



Children Are Unbeatable! Alliance

Children, Schools and Families Bill
House of Lords Second Reading
Monday 8 March 2010

Extending prohibition of corporal punishment to madrasas, Sunday schools, youth clubs and others *in loco parentis*

New clause

To move the following Clause:—

- (1) The Children Act 2004 is amended as follows
- (2) In section 58 (reasonable punishment), after subsection (4) there is inserted—
“(4A) Only a person with parental responsibility for a child within the meaning of section 3 of the Children Act 1989 can justify battery of that child on the ground that it constituted reasonable punishment.”.

The Children Are Unbeatable! Alliance¹ is seeking the removal of a loophole in the law which allows certain adults who do not have legal parental responsibility to use physical punishment on a child in their care. We are calling on the Government to use the opportunity given in the Children, Schools and Families Bill to close this loophole.

Introduction

The Government has asked the Chief Adviser on the Safety of Children, Sir Roger Singleton, to review the use of physical punishment in part-time educational and learning settings and by others who may be acting *in loco parentis* and report back by the end of March 2010.² At Commons Report Stage, Ed Balls confirmed that the Government would respond to the report on the day that it was published. Responding to a new clause (NC10) proposed by a cross-party group of MPs, which would limit the defence of “reasonable punishment” to those with legal parental responsibility, the Minister said he favoured tightening up the law and had not ruled out the possibility of the new clause, but wanted to wait for Sir Roger’s advice before reaching a view.

This briefing addresses concerns raised about limiting the “reasonable punishment” defence to those with parental responsibility and shows them to be unfounded. We highlight evidence of children being mistreated by those *in loco parentis*, for example in madrasas and other “voluntary” forms of care such as private foster care or sports coaching. The child protection world has long been concerned about the vulnerability of children to physical assaults by adults such as partners of parents and baby-sitters within the home. Adults *in loco parentis*, either in the home or elsewhere, do not have to act according to parents’ wishes or directions. Parents may not necessarily know

¹ Children Are Unbeatable! is an alliance of more than 600 organisations and projects, and many more individuals, seeking legal reform to give children the same protection under the law on assault as adults and promoting positive, non-violent discipline.

² http://www.dcsf.gov.uk/news/index.cfm?event=news.item&id=sir_roger_singleton_to_look_further_into_the_use_of_physical_punishment_in_parttime_educational_and_other_learning_settings

that physical punishment is allowed in certain settings or they may feel unable to object to its use or to withdraw their child.

It is important to bear in mind that an adult *in loco parentis* does not have to prove the defence of “reasonable punishment”; in every case the prosecution has to prove that a punishment was not reasonable. The defence of “reasonable punishment” does not just cover “mild smacks”. Punishments can be frequent, painful, humiliating, risk but not cause serious injury or involve acts such as hair-pulling and still be lawful.

What is the current legal position? At present any parent or anyone *in loco parentis* – in place of the parent – has a legal right in England, Wales and Northern Ireland to use the defence of “reasonable punishment” under section 58 of the Children Act if they inflict a common assault on a child.

What sort of people are in loco parentis? Teachers are an example of adults *in loco parentis* to children in their care. Most teachers are prohibited in law from using corporal punishment; however the prohibition does not apply to teachers providing under 12½ hours education a week – for example sports coaches, Sunday school or madrasa teachers, youth workers, music teachers or home tutors. Private foster carers, baby-sitters, nannies and relatives (including step-relatives and unmarried partners of parents) are also *in loco parentis* when they have care and control of children, and so may use the defence. Staff in secure training centres are *in loco parentis* to the children detained there and are not explicitly prohibited from using corporal punishment.

Does someone in loco parentis have to follow the parents’ wishes? No. This is why the Scottish parents who objected to their children being threatened with the cane in school against their wishes had to go to the European Court of Human Rights in 1982 to get it stopped.³

If parents can choose where their child is looked after, is it not up to them to withdraw their child from that setting? All physical punishment has already been banned in other voluntary provision such as early years centres, child-minding, private education and part-time education of 12½ hours or more a week. There can be no justification for failing to protect children in the remaining voluntary settings. Parents may be unaware that the “reasonable punishment” defence can be used in these settings or may feel unable to object to physical punishment being used. Professionals and concerned Muslims, for example, have found it extremely difficult to persuade parents or children to make complaints about the use of physical punishment in some madrasas, or to even admit the assaults occur. The leader of the Muslim Parliament of Great Britain said as long ago as 2006 that the Muslim community was in a state of denial over child mistreatment in madrasas, and that it was an unacceptable dereliction of duty not to protect these children for fear of being accused of cultural insensitivity.⁴

What is common assault? The Crown Prosecution Service has advised that only assaults on children where the injury is trivial and transitory should be treated as common assault (a smack that doesn’t bruise is a clear example) while any injury more serious should be charged as actual bodily harm (ABH), for which the “reasonable punishment” defence is not available. A common assault could include forcing children to sit or stand in a painful position, making them eat unpleasant

³ European Court of Human Rights, *Campbell and Cosans v UK*, 25 February 1982

⁴ Muslim Parliament of Great Britain (2006) *Child Protection in Faith-Based Environments* (from which the spelling ‘madrasa’, rather than ‘madrassa’ or ‘madrassah’, is taken)

things like soap or chilli, pulling their hair or even (according to Court of Appeal judges in a recent civil case⁵) giving them a kick, so long as they are not bruised or physically injured. In addition, assaults that risk serious injury but do not actually cause it, like blows to the head, ears or kidneys, are common assault, as are assaults that cause pain or humiliation but no injury. Frequency of smacking is also not a consideration for determining whether the punishment is a common assault or ABH.

What punishment is “reasonable”? Nobody can answer this question. Since section 58 was enacted five years ago there has not been a single recorded prosecution where a common assault has been challenged on the grounds that the punishment was unreasonable.⁶

What about the offence of “cruelty to children”? The defence of “reasonable punishment” is not permitted for an offence of “cruelty to children” under section 1 of the Children and Young Persons Act 1933. In fact the word cruelty only appears in the side heading, not in the actual law, which provides that anyone over the age of sixteen responsible for a child under that age is guilty of an offence if he “wilfully assaults, ill-treats, neglects, abandons, or exposes him, or causes or procures him to be assaulted, ill-treated, neglected, abandoned, or exposed, in a manner likely to cause him unnecessary suffering or injury to health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement).” Section 1 does not create an offence of strict liability so the prosecution has to prove a deliberate or reckless act or failure – ignorance, or a genuine belief the punishment is benign, for example, is an acceptable defence.⁷ The Crown Prosecution Service notes that, although “reasonable punishment” is not available as a legal defence to section 1 *per se*, it can still be put forward as an explanation for the parents’ actions.⁸

In practice, are children now being hit or subjected to other degrading punishments by people in loco parentis? Yes, many children are. This issue is raised here because of concerns first expressed in 2006 by the Muslim Parliament of Great Britain about the physical abuse of children in **madrasas** - part-time weekend or evening Islamic schools.⁹ There are estimated to be nearly 1,600 madrasas in the UK, teaching as many as 200,000 children overall.¹⁰ Dr Siddiqui, the Muslim Parliament’s leader, estimated that at least 40% of madrasas permit the hitting of children, sometimes very violently, and criticised the fact that they were unregulated: “In our view this is simply not acceptable. It is also not acceptable for the local authorities and police not to take this challenge seriously for fear of being accused of cultural insensitivities.” In December 2008, an investigative article in *The Times* reported that physical punishment was still rife in madrasas, including a “particularly brutal form of punishment...known as the Hen, in which the victim is forced to hold his ears while squatting with his arms fed through his legs.”

⁵ Court of Appeal (Civil Division) MA, SA and HA (child applicants) and MA, HA and the Cit and County of Swansea (respondents), Case No B4/2009/1068, 31 July 2009

⁶ For a summary of Crown Prosecution Service and Government evidence on this point, see A. against the United Kingdom Judgment of 23 September 1998, Revised Memorandum of August 28 2008 (“Memorandum”) prepared by the Department for the Execution of Judgments of the European Court of Human Rights in the light of the developments since the adoption by the Committee of Ministers of Interim Resolution ResDH(2004)39 on 2 June 2004; CM/Inf/DH(2008)34; paragraphs 11 and 12.

⁷ See, for example, *Stone’s Justices’ Manual* 2009 5-80, footnote 6: “a genuine lack of appreciation through stupidity or personal inadequacy will be a good defence”

⁸ *Reasonable chastisement research report*, Crown Prosecution Service, July 2007

⁹ Muslim Parliament of Great Britain (2006) *Child Protection in Faith-Based Environments*

¹⁰ *The Times* December 10 2008

One problem is that the parents of these children are unwilling to make complaints, either because they support the assaults or because they fear being ostracised. Another problem is that teachers in madrasas are permitted in law to use the defence of “reasonable punishment” for common assaults, as confirmed by a spokesperson for the DCSF in *The Times* article.¹¹ It is not clear, for example whether “the Hen” constitutes common assault or ABH, because no lasting injury is caused.

Madrasas are almost certainly not the only faith group to use physical punishment. There have been no disclosures about physical punishment in **Christian Sunday schools**, but it is highly likely to be used by some minority fundamentalist groups because of the fierce legal battles fought – and lost - by these groups to retain corporal punishment in their independent schools.¹² Where it can still be inflicted lawfully, for example in a Sunday school, it is likely that the practice continues.

Beliefs that children can be witches or possessed by evil spirits and need to be physically punished prevail in certain African Christian churches within the UK, as well as in other minority faiths. Victoria Climbié is perhaps the most notorious example. As a result of her case and other similar cases, Scotland Yard set up “Project Violet” to investigate ritual abuse in churches. The final report in 2006 analysed the cases of 47 children, mostly between eight and fourteen, who were hit, punched, burned, stabbed, half-strangled, starved, tied up, placed in cold baths or had chilli pepper, salt or ginger applied to their eyes and genitals.¹³ Sometimes this abuse occurred in a place of worship or with the authority of a priest. All children suffered lasting psychological damage. The report makes recommendations about better professional practice, but does not propose that the law entitling religious leaders and others to physically punish children must be changed.

As regards **part-time teachers**, concerns have been raised about children being abused by **sports trainers**, and a number of sporting bodies have responded by introducing standards and guidance by which trainers and coaches have to abide. However this does not prevent the many unregulated, informal sports teachers from using “reasonable” punishment. Other teachers, such as **music teachers**, are also free to, for example, rap children’s knuckles with rulers.

We have no evidence that people working in **youth clubs or playgrounds** are hitting children, but this group may technically be entitled to deploy the defence of “reasonable punishment”, as are people working in the **health sector, police or leisure** facilities. While legal prohibitions of corporal punishment continue to be applied to institutions and professions, rather than belonging to children themselves, there will continue to be large swathes of the population who are legally entitled to subject them to common assault.

Finally, many children are hit, day in, day out, by **partners of their parents, step-parents, relatives, informal foster carers, babysitters and nannies**. While those who do not object to “mild” physical punishment might think it right that anyone responsible for a child should be allowed smack them, it is important to reflect on the

¹¹ *The Times* December 10 2008

“We are crystal clear that all organisations, including faith-based, must abide by children protection and safeguarding laws. Any actions that go beyond reasonable punishment are absolutely unacceptable and must be dealt with by the courts. We urge anyone who is aware of such incidents to report them to the police and relevant authorities.”

¹² *Regina v. Secretary of State for Education and Employment and others (Respondents) ex parte Williamson (Appellant) and others*, House of Lords, [2005] UKHL 15

¹³ *Child Abuse Linked to Accusations of “Possession” and “Witchcraft”* Eileen Stobart, DCSF 2006 Research Report RR750.

fact that a disproportionate number of grave assaults and child killings are perpetrated by a partner or step parent, or by someone caring for the child while the parent is elsewhere, like a baby-sitter or relative living in the household. Baby P is the most recent in a long line of such cases coming to public attention.

How should the law be reformed to prevent this? The most effective measure would be to outlaw all forms of physical punishment or other forms of degrading treatment or punishment by complete removal of the “reasonable punishment” defence. This is the aim of Children Are Unbeatable!, an alliance of more than 600 organisations and projects, supported by more than 260 parliamentarians. The Government continues to resist this reform and restated recently that it will not allow a free vote on the issue. Therefore, in the context of this Bill, we are advocating limitation of the use of the defence, rather than its complete removal.

We believe the most practical reform, in this context, is to amend section 58 so that the defence of reasonable punishment is only available to those with parental responsibility (i.e. formal legal rights acquired in respect of the child, for example guardians, unmarried fathers or adoptive parents). Unmarried fathers since December 2003 automatically have parental responsibility if their name is on the birth certificate or can easily obtain it if they are involved in the child’s care. Step-parents and partners in civil partnerships can obtain parental responsibility alongside natural parents, either by a formal written agreement signed by both parents or by a court order; other people like grandparents with whom children live may also obtain these rights through a court order. Limiting the “reasonable punishment” defence to those with parental responsibility would have the added merit of putting beyond doubt that all other people - part-time teachers, coaches, relatives, partners, neighbours, baby-sitters, youth workers, policemen and others - do not have a legal right to inflict “reasonable punishment.”

Why not just ban physical punishment in educational settings?

Banning physical punishment in educational settings would not protect all children in the care of people other than their parents or others with parental responsibility. Given that full prohibition of physical punishment already extends beyond educational placements to, for example, day care, childminders and state foster carers, there is a compelling case for ensuring that children are systematically protected in *all* placements (e.g. private foster care, play and youth centres, sports coaching, health placements) and forms of care (e.g. nannies and babysitters), not just educational ones.

There are also a number of practical difficulties in defining educational and learning settings. For example, it is not always clear that religious classes can be termed “education”. Often such activities can just as legitimately be called “worship” or “an act of religion”, particularly when conducted in a church or mosque (or Scientology centre or other venue used by religious groups). It would also be manifestly inappropriate if, because of a change in definition, Ofsted or a local education authority became involved in such settings.

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