

**EUROPEAN COMMITTEE OF SOCIAL RIGHTS  
COMITÉ EUROPÉEN DES DROITS SOCIAUX**



18 March 2004

**Collective Complaint No. 18/2003  
World Organization against Torture v. Ireland**

**Case Document No. 5**

**OBSERVATIONS FROM THE IRISH GOVERNMENT  
ON THE MERITS**

**registered at the Secretariat on 12 March 2004**



**COUNCIL OF EUROPE**

**EUROPEAN COMMITTEE OF SOCIAL RIGHTS**

**Collective Complaint No. 18/2003**

**World Organisation Against Torture (OMCT) v. Ireland**

**Observations of Ireland on the merits of the complaint  
12<sup>th</sup> March 2004**

Pursuant to Rule 28(2) of the Rules of Procedure of the European Committee of Social Rights (“the Committee”) and Article 7(1) of the Additional Protocol to the European Social Charter providing for a system of collective complaints (“the Protocol”) Ireland has the honour of submitting the following observations to the Committee:

**1. PRELIMINARY**

- 1.1. By way of complaint lodged on July 28<sup>th</sup> 2003 the World Organisation Against Torture (“OMCT”) has applied to the Committee pursuant to the Protocol and Rule 19 of the Rules of Procedure of the Committee requesting that the Committee find that Ireland failed to apply Article 17 of the Revised European Social Charter (“the Revised Charter”) in a satisfactory manner.
- 1.2. On October 30<sup>th</sup> 2003 Ireland submitted observations on the admissibility of the complaint. The Committee declared the complaint admissible and invited Ireland to submit observations on the merits.
- 1.3. Pursuant to Article 7(4) of the Protocol and Rule 29(1) of the Rules of Procedures, Ireland requests that the Committee should hold a hearing with the Irish representatives.

**2. OMCT’S COMPLAINT**

- 2.1 OMCT complains that Ireland is failing to conform with its obligations under Article 17 of the Revised Charter because it has not explicitly and effectively prohibited all corporal punishment of children, including by parents and others. OMCT alleges that Ireland has not prohibited in legislation any other form of degrading punishment or treatment of children or provided adequate sanctions in penal or civil laws. OMCT has, in particular, made reference to proposals for reform of the law made by various bodies within Ireland but accuses Ireland of having taken no significant action in respect of such proposals. OMCT is of the view that no further delay on Ireland’s part in changing

the law can be justified. OMCT in this regard takes a particular view of law reform: such reform should not take place subsequent to public education or information campaigns. OMCT's complaint therefore appears to be predicated on a view that law reform should, if necessary, precede societal norms or attempts made to modify those norms. It is submitted, with respect, that this approach addresses the issue at a level of abstraction not intended by the Charter participants and which, in particular, does not pay any, or at least any sufficient attention, to the individual circumstances of the affected State and in this particular case, does not address significant features of the Irish legal system and protection afforded to children by a flexible and reasonable test which can be adjusted to meet the demands of the individual case and, furthermore, and in particular, does not address the constitutional protection afforded in Ireland to the family and its participants. It must be open to serious doubt whether the position of even one child will be altered for the better if the complaint succeeds. It is significant that OMCT does not cite the support of any individual or interest group familiar with its position.

### **3. COUNCIL OF EUROPE AND COMMITTEE MEASURES**

3.1 The European Social Charter ("the Charter") provided, at Article 17, as follows:

*"With a view to ensuring the effective exercise of the right of mothers and children to social and economic protection, the Contracting Parties will take all appropriate and necessary measures to that end, including the establishment or maintenance of appropriate institutions or services."*

3.2 However, the Revised Charter substantially amended Article 17 so that it reads as follows:

*"With a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities, the Parties undertake, either directly or in co-operation with public and private organisations, to take all appropriate and necessary measures designed:*

*(a)...*

*(b) to protect children and young persons against negligence, violence or exploitation;...*”

- 3.3 The effect of the amended Article 17 and the Revised Charter was doubtless to afford a greater level of protection to children and young persons. It is noteworthy, however, that the Explanatory Report to the Revised charter does not indicate that the aim of such amendments were, in particular, to prohibit corporal punishment, still less corporal punishment in the context of reasonable discipline imposed by parents.
- 3.4 Nonetheless, Ireland acknowledges that this is the interpretation that has recently been given to Article 17(b) by the Committee.
- 3.5 In its general introduction to Conclusion (XV-2), the Committee indicated that, in examining national situations, it had regard to the approach adopted by the UN Committee on the Rights of the Child, which encouraged countries to reform their legislation with a view to ensuring the prohibition of corporal punishment. The Committee also referred to the judgment of the European Court of Human Rights in *A. v. The United Kingdom*<sup>1</sup> in which the European Court of Human Rights held that, on the facts of the case before it, where a nine year-old boy was found by a consultant paediatrician to have been beaten with a garden cane which had been applied with considerable force on more than one occasion, there was a breach of Article 3 of the European Convention on Human Rights (“the Convention”)<sup>2</sup>. The Committee noted that corporal punishment of children was explicitly prohibited by law in several Contracting Parties (being Austria, Denmark, Finland, Iceland, Norway and Sweden). It concluded that:

*“Article 17 requires a prohibition in legislation against any form of violence against children, whether at school, in other institutions, in their home or elsewhere. It furthermore considers that any other form of degrading*

---

<sup>1</sup> Reports 1998-VI, judgment of 23<sup>rd</sup> September, 1998.

<sup>2</sup> The European Court of Human Rights of course did not conclude that the failure on the part of the United Kingdom to expressly prohibit corporal punishment constituted a breach of the Convention. Rather, the Court held that ill-treatment of a child, if it attained a minimum level of severity, could fall within the scope of Article 3. It underlined that the assessment of this was relative: it depended on all 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.

*punishment or treatment of children must be prohibited in legislation and combined with adequate sanctions on penal or civil law.”*

3.6 Since issuing this general observation, the Committee has asked Contracting Parties to provide information on the legality of corporal punishment of children in the home, in schools and other institutions and all forms of care. In some cases, the Committee has deferred issuing a conclusion on compliance with Article 17 until it received information on the legality of corporal punishment (see Conclusions XV-2 on Belgium, Spain and the United Kingdom). In Conclusions XV-2 relating to Ireland, the Committee noted that corporal punishment of children in schools was prohibited and wished to know whether corporal punishment was prohibited in institutions caring for children. The Committee noted that there was a common law immunity which permitted parents and other persons *in loco parentis* to use reasonable and moderate chastisement in the correction of their children<sup>3</sup>. The Committee referred to its general observations on Article 17 in the general introduction on this issue and decided to defer its Conclusion on this point pending information from Ireland as to whether the government intended to remove this immunity and prohibit all corporal punishment of children.

3.7 In February 2003, the Committee issued its first finding of non-conformity with Article 17 on the basis that a contracting party, Poland, had not prohibited corporal punishment in the family<sup>4</sup>. Similar conclusions were issued on reports from France, Romania, Slovakia and Slovenia.

3.8 Ireland respectfully submits that it is inappropriate for the Committee to interpret Article 17(b) as requiring a complete prohibition in legislation against any form of corporal discipline of children and, in particular, such discipline as is administered in the home by parents, on the following grounds:

- (a) Article 17 requires the Contracting Parties to undertake to take all “appropriate and necessary” measures to achieve the protection of young persons referred to at subparagraph (b). Consequently, prior to

---

<sup>3</sup> page 23

<sup>4</sup> Conclusions XVI-2, vol. 2 Chapter 14

concluding that an absolute prohibition by way of legislation is required in each contracting party, it is necessary for the Committee to have regard to what is appropriate or necessary in the particular constitutional and legal framework in a given contracting party. Ireland submits that it is neither "*appropriate nor necessary*" for a blanket legislative prohibition to be introduced in the Irish context. The requirement to introduce an express legislative measure fails to take account of the constitutional protection afforded to all persons, including children, in relation to the guarantees of bodily integrity, freedom from cruel and degrading treatment, the constitutional position of the family unit and the flexible and responsive nature of the common law and the defence of "reasonable chastisement";

- (b) In concluding as it did in its general observations that Article 17(b) required a legislative prohibition on corporal punishment, the Committee had regard to, *inter alia*, the UN Convention of the Rights of the Child. Ireland respectfully submits that it is inappropriate to interpret the scope of the obligation imposed by Article 17(b) of the Revised Charter by reference to the provisions of a separate international treaty;
- (c) Insofar as the Committee had regard to the case of *A. v. the United Kingdom*, Ireland contends that this case does not support the conclusion that a blanket legislative prohibition against corporal punishment, *inter alia* within the home, is required to demonstrate compliance with the Convention. On the contrary, having regard to the European Court of Human Rights' specific reference to the context of a particular case, Ireland is of the view that the operation of the law on assault in Ireland has not given rise to a breach of Article 3 of the Convention;
- (d) Ireland respectfully takes issue with the Committee's reliance on the introduction of a prohibition on corporal punishment in six civil law countries to justify the Committee's interpretation of Article 17(b). It is clear that more Contracting Parties have not introduced such a legislative prohibition and either do not propose doing so or do not propose doing so for the time being. It is respectfully submitted that if



such comparisons are to be given weight, then the Committee should take significant account of the fact that a clear majority of contracting states have no such blanket prohibition and, in particular, that none had at the time of the coming into force of the Charter or the Revised Charter.

- (e) Ireland does not accept that the Committee should be availed of by non-governmental organisations to dictate the pace for legislative reform within Ireland. In particular, Ireland does not necessarily accept the OMCT's views on the role of law reform as being a precursor to societal change.

3.9 In the premises, Ireland respectfully asks the Committee to reconsider the basis for its conclusion that Article 17(b) inevitably requires the introduction of a legislative prohibition on corporal punishment.

3.10 Without prejudice to the above, Ireland now proposes setting out the law and policy relating to corporal punishment of children in Ireland. In this regard, it notes that there are certain inaccuracies in the analysis given of Irish law in the OMCT's complaint.

#### **4. THE LAW AND POLICY RELATING TO CORPORAL PUNISHMENT OF CHILDREN IN IRELAND**

##### **(i) Background**

4.1 Article 40.3.2 of the Constitution requires the State by its laws to protect as best it may from unjust attack and, in the case of injustice done, to vindicate the person of every citizen. This freedom of the person has been held by the Irish Courts to include freedom from the unlawful application of force or violence through the constitutionally guaranteed right to bodily integrity. This is one of the unenumerated rights guaranteed by Article 40.3.1 of the Constitution which has been recognised by the Irish Courts.

This right to bodily integrity was recognised in *Ryan v The Attorney General*<sup>5</sup> where Kenny J. held that:

*“I understand the right to bodily integrity to mean that no mutilation of the body or any of its members may be carried out on any citizen under the authority of the law except for the good of the whole body and that no process which is or may, as a matter of probability, be dangerous or harmful to the life or health of the citizens or any of them may be imposed (in the sense of being made compulsory) by an Act of the Oireachtas.”*

4.2 Since the decision of *Ryan v The Attorney General*, the Irish courts have repeatedly acknowledged the fundamental nature of the right to bodily integrity, second only in importance to the right to life. Further, the freedom of the person from torture has also been recognised as guaranteed under Article 40.3.1 of the Constitution<sup>6</sup>. This is the constitutional framework against which all law, whether statutory or common law in origin, must be measured. It follows from the foregoing analysis that the current common law on the defence of reasonable chastisement has not been considered to breach the constitutional guarantee.

**(ii) Corporal Punishment of Children within the Family**

4.3 The common law recognises the right of a parent to administer moderate and reasonable physical chastisement on a child. This parental power was preserved by Section 37 of the Children Act 1908 which provided as follows:

*“Nothing in the part of this Act [relating to the prevention of cruelty to children and young persons] shall be construed to take away or affect the right of any parent, teacher or other person having the lawful control or charge of a child or young person to administer a punishment to such child or young person.”*

---

<sup>5</sup> [1965] IR 294

<sup>6</sup> See, most recently, *Murray v Ireland* [1985] IR 532

Contrary to what is stated at page 4 of the OMCT's submissions, Section 37 of the Children Act 1908 was repealed with effect from May 1<sup>st</sup> 2002 by the Children Act 2001 ("the 2001 Act"). The effect of the 2001 Act will be addressed more fully below.

4.4 However, the right of the parent to administer moderate or reasonable physical chastisement of a child subsists despite the repeal of Section 37. In practice, this right takes the form of the defence of reasonable chastisement in the event of a prosecution for assault. In order to successfully rely on the defence of reasonable chastisement as a defence to an assault, it is clear that the motive for, the duration and force of the physical punishment must be objectively reasonable. This means that it must not merely be reasonable in the opinion of the parents. The question of whether the parents' conduct has gone beyond reasonable physical chastisement is a matter for a jury<sup>7</sup>. Therefore, the "right" of chastisement is "*limited to the punishment of unemancipated children above the age of infancy not resulting in permanent injury, the reasonableness of which is to be judged according to the customs of contemporary Irish society*"<sup>8</sup>. The standard thus adopted, is one peculiarly well suited to reflect developing societal views on acceptable methods of discipline.

4.5 In its 1994 report, the Law Reform Commission clearly recommended in favour of the abolition of corporal punishment in schools. However, the Commission noted that parental chastisement presented different considerations. The arguments for and against corporal punishment within the home were presented, the Law Reform Commission noting the argument that "*spanking or slapping is a widely-accepted and supported form of effective family discipline*"<sup>9</sup>. The Commission noted that it was also argued that the removal of the common law immunity would, in principle (and indeed the civil law), expose the family to the intrusion of the criminal law for every trivial slap or physical restraint. On the basis of such forceful pragmatic considerations, the Commission noted that countries were slow to waive the protection of parents and guardians from the ordinary application of the law of assault in the case of children. The Commission noted that a change in attitudes to the punishment of children was slow in

---

<sup>7</sup> See generally Law Reform Commission Report on Non-Fatal Offences Against the Person, page 22.

<sup>8</sup> *ibid* page 24.

<sup>9</sup> Paragraph 9209

emerging and that while it was confident that the criminal law of assault would apply to all, including parents, it was important that change be made in stages:

*“The sudden introduction of criminal liability for any assault in the home without more education and information would be inimical to good reform and the interests of children. Foundations have to be laid with prudence. Without proper guidance in effective, enlightened, non-violent parenting, parents will feel lost, resentful and resistant to change.”*

Consequently, the Commission considered it wise to postpone abolition of the common law exception of chastisement of children, concluding that:

*“Whereas it would be premature to abolish the common law chastisement exception immediately, the re-education of parents should proceed without delay and the exception should be abolished at the right time.”*

4.6 Ireland supports the recommendations of the Law Reform Commission and consistently keeps under review the issue of whether or not the common law chastisement exception should be abolished. However, it respectfully submits that the pace of reform of this issue should be set not by international non-governmental organisations but by an analysis of the level of public education, awareness, societal norms and parental attitudes within Ireland. It is noteworthy that the year the Law Reform Commission Report was published, the Irish Society for the Prevention of Cruelty to Children commissioned a report<sup>10</sup> designed to ascertain the extent of support for physical punishment of children. 61% of those surveyed saw nothing wrong with slapping a child who misbehaved. 69% opposed the introduction of a law which would make it illegal for anyone to administer any form of physical punishment to a child.

4.7 In practice, the defence of reasonable chastisement has rarely, if ever, been successfully relied upon in Ireland in recent years. In the circumstances, there do not appear to have been cases in Ireland where corporal punishment was administered by a parent in circumstances that would give rise to a breach of Article 3 of the European Convention

---

<sup>10</sup> Prepared by Irish Marketing Surveys Limited and dated December 1994

on Human Rights, such as those as arose in the case of *A. v. The United Kingdom*. Rather, the existing law indicates that the courts and Irish juries are intolerant of anything but mild physical punishment.

4.8 In a case reported in the Irish Independent newspaper on 10<sup>th</sup> January 1999, the Galway District Court imposed a £100 fine on a man for slapping his four year-old son across the face. The judge stated that the punishment had exceeded what was reasonable in the circumstances. In 2000 the Dublin Circuit Criminal Court imprisoned a father for three and a half years for striking his seven year-old son three or four times with a poker. In that case, the judge indicated that she was “speechless at this type of brutality being inflicted on a child”.<sup>11</sup> It should be noted that this conviction occurred in a criminal prosecution where the standard was proof beyond a reasonable doubt. In civil matters, the evidential standard is the balance of probabilities.

4.9 In line with its policy to keep the law relating to corporal punishment under review, Ireland introduced the Children Act 2001 (“the 2001 Act”)<sup>12</sup>. Section 246 of the 2001 Act provides that:

*“246. —(1) It shall be an offence for any person who has the custody, charge or care of a child wilfully to assault, ill-treat, neglect, abandon or expose the child, or cause or procure or allow the child to be assaulted, ill-treated, neglected, abandoned or exposed, in a manner likely to cause unnecessary suffering or injury to the child's health or seriously to affect his or her wellbeing.*

*(2) A person found guilty of an offence under this section shall be liable—*

*(a) on summary conviction, to a fine not exceeding £1,500 or imprisonment for a term not exceeding 12 months or both, or*

*(b) on conviction on indictment, to a fine not exceeding £10,000 or imprisonment for a term not exceeding 7 years or both.*

*(3) A person may be convicted of an offence under this section—*

---

<sup>11</sup> Copies of the newspaper reports are appended to these observations.

<sup>12</sup> Certain parts of this Act have been commenced by SI 151 of 2002. In particular that part of the 2001 Act repealing Section 37 of the Children Act 1908 has been commenced.

*(a) notwithstanding the death of the child in respect of whom the offence is committed, or*

*(b) notwithstanding that actual suffering or injury to the health of the child, or the likelihood of such suffering or injury, was obviated by the action of another person.*

*(4) On the trial of any person for the murder of a child of whom the person has the custody, charge or care, the court or the jury, as the case may be, may, if satisfied that the accused is guilty of an offence under this section in respect of the child, find the accused guilty of that offence.*

*(5) For the purposes of this section a person shall be deemed to have neglected a child in a manner likely to cause the child unnecessary suffering or injury to his or her health or seriously to affect his or her wellbeing if the person—*

*(a) fails to provide adequate food, clothing, heating, medical aid or accommodation for the child, or*

*(b) being unable to provide such food, clothing, heating, medical aid or accommodation, fails to take steps to have it provided under the enactments relating to health, social welfare or housing.*

*(6) In subsection (1) the reference to a child's health or wellbeing includes a reference to the child's physical, mental or emotional health or wellbeing.*

*(7) For the purposes of this section ill-treatment of a child includes any frightening, bullying or threatening of the child, and "ill-treat" shall be construed accordingly.*

4.10 Consequently, it is clear that the criminal law renders it an offence, in any context, to cause unnecessary suffering or injury to a child's health<sup>13</sup>.

4.11 As a result of the above, it is clear that there have been significant developments in relation to the protection afforded by Irish law against corporal punishment. As will be seen, the only form of corporal punishment tolerated in Irish society is that as between a parent and a child, and then only such physical punishment as a court would consider reasonable. Since most reasonable parents will not wish to become subject to either the

---

<sup>13</sup> SI 151/2002 commenced Section 246 with effect from 1<sup>st</sup> May 2002.

criminal or civil law, and since any significant punishment could be subject to criminal and civil sanctions, it appears that the only form of physical discipline of children tolerated by Irish law, is relatively mild correction visited upon children by reasonable parents in private, which conduct is not within the mischief aimed at by the Charter. Furthermore, it occurs in the context of a relationship the regulation of which raises difficult and important societal issues and in Ireland, issues of constitutional significance.

## **5. CONSTITUTIONAL PROVISIONS.**

5.1 Of course, regard must also be had to the fact that the power of the Oireachtas (the Irish legislature) to legislate in relation to children within the family unit is tempered by Articles 41 and 42 of the Irish Constitution.

5.2 Article 41 provides as follows:

*“1. 1° The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.*

*2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.”*

5.3 Article 42.1 provides as follows:

*“1. The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.”*

5.4 Article 42.5 provides as follows:

*“5. In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.”*

5.5 As a result of these provisions, it is clear that the Irish Constitution acknowledges the primary role of the family in society. The family is endowed by the Constitution with an authority which is recognised as being superior even to the authority of the State itself. The Constitution firmly outlaws any attempt by the State in its laws or its executive actions to usurp the exclusive and privileged role of the family in the social order<sup>14</sup>. Of course, within this unit the child also has rights. The rights of the child encompass the panoply of constitutional rights which include personal rights to life and bodily integrity. However, the Supreme Court has acknowledged<sup>15</sup> that, in addition, the child has a right to and in his family:

*“When assessing the welfare of a child – the fundamental concept when analysing the position of a child – complex social, political, educational and health rights of the child in and to his family are important. The bonds which bind a child in a family are strong. Any intervention by the courts in the delicate filigree of relationships within the family has profound effects. The State (which includes the legislature, the executive and the courts) should not intervene so as to weaken or threaten these bonds unless there are exceptional circumstances. Exceptional circumstances will depend on the facts of the case; they include an immediate threat to the health or life of the child.*

*The principle behind excluding the State from decision-making in relation to the child where parents are exercising their responsibilities and duties is a constitutional principle. It is one of the fundamental principles of the Constitution. The Constitution describes a society which aspires to a community of families. Families are to be protected. This means that State interventions are limited.”*

---

<sup>14</sup> See *North Western Health Board v HW* [2001] IR 622

<sup>15</sup> *ibid* page 725



5.6 A balance must therefore be struck between the bodily integrity and welfare of the child and the constitutional importance afforded to the family. As a result of this delicate constitutional framework, it is questionable whether the introduction of a bald prohibition on corporal punishment within the family in all circumstances would pass constitutional muster. In the event of a constitutional amendment being required in order to allow for the introduction of such a prohibition, it is, for the moment, at best unclear and perhaps even unlikely that such a proposal to amend the Constitution would have the support of the majority of the population at a referendum, which must be held to amend the Constitution. These are considerations which, it is respectfully submitted, are of the utmost seriousness. It must also be recognised that no State seeks to intervene in matters of family discipline which do not involve corporal punishment. Nevertheless, any form of discipline or punishment *may* be harmful to a child especially discipline unjustly imposed. Nevertheless, no society can or does seek to second-guess such parental decisions. A unique margin of appreciation is accorded by most States to the regulation of matters within a family and most states are properly reluctant to intervene when no significant harm is done which would justify the clear and real damage that will be done to the relationship, by State intervention. Since that relationship is of fundamental interest to society and since governmental intrusion into it, is inevitably damaging to the relationship, such intrusion and intervention is justified only when it can be demonstrated that the harm done to the individual members of the family outweighs the harm done to that and other family units by the possibility of governmental intrusion. Thus, as is set out above, this occurs in circumstances where there is an immediate threat to the health or life of a child. It is respectfully submitted that Irish law achieves this balance by prohibiting all physical punishment but within an exception in those cases for what can be demonstrated by a parent to be no more than is reasonable, a decision of the parent which, in turn, can be tested and scrutinised by a court.

## 6. CORPORAL PUNISHMENT IN OTHER CONTEXT.

### Corporal Punishment in Schools

- 6.1 As indicated above, on foot of the recommendation of the Law Reform Commission, corporal punishment in schools was formally abolished by way of the introduction of the Non-Fatal Offences against the Person Act 1997. This Act abolished the common law rule providing for immunity by teachers from criminal liability for punishing pupils, previously preserved by Section 37 of the Children’s Act 1908.
- 6.2 However, in 1982, the Department of Education had already adopted circulars on national and post-primary schools prohibiting the use of corporal punishment.
- 6.3 Regarding the industrial and reformatory schools (to become children detention schools under the 2001 Act), the central policy on child protection and welfare issued by the Department of Education to these schools specifically provides that “physical punishment is unacceptable in the schools and agreed disciplinary procedures are in place to deal with employees guilty of such actions”. Statutory force is given to this prohibition once the 2001 Act comes into effect<sup>16</sup>. Section 201 provides that:

*“201. —(1) Any child who breaches the rules of a children detention school may be disciplined on the instructions of the Director of the school in a way that is both reasonable and within the prescribed limits.*

*(2) Without prejudice to the power of the Minister to prescribe limits for the disciplining of children detained in children detention schools, the following forms of discipline shall be prohibited—*

*(a) corporal punishment or any other form of physical violence,*

*(b) deprivation of food or drink,*

*(c) treatment that could reasonably be expected to be detrimental to physical, psychological or emotional wellbeing, or*

*(d) treatment that is cruel, inhuman or degrading.”*

---

<sup>16</sup> Section 201 has not yet come into force.

## **Prisons and places of detention**

- 6.4 Corporal punishment has not been used in the prison system for many years. Rule 72(1) of the Rules for the Government of Prisons prohibits corporal punishment except where ordered by a court. The 2001 Act repealed the provisions in the Children Act 1908 (Section 107(g)) which permitted the court to impose corporal punishment on children<sup>17</sup>. Again, Section 201 of the 2001 Act, when commenced, will prohibit corporal punishment in children detention schools, designed for the detention of young offenders under 16 years of age.

## **Pre-school establishments**

- 6.5 Article 8 of the Child Care (Pre-School Services) Regulations 1996 (SI No. 398/1996) provide that:

*“A person carrying on a pre-school service shall ensure that no corporal punishment is inflicted on a pre-school child attending the service.”*

- 6.6 In this context, pre-school services are categorised into sessional services, full day care, childminders and drop-in centres. In relation to childminders, only childminders caring for more than three children who are not the children of relatives or of the same family are covered by the provisions of the legislation.
- 6.7 However a voluntary notification scheme for childminders is in place which allows childminders who are exempt from the legislation to notify their local health board and receive support from the health board and the local City or County Childcare Committee. National Guidelines for Childminders who wish to voluntarily notify are currently being prepared. Among the core requirements and good practice recommendations being considered for inclusion in the Guidelines is a reference to corporal punishment not being inflicted.

---

<sup>17</sup> This repeal has not yet come into effect.

6.8 In addition, membership of Childminding Ireland, the national childminding organisation which is funded mainly by the Department of Justice, Equality and Law Reform and the Department of Health and Children, is open to all childminders. Childminding Ireland has Guidelines for the Provision of Quality Family Day Care which includes a reference to the organisation's "No Smack Policy" adopted in 1989.

### **Children in Foster Care and Residential Care**

6.9 The Child Care Act 1991 ("The 1991 Act") sets out the statutory framework within which child welfare and protection services are provided in Ireland. The 1991 Act places statutory responsibility for the provision of child welfare and protection services on regional health boards. (The 1991 Act also allows for voluntary and other bodies to provide certain of these services on behalf of the regional health boards).

6.10 While the emphasis of child welfare and protection services is increasingly on early intervention and family support services (with the aim of preventing the need for children being taken into care), where children are taken into care by regional health boards this is done either on a voluntary basis (i.e. with the consent of the parents of the child) or under a Court Order.

6.11 Over 80% of the approximately 4,500 children in care in Ireland are in foster care. Numbers in residential care would amount to between 500-600 (including about 80-100 in specialised residential care i.e. high support and special care). As required by the 1991 Act, four sets of regulations apply to the provision of services to children in care.

These are the:

- (a) Child Care (Placement of Children in Residential Care) Regulations 1995 (S.I. 259 of 1995)
- (b) Child Care (Placement of Children in Foster Care) Regulations 1995 (S.I. 260 of 1995)
- (c) Child Care (Placement of Children with Relatives) Regulations 1995 (S.I. 261 of 1995).
- (d) Child Care (Standards in Children's Residential Centres) Regulations 1996, (SI No. 397 of 1996).

6.12 SIs 259, 260 and 261 of 1995 have been in force since the latter part of 1995 and SI No. 397 of 1996 has been in force since the end of 1996. The Child Care (Placement of children in Residential Care) Regulations 1995 state at Part III- 5 that:

*“A health board shall satisfy itself in respect of each relevant residential centre that appropriate and suitable care practices and operational policies are in place having regard to the number of children in the centre and the nature of their needs.”*

6.13 It is quite clear that corporal punishment would not be an appropriate or suitable care practice in relation to children in care. Practice guidance in relation to acceptable child care practice such as that contained in *“Our Duty to Care: The Principles of Good Practice for the Protection of Children and Young People”* published by the Department of Health and Children states that workers should *“never use physical punishment with children”*. Although this document is primarily aimed at the voluntary and community sector this would also represent the Government’s position in relation to children in residential care and foster care.

6.14 Non-health board operated residential centres to operate lawfully must be inspected and registered by the health board concerned under the 1991 Act and are subject to ongoing monitoring of their service by the health board and to periodic inspection and renewal of registration. Health Board run residential services are subject to ongoing monitoring by the health board and to inspection by an authorised person acting on behalf of the Minister under section 69 of the Act of 1991. The Social Services Inspectorate (SSI) which was established in 1999 carries out these inspections. In addition each individual child is required to have a care plan and to be visited regularly by a social worker.

6.15 The SSI also liaises with and monitors the reports of the inspections of non-health board run residential services by the health boards. The SSI has indicated that corporal punishment is not an acceptable practice in relation to children in residential care or foster care. To date, the SSI, in its 90 inspections of 82 health board centres (of a total of 96) has come across no instance of smacking or corporal punishment being used as a sanction. Furthermore, in all 76 of the non health board run residential centres which have either been inspected and registered or, in a small number of cases, given

conditional registration pending inspection, no instance of smacking or corporal punishment was found. Indeed not only was there no instance of corporal punishment found, but the SSI and Health Boards require each centre to have a policy on acceptable sanctions in line with the National Standards on Residential Care and, as part of this, to expressly prohibit the use of corporal punishment.

- 6.16 The Regulations on foster care and relative foster care provide for health boards to conduct assessments to ensure that prospective foster parents are suitable and to supervise and regularly visit children and to review cases. In practice, the care plan and supervision is done by a health board social worker. The Regulations also provide a procedure for children to be removed, *inter alia*, where the health board considers that the continued placement of the child with the foster parents is no longer the most appropriate way of performing its duty to provide care for the child under the Act. The “*National Standards for Foster Care*” and the “*Children’s Book About Foster Care*” (aimed at children in foster care), both issued by the Department of Health and Children in April 2003, expressly state that *corporal punishment or smacking is unacceptable and prohibited*. If an instance occurs, children are advised to complain and inform their social worker immediately. The thorough assessment and induction that foster parents are required to undergo and the ongoing review of placements by the health board ensures that children are not subjected to corporal punishment.

## 7. CONCLUSION

- 7.1 Having regard to the above, it is clear that Ireland has taken steps to ensure that the law prohibits the ill-treatment of any child by virtue of Section 246 of the Children Act, 2001. Such a statutory prohibition will of course supplement the constitutional guarantee to bodily integrity and to freedom from cruel and degrading treatment which any child is entitled to invoke.
- 7.2 In schools, teachers no longer benefit from any immunity from the law of assault. Corporal punishment is expressly prohibited by way of primary legislation<sup>18</sup> in

---

<sup>18</sup> Section 201 of the 2001 Act.

detention schools and in other schools.<sup>19</sup> It is also prohibited in pre-schools coming within the definition of the Pre-school Services Regulations, 1996.

7.3 As regards children in foster care, the relevant regulations require that such placements must be suitable. Similarly, the regulations applying to children in residential care require that appropriate and suitable care practices must be in place. Policy documents exclude corporal punishment as either a suitable or appropriate care practice for children in foster care and in residential care. Consequently, it is inaccurate to state, as the OMCT does at page 6 of its complaint, that there is no legislation – primary or secondary – protecting children from corporal punishment and other humiliating forms of punishment or treatment in foster care or residential care institutions.

7.4 Similarly, it is inaccurate to state that there is no legislation protecting children from corporal punishment from child-minders looking after children of relatives, children of the same family or not more than three children of different families in circumstances where Section 246 of the 2001, Act which entered into force on 1 May 2002 expressly makes it an offence to ill-treat children.

7.5 Ireland concedes, however, that there is no express statutory prohibition on all forms of corporal punishment within the family, although any reasonable punishment is not prohibited and any such punishment is subject to objective and independent review, by reference to developing societal norms. As indicated above, Ireland is not of the view that it is appropriate to interpret Article 17(b) of the Revised Charter in such a manner as to require the Contracting Parties to introduce such a legislative prohibition. Ireland's policy is to keep the law relating to corporal punishment within the family under review but does not consider it appropriate, for the time being, to introduce such legislation. Indeed, there may be constitutional hurdles to the introduction of such legislation.

7.6 In the circumstances, Ireland asks the Committee not to find that Ireland is failing to conform with its obligations under Article 17 in the manner suggested by the OMCT.

---

<sup>19</sup> By Ministerial circular.

Dated this 12<sup>th</sup> day of March 2004

Signed:

Denise McQuade  
Agent of the Government of Ireland  
Legal Division  
Department of Foreign Affairs  
Hainault House  
69/71 St. Stephen's Green  
Dublin 2

To:

Regis Brillat  
Secretariat of the European Social Charter  
Council of Europe



## APPENDIX

### Newspaper reports:

Irish Independent, 10 June 1999  
Irish Independent, 20 January 2000  
Irish Times, 20 January 2000.

i.  
ii.  
iii.

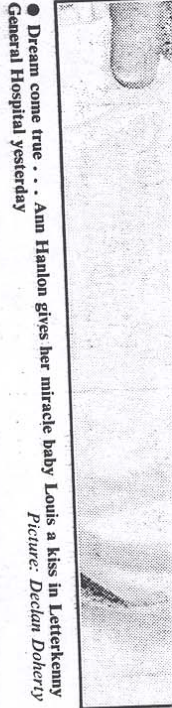
m58206

provoked by ...  
 RETREAT  
 It was accepted on behalf of the alliance by Lt Gen Mike Jackson, Nato's commander for Kosovo, at the end of four days of talks. Yugoslavias's Col Gen Svezozar Marjanovic said with the signing of the agreement, "the war has ended".

Although British Prime Minister Tony Blair and his foreign secretary Robin Cook had insisted there would be no negotiation with the Serbs, Nato finally adopted a German proposal to telescope what had been a complex procedure of verification of troop withdrawal and UN diplomacy into just hours.  
 Foreign ministers of the G8, which includes the major Nato governments and Russia, agreed to the concession during negotiations in Cologne to revive the stalled talks.

The truncated version of Natos original demand for verification of the Serb retreat was vigorously promoted yesterday by German Foreign Minister Joschka Fischer.  
 Against fierce British opposition, Mr Fischer has long been promoting the idea that there ought to be a "pause" in the bombing. (© Daily Telegraph, London)

**Doctors come out in protest — Page Six**



● Dream come true . . . Ann Hanlon gives her miracle baby Louis a kiss in Letterkenny General Hospital yesterday  
*Picture: Declan Doherty*

## Child group praises fine for dad who slapped son

THE ISPCC last night welcomed a court decision in which a father was fined for severely slapping his four-year-old son across the face.

Brett Shaw (27), of Ballinfolie Park, Galway was fined £100 in Galway District Court yesterday for hitting his son Gavin Clarke. Judge John Garrahan said Shaw had exceeded what was reasonable in the circumstances.

ISPCC director of services Paul Gilligan said the court had rightly viewed the incident as an assault and called for a change in current Irish legislation.

"There is an exception in current law where a physical assault can be justified as a reasonable chastisement and used as a defence. We are looking for that to be changed," he said.

The court heard that Gavin had refused to eat his dinner when told to do so by his mother and she had sent him to his room as punishment. When Shaw went to his son's bedroom to talk to him about his behaviour, Gavin refused to answer him.

By MARTHA KEARNS and BRIAN McDONALD

Garda Richard Rice told the court that Shaw had slapped his son once across the face. He said it had been a very strong slap. He had gone to Shaw's home to speak to him about the incident but he had declined to make a statement. The child's mother made a statement outlining the nature of the assault.

Mr Shaw's solicitor Sean Acton said his client now accepted liability and regretted the incident very much and had a great relationship with his son.

He is going to meetings to learn to control his anger and is back with his girlfriend - the child's mother.

The 'National Parents' Council (primary) said more needed to be done to support parents in using "positive ways" to discipline their children. The council's chief executive, Fionnuala Kilfeather, said it did not support the physical punishment of children but parents needed help to learn other ways to discipline them.

*Independent - 20.1.99*

**No. 1 DOW**  
 Avril - for EURO  
 Former, Minister at Environment, Finance  
 Fine Gael front bench SpO  
 Environment and the Ma  
 County Coun  
 Deputy Leader and Spo  
 Scenad  
 fine gael  
 And continue your pr

*Independent*  
20 January, 2000.

# Poker-wielding father-of-five jailed

By TOMAS Mac RUAIRI

A FATHER who battered his seven-year-old son with a poker was jailed for three-and-a-half years yesterday.

Judge Elizabeth Dunne at Dublin Circuit Criminal Court said that she was "speechless at this type of brutality being inflicted on a child of that age".

The victim had not only suffered physically but was now also severely traumatised, she said.

Michael Kearns (33), a father of five, of Neilstown Drive, Clondalkin, Dublin, pleaded guilty to causing serious harm to his son, Kenneth, on November 25, 1998.

Gda Derek Quinn said Kenneth suffered a broken arm, lost six teeth and had bruising all over his body which

also showed signs of old injury indicating previous beatings.

Judge Dunne said Kearns' conduct, after the terrible beating he inflicted on the boy, when he failed to get assistance and stopped his wife from getting medical help, was also difficult to explain.

Gda Quinn told prosecuting counsel Ms Melanie Grealley BL Kearns had hit the boy three to four times with a poker at about 8pm.

The other children witnessed the ferocious assault.

The mother returned from work around 10pm but Kearns pulled the telephone from her and wouldn't let her

call an ambulance. Kenneth was crying in pain.

Some hours later Kearns injured himself in seething anger and ambulances were called for both.

Patrick Marrison BL, defending, said the psychiatric report indicated his client was a man of limited intelligence.

He said Kearns had shown remorse when questioned by gardai and was under severe pressure at the time, had had no sleep and had been given bad news about his work.

Kearns hoped he could ultimately be restored to live with his family. The children were now all in foster care. Kearns acknowledged he had an anger problem which had to be addressed.

The Irish Times - Thursday, January 20, 2000

### Man jailed for beating son with poker

A father who battered his seven-year-old son with a poker has been jailed for three-and-a-half years by Judge Elizabeth Dunne at Dublin Circuit Criminal Court.

Judge Dunne said she was "speechless at this type of brutality being inflicted on a child of that age". The young victim had not only suffered physically but was also severely traumatised.

Garda Derek Quinn said Kenneth Kearns suffered a broken arm, lost six teeth and had bruising all over his body which also showed signs of "old injury", indicating previous beatings.

Michael Kearns (33), a father of five, of Neilstown Drive, Clondalkin, pleaded guilty to causing serious harm to his son, Kenneth, on November 25th, 1998. He had no previous convictions.

His children were now all in foster care and he had contact with his wife. While on bail he had observed all the conditions and had access to his children only under the supervision of the Eastern Health Board.

Judge Dunne said Kearns's conduct after inflicting the beating, when he failed to get assistance and also stopped his wife from getting medical help, was also difficult to explain.

She added that a sentence of five years was deserved but she was mindful to show leniency only because Kearns had no previous convictions and pleaded guilty at the first instance.

She also took the matters raised by defence counsel Mr Patrick Marrinan into consideration.

Garda Quinn said Kearns hit the boy three to four times with a poker at about 8 p.m. Their other children witnessed the assault. The boy's mother returned from work around 10 o'clock but Kearns pulled the telephone from her and wouldn't let her call an ambulance. Kenneth was crying in pain at this time.

Some hours later Kearns injured himself and ambulances were called. Mr Marrinan noted the psychiatric report indicated his client of limited intelligence. Kearns denied any prior problems in the family.

He had shown remorse when questioned by gardai. Kearns was under severe pressure at the time he assaulted Kenneth, who was his eldest child. He had no sleep and had been given bad news about his work that day.

Mr Marrinan said the victim impact report indicated his son was not completely hostile to Kearns, who was genuinely concerned that he could ultimately be restored to live with his family and take on his responsibilities.

Mr Marrinan added that Kearns acknowledged he had an anger problem which had to be addressed.

© The Irish Times