement.

### ***B Punishment of children by their parents***

With the law clarified through statutory provisions limiting the use of physical punishment in regulated settings, it was inevitable that a complaint would eventually be brought before the European Court which focused on discipline within the home. The seminal case is that of *A v United Kingdom*,<sup>20</sup> which concerned the acquittal of a stepfather charged with assault of a 9-year-old boy. The boy sustained severe bruising and markings which lasted several days from beatings with a cane, although the jury accepted the stepfather's defence of reasonable chastisement. The court considered that the UK had infringed its obligations under Article 1 of the European Convention by failing to ensure the criminal law applied to a perpetrator of treatment which infringed Article 3 of the European Convention. The factors identified as being indicative of an unacceptable level of punishment reflected previous jurisprudence: the age, health and size of the child, the nature and duration of the punishment, and the lasting physical or psychological effect.<sup>21</sup> Note that the European Court did not advocate banning all corporal punishment by parents; its judgment was restricted to ensuring that excessive use of punishment - beating, rather than 'careful chastisement' - was caught under the criminal law.<sup>22</sup> In other words the State was merely required to discharge its positive obligation to protect individuals from treatment of a severity which infringed Article 3.

Not surprisingly, the combination of *A v UK* and the imminent entry into force of the *Human Rights Act 1998* (HRA 1998) ensured a high public profile for this area of the law. Public consultations in all UK jurisdictions ensued. Within England, *Protecting Children, Supporting Parents - A Consultation Document on the Physical Punishment of Children*<sup>23</sup> proposed legislation clarifying the limits of the defence of reasonable chastisement.<sup>24</sup> The consultation exercise was shaped by the view that 'we do not consider that the right way forward is to make unlawful all smacking and other forms of physical rebuke ... this [consultation] paper explicitly rules out this possibility'.<sup>25</sup> Indeed, following a brief resumé of European countries, the government view was that 'it would be quite unacceptable to outlaw all physical punishment of a child by a parent'.<sup>26</sup> Its approach was essentially to propose legislation reiterating the factors considered relevant by the European Court in *A v United Kingdom*. Additional options were also proposed, including expanding the determinant factors (for example specifying circumstances in which the defence should not operate),<sup>27</sup> removing the defence from all but common assault charges<sup>28</sup> and further restricting those who could claim the defence of reasonable chastisement.<sup>29</sup> In contrast, the contemporaneous Scottish and subsequent Northern Irish consultations additionally proposed removing the equivalent defence entirely, thereby leaving anyone

physically chastising a child liable for assault charges.<sup>30</sup> The Northern Irish document also mooted enacting a statement of principle.<sup>31</sup>

In 2001, the English Government started from the premise that it was 'obliged to change UK law in a way which takes account of the court's judgment' in *A v United Kingdom*<sup>32</sup> and that the government fully accepted the need for change.<sup>33</sup> Nevertheless, after analysing the responses to the consultation document, the government later concluded that there was no need for any change since the entry into force of the HRA 1998 meant that any court considering a case involving reasonable chastisement as a defence would be required by section 3 to take into account the guidance provided by the European Court in *A v United Kingdom*.<sup>34</sup> This conclusion is surprising considering that the analysis of responses records 'clear support for the premise that it can never be reasonable to cause a head injury through disciplining a child'.<sup>35</sup> A broad consensus of opinion indicated that injuries more serious than those causing red marks of bruises of a few days' duration, injuries to the head and harsh physical injuries (biting, shaking, burning, kicking) were in themselves unacceptable and outwith the terms of reasonableness.<sup>36</sup> Given such recorded consensus on the outer limits of permissible punishment and the agreed need to protect children from harm, it is extraordinary that the government's professed commitment to 'improving safeguards for children'<sup>37</sup> resulted in a decision to leave English law unchanged.

The government had undertaken its consultation exercise at a time when the HRA 1998 was already enacted, albeit not fully in force. Despite the Act's imminent implementation, the government then considered that legislative change would still be needed. Its subsequent change of heart appears to have been influenced by the decision of the Court of Appeal Criminal Division in *R v H (Assault of Child: Reasonable Chastisement)* [2001] EWCA Crim 1024.<sup>38</sup> This was a Crown appeal occasioned by judicial reluctance to direct a jury to apply the defence of reasonable chastisement incorporating the *A v UK* criteria.<sup>39</sup> The trial judge was uncertain over the extent to which the HRA 1998 and *A v UK* had modified the scope and definition of the defence and the propriety of directing the jury towards a modified version of the old common law defence, in accordance therewith. Perhaps unsurprisingly, the Court of Criminal Appeal upheld the appeal, noting that common law is evolutionary and that directing a jury in accordance with the aforementioned criteria is 'an appropriate and accurate reflection of the current state of the common law in the light of the Strasbourg jurisprudence to which the English courts, by virtue of the HRA 1998, must now have regard'.<sup>40</sup> It should be noted, that although including the relevant factors listed by the European Court in *A v UK*, an additional factor was now suggested, that of motive. In neither *A v UK* nor any other salient case has the 'reasons given by the defendant for administering punishment' been referred to by the European Court as a pertinent factor. Indeed, as the Northern Irish Office of Law Reform commented in its consultation paper, the additional factor identified in *R v H* 'places a gloss on the *A v UK* factors which changes their meaning'.<sup>41</sup> Article 3 of the European Convention is itself non-derogable, thus it is not possible for the law to be applied by the domestic courts to permit an individual a potentially wider margin of discretion regarding the circumstances in which criminal responsibility may be avoided than those set out by the European Court itself.

The dicta of the European Court in *A v UK*<sup>42</sup> made it clear that the government had overall responsibility for ensuring that the rights and freedoms of individuals were not infringed. But, the State cannot absolve itself of its responsibilities under Article 1 of the European Convention by simply passing the 'buck' to the courts. It can be seen that although invoking the HRA 1998 in such situations may appear to be in accordance with the letter of the law, it leaves considerable discretion to the courts and judges and juries. In particular, reliance on a jury for the final evaluation, on the basis of set criteria, risks a jury acquitting a defendant in circumstances which the European Court may still consider to be inhuman or degrading treatment or punishment. Rogers is therefore of the opinion that the government should not be complacent.<sup>43</sup> A direction merely pointing out relevant factors in assessing the reasonableness of the treatment will not, per se, produce appropriate acquittals in all cases. Instead, Rogers proposes that the judge should direct the jury on the basis of his or her evaluation of the facts. In other words, the evaluative decision as to the reasonableness of the treatment should not be left to the jury. Perhaps some support for this can be drawn from Rose LJ's dictum in *R v H*, alluding to the continuous development of the common law. In complying with section 3 of the HRA 1998, judges could potentially erode the scope of the defence over the years, in accordance with the evolving standards emerging from the jurisprudence of the European Court.<sup>44</sup> The fact remains that the criteria mentioned in *R v H* potentially permit acquittals in circumstances falling within Article

3 of the European Convention. Although as a stopgap measure, the present approach may have some superficial appeal, as the analyses of Rogers and the Northern Irish Office of Law Reform suggest, it is hardly a foolproof method. Indeed, arguably the government's assertion that this approach satisfactorily reconciles the current law with the European Convention is fundamentally flawed. Moreover, the Committee of Ministers of the Council of Europe is not yet satisfied that this is an appropriate response to *A v United Kingdom*.<sup>45</sup>

## IV Mounting pressure for change

Calls for reform of the law in this area have been increasingly vocal over the last few years, gathering momentum and support. Both international and national pressure is being exerted on the government. Many legal commentators note that removal of the defence of reasonable chastisement and/or outlawing physical chastisement of children is essential to bring English, and indeed Scots, law into conformity with international obligations.<sup>46</sup>

### *A International pressure*

From a human rights perspective, the evolution of societal attitudes towards corporal punishment of children reflects the evolution of international human rights themselves. The *UN Convention on the Rights of the Child 1989*, a comparatively recent treaty, specifically requires that the State takes all appropriate measures to protect the child from all forms of physical or mental violence, injury or abuse.<sup>47</sup> Many other earlier international human rights treaties, however, focus on protecting the individual from the abusive use of power by the State. Nevertheless, in the case of the chastisement of children, the State's obligation has been interpreted as having an element of horizontal effect. Thus, in the context of the European Convention, a State must ensure that (in this instance) criminal law adequately protects individuals from each other by punishing those perpetrating treatment which violates the European Convention.<sup>48</sup> Through developing the positive obligation on States and the human rights' standard, treaty-monitoring bodies have inferred a prohibition on corporal punishment. For example, in Europe, the European Committee of Social Rights (European Committee) (which supervises the implementation of the *European Social Charter*) opined in an observation on corporal punishment that 'Article 17 requires a prohibition in legislation against any form of violence against children, whether at school, in other institutions, in their home or elsewhere'.<sup>49</sup> The lack of such a prohibition in, inter alia, the UK was viewed critically in recent reports - the European Committee requested further information on the government's intentions and the position pertaining in Scotland and Northern Ireland. The Committee took account of the work of the UN Committee on the Rights of the Child, which had commented on the subject in many of its concluding observations. Indeed, when responding to the UK's two periodic reports, the UN Committee on the Rights of the Child has criticised the reasonable chastisement defence. Most recently in 2002, the UN Committee recommended that 'with urgency' the UK should adopt legislation throughout its jurisdictions to 'remove the "reasonable chastisement" defence and prohibit all corporal punishment in the family and in any other contexts not covered by existing legislation'.<sup>50</sup> If the government wishes to avoid further international criticism, additional change will be required before the third periodic report is submitted.

Other instruments are also relevant. The *International Covenant on Civil and Political Rights 1966* has been interpreted to prohibit excessive corporal punishment, the salient provision prohibiting torture and cruel treatment or punishment of children and pupils.<sup>51</sup> There is, however, little to suggest that an outright ban is advocated by the Human Rights Committee (the covenant's principal monitoring body). In contrast, the Committee on Economic, Social and Cultural Rights, which oversees the *International Covenant on Economic, Social and Cultural Rights 1966*, has drawn support for such a prohibition from the basic principles of the dignity of the individual which underpin all such instruments. In its concluding observations on the latest report of the UK, the committee recommended that 'the physical punishment of children in families be prohibited'.<sup>52</sup>

International pressure mounts as ever more States enact criminal legislation prohibiting all physical

chastisement. Within Europe, and indeed further afield, many countries now proscribe physical chastisement of children. Sweden led the way in 1979 (the International Year of the Child), enacting a prohibition on physical punishment of children. The other Nordic States followed suit in the 1980s (Finland, Denmark and Norway), with the relevant Icelandic law entering into force in November 2003. Germany, Latvia, Cyprus, Austria and Croatia have also enacted prohibitions. Yet more States have developed the defence of reasonable chastisement and/or existing criminal law through legislation and/or jurisprudence, while other States have conducted, or are in the process of undertaking, consultations on corporal punishment.

A key element in the successful implementation of restrictions on physical chastisement of children has been comprehensive education programmes. Many countries which have not yet proscribed the physical chastisement of children have successfully effected attitudinal change<sup>53</sup> which, in itself, must be regarded as a positive step as well as a potential precursor to legislation. The trend towards abolition of corporal punishment reflects the work of international and regional human rights monitoring bodies promulgating progressive changes in national laws.

### ***B National pressure***

Alongside emergent international pressure, the UK Government is facing growing national pressure. Recent reports of the Parliamentary Joint Committee on Human Rights and the House of Commons Health Committee advocated abolition of the defence of reasonable chastisement. These reports contrast starkly with the government's own view that an outright ban on parental chastisement would be unacceptable.<sup>54</sup> The Joint Committee on Human Rights reviewed the UN Convention on the Rights of the Child 1989, the reports of the UK to the UN Committee on the Rights of the Child and that committee's concluding observations thereon.<sup>55</sup> Given that two successive concluding observations of the UN Committee had highlighted the problems inherent in the application of the reasonable chastisement defence, the Joint Committee was bound to consider the matter in detail. It noted that imprecision in 'reasonable chastisement' and its very retention have been condemned by the UN Committee on the Rights of the Child, while the government has consistently maintained that application of the existing law is sufficient to combat child abuse. A number of examples of 'improper' use of the reasonable chastisement defence were highlighted by the Joint Committee,<sup>56</sup> as was the potential link<sup>57</sup> between chastisement and abuse (through a gradual escalation of violence). Having considered considerable evidence from interested parties, the Joint Committee concluded that 'the lack of respect [the defence of reasonable chastisement] embodies for children's entitlement to be free from physical assault [is] unacceptable'.<sup>58</sup> It therefore recommended that the government review its obligations under the Convention in order to bring practice into line therewith.<sup>59</sup>

Meanwhile, the House of Commons Health Committee<sup>60</sup> was contemporaneously considering the report of the Victoria Climbié inquiry.<sup>61</sup> The Committee noted that '[w]hat happened to Victoria involved the apparent escalation of discipline and punishment', and urged the government to use its forthcoming Green Paper on children at risk to 'remove the increasingly anomalous reasonable chastisement defence from parents and carers in order to fully protect children from injury and death'.<sup>62</sup> Regrettably *Every Child Matters*, the government's Green Paper response to the Climbié inquiry, was published in September 2003,<sup>63</sup> with no mention of the reasonable chastisement defence. Nevertheless, the focus on children's services and the mechanics of system protection heralds a major shake up of child protection provision in England and it is not possible to predict what amendments may yet be made to the new Children Bill.<sup>64</sup>

Given the alleged human rights based foreign policy agenda advocated by the government<sup>65</sup> and the allegedly moral stand adopted on many global issues, such inaction is remarkable. The fact that two prominent parliamentary committees recently derided the status quo is not something which should be ignored by the government. Given the growing support for reform of the law, it should perhaps reconsider its options, but, as discussed below, the government may consider there to be good political reasons for not altering the status quo.

### **V Additional policy factors**

While international human rights bodies favour the abolition of corporal punishment, there are clearly a number of factors influencing national policy and law. In the first place, the government is wary of courting public disapproval. In its *Analysis of Responses*, the government stated 'we do not believe that any further change to the law at this time would command widespread public support or ... be capable of consistent enforcement'.<sup>66</sup> Lack of popular support may be attributable to the government's failure to educate parents over alternative forms of punishment. Undoubtedly public attitudes towards corporal punishment of children have evolved in recent years,<sup>67</sup> which should have encouraged a more positive governmental response. Public opinion responds to information programmes; thus clearly some sort of education strategy is an essential prerequisite to any reform of the law. The Irish Law Commission highlighted the role of education in its 1994 report on the subject. Following the Swedish model, it advocated a programme of re-education in support of non-physical forms of discipline as a preliminary step towards abolition of parental rights of corporal punishment.<sup>68</sup> The UN Committee on the Rights of the Child recommended that the UK 'promote positive, participatory and non-violent forms of discipline ... and carry out public education programmes on the negative consequences of corporal punishment'.<sup>69</sup> A comprehensive, near saturation education programme eased the introduction of the Swedish legislation prohibiting corporal punishment and other humiliating treatment, the world's first such initiative, in 1979.<sup>70</sup> Indeed the Swedish initiative was primarily intended to be educational rather than punitive.<sup>71</sup> Explanatory leaflets were delivered to all households, a series of advertisements were broadcast on television and even milk cartons were emblazoned with supporting information. Aided by the high literacy rate and progressive nature of Swedish society, the new law can be judged a success: in the last 20 years, Sweden has witnessed few prosecutions for child chastisement and improved abuse statistics.<sup>72</sup> That the message was conveyed lucidly and explained in detail is surely a contributing factor.<sup>73</sup>

There is clearly also a precedent for advertising designed to influence public attitudes in the UK. The HIV/AIDS advertisements of the 1980s and the ongoing anti-smoking campaign are two examples. Within Scotland, the Health Education Board funds an even higher proportion of advertisements.<sup>74</sup> More generally, organisations such as Save the Children, Children First and the single issue non-government organisation amalgamation, Children are Unbeatable, have produced an array of literature aimed at informing and shaping public opinion. An education programme is an essential, yet feasible, pre-requisite to a successful change in the law.

Amongst other factors, the government clearly fears a spate of frivolous prosecutions; these would obviously exacerbate public disapproval. As is acknowledged in many responses to the consultation documents and other sources, any reform of the law must take into account the right of parents physically to *restrain* children in certain situations, for example to prevent them harming themselves.<sup>75</sup> Obviously, such restraint should not ipso facto be prosecuted as an assault, if the force used had been confined to what was strictly necessary in the circumstances. Significantly, the common law defence existed originally to enable parents and other carers to discharge their protective duties without fear of legal challenge. On this point, the Joint Committee on Human Rights noted that in the event of any wholesale repeal of the reasonable chastisement defence, '[I]t would then be necessary to rely on current prosecution policy ... to ensure that mild smacks of children, like minor assaults on adults, would not be prosecuted'.<sup>76</sup> However, the government, in its consultation paper, noted that 'there could be no guarantee that there would not be charges of assault brought in relation to minor cases'.<sup>77</sup> Obviously the decision as to whether to bring a prosecution will rest with the Crown Prosecution Service, as is already the case for other prosecutions, with the facts as presented being the determining factor. Perhaps some safeguards could be incorporated from other successful models. For example, the Swedish education model includes information on circumstances in which children can be restrained without recourse to prosecution.<sup>78</sup>

The government might also be influenced by the difficulties experienced by those seeking to reform the law in Scotland. The Scottish Parliament (before its 2003 pre-election dissolution) considered a Bill limiting the defence of reasonable chastisement and removing its use for children under three completely. Such a proposal was controversial and, indeed, highly problematic. The proposed clause drew on the work of the Scottish Law Commission<sup>79</sup> which had recommended removing from the ambit of the defence striking a child 'with a stick, belt or other object; or ... in such a way as to cause, or to risk causing, injury; or ... in such a way as to cause, or to risk causing, pain or discomfort lasting more than a very short time'.<sup>80</sup> Even more controversial was the age proposal: the country was polarised on whether to outlaw physical chastisement of



very young children. The uncertainty of the parameters between appropriate restraint and inappropriate punishment caused concern, with proponents arguing strongly in support of 'loving smacks', controlled and limited physical punishment. It was also feared that the Scottish proposals might also cause problems at the other end of the age spectrum. For example, the behaviour of a father physically punishing a 15-year-old daughter, or a mother her son, might be sufficiently degrading to contravene Article 3 of the European Convention.<sup>81</sup> Eventually the clause removing the defence from those chastising children under 3 years of age was withdrawn from the Bill, thereby facilitating swift enactment of its remainder.<sup>82</sup> Section 51 of the *Criminal Justice (Scotland) Act 2003* retains the proposed limitations on the defence: a series of factors which a court must have regard to when determining whether chastisement is reasonable and a list of circumstances in which the defence is not applicable. The former<sup>83</sup> reflects the judgment of the European Court in *A v UK*. The latter specifies that a justifiable assault will not include a blow to the head, shaking or the use of an implement.<sup>84</sup>

Admittedly the English courts, in reliance on section 3 of the HRA 1998 could equally well follow the new Scottish approach. However, an anomalous situation has clearly been created, whereby Scotland has enacted a compromise between abolition and recourse to the maturing common law. While not ensuring compliance with the UN Convention on the Rights of the Child 1989, when taken in conjunction with the HRA 1998, it signifies a positive step towards securing compliance with the European Convention and demonstrates a willingness to embrace the recommendations of the UN Committee on the Rights of the Child and respond overtly to *A v United Kingdom*. England, on the other hand, seems to be content with a fingers-crossed, wait-and-see attitude, 'delegating' discharge of its international duties to the courts and juries. This contrast between the two legal jurisdictions is likely to be highlighted by the UN Committee on the Rights of the Child. Perhaps more importantly, the Scottish Executive demonstrated that legislative change is feasible and not political suicide. Despite the Bill being enacted shortly before the Scottish Parliament was dissolved, the Labour party was returned to power in May 2003. Given that the UK is legally obliged to disseminate reports of the UN Committee on the Rights of the Child,<sup>85</sup> surely repeated public condemnations by the UN, and potentially the European Court, could be as damaging to the government as public disapproval.

Finally, international pressure will continue to grow. The maintenance of the reasonable chastisement defence in Canada was recently upheld by a majority decision by the Supreme Court, although there were strong dissenting opinions.<sup>86</sup> As further countries elect to enact legislation severely curtailing the right of parents to physically chastise their children, international human rights bodies will continue to promote proscription as the only option guaranteeing respect for the dignity of the child.

## VI Conclusions

Clearly the status quo is unsatisfactory in terms of pre-existing public international law. As noted above, the risk of spurious prosecutions and the apparent lack of public support are not insurmountable. A comprehensive education programme would pave the way for a change in the law. Alongside detailed guidelines issued to the prosecuting authorities in a transparent process, opposition to changes in the law might become more muted. The situation is ameliorated at present by the HRA 1998, and the provisions of the *Criminal Justice (Scotland) Act 2003* mentioned above. However, there are limits to the powers of the courts and prosecuting authorities. Under the constitutional machinery of the UK, it is for Parliament and Parliament alone to legislate for restrictions on, or abolition of, corporal punishment.<sup>87</sup> Therein lies the real problem. In reality, the major stumbling block encountered is government policy. As Fortin notes, the 'pusillanimous official approach continues to mar the government's present position on the use of physical punishment on children'.<sup>88</sup> Nothing in the Green Paper suggests an altered stance. In the current political climate more emphatic measures seem ever less likely.

Children remain 'society's smallest and least powerful members',<sup>89</sup> and inherently vulnerable. That the greatest legitimate threat to their physical well-being comes from within the family unit, from their primary carers, must surely be a matter for concern. Children certainly need protection but they also need discipline, albeit within the limits prescribed by international and regional instruments. The international community

requires that society gives children the best it has to give. Within England, the government response to date falls considerably short of this.

## VII Postscript

Prior to this article going to print, there were mounting calls for the Children Bill to contain a provision reforming the law on the physical chastisement of children. These were heeded and Lord Lester's amendment of the Bill was accepted in the House of Lords, in the form of clause 49. The clause provides that for certain statutory offences, such as actual bodily harm, the battery of a child cannot be justified as reasonable punishment. The clause's terms are opposed by many on the basis that by removing the legal defence of 'reasonably chastisement' only in relation to certain forms of assault, English law will still condone the physical punishment of children. Furthermore, the absence of any clear prohibition may send confused messages about the state of the law to parents.

The Children Bill emerged from its second reading in the House of Lords in September 2004 with clause 49 intact. Shortly thereafter, the Joint Committee on Human Rights, published a critical report on the Bill's compliance with human rights' norms (HL 161/HC 537). While the Committee acknowledged that the clause is compatible with Convention rights (para 137), it highlights that the European Court is subtly evolving its approach, thus eventually 'the continued availability of the defence of reasonable chastisement may be held to be incompatible with Convention rights' (para 141). The Committee also stated that the clause is not compatible with a contemporary application of the UN Convention on the Rights of the Child, the *International Covenant on Economic, Social and Cultural Rights* or the European Social Charter. It concluded by recommending amendment of the clause and abolition of the reasonable chastisement defence (paras 176-177). It remains to be seen whether the House of Commons will elect to bring children's rights in England into line with international human rights.

<sup>1</sup> *Every Child Matters*, Cm 5860 (2003).

<sup>2</sup> *Offences Against the Person Act 1861*, s 47.

<sup>3</sup> *R v Hopley* (1860) 2 F & F 202; see also the *Children and Young Persons Act 1933*, s 1(7).

<sup>4</sup> Erskine, Institute, I vi 53.

<sup>5</sup> *B v Harris* (1989) SC 278; *G v Templeton* (1998) SCLR 180.

<sup>6</sup> See n 3 above.

<sup>7</sup> *Ibid*, at p 206.

<sup>8</sup> Law Commission, *Consent in the Criminal Law*, Law Com No 139 (HMSO, 1995), Part XI, Lawful Correction, at para 11.19.

<sup>9</sup> See n 3 above, at p 206.

<sup>10</sup> (1979-80) 2 EHRR 1.

<sup>11</sup> *Ibid*, at para 33.

12 (1982) 4 EHRR 293.

13 A split leather belt used to rap the proffered hands of offenders.

14 Similar legislation gradually prohibited such punishment in Scottish schools: *Education (No 2) Act 1986*, s 48; *Education Act 1993*, s 295; *Standards in Scotland's Schools etc (Scotland) Act 2000*, ss 13 and 16.

15 (1996) 19 EHRR 112.

16 See now *Education Act 1996*, ss 548-549, as inserted by s 131 of the *School Standards and Framework Act 1998*.

17 The *Child Minding and Day Care (Wales) Regulations 2002 (SI 2002/812 (W92))*, reg 10(5).

18 The *Day Care and Child Minding (National Standards) (England) Regulations 2003 (SI 2003/1996)*, reg 5. For the relevant provision in Scotland, see the *Regulation of Care (Requirements as to Care Services) (Scotland) Regulations 2002 (SI 2002/114)*, reg 4(3).

19 The Secretary of State considered that any decision to remove parentally condoned chastisement would signify the first steps down an inevitable path towards abolition of corporal punishment within England.

20 (1999) 27 EHRR 611.

21 *Ibid*, at para 20.

22 Note, however, that the European Commission dismissed an application regarding such a complete ban, principally because the relevant provisions of Swedish law did not attract punitive criminal sanctions. (Application No 8811/79) (unreported) 13 May 1982.

23 Department of Health, *Protecting Children, Supporting Parents - A Consultation Document on the Physical Punishment of Children* (TSO, 2000).

24 *Ibid*, at 5.1-5.4.

25 *Ibid*.

26 *Ibid*, at 2.4.

27 *Ibid*, at 5.6-5.7.

28 *Ibid*, at 5.8-5.10.

29 *Ibid*, at 5.11-5.16.

30 *The Physical Punishment of Children in Scotland: A Consultation* (Scottish Executive Justice Department, 2000) and *Physical punishment in the home - thinking about the issues, looking at the evidence* (Northern Ireland Office of Law Reform, 2001).

31 *Ibid*, at p 45.

- 32 See n 20 above, at 1.4.
- 33 See n 23 above, at 1.5.
- 34 *Analysis of Responses to the Protecting Children, Supporting Parents Consultation Document* (2001) which is still available online at <http://www/dh.uk/assetRoot/04/06/72/05/04067205.pdf>, checked 5 May 2004), at para 73.
- 35 Ibid, at para 50.
- 36 Ibid, at para 69.
- 37 Ibid, at para 70.
- 38 [2001] 2 FLR 431.
- 39 Ie the jury should be directed to consider whether the chastisement infringed the child's rights under Art 3 of the European Convention in the light of his age, health and size, the nature and duration of the punishment and the lasting physical or psychological effect.
- 40 See n 38 above, at para [35]. Appropriate criteria are considered at paras [31] and [33].
- 41 Op cit, n 30, at pp 40-41.
- 42 See n 20 above.
- 43 J. Rogers, 'A Criminal Lawyer's Response to Chastisement in the European Court of Human Rights' [2002] *Criminal Law Review* 98, at pp 112-113.
- 44 The European Convention is a 'living instrument', its standards evolve over time. As the Office of Law Reform in Northern Ireland commented in its consultation paper on the issue, *R v H* may not satisfy the standards of the European Convention indefinitely - op cit, n 30, at p 41.
- 45 See, for example, Council of Europe Doc CM/Del/Dec(2003)854 (7 November 2003), Item H54-1121, when it was decided to resume consideration of the matter at the December meeting after receiving information from the UK concerning the 'general measures proposed in order to prevent new, similar violations'.
- 46 See, for example, G. Van Beuren, *The International Law on the Rights of the Child* (Kluwer, 1995); J. Fortin, *Children's Rights and the Developing Law* (Butterworths, 2nd edn, 2003); A. Cleland and E. Sutherland, *Children's Rights in Scotland* (W. Green, 2nd edn, 2001); E. Sutherland, *Child and Family Law* (T. & T. Clark, 1999); P. Spink and S. Spink, 'What is reasonable chastisement?' (1999) 44 (6) JLSS 26; C. Barton, 'It's OK to belt your kids' [1992] NLJ 1262.
- 47 UN Convention on the Rights of the Child 1989, Art 19.
- 48 As the European Commission noted in *A v UK* the obligation on the State under Art 1 of the European Convention 'cannot be interpreted as requiring the State to guarantee through its legal system that inhuman or degrading treatment is never inflicted by one individual on another', rather it demands that the State be held responsible if national law 'fails to provide practical and effective protection of the rights guaranteed by Article 3'; see n 20 above, at para 48.
- 49 Council of Europe European Committee of Social Rights, Conclusions XV-2, Vol 1 (2001).
- 50 *Concluding Observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern*

Ireland UN Doc. CRC/C/15/Add.188 (4 October 2002), at para 36(a).

51 Human Rights Committee, *General Comment 20*, UN Doc A/47/40 (1992), 193, at para 5.

52 *Concluding Observations of the Committee on Economic, Social and Cultural Rights: United Kingdom of Great Britain and Northern Ireland*, UN Doc E/C.12/1/Add.79, at para 36. This paragraph cross-referenced itself to the recommendations directed to the UK by the Committee on the Rights of the Child in 1995.

53 In Australia, change is occurring progressively across the states and territories, for example, in New South Wales, the use of force is now limited by law and there is a prohibition on force to the head and neck. A global analysis can be viewed at <http://www.endcorporalpunishment.org/> (checked 5 May 2004).

54 Discussed above.

55 *Tenth Report of the Joint Committee on Human Rights - The UN Convention on the Rights of the Child*, HL Paper 117/ HC 81 (TSO, 2003).

56 *Ibid*, at para 99.

57 Further discussed in the *Sixth Report of the House of Commons Health Committee - The Victoria Climbié Inquiry Report*, HC 570, (TSO, 2003).

58 *Op cit*, n 55, at para 110.

59 *Ibid*, at para 111.

60 *Op cit*, n 57.

61 Victoria Climbié was found to have been murdered by her guardians. She had suffered horrific abuse which went undetected by the relevant government child protection agencies.

62 *Op cit*, n 57, at para 54.

63 *Op cit*, n 1.

64 The Children Bill, HL Bill 35 (2004). See postscript, at p 271.

65 See, for example, UK Foreign and Commonwealth Office, *Human Rights Annual Report 2003*, Cm 5967 (2003).

66 *Op cit*, n 34, at para 76.

67 In Scotland, approximately 57% of respondents supported retention of the reasonable chastisement defence in 1992 (Scottish Law Commission, *Report on Family Law*, Scot Law Com No 135 (1992) at para 2.72). By 2000, only 17% of respondents opposed any change in the law (*The Physical Punishment of Children in Scotland, analysis of responses* (Scottish Executive Justice Department, 2001), at para 1.3). See also S. Anderson, L. Murray and J. Brownlie, *Disciplining Children: Research with Parents in Scotland* (Scottish Executive Central Research Unit, 2002). In 2000, 74% of respondent children considered it wrong that they should be subjected to corporal punishment: E. Cutting, 'It Doesn't Sort Anything!' A report on the views of children and young people about the use of physical punishment (Save the Children Scotland, 2001).

68 Law Reform Commission of Ireland, *Report on Non-Fatal Offences against the Person*, LRC 45-1994, at para 9.214. The subsequent legislation solely abolished the rule of law under which teachers are immune from criminal liability for physical

chastisement of pupils - *Non-fatal Offences Against the Person Act 1997*, s 24.

69 Op cit, n 50, at para 36(b).

70 J. Durrant, *A Generation Without Smacking: The impact of Sweden's ban on physical punishment* (Save the Children UK, 2000).

71 Ibid, at p 6.

72 Ibid, at pp 12-17.

73 Ninety-nine per cent of Swedes knew about the law by 1981 - K.A. Ziegert, 'The Swedish prohibition of corporal punishment: a preliminary report' [1983] *Journal of Marriage and the Family* 45, pp 917-926, cited in J. Durrant, op cit, n 70, at p 8.

74 Alcohol consumption, sexual health, exercise and fitness are targeted issues.

75 See, eg, J. Fortin, 'Children's rights and the use of physical force' [2001] CFLQ 243, at pp 247-250.

76 Op cit, n 55, at para 109.

77 Op cit, n 23, at para 2.14.

78 For example, while children could be restrained, without fear of parental prosecution, if in their own interest, other forms of punishment such as threatening, frightening children or even locking them up would also fall foul of the new law. The relevant Swedish prohibition is found in the civil Swedish parents' code (Föräldrabalken) - it does not attract criminal liability.

79 Op cit, n 67.

80 Ibid, at para 2.105.

81 Age is a relevant factor for assessing infringements of Art 3 of the European Convention, see *A v United Kingdom*, n 20 above.

82 For the Scottish Executive's guide for parents, see <http://www.scotland.gov.uk/library5/justice/cppl-00.asp>.

83 *Criminal Justice (Scotland) Act*, s 51(1).

84 Ibid, at s 51(3), echoing the 1992 Scottish Law Commission proposals.

85 UN Convention on the Rights of the Child 1989, Art 44(6). Other international and regional instruments do not contain a comparable obligation.

86 *Canadian Foundation for Children Youth and the Law v Canada*, File 29113 before Supreme Court of Canada, case heard 6 June 2003, decision 30 January 2004, 2004 SCC 4.

87 As is apparent, under the terms of the devolution agreements, legislative power for criminal matters in Scotland now rests exclusively with the Scottish Parliament.

88 J. Fortin, *op cit*, n 75, at p 244.

89 D. Pollard, 'Banning Corporal Punishment' [2003] *Tulane Law Review* 575, at p 587.