

Campaigning for law reform to prohibit corporal punishment: Using legal action and regional and international human rights mechanisms

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Global Initiative to
End All Corporal Punishment
of Children

In countries where governments are refusing to introduce law reform or are actively opposing it, international human rights law and national law can be used to “force” them to accept their obligations to realise children’s rights. You do not need to be a lawyer in order to use the law.

Using national legal systems

Incorporation of the UN Convention on the Rights of the Child (UNCRC)

The UNCRC is part of international human rights law, and ratification entails legal obligations to ensure full implementation, including to enact legislation prohibiting all corporal punishment of children.

In some states, on ratification the UNCRC automatically becomes part of (is incorporated into) national domestic law and takes precedence over domestic law, so can be used in courts to claim the rights guaranteed by it. In other states, incorporation is not automatic but requires some action of Parliament. In some, the status of the UNCRC will only be established when someone takes a case to court. In states where incorporation is not automatic, the domestic law should be reviewed and reformed to bring it into line with the Convention.

In all cases, governments need to be reminded that the UNCRC imposes *legal* obligations under international law. The Vienna Convention on the Law on Treaties emphasises that accepting human rights instruments means taking on legal obligations, and states that the existence of domestic law which is in conflict with these obligations cannot be used as an excuse for not complying fully.

Constitutional and other domestic laws

Most states have provisions in constitutions or other basic laws that conflict with laws authorising or justifying corporal punishment, e.g. laws protecting people’s human dignity and physical integrity, prohibiting cruel or degrading punishment or treatment, or stating everyone’s right to equal protection under the law. These national legal provisions can be used to challenge corporal punishment in all or some settings, in addition to using the international instruments which the state has accepted. The complaint is against the state, and the final authority in the case depends on the national legal system.

Getting and using a legal opinion

An expert legal opinion is extremely useful when progress towards prohibition is not happening, or is being resisted. It is essential in challenging the legality of corporal punishment in the courts – and if this

fails, the legal opinion provides a firm foundation for using international and/or regional human rights mechanisms. In every state, a legal opinion is very useful to support the campaign for prohibition.

In **commissioning a legal opinion**, ensure that:

- it is written by a lawyer who believes in children's rights and is fully supportive of the human rights imperative to prohibit all corporal punishment of children
- it addresses the extent to which the law which allows corporal punishment is in conflict with the international human rights instruments which the state has ratified, including the UNCRC, and relevant provisions in the Constitution and other domestic law, and how this conflict can be challenged in the national legal system and, if necessary, by using regional or international human rights mechanisms (see below).

The opinion can usefully cite the many important and clear judgments made in high-level national courts in other states, which support the case for full prohibition.

In **using the legal opinion**, remember:

- its primary purpose is to enable legislation allowing corporal punishment to be challenged in the courts, but simply threatening to take legal action may be sufficient to provoke action
- the decision to take the challenge to the courts should follow a careful assessment of the risks of such action, especially the risk of losing the case and creating a bad precedent. Bad judgments can be challenged, but it is critical to ensure that the advocates are very good and are using all the right arguments
- taking or threatening legal action should be part of a comprehensive strategy to promote law reform and not an isolated approach to the issue.

Using international and regional human rights mechanisms

International and regional mechanisms (complaints/communications mechanisms) provide a means to appeal to, and bring pressure on, national governments in states which have ratified the relevant optional protocol or made the appropriate declaration on ratifying the main instrument. These mechanisms usually require that any possible use of national legal systems has been tried and has failed – the process known as “exhausting domestic remedies”. They nearly always require an actual victim(s) to make a case.

Complaints/communications mechanisms include those linked to the International Covenant on Civil and Political Rights, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the UN Convention on the Elimination of All Forms of Discrimination against Women, the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man, the African Charter on the Rights and Welfare of the Child, the European Convention on Human Rights and the European Social Charter and Revised Social Charter.

Other summary briefings available:

1: Understanding the need for prohibition; 2: Reviewing current law

3: Drafting prohibiting legislation; 4: Building a national strategy

5: Working with Government and Parliament; 7: Key resources to support campaigning

Further information at www.endcorporalpunishment.org, email info@endcorporalpunishment.org.