

Why Wales should ban smacking now

International human rights pressure and the Rights of Children and Young Persons (Wales) Measure

'Sdim Curo Plant!
Children are Unbeatable!

The UK Government is under sustained pressure to fulfill its clear human rights obligations to prohibit all physical punishment of children, from United Nations and European human rights monitoring bodies and mechanisms, as detailed below.

Children's right to respect for their human dignity and physical integrity and to equal protection under the law requires the complete removal of the "reasonable punishment" defence. This is fundamental to children's status in society as well as to their well-being, safety and protection. Physical punishment is the only form of inter-personal violence remaining lawful in the UK.

For more than 10 years successive Welsh Governments have been publicly committed to banning physical punishment – in contrast to the continuing resistance of the UK Government. This commitment was reported to the UN Committee on the Rights of the Child in 2007 and acknowledged by the Committee in 2008.

The First Minister confirmed that the National Assembly now has the devolved power to achieve this reform in October 2011. Earlier in 2011 the Assembly unanimously passed the Rights of Children and Young Persons (Wales) Measure, placing formal duties on Welsh Ministers to respect children's rights.

The Welsh Government's commitment to children's rights and the Rights of Children and Young Persons (Wales) Measure 2011

The current and previous Welsh governments have expressed their full commitment to rights-based policy-making, with a particular commitment to children's rights. A Ministerial Foreword to the Children's Rights Scheme, adopted by the National Assembly on March 27 2012, states:

"Being the first administration in the UK to enshrine the UNCRC in domestic law, the Rights of Children and Young Persons (Wales) Measure 2011 is an example of how we as Ministers are committed to putting the rights of children and young people at the heart of all that we do.

"The Measure places a duty on us as Ministers to have due regard to the UNCRC, and we are responsible for making sure that it is complied with. The law does not allow us to pass our responsibility on to someone else, such as our staff. We have clearly stated in our Manifesto our commitment to ensure that the Measure is given

full effect in government policies and programmes throughout the course of this administration...

“Our aim is to achieve a culture in the Welsh Government where there is a full appreciation of children’s rights, and that we consciously consider them in all our work.”

The Rights of Children and Young Persons (Wales) Measure 2011 received unanimous cross-party support when it was passed by the National Assembly on 18 January 2011; it came into force on 16 May 2011. Thus Wales became first in the UK to incorporate into its legislation direct obligations to give “due regard” to the Convention on the Rights of the Child in developing legislation and policy.¹

From May 2012, Welsh Ministers have been required to have “due regard” to the CRC when making any decision concerning:

- “(a) provision proposed to be included in an enactment;
- (b) formulation of a new policy;
- (c) a review of or change to an existing policy.”

In setting out the arrangements they have adopted for complying with their duty under the Rights Measure, Welsh Ministers are required to have regard to reports of the Committee on the Rights of the Child and also (under section 3(1)(a) of the Measure) to reports of studies undertaken under article 45 (c) of the CRC.

Thus Welsh Ministers are required to take account of the clear and consistent interpretation of the CRC by the Committee on the Rights of the Child - that compliance requires immediate removal of the “reasonable punishment” defence, effectively prohibiting physical punishment.

They must also have regard to the report of the UN Secretary General’s Study on violence against children, which was requested by the Committee under article 45(c). The Study reported to the UN General Assembly in 2006; a key recommendation was prohibition of all forms of violence against children, explicitly including all corporal punishment.

This briefing details the human rights pressure to achieve equal protection for children now.

UN Committee on the Rights of the Child

The **Committee on the Rights of the Child** has told the UK that it should remove the “reasonable punishment” defence three times, in 1995, 2002 and 2008. In addition the Committee’s General Comment No. 8, on the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment, emphasises that a ban is “an immediate and unqualified obligation of States parties.” Two other General Comments –

¹ Rights of Children and Young Persons (Wales) Measure, 2011, section 1

authoritative statements of the Committee's interpretation of states' obligations under the CRC – have drawn attention to the need to prohibit and eliminate physical punishment (General Comments No. 13 on the child's right to freedom from all forms of violence (2011) and No. 15, on the child's right to health (2013)).

In 2002, in its concluding observations following examination of the UK's report, the Committee stated:

“The Committee is of the opinion that the Government's proposals to limit rather than to remove the ‘reasonable chastisement’ defence do not comply with the principles and provisions of the Convention and the aforementioned recommendations, particularly since they constitute a serious violation of the dignity of the child (see similar observations of the of the Committee on Economic, Social and Cultural Rights, E/C.12/1/Add.79, para. 36). Moreover, they suggest that some forms of corporal punishment are acceptable, thereby undermining educational measures to promote positive and non-violent discipline.”²

In its 2008 concluding observations, the Committee stated:

“The Committee, while noting amendments to legislation in England, Wales, Scotland and Northern Ireland which restrict the application of the defence of ‘reasonable chastisement’, is concerned that this defence has not been removed. **The Committee welcomes the commitment of the National Assembly in Wales to prohibiting all corporal punishment in the home, but notes that under the terms of devolution it is not possible for the Assembly to enact the necessary legislation [our emphasis].** The Committee is concerned at the failure of the State party to explicitly prohibit all corporal punishment in the home and emphasises its view that the existence of any defence in cases of corporal punishment of children does not comply with the principles and provisions of the Convention, since it would suggest that some forms of corporal punishment are acceptable.”³

Other international and European human rights pressure

Other UN human rights Treaty Bodies have echoed the Committee on the Rights of the Child in recommending prohibition:

- The **Committee on Economic, Social and Cultural Rights**: twice, in 2002 and 2009. In 2002 it made its recommendation in the light of “the principle of the dignity of the individual, which provides the foundation for international human rights law...”. The Committee repeated its recommendation in 2009.⁴

² Committee on the Rights of the Child, concluding observations on the UK's second report, 9 October 2002, CRC/C/15/Add.188

³ Committee on the Rights of the Child, concluding observations on the UK's third and fourth report, 3 October 2008, CRC/C/GBR/CO/4

⁴ Committee on Economic, Social and Cultural Rights, concluding observations on the UK's fourth report under the International Covenant, 5 June 2002, E/C.12/1/Add.79; also see, E/C.12/GBR/CO/5, 22 May 2009

- The **Committee on the Elimination of Discrimination against Women**: twice, in 2008 and 2013. In 2008 it stated: "... The Committee also notes with concern that corporal punishment is lawful in the home and constitutes a form of violence against children, including the girl child".⁵ In 2013 it repeated its concern and added "... Recalling its general recommendation No. 19 (1992) on violence against women, and its previous recommendation, the Committee urges the State party to: ...e) revise its legislation to prohibit corporal punishment of children in the home."⁶
- Most recently, the **Committee against Torture**, in its concluding observations on the UK's fifth report under the Convention against torture, stated that it remained concerned "that some forms of corporal punishment are still legally permissible in the home for parents and those in loco parentis...The Committee recommends that the State party prohibits corporal punishment of children in all settings in Metropolitan territory, Crown Dependencies and Overseas Territories, repealing all legal defences currently in place, and further promote positive non-violent forms of discipline via public campaigns as an alternative to corporal punishment".⁷

In examination of the UK in the first and second cycles of the **Universal Periodic Review at the Human Rights Council**, there have also been repeated recommendations from other states that the UK should prohibit all physical punishment (2008 and 2012).

Within Europe, in 2005 and again in 2012, the **European Committee of Social Rights**, reviewing compliance with the European Social Charter, found that the UK was in breach because it had not prohibited all corporal punishment in the family. In 2008, the **Commissioner for Human Rights of the Council of Europe**, following his visits to the UK in February and March/April 2008, stated in a formal Memorandum to the UK Government that laws allowing "reasonable punishments" on children are not compliant with international human rights standards. "That children, uniquely, should have *less* protection under the criminal law from assault is additionally discriminatory and unimaginable, given children's obvious special vulnerability."⁸

Also in 2008, the **Council of Europe** launched a Europe-wide campaign for prohibition of all physical punishment and the promotion of positive non-violent parenting in its 47 member states, seeking to achieve "a continent free of corporal punishment".⁹ This had been the recommendation of the Parliamentary Assembly of the Council of Europe in 2004: "The Assembly considers that any corporal punishment of children is in breach of their fundamental rights to human dignity and physical integrity. The fact that such corporal punishment is still lawful in certain member states violates their equally fundamental right to the same legal protection as adults. Striking a human being is prohibited in European society and children are

⁵ Committee on the Elimination of Discrimination against Women, concluding observations on the UK's fifth/sixth report under CEDAW, 18 July 2008, *CEDAW/C/GBR/CO/6*

⁶ Committee on the Elimination of Discrimination against Women, concluding observations on the UK's seventh report under CEDAW, 26 July 2013, *CEDAW/C/GBR/CO/7* Advance Unedited Version, paras. 34 and 35

⁷ Committee Against Torture, Concluding observations on the fifth periodic report of the United Kingdom, adopted by the committee at its fiftieth session, 6-31 May 2013, 31 May 2013

⁸ Memorandum by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visits to the United Kingdom, 5-8 February and 31 March-2 April 2008, CommDH(2008)28, Strasbourg, 9 October 2008

⁹ See http://www.coe.int/t/dg3/corporalpunishment/default_en.asp

human beings. The social and legal acceptance of corporal punishment of children must be ended.”¹⁰

The **European Court of Human Rights** has progressively condemned corporal punishment of children, in a series of judgments against the UK since the 1970s.¹¹ In 1998 the Court ruled in the first case concerning parental corporal punishment, *A v UK*, that a nine year-old boy had suffered a violation of his rights under Article 3 of the European Convention on Human Rights (protection from inhuman and degrading punishment). A British jury had acquitted his stepfather, who had beaten him severely with a cane; the stepfather had been charged with causing “actual bodily harm”, but used the defence of “reasonable chastisement”.¹²

As a result of this case, the Government was required to end use of the defence by those charged with actual bodily harm and more severe assaults. Thus the revised defence of “reasonable punishment” was introduced for England and Wales, through Section 58 of the Children Act 2004. Under this legislation, parents and some others can still justify common assault as “reasonable punishment”. The Committee of Ministers of the Council of Europe had been supervising the execution of the *A v UK* judgment by the UK Government since 1998. It took 10 years, to 2008, before the Committee accepted that, given the particular circumstances of this very severe case of physical punishment, the UK’s action was adequate. The Court is limited to considering the particular circumstances of cases brought before it.

The UN Secretary General’s Study on Violence against Children

The Committee on the Rights of the Child requested the UN Secretary General to carry out a comprehensive study on violence against children in 2001, using its powers under Article 45(c) of the CRC. The 2006 report of the **UN Secretary-General’s Study on Violence against Children** calls on all countries to prohibit all violence against children, explicitly including all corporal punishment, as a matter of priority.¹³

Professor Paulo Sérgio Pinheiro, the Independent Expert appointed by the UN Secretary-General to lead the Study, wrote:

“The Study should mark a turning point – an end to adult justification of violence against children, whether accepted as ‘tradition’ or disguised as ‘discipline’. There can be no compromise in challenging violence against children. Children’s uniqueness – their potential and vulnerability, their dependence on adults – makes it imperative that they have more, not less, protection.”

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For further information contact cau@childreninwales.org.uk or dimtarocymru@gmail.com

¹⁰ Recommendation 1666/2004 Parliamentary Assembly of the Council of Europe.

¹¹ Council of Europe *Eliminating corporal punishment: a human rights imperative for Europe’s children* 2008

¹² *A v United Kingdom*, No. 25599/94, judgement September 23 1998

¹³ Report of the Independent Expert for the United Nations Study on Violence against Children, Paulo Sérgio Pinheiro, A/61/299, paras. 97 and 116; see www.unsvac.org