



# MILLION

**Section 58 of Children Act 2004 Review -**  
A response by 11 MILLION, led by Prof Sir Al  
Aynsley-Green, the Children's Commissioner  
for England

10 August 2007

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# 1 Who are we?



**11 MILLION is a national organisation led by the Children's Commissioner for England, Professor Sir Al Aynsley-Green. The Children's Commissioner is a position created by the Children Act 2004.**

## Our mission



We will use our powers and independence to ensure that the views of children and young people are routinely asked for, listened to and that outcomes for children improve over time. We will do this in partnership with others, by bringing children and young people into the heart of the decision-making process to increase understanding of their best interests.

## The Children Act 2004

The Children Act requires the Children's Commissioner for England to be concerned with the five aspects of well-being covered in *Every Child Matters* – the national government initiative aimed at improving outcomes for all children. It also requires us to have regard to the United Nations Convention on the Rights of the Child (UNCRC). The UNCRC underpins our work and informs which areas and issues on which we focus our efforts.

## Our long-term goals



Children and young people see significant improvements in their wellbeing and can freely enjoy their rights under the United Nations Convention on the Rights of the Child (UNCRC).



Children and young people are more highly valued by adult society.

## Spotlight areas

11 MILLION seeks to engage in policy debate and process across a range of 'Spotlight' issues. In 2007/08, our work on section 58 forms part of our spotlight entitled 'A fair life'.

## 2 Executive Summary

The Children's Commissioner for England believes that in order to ensure that children are free from torture, inhuman or degrading treatment or punishment, as guaranteed by Article 3 European Convention on Human Rights and Article 37 United Nations Convention on the Rights of the Child, the UK Government should extend to children the same right to protection from common assault as is currently enjoyed by adults. In the case of England, this would mean repealing the defence of "reasonable punishment" as provided in section 58 of the Children Act 2004. This should be accompanied by a large-scale public education campaign to raise awareness of the change in law and with significant investment in promoting positive parenting and alternatives to the physical punishment of children.

### **3 Has section 58 improved legal protection for children in cases of alleged assault by their parents?**



#### **Our response to question 1 of the consultation**

11 MILLION takes the view that section 58 of the Children Act 2004 has provided some improved legal protection, but the level provided is inadequate to safeguard children or ensure that their right to physical integrity is respected.

#### **Legal Effect of Section 58**

Section 58 of the Children Act 2004 removed the former defence of “reasonable chastisement” which had, prior to the 2004 Act, provided parents with a defence to acts of physical punishment against their children, including assault occasioning actual bodily harm as defined in the Offences Against the Person Act 1861. Section 58 of the Children Act 2004 did not, however, fully remove the parental defence to acts of physical punishment against children; rather, it introduced a new defence of “reasonable punishment” to replace that of “reasonable chastisement”. Under the 2004 Act, therefore, a parent is provided with a defence of “reasonable punishment” where the physical punishment amounts to common assault against his or her child but not where the physical punishment amounts to assault occasioning actual bodily harm.

In the view of the Children’s Commissioner, there are two main reasons why the change in law has failed to provide adequate protection for children:

- (1) Section 58 discriminates against children by providing parents with a defence to acts of common assault against their children when there is no such ready defence to the same acts of assault committed against any other group in our society;
- (2) Section 58 does not sufficiently protect children's right to be free from torture, inhuman or degrading treatment or punishment as guaranteed by Article 3 of the European Convention on Human Rights<sup>1</sup> and Article 37 of the United Nations Convention on the Rights of the Child,<sup>2</sup> in respect of which the UK Government is a State Party.

The first of these points is self-explanatory therefore the remainder of this response will be dedicated to showing how, in the view of the Children's Commissioner, section 58 fails to adequately protect children's right to physical integrity as enshrined in European and International human rights treaties. Much of this material was recently shared with the Council of Europe's Committee of Ministers as part of a joint submission by the four UK Children's Commissioners<sup>3</sup> in regard to the UK Government's implementation of the judgment of the European Court of Human Rights in the case of A v UK.<sup>4</sup>

### **Common Assault and Assault Occasioning Actual Bodily Harm**

Under the law in England and Wales, the only factors which distinguish the offence of common assault from assault occasioning actual bodily harm are the degree of the injury caused by the assault and the sentence available to the court. In order therefore to assist prosecutors

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<sup>1</sup> Article 3 of the European Convention on Human Rights provides: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

<sup>2</sup> Article 37 of the United Nations Convention on the Rights of the Child provides: "No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment."

<sup>3</sup> Joint Submission by the UK Children's Commissioners to the Committee of Ministers of the Council of Europe on the Matter of: Implementation by the UK Government of the Judgment of the European Court of Human Rights in the Case of A v UK (100/1997/884/1096), 23 September 1998. (June 2007)

<sup>4</sup> A v UK, (1999) 27 EHRR 611. This case related to the compatibility with the Convention of the former "reasonable chastisement" defence.

in determining the appropriate offence in a given case, the Crown Prosecution Service prepares charging standards.

At the time of the passing of section 58 of the Children Act 2004, the Director of Public Prosecutions for England and Wales published a new charging standard, in part, to provide further clarity as to when acts of assault against children should be charged as common assault – to which the reasonable punishment defence applies - and when they should be charged as assault occasioning actual bodily harm.<sup>5</sup>

The standard explains that:

*“.....although any injury that is more than transitory or trifling can be classified as actual bodily harm, the more appropriate charge will be ... [common assault] where injuries amount to no more than the following: grazes, scratches, abrasions, minor bruising, swellings, reddening of the skin, superficial cuts or a ‘black eye’”.*

The charging standard goes on to say however that:

*“.... there may be cases where the injuries suffered by a victim would usually amount to common assault but due to the presence of serious aggravating features, they could more appropriately be charged as actual bodily harm.”*

One such aggravating feature is whether the victim is a child. Even in such cases however, prosecutors are nonetheless required to bear in mind that:

*“.....the definition of assault occasioning actual bodily harm requires the injury to be more than transient and trifling.”*

It appears to the Children’s Commissioner that the English law on common assault, taken together with the Charging Standard, is

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<sup>5</sup> *Offence Against the Person, Incorporating the Charging Standard*, Crown Prosecution Service, 2004.

insufficient to protect children's right to be free from torture, inhuman or degrading treatment and punishment as guaranteed by Article 3 of the European Convention on Human Rights and Article 37 of the UN Convention on the Rights of the Child. The reliance on a prosecutor's subjective view as to whether injuries fall one side or the other of "transitory and trifling" provides insufficient legal clarity and certainty, and is too dependent upon the outcome, rather than the act committed. Thus, a child who bruises easily may be protected as the marks left are such as to constitute assault occasioning actual bodily harm, while a child who does not bruise so readily, but has been subject to the same assault, will not benefit from protection under Article 3.

The result of such uncertainty in the law means that it is possible, if not likely, that parents may be charged with common assault and have the defence of reasonable punishment available to them, even where the physical punishment is severe enough to amount to ill-treatment within the meaning of Article 3 European Convention on Human Rights. A recent research study by the Crown Prosecution Service, reviewing a sample of cases where a child was assaulted by a parent or adult acting in loco parentis, showed that of five common assault cases that were reviewed, two could have been charged differently.<sup>6</sup> While the study, given its small scale and methodology, is not statistically relevant, it nonetheless raises concern about how the law on common assault and the reasonable punishment defence have been used in practice and poses serious questions about the level of protection from assault afforded to children.

### **Compatibility of Current Law with Article 3 of the European Convention on Human Rights**

The question of whether section 58, taken together with the new charging standard, adequately protects children's right under Article 3 European Convention on Human Rights is being considered by the

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<sup>6</sup> *Reasonable Chastisement Research Report: Case Sampling Exercise Examining Usage of the Reasonable Chastisement Defence – Findings Summary*, Crown Prosecution Service, July 2007. See pg. 5.



Committee of Ministers of the Council of Europe in its function of supervising the judgments of the European Court of Human Rights. The Committee will examine the measures that the UK Government has taken to implement the Court's ruling in the case of A v UK, which found the UK in breach of its duty to protect children from inhuman and degrading treatment and punishment, including providing effective deterrence.<sup>7</sup>

On the basis of the uncertainty around the UK law on common assault, it is far from clear how the Committee of Ministers will view the steps that the UK Government has taken to implement the judgment in A v UK. In considering the compatibility of Clause 58 (of the then Children Bill) and the proposed charging standard with the judgment in A v UK, the UK Parliament's Joint Committee on Human Rights concluded that "...the combination of the new clause and the new charging standard may well be considered sufficient to satisfy the UK's obligation to comply with the judgment of the European Court of Human Rights in A v UK...", but agreed that it was "impossible to say with certainty" whether the new UK law would provide sufficient protection for children against treatment in breach of Article 3.<sup>8</sup>

In A v UK,<sup>9</sup> the court held at paragraph 20 that:

*"ill-treatment must attain a minimum level of severity if it is to fall within Article 3. The assessment of this minimum is relative: it depends on the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim".*

In considering the minimum threshold for a violation of Article 3, the Children's Commissioner has taken account of the interpretative comments of the United Nations Committee on the Rights of the Child

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<sup>7</sup> Ibid., n.4.

<sup>8</sup> Nineteenth Report of the Joint Committee on Human Rights, Part 4; Session 2003-2004, UK Parliament, The Stationery Office.

<sup>9</sup> Ibid. n.4.

(UNCRC) in regard to acts which the Committee considers as a violation of the comparable Article 37 of the UNCRC – the right to be free from torture, cruel, inhuman or degrading treatment or punishment. In a recent General Comment on Corporal Punishment the UN Committee stated that physical or corporal punishment is “*invariably degrading*” and as such a violation of Article 37 UNCRC.<sup>10</sup> It defined physical or corporal punishment as: “*any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light*”.<sup>11</sup>

Such unequivocal statements cannot be easily dismissed and increasingly the European Court of Human Rights makes reference to other international human rights treaties, including the UN Convention on the Rights of the Child.

11 MILLION is of the opinion therefore that section 58 of the Children Act 2004 does not provide adequate legal protection to children. Neither is it a sufficient measure to remedy the deficiencies in English law found by the European Court of Human Rights in the case of A v UK.

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<sup>10</sup> General Comment No.8, (CRC/C/GC/8), June 2006, paragraph 11.

<sup>11</sup> Ibid.

## 4 To what extent is the legal position on the physical punishment of children widely understood by those working with children and families?



### Our response to question 6 of the consultation

11 MILLION believes that the current uncertainties in the law across the UK mean that the legal position on physical punishment of children is unclear to parents and to those working with them. Indeed, the wealth of public misunderstanding over the scope of permissible punishment against children following the enactment of the 2004 Act would strongly suggest that the measure may not have the desired deterrent effect.

## 5 11 MILLION recommends the following publications be considered as part of the review



### Our response to question 9 of the consultation

Joint Submission by the UK Children's Commissioners to the Committee of Ministers of the Council of Europe on the Matter of: Implementation by the UK Government of the Judgment of the European Court of Human Rights in the Case of A v UK (100/1997/884/1096), 23 September 1998. (June 2007)

The views of the UN Committee on the Rights of the Child in their General Comment No.8 on Corporal Punishment, June 2006 (CRC/C/GC/8)

The United Nations Secretary-General's Study on Violence against Children, October 2006.

Reasonable Chastisement Research Report: Case Sampling Exercise Examining Usage of the Reasonable Chastisement Defence – Findings Summary, Crown Prosecution Service, July 2007

Nineteenth Report of the Joint Committee on Human Rights, Part 4; Session 2003-2004, UK Parliament, The Stationery Office.

Willow C & Hyder T (1999) "*It hurts you inside*": *Children talk about smacking*, Save the Children and National Children's Bureau.



**“The 11 MILLION children  
and young people in  
England have a voice”**

Children’s Commissioner for  
England, Professor Sir Albert  
Aynsley-Green



**MILLION**

11 MILLION, 1 London Bridge, London, SE1 9BG  
Telephone: 0844 800 9113 Fax: 020 7357 8329  
Email: [info.request@11MILLION.org.uk](mailto:info.request@11MILLION.org.uk)  
[www.11MILLION.org.uk](http://www.11MILLION.org.uk)  
CR001