

## Justice Committee

### Criminal Justice (Scotland) Bill

#### Written submission from Children Are Unbeatable! Scotland

*The Scottish Government is committed to a challenging modernising agenda to ensure our justice system is as efficient and effective as possible in meeting the needs of a modern and progressive country and to ensure that Scottish criminal law and practice is compliant with the European Convention on Human Rights (“the ECHR”) and able to withstand challenges on Convention grounds... The Criminal Justice (Scotland) Bill is the legislative vehicle to take forward the next stage of essential reforms to the Scottish criminal justice system to enhance efficiency and bring the appropriate balance to the justice system so that rights are protected whilst ensuring effective access to justice for victims of crime<sup>i</sup>.*

Children are unbeatable! (CAU) Scotland agrees that the Bill should serve this purpose but there is a significant omission: the Bill fails to give children the same protection from assault as adults.

Children are unbeatable! (CAU) Scotland is an alliance of individuals and organisations opposing the use of corporal punishment in the home and is campaigning to ensure that children enjoy equal protection from assault, under the law, as adults.

Adults hitting children is a human rights issue. It is out of date, out of sync with the majority of countries in Europe<sup>ii</sup> and delivers a harmful message that hitting is a way to solve problems. The current law in Scotland is confusing and undermines our ability to protect children from harm. By removing the current legal ambiguity about what constitutes physical harm to a child we can keep all children safe and respect their human rights.

In the work of our member organisations such as ParentLine Scotland, which is a free helpline and email service for anyone with a concern about a child, and professionals such as doctors we are in touch with real life experiences and the harm caused by violence. So in addition to the need for legal reform, the ethos underpinning our campaign is:

- Discipline is a critical element of parenting but smacking is not an effective or constructive way of dealing with a child’s bad behaviour
- We want to support parents to use other methods to teach their children the difference between right and wrong
- We know that nurture in the early years is a key priority for Scottish Government<sup>iii</sup> and we believe that equal protection will help to achieve this.

#### Justifiable assault

It is ten years since the Scottish Parliament passed the Criminal Justice (Scotland) Act 2003 which introduced, in Section 51, a defence for adults of ‘justifiable’ assault<sup>iv</sup> when they hit children as a punishment, and sought to prohibit the use of

implements, blows to the head and shaking<sup>v</sup>. Despite promises to mount a public information campaign and to monitor the use of the law, there has been little activity on this matter in the last ten years.

Section 51 undermines the Scottish Government's ambition for 'Scotland to be the best place in the world for children to grow up'. That ambition is unrealistic as long as the law justifies the assault of children and they are treated differently in law and in practice from adults. As it was the Criminal Justice (Scotland) Act 2003 that justified this defence, we feel that this Criminal Justice Bill is an appropriate vehicle to remove this defence. Simple legal reform will send a clear message that hitting children is as unacceptable and unlawful as hitting anyone else. CAU is concerned that there is no evidence that the law is working effectively which is another reason to listen to the UN and take action now. There would be no financial cost involved in the removal of section 51.

The existence of Section 51 for ten years contradicts other policies. Although it supports 'tough action to punish those who break the law and invests in work to tackle the causes of violence'<sup>vi</sup>, it refuses to change the law on hitting children. In practice there is a real potential for conflict as the oath of Scotland's new National Police Force, operational since 1st April 2013, states "I, do solemnly, sincerely and truly declare and affirm that I will faithfully discharge the duties of the office of constable with fairness, integrity, diligence and impartiality, and that I will uphold fundamental human rights and accord equal respect to all people, according to law."<sup>vii</sup>

In the Scottish Government's recent response to the Universal Periodic Review it was stated that "*that the existing law provides the right protection of children and young people*" and that there are "*no plans to change this approach*". However the description given of the existing law was incorrect, stating that "*it is already illegal to punish children by shaking or hitting them.*"<sup>viii</sup> Although S51 of the Criminal Justice (Scotland) Act 2003 prohibits the administration of blows to a child's head, the shaking of a child and the use of an implement in the chastisement of a child, it does not make it illegal to punish children by hitting them. This emphasises the confusion caused by the complexities of the current law.

We believe that children need and deserve at least equal protection in all circumstances as adults. In this particular situation children do not currently have even equal protection to adults.

It is now time that the law on hitting children is consistent with international human rights law.

### Positive parenting

We welcome the Scottish Government's commitment to supporting alternative ways for parents to raise children, including positive parenting<sup>ix</sup>. We would, however, like to see this translate into a more meaningful commitment. Along with the removal of the defence of justifiable assault we would like to see reporting requirements on local authorities, to see what they have done to promote positive parenting in their area, and a concurrent evaluation of the impact of this.

We welcome the new section 51, and would expect the police and other relevant agencies to take the best interests of the child into account when deciding whether to prosecute a parent who has hit their child. We feel strongly that a removal of the defence of justifiable assault should not lead to disproportionate responses or parents unnecessarily being criminalised. We are, however, very clear that in cases where there is criminal injury we do support criminal sanctions. We believe that in cases where no serious injury is inflicted there may still be a need for some form of follow up, and consideration should be given to what these supports and/or sanctions should entail.

### International example

In the European Union, 17 States have achieved full prohibition and a further six are moving towards full prohibition. Just five states have yet to commit to law reform: the UK, Belgium, France, Ireland and Malta. Nineteen countries in Europe now give children equal protection: Austria (1989), Bulgaria (2000), Croatia (1999), Cyprus (1994), Denmark (1997), Finland (1983), Germany (2000), Greece (2006), Hungary (2004), Iceland (2003), Italy (1996 by supreme court ruling), Latvia (1998), Netherlands (2007), Norway (1987), Portugal (2007), Romania (2004), Spain (2007), Sweden (1979) and Ukraine (2004).

The UN has repeatedly recommended that the UK and Scotland change its laws:

- In 2008 when assessing the UK's compliance with the Convention on the Elimination of All Forms of Discrimination against Women, the UN Committee on the Elimination of Discrimination against Women "further recommends that the State party include in its legislation the prohibition of corporal punishment of children in the home." A further Hearing on UK compliance took place in July 2013, and the physical punishment of children was discussed. Concluding observations stated: 'The Committee further recalls its previous concluding observations (A/63/38, paras. 280 and 281) and is concerned that corporal punishment remains lawful in the home. The Committee urges the State party to... Revise its legislation to prohibit corporal punishment of children in the home.'
- In October 2008, the United Nations Committee on the Rights of the Child stated in its concluding observations on the UK: "The Committee is concerned at the failure of 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." In June 2006, the United Nations Committee on the Rights of the Child said that giving children equal protection from assault is "an immediate and unqualified obligation" under the Convention on the Rights of the Child (UNCRC).
- In May 2009, when assessing UK compliance with the UN Convention on Economic, Social and Cultural Rights 'The Committee reiterated its recommendation that physical punishment of children in the home be prohibited by law'.

- In May 2012 the UK's human rights record was examined by the UN Human Rights Council and Sweden, Finland, Norway and Hungary recommended that the UK must ensure the freedom of children from corporal punishment, in accordance with the UNCRC .
- In May 2013, the UN Committee Against Torture examined the UK's, including Scotland's, compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In its Concluding Observations, published on 31st May 2013, the Committee urged prohibition of physical punishment of children by adults: "The Committee takes note of amendments to legislation in England, Wales, Scotland and Northern Ireland, which limit the application of the defence of "reasonable punishment" (or "justifiable assault" in Scotland), but remains concerned that some forms of corporal punishment are still legally permissible in the home for parents and those in loco parentis. In addition, it expresses concern that corporal punishment is lawful in the home, schools and alternative care settings in almost all overseas territories and crown dependencies. 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."

### Conclusion

The case for legal reform has already been successfully made in many countries to change the law on physical punishment. It is extremely disappointing that Scotland has failed to learn from their example. Currently Section 51 of the Criminal Justice (Scotland) Act provides parents/carers with a "justifiable assault" defence if they hit a child as a punishment. It is bizarre that the law should permit and define "justifiable assault" on any human being. CAU urges the committee to consider the issue of physical punishment and the adult defence of 'justifiable assault'. If the opportunity presented by this Bill is not utilised to repeal this defence, Scotland cannot claim to be the best place for children to grow up.

By amending the law and removing this defence, the human rights of children will be respected and protected. Children should have the same legal protection from violence as adults currently enjoy.

## Appendix 1 - Evidence

The extent and use of physical punishment in Scotland is not well understood. The investigation into child abuse and neglect in the Western Isles was published in 2005<sup>x</sup> and is instructive about the use and effect of physical punishment in one home. The Social Work Inspection Agency concluded that "...the children were subjected to physical abuse throughout their childhood until their removal from home. Some of the physical injuries to the children were caused by over-chastisement by Mr A. Once in England and twice in Eilean Siar he admitted at the time to losing his temper and/or causing an injury. In a later statement to police he said: 'I did have a temper...like anybody I became aggressive, shouting and shaking...if I had to smack them I would smack them, but I'm heavy handed ...on the legs...bruising...'

The Report went on to point out: "We recognise that during the period when these physical injuries to the children occurred, common law entitled someone with parental responsibilities and rights relating to a child and someone with care and control of a child to physically punish the child. It entitled parents to use force to discipline their children provided their actions could be justified in court as 'reasonable chastisement'. Section 51 of the Criminal Justice (Scotland) Act 2003 set out to clarify the law relating to the physical punishment of children. The 2003 Act specifically prohibited blows to the head, shaking and the use of an implement."

"However, in all other cases the defence of 'reasonable chastisement' remains and the onus is on the prosecutor to prove that the punishment went beyond this. Mr and Mrs A were, and still would be, legally entitled to physically punish the children and if prosecuted could have claimed a defence of 'reasonable chastisement'. While there is evidence that professionals, particularly in England, did encourage Mr and Mrs A to use more positive methods of discipline, they could not legally prevent them from using physical punishment." (para 80, Ibid)

A study of the ChildLine database by the Centre for Research on Families and Relationships at Edinburgh University found alarming levels of violence reported in calls from children suffering physical abuse. Children tell of physical assaults that are frequent, brutal and sadistic. Whilst they use many terms to describe the nature of their abuse including smacking, slapping and hitting, they more commonly discuss it in terms of 'being battered', 'beaten', 'hammered', 'punched', 'kicked' and so on. Children often talk about having marks, bruises and abrasions after assaults and some children talk about being kept off school until their bruises are healed.

Children subjected to corporal punishment have been shown to be more likely than others to be aggressive to siblings; to bully other children at school; to take part in aggressively anti-social behaviour in adolescence; to be violent to their spouses and their own children and to commit violent crimes<sup>xi</sup>.

Children and parents alike tell us that they do not like physical punishment, and that it doesn't work<sup>xii</sup>. The intention of law change would not be to criminalise parents, but to help them understand that physical punishment is unacceptable. In conjunction with this law change we would want to see support for parents to use other methods of discipline and approaches to parenting.

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Children are Unbeatable! (Scotland)  
29 August 2013

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<sup>i</sup> Criminal Justice (Scotland) Bill Policy Memorandum paras 3-4 pub by Scottish Government

<sup>ii</sup> For example the UK is one of only five EU countries not to have committed to introduce a ban to prohibit corporal punishment.

<sup>iii</sup> <http://www.scotland.gov.uk/Resource/0041/00418332.pdf>

<sup>iv</sup> S51 (1) of the Criminal Justice (Scotland) Act 2003

<http://www.legislation.gov.uk/asp/2003/7/section/51>

<sup>v</sup> Ibid S 51 (2)

<sup>vi</sup> <http://www.scotland.gov.uk/Topics/Justice/public-safety/17141/violence>

<sup>vii</sup> Police and Fire Reform (Scotland) Act 2012: Section 10: Constable's Declaration

<sup>viii</sup> Roseanna Cunningham's letter to Lord McNally regarding the UPR process, dated 29<sup>th</sup> August 2012

<sup>ix</sup> <http://www.scotland.gov.uk/Publications/2012/10/4789>

<sup>x</sup> 'An inspection into the care and protection of children in Eilean Siar' published by the Social Work Inspection Agency, published by the Scottish Executive 2005 ISBN 0-7559-4757-6

<sup>xi</sup> <http://www.endcorporalpunishment.org/pages/pdfs/hittingwrong.pdf>

<sup>xii</sup> 'Respecting children, supporting parents', a short film about physical punishment based on calls to ChildLine Scotland and ParentLine Scotland

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