

**EUROPEAN COMMITTEE OF SOCIAL RIGHTS  
COMITE EUROPEEN DES DROITS SOCIAUX**



7 May 2004

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

**Case Document No. 6**

**ADDITIONAL INFORMATION FROM THE  
WORLD ORGANIZATION AGAINST TORTURE (OMCT)  
ON THE MERITS**

**registered at the Secretariat on 3 May 2004**



## **Collective complaint 18/2003**

### **World Organisation against Torture v Ireland**

**Response of the World Organisation against Torture to the written observations submitted by the Government of Ireland; please see also separate document including general additional explanations and information on the merits of this complaint.**

#### **Summary**

1. The Government's Observations concede that the common law defence of "reasonable chastisement" persists for parents and some other carers. The Observations appear to defend the legal status quo. As we noted in our complaint: "The Irish Government appears to have accepted the case for eventual law reform to prohibit all corporal punishment, but it has taken no significant action. There is no justification for further delay in providing effective legal protection for Ireland's smallest and most vulnerable citizens. Law reform should not wait for public education; law reform should be accompanied by widespread awareness-raising about the law and children's right to protection. While the law continues to condone hitting and humiliating children, education campaigns and promotion of positive, non-violent forms of discipline are unlikely to be effective."
2. In addition, while there are guidance and standards, there is no legislation prohibiting corporal punishment and any other forms of degrading punishment or treatment of children in some forms of child care (foster-care, residential care and certain childminding situations; see para. 43 et seq below).
3. Research quoted in the complaint (and referred to in the Government's Observations, para. 4.6) shows that corporal punishment remains prevalent and socially approved.
4. **Thus, we ask the Committee to conclude that Ireland is not in compliance with Article 17 of the Revised Social Charter because the common law defence of "reasonable chastisement" justifies corporal punishment. Ireland has failed to prohibit effectively all corporal punishment and any other forms of degrading treatment or punishment of children by parents and in some other settings. Given the scale and extent of the breaches of children's right to protection suggested by the quoted research, we hope that the Committee will emphasise the importance and urgency of implementing law reform and other linked comprehensive awareness-raising and educational measures. These are "appropriate and necessary measures" in the terms of article 17.**

#### **Comments on the Government's Observations**

5. In para. 2.1 of the Observations, the Government alleges that OMCT takes "a particular view of law reform: such reform should not take place subsequent to public education or information campaigns". OMCT believes that Contracting States should fulfil the legal obligations they undertake when they ratify international human rights instruments in a timely manner. Law reform is essential

to respect children's human rights and should be perceived as a key element in promoting a change in attitudes and practice. It is three years since the European Committee of Social Rights issued its general observation on article 17. It is six years since the Committee on the Rights of the Child expressed concern, in the context of Ireland's implementation of the Convention on the Rights of the Child, that corporal punishment in the family was not prohibited. It is seven years since the report of the parliamentary Select Committee on Social Affairs on "Non-Fatal Offences against the Person in respect of Children" recommended removal of the common law defence of "reasonable chastisement". It is 10 years since Ireland's Law Reform Commission recommended 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".

6. The Government presents no evidence of its active involvement in or support of the re-education of parents actively to discourage corporal punishment and promote positive, non-violent forms of discipline. While the National Children's Strategy 2000 promotes quality parenting programmes, inquiries with potentially responsible government departments produced no evidence of active discouragement of corporal punishment by parents.
7. Fulfilment of human rights obligations by governments should certainly not wait for majority public opinion to support them. In particular, there is no justification whatsoever for waiting for public – adult – opinion to change before remedying a breach of unenfranchised children's human rights. Many European states would still have the death penalty and lack anti-discrimination legislation if they relied on public opinion to determine their approach to human rights.
8. The Government suggests (para. 2.1) that our approach addresses the issue "at a level of abstraction not intended by the Charter participants". There is nothing abstract about this complaint. As it states, "the purpose of this complaint is to improve the effective enforcement of children's rights to protection from violence, including all corporal punishment, in the family and all other settings". Available research, quoted in the complaint and in part referred to in para. 4.6 of the Government's Observations, illustrates the scale of breaches of children's rights to respect for their physical integrity and human dignity. The existence of the common law defence, rendering legal an arbitrary level of corporal punishment, in itself plainly breaches article 17 of the Revised Social Charter.
9. We would agree with the Government that simply removing the defence without linking law reform to widespread awareness-raising on the law and children's right to protection and public and parent education would be unlikely to be effective. But equally, while the law condones corporal punishment, and the Government persists in defending its legality as it does in its Observations, there is little hope of public education having a substantial impact.
10. In the light of the researched experience of other states which have removed defences and gone on to prohibit explicitly all corporal punishment (see general explanations and information attached), it is strange that the Government should state: "It must be open to serious doubt whether the position of even one child will

be altered for the better if the complaint succeeds”. If the complaint succeeds and the Government of Ireland moves quickly to fulfil its human rights obligations and prohibit all corporal punishment and any other form of degrading treatment or punishment of children, and to link this reform with the other necessary measures proposed in the complaint, the lives of very many Irish children would be very significantly improved.

11. In the last line of para. 2.1, the Irish Government states it is significant “that OMCT does not cite the support of any individual or interest group familiar with its position”. As the Government must be aware, Ireland’s major child protection organisation, the ISPCC, which has advised us in the preparation of this complaint, has for more than a decade campaigned for abolition of parents’ rights to use corporal punishment. In 1997, the Children’s Rights Alliance, a coalition of Irish NGOs concerned with the rights and welfare of children, called for the Government to lead the effort to discourage parents from slapping their children and to take steps culminating with the elimination of the common law chastisement exception. Subsequently, the Alliance, now with 75 supporting non-governmental organisations, has given its full support to the implementation of the Concluding Observations of the Committee on the Rights of the Child, which call on Ireland to “take all appropriate measures, including of a legislative nature, to prohibit and eliminate the use of corporal punishment within the family”.
12. Internationally, the Global Initiative to End All Corporal Punishment of Children is supported by UNICEF, UNESCO, successive UN High Commissioners for Human Rights (including Mary Robinson, former President of Ireland) and very many individual human rights institutions and international and national NGOs, including OMCT and the ISPCC. The statement signed by supporters calls on governments to explicitly prohibit all corporal punishment.
13. In paras. 3.5 to 3.9, the Government’s Observations summarise aspects of the general observations issued by the European Committee of Social Rights in 2001 and “respectfully submit” (para. 3.8) that it is “inappropriate” for the Committee to interpret article 17(b) as requiring a complete prohibition in legislation of corporal punishment by, in particular, parents. We respectfully submit that it is inappropriate for a Contracting Party to challenge in this way the developed case law of the Committee which is charged with the interpretation of the Charters. The 1991 Amending Protocol to the Charter asserts the competence of the Committee of Independent Experts, and the Committee of Ministers has encouraged states to envisage the application of the Protocol before its entry into force.
14. In para. 3.8 (a), the Government argues that a “blanket” legislative prohibition is inappropriate; first because it 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”. These constitutional guarantees, while welcome, have not been interpreted to fully protect children’s bodily integrity. If they had been, the common law defence would have been declared unconstitutional. The Government also refers to “the constitutional position of the family unit”: we comment on these issues in para. 39 below.

15. The Government also refers to the “flexible and responsive nature of the common law and the defence of ‘reasonable chastisement’”. The law is certainly not “flexible and responsive” from a human rights or children’s perspective. The common law defence sends a clear message to society that hitting children, unlike hitting adults, is acceptable if determined, ultimately by a court, to be reasonable. When the defence is used in court, it is up to the prosecution to prove that the chastisement used was not “reasonable”.
16. In para. 3.8 (b), the Government suggests 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 (the UN Convention on the Rights of the Child). The European Committee does not rely on the CRC for its interpretation, nor does it interpret the scope of the Charter provision primarily by reference to the CRC. But it is standard practice, and is entirely appropriate, for the Committee to take account of all relevant provisions of international law in reaching its own interpretation of the Charter provision. To do otherwise would be irresponsible and show a lack of seriousness. All international courts, tribunals and treaty bodies and increasingly national courts, undertake a general survey of the relevant provisions of applicable treaties when trying to determine the normative scope of a provision such as Article 17.
17. Additionally, because every contracting party to the Social Charter is also a party to the CRC, it is appropriate that the Committee should take full account of the binding obligations undertaken by those governments under the CRC, insofar as they are relevant to the issues under consideration. To the extent that the relevant provisions of the CRC are international customary law, and the fact that 192 states are parties to it creates a significant presumption in that respect, it would violate the general principles of interpretation if the Committee had not taken account of the interpretation accorded to the CRC provision by the only body charged with some responsibility in that regard.
18. As the European Court of Human Rights Grand Chamber noted in a recent judgment (*Sahin v Germany*, July 8 2003):

“The human rights of children and the standards to which all governments must aspire in realising these rights for all children are set out in the Convention on the Rights of the Child. The Convention entered into force on 2 September 1990 and has been ratified by 191 countries, including Germany.

“The Convention spells out the basic human rights that children everywhere – without discrimination – have: the right to survival; to develop to the fullest; to protection from harmful influences, abuse and exploitation; and to participate fully in family, cultural and social life. It further protects children’s rights by setting standards in health care, education and legal, civil and social services.”
19. As noted in our separate general explanations and information on the merits of the complaint, the European Committee’s observation is in fact consistent with established international human rights standards.

20. In para. 3.8 (c), the Government refers to the judgment of the European Court of Human Rights in *A v UK*. The European Court judgment is limited to the facts of the particular case and *A v UK* concerned a young boy who was beaten with a cane causing bruising. The judgment is relevant because it emphasised the responsibility of the state to provide adequate protection including effective deterrence against violence including in the home, and it found that domestic law in the UK (the same defence of “reasonable chastisement”) failed to achieve this. It also referred to articles 19 and 37 of the UN Convention on the Rights of the Child. Supervision of execution of the judgment by the UK continues in the Committee of Ministers. It is clear that the European Committee of Social Rights was not justifying its general observation on the basis of this particular judgment; the judgment highlights the Court’s emphasis on state responsibility and that children are particularly vulnerable individuals.
21. In para. 3.8 (d), the Government suggests that the Committee has relied on the introduction of a prohibition on corporal punishment in six “civil law countries” to justify its interpretation of article 17(b). While the Committee did name six countries in its observation, this is plainly not in itself the justification for its observation. In fact, it appears that at least 10 and possibly 12 member-states of the Council of Europe have explicitly prohibited all corporal punishment, having previously removed defences or justifications in their criminal or civil codes or both. At least another 10 states have either removed an existing defence, or there has never been a defence – but these states have not as yet gone on to explicitly prohibit all corporal punishment.<sup>1</sup>
22. The identification of the legality of corporal punishment of children as a clear breach of children’s human rights is relatively recent, a reflection of children’s dependent, disempowered and unenfranchised status. Now identified, no state should hide behind the slowness of other states in bringing their laws into line with their human rights obligations. We cannot see the relevance of the Government’s assertion that none had implemented a “blanket prohibition at the time of the coming into force of the Charter or the Revised Charter”. But in any case this claim is inaccurate. In Sweden, a provision in the Criminal Code excusing parents who caused minor injuries through physical punishment was removed in 1957 and from that date the criminal law on assault applied equally to “disciplinary” assaults on children. By the time the Revised Charter came into force in 1999 at least eight member states had explicitly prohibited corporal punishment and many more had no defences equivalent to “reasonable chastisement” in their law. Of the contracting parties to the Additional Protocol providing for a system of collective complaints, at least five have explicitly prohibited corporal punishment.
23. In para. 3.8 (e), the Government states: “Ireland does not accept that the Committee should be availed of by non-governmental organisations to dictate the pace for legislative reform within Ireland.” This appears to negate the purpose of the “collective complaints” procedure which Ireland accepted when it ratified the Additional Protocol in November 2000. The overall purpose of the 1995

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<sup>1</sup> Summary table in Council of Europe Forum for Children and Families Document CS-Forum (2003) 5 rev; draft prepared for December 2003 meeting of the Forum from information collected by the Council of Europe and the Global Initiative to End All Corporal Punishment of Children.

Additional protocol is “to improve the effective enforcement of the social rights guaranteed by the Charter”. As noted in the complaint, page 7, we see its purpose being to “improve the effective enforcement of children’s rights to protection from violence, including all corporal punishment, in the family and all other settings”.

24. We are perplexed by the Irish Government’s lack of faith in law reform and in state interventions. In para. 5.6 the Government appears to suggest that “governmental intrusion” is inevitably damaging, although it recognises that it is necessary in some circumstances. The purpose of explicit law reform is to reflect children’s human rights and to send a clear message into the “privacy” of the family, to change traditional attitudes and practice. Over time, we can be confident that this will lead to less need for formal interventions and prosecution of family members. Law reform is needed to provide a clear basis for other positive and supportive interventions.

### **The law and policy relating to corporal punishment of children in Ireland**

25. As noted above, it appears that the compatibility of the constitutional protection of “bodily integrity” with the persisting “reasonable chastisement” defence has not been tested. The Government states that “the current common law on the defence of reasonable chastisement has not been considered to breach the constitutional guarantee”. This has not been tested, and the most likely reason is the extreme difficulty for children of mounting a legal and ultimately constitutional challenge concerning assaults by their parents.
26. Many states have constitutional guarantees of protection of human dignity and physical integrity, but these have not proved adequate to protect children from corporal punishment.
27. In para. 4.3, the Government notes that we wrongly stated in the complaint that section 37 of the Children Act 1908 had not been repealed. We did this in good faith, our adviser having asked an official in the Ministry of Justice in May 2003, who stated that this statutory confirmation of the defence had not as yet been repealed. We discovered subsequently that through a Commencement Order, the provision had been repealed, with effect from May 1 2002, and without, it appears, any publicity.
28. As the Government confirms, this is in any case of no consequence in relation to the substance of the complaint. We stated in the complaint that “it is important to emphasise that removing the common law defence would require an explicit provision in addition to repealing this statutory confirmation of the defence”. The Government states in para. 4.4 that “the right of the parent to administer moderate or reasonable physical chastisement of a child subsists despite the repeal of section 37”.
29. The Government suggests (para. 4.4) that “the standard thus adopted” is one “peculiarly well suited to reflect developing societal views on acceptable methods of discipline”. In fact, the existence of the defence confirms to parents and children and the general public that some level of violent punishment of children



can be justified in law, and the onus is on the prosecution to prove that such violence is not “reasonable”. Case law may suggest that the defence is “limited to the punishment of unemancipated children above the age of infancy not resulting in permanent injury”, but the message received by the general public is that corporal punishment of children by their parents is permitted.

30. The Law Reform Commission in its 1994 Report, while noting that parental chastisement raised in its view different considerations from school corporal punishment, did recommend – 10 years ago – that the common law chastisement exception should be abolished, albeit once the re-education of parents had proceeded “without delay”. A generation of children has suffered from the perpetuation of this defence over the last decade.
31. In para. 4.6, the Government notes that it supports the recommendations of the Law Reform Commission. 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”. OMCT respectfully submits that none of these factors in any way lessens or delays the application of the obligations of contracting states under human rights instruments, including the Revised Social Charter. OMCT hopes that the conclusions adopted by the European Committee of Social Rights on this complaint will indeed accelerate the pace of a long overdue legal reform and implementation of other necessary measures. But if this is the case, it will be the human rights mechanisms of the Council of Europe, not OMCT, which sets the pace.
32. Also in para. 4.6, the Government quotes the results of a survey commissioned by the ISPCC which found that 61 per cent of those surveyed “saw nothing wrong with slapping a child who misbehaved”. This surely, should have been an immediate incentive to reform the law, linking the reform to public education. The fact that 69 per cent opposed introduction of a law prohibiting all corporal punishment is, as we have noted before, irrelevant to the obligations to respect human rights standards. In fact in most if not all the states which have removed similar defences and gone on to implement explicit prohibition of all corporal punishment, law reform has been pursued by parliaments well ahead of public opinion, on the basis of human rights considerations and expert opinion. Following reform, where it has been measured it appears that public opinion quickly changes to support such reforms.
33. The infrequent use of the defence in court proceedings does not reduce the importance of removing it (para. 4.7). The existence of the defence sends a clear message to parents, children and others that corporal punishment is permitted. It prevents those involved in child protection and those working with parents delivering a clear message that no violence against children is acceptable, that it is at least as unlawful to hit a child as to hit anyone else. Interview research, quoted in the complaint (page 6), has shown the high prevalence of corporal punishment and persisting social approval of it by parents in Ireland.
34. In addition, it is likely that the existence of the defence directly affects the number of prosecutions that are brought against parents. The Government has no way of

knowing how often social workers, police and prosecutors are deterred from action to protect children because of the defence. But in asserting this, we should make clear that we do not see the primary purpose of the law in this context being to prosecute parents. Removal of the defence will certainly ease prosecution in those cases in which it appears to be necessary to protect a child and to be in the best interests of the affected child or children. But prosecution in such instances is in every case an indication of the failure of the child protection system to prevent assault. There are special and obvious reasons why prosecution of parents is very seldom in the interests of their children. But that does not justify preserving law which is incompatible with human rights. It could, however, point to the need for guidance on prosecutions which focuses on the best interests of the child victim.

35. The Government suggests in paras. 4.7 and 4.8 and appendices that the courts “are intolerant of anything but mild physical punishment”. It makes this claim on the basis of reports of only two cases, in one of which a man was fined for slapping a four year-old across the face (in the 1999 press cutting submitted, the Director of Services of the ISPC is quoted as calling for law reform to remove the “reasonable chastisement” defence). The other case concerned a father who pleaded guilty and had battered his seven year-old son with a poker, causing a broken arm, loss of six teeth and bad bruising all over his body. This does not add to the Government’s claim.
36. In para. 4.9 the Government suggests that the introduction of section 246 of the Children Act 2001 is “in line with its policy to keep the law relating to corporal punishment under review”. In fact section 246 is a normal measure to prohibit severe violence or “cruelty” to children, as the last part of subsection (1) makes clear, “. . . in a manner likely to cause unnecessary suffering or injury to the child’s health or seriously to affect his or her wellbeing” [our emphasis added]. The phraseology of subsection (1) is not significantly different from subsection (1) of section 24 of the 1908 Act which it replaces. The addition of subsection (7), including “frightening, bullying or threatening” in the definition of “ill-treatment” for the purposes of the section, is welcome, but is still subject to the limitations in subsection (1).
37. Contrary to the Government’s assertion in para. 4.11, there have been no significant developments in relation to the protection afforded by Irish legislation against corporal punishment since the formal prohibition of school corporal punishment in the 1997 Non-Fatal Offences against the Person Act. As the Government’s observations confirm, the common law defence of reasonable chastisement persists for parents and for some other carers. As noted above, (para. 27), repeal of the statutory confirmation of parents’ and others’ punishment rights in the 1908 Act has no effect on the common law and was implemented with no publicity.
38. The general observation of the European Committee of Social Rights refers to the prohibition of “any form” of violence against children as well as of any other form of degrading punishment or treatment. The Committee also emphasises that it “does not find it acceptable that a society which prohibits any form of physical violence between adults would accept that adults subject children to physical violence”. There is no basis for the suggestion by the Government that

“reasonable” corporal punishment “is not within the mischief aimed at by the Charter” (para. 4.11).

### **Constitutional provisions**

39. In paras. 5.1 to 5.6, the Government suggests that removing the defence to prohibit all corporal punishment might not “pass constitutional muster”. This is not an issue that was raised by the Law Reform Commission when it reviewed this law and recommended removal of the defence. The Government, in accepting the case for eventual law reform to remove the defence, has not previously raised these concerns itself. There is nothing in the articles of the Constitution quoted by the Government which suggests that children should be accorded a lesser right to protection from assault than other family members. The Constitution extends to the child an equal right of bodily integrity. It also upholds the principle of equal protection under the law. Constitutional principles concerning the family have not prevented wives and partners being accorded equal rights to protection from assault; children too are people and holders of human rights – simply smaller and more fragile people. A relevant decision of the European Commission on Human Rights as long ago as 1982 found that prohibition of corporal punishment in the family did not breach the “family” rights of parents, nor rights to religious freedom (European Commission on Human Rights, admissibility decision on application 8811/79, “Seven Individuals v Sweden”, May 13 1982).
40. We underline again that there is a human rights imperative, asserted by the European Committee of Social Rights and by other human rights monitoring bodies, for law reform to restrict the defence which justifies corporal punishment and thus give children equal protection under the law on assault. The Law on Treaties emphasises that states cannot justify failure to meet human rights obligations on the basis of their domestic law: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty” (Article 27).
41. Taking action to prohibit violence in all family relations does not weaken or threaten family bonds; violence and a belief that violence is legitimate do threaten healthy and safe relationships. We accept, as we have noted above, that given children’s dependent status, there should be careful consideration of the child’s best interests before prosecution of parents is pursued. If existing prosecution policy does not require appropriate tests to be applied before prosecution goes ahead, consideration could be given to issuing guidance to all those involved in child protection and working with families.
42. In para. 5.6 the Government is in effect arguing that children should be accorded less protection than adults from assault within the family. It also contends that “no State seeks to intervene in matters of family discipline which do not involve corporal punishment”. This is not the case; section 246 (7) of Ireland’s own Children Act 2001 includes “frightening, bullying or threatening” in the concept of “ill-treatment”. Other states have included in their law a prohibition on degrading or humiliating punishment or treatment of children.

### **Corporal punishment in other contexts**

43. It appears from para. 6.3 that section 201 of the 2001 Act is not as yet brought into effect, but will prohibit corporal punishment in “detention schools”. We assume it will be brought into effect shortly.
44. The situation set out by the Government in paras. 6.5 to 6.16 appears to reflect that described in the complaint. To summarise, it appears that the following forms of child care or day care are not as yet covered by legislation prohibiting all corporal punishment and any other form of degrading punishment or treatment of children:
- Childminders caring for children of relatives, children of the same family or not more than 3 children of different families (exempt from the Child Care (Pre-School Services) Regulations 1996; see section 58 of the Child Care Act 1991);
  - Foster-care;
  - Residential care.
45. The guidance, standards, voluntary registration schemes and inspection described by the Government in this section of its Observations are very welcome. We also acknowledge the standards set by the professional bodies for child minders and foster-carers, and note that Childminding Ireland advocates removal of the “reasonable chastisement” defence. But none of this reduces the obligation to ensure consistent prohibition, in legislation, of all corporal punishment and of any other form of degrading punishment or treatment of children. We recognize and welcome the effect of section 246 of the 2001 Act, but as noted above (para. 36) this does not provide adequate protection.
46. The recognition in Ireland of the need to use legislation to prohibit school corporal punishment underlines the importance of ensuring consistent legislation prohibiting all corporal punishment and any other form of degrading punishment or treatment in all other institutional and alternative care settings for children. Schools and these other settings are to varying degrees “public” and subject to forms of inspection and other monitoring, including by parents. The acceptance of the need for explicit legislation relating to schools underlines in particular the need for legislation to send an explicit and clear message to parents in the “privacy” of the home.

## **Collective complaint 18/2003**

### **World Organisation against Torture v Ireland**

#### **Additional general explanations and information on the merits of the complaint**

1. This and other similar complaints (numbers 17-21/2003) submitted by the World Organisation Against Torture concern the human rights of children – who are particularly vulnerable people – to effective protection from all corporal punishment and from any other forms of degrading punishment or treatment of children, within the family and all other settings.
2. In all European countries, there has been a common tradition of corporal punishment being regarded as an acceptable and lawful form of discipline, punishment or control of children. If one goes back centuries, this applied also to “discipline” of wives by their husbands and of servants and apprentices by their masters. Corporal punishment is not simply a particular category of violence against children; its significance is that unlike any other form of inter-personal violence, it still remains in a majority of member-states to varying degrees lawful, or perceived as lawful, common and socially approved.
3. Hitting people breaches their rights to respect for their human dignity and physical integrity. Children are smaller, more fragile people. They are equal holders of human rights. But the acceptance that violent and humiliating forms of discipline breach fundamental human rights - including, where corporal punishment remains explicitly lawful, the right to equal protection under the law - has been relatively recent. It is not easy for children, unenfranchised and generally disempowered, to use legal systems and human rights mechanisms to challenge breaches of their rights, in particular when the perpetrators are their parents.
4. All member states have ratified the UN Convention on the Rights of the Child, requiring them to protect children from “all forms of physical or mental violence” while in the care of parents and others (Article 19). Many states have constitutions asserting these rights. All states have laws prohibiting assault and also varying laws prohibiting cruelty or abuse or maltreatment of children. But these and other relevant developments in international and national law have not in themselves been sufficient to challenge the traditional acceptance of corporal punishment and any other forms of degrading punishment and treatment of children. There has been progressive prohibition of corporal punishment in penal systems, in schools and in other institutions (although enforcement in institutions remains inconsistent). But in the absence of explicit law reform linked to comprehensive awareness-raising, corporal punishment in the family context tends not to be regarded by a majority of parents and the public as prohibited “violence” or as a breach of fundamental rights.
5. This is the overall context in which the European Committee of Social Rights (ECSR) is pursuing respect for children’s rights under the European Social Charter and the Revised Social Charter. As the Committee has emphasised, “the

aim and purpose of the Charter, being a human rights protection instrument, is to protect rights not merely theoretically, but also in fact”.<sup>1</sup> Thus if the protection from all corporal punishment and any other forms of degrading punishment or treatment is to be realised for children, the legislation must not only be clear and explicit, but also disseminated and understood by the population, including children.

6. The ECSR, in its 2001 observation, has highlighted:<sup>2</sup>
  - That it “attaches great importance to the protection of children against any form of violence, ill-treatment or abuse, whether physical or mental”;
  - That: “Like the European Court of Human Rights it emphasises the fact that children are particularly vulnerable and considers that one of the main objectives of Article 17 is to provide adequate protection for children in this respect”.
  - That the Committee “does not find it acceptable that a society which prohibits any form of physical violence between adults would accept that adults subject children to physical violence”.
  - That the Committee “does not consider that there can be any educational value in corporal punishment of children that cannot be otherwise achieved”.
  - That “it is evident that additional measures [our emphasis] to come to terms with this problem are necessary. To prohibit any form of corporal punishment of children is an important measure for the education of the population in this respect in that it gives a clear message about what society considers to be acceptable. It is a measure that avoids discussions and concerns as to where the borderline would be between what might be acceptable corporal punishment and what is not”.

The observation concludes: “For these reasons, the Committee considers 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 punishment or treatment of children must be prohibited in legislation and combined with adequate sanctions in penal or civil law.”

7. The Committee, in the context of examining reports on conformity with Article 17, has consistently asked states “whether legislation prohibits all forms of corporal punishment of children, in schools, in institutions, in the home and elsewhere”.
8. For example, in its conclusions on Spain’s most recent report under article 17, the Committee stated: “...The Committee notes from the Concluding Observations of the Committee on the Rights of the Child in respect of Spain's first report under the Convention on the Rights of the Child, that Article 154 of the Spanish Civil Code provides that parents ‘may administer punishment to their children reasonably and in moderation’. The Committee notes that this would permit the

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<sup>1</sup> Complaint NO. 1/1998 : International Commission of Jurists against Portugal, Decision on the merits, para. 32.

<sup>2</sup> European Committee of Social Rights, Introduction to Conclusions XV- 2, Volume 1, 2001

corporal punishment of children, which is in breach of Article 17 of the Charter and it refers to its general observations on Article 17 in the General introduction. The Committee wishes to know whether this provision of the Civil Code has been amended, and further whether legislation prohibits the corporal punishment of children in schools, institutions and elsewhere. Meanwhile, it defers its conclusion.”<sup>1</sup>

9. Some states retain in their law special justifications or defences for parents and some other carers who assault their children as a form of “discipline” or punishment, for example the provision in Spanish law referred to above, the “reasonable chastisement” defence which exists in English common law and is confirmed in statute, and the concept of “justifiable assault” of children, recently introduced into Scottish law by the Criminal Justice (Scotland) Act 2003.
10. In some states, defences have been repealed. But the act of repeal is generally a “silent” reform, sending no clear message to parents and others that the law has changed and corporal punishment is now prohibited. In other member states it appears there has never been a defence. Where there is no explicit defence, the criminal law on assault applies, on paper, equally to disciplinary or punitive assaults of children. But that does not overcome the traditional belief in a right to use corporal punishment.
11. It has been the practice of most member states to prohibit school corporal punishment explicitly. Schools are generally “public” institutions and invariably subject to various forms of inspection and varying degrees of public and parent scrutiny. In the “privacy” of the family home, there is no such supervision and it is for this reason that it is all the more important that parental corporal punishment should be prohibited explicitly and the law well disseminated, in order to send a clear message to parents and children, and to enable all those working with families to deliver a clear message that all violence against children is a breach of human rights and unlawful.
12. The prime purpose of the law in this context is to act as an educational tool and to provide effective deterrence. Given children’s special and dependent status, prosecution of parents for assaulting their children is unlikely to be in children’s best interests except in the most extreme cases where it appears to be the only effective way of protecting the child. Human rights demands that children have equal protection under the law on assault, but guidelines on intervention and prosecution can focus on the best interests of the child and promote wherever possible sensitive and supportive interventions. Law reform, linked to widespread awareness-raising of the law and of children’s rights to protection and promotion of positive, non-violent or degrading forms of discipline, can achieve rapid changes in attitudes and practice. This is likely over time to reduce rather than increase the need for prosecution and formal interventions in families.

#### **International human rights standards**

13. The European Committee of Social Rights, in advocating the prohibition and elimination of all corporal punishment and any other form of degrading

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<sup>1</sup> European Committee of Social Rights, Conclusions XV-2, Vol. 2, page 537

punishment or treatment of children, has developed a clear and consistent human rights standard for compliance with Article 17, parallel to that of other human rights bodies.

14. The ECSR refers in its 2001 observation to the European Convention on Human Rights and the jurisprudence of the European Court (in particular, the judgment *A v UK*, 23 September 1998). A particular significance of this unanimous judgment of the Court is its assertion of state responsibility for ensuring adequate protection and effective deterrence from ill-treatment, for children and other vulnerable people, including ill-treatment administered by private individuals. All member states have accepted the Convention and are thus bound by its provisions, including Articles 3 and 8 and the non-discrimination principle of Article 14; some member states have incorporated its provisions into their domestic law.
15. The European Commission on Human Rights and the European Court have rejected applications alleging that prohibition of all corporal punishment can breach family rights or rights to religious freedom.<sup>1</sup>
16. The ECSR also refers in its observation (and in various conclusions) to the jurisprudence of the Committee on the Rights of the Child. This Committee has consistently interpreted the UN Convention on the Rights of the Child as requiring prohibition of all corporal punishment, however light. All member states have ratified the UN Convention, including - without reservation - article 19 and its obligation to take all appropriate legislative, administrative, social and educational measures to protect the child from “all forms of physical or mental violence... while in the care of parent(s), legal guardian(s) or any other person who has the care of the child”. The fact that globally 192 states are parties to the UN Convention creates a significant presumption that its relevant provisions are customary law. The Committee on the Rights of the Child is the only body charged with responsibility for interpreting the provisions in the Convention.
17. The acceptance of international and regional human rights standards, common to all member states, does not in itself amount to effective prohibition of corporal punishment of children, as the European Committee of Social Rights has recognised. The Committee on the Rights of the Child has come to the same conclusion in its examination of reports from states. The Committee has recommended prohibition of all corporal punishment in the family to each of the countries subject to collective complaints (17/2003 to 21/2003), and to many other member states. It has emphasised its interpretation of the Convention in concluding observations to more than 130 states in all continents, in the conclusions of two General Discussion days on violence against children (2000 and 2001) and in its General Comment No. 1 on “The aims of Education”.<sup>2</sup>
18. The Committee on Economic, Social and Cultural Rights has also condemned corporal punishment and recommended prohibition. In 1999, the CESCR adopted

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<sup>1</sup> European Commission on Human Rights, *Seven Individuals v Sweden*, admissibility decision, 13 May 1982; European Court of Human Rights, *Philip Williamson and Others v UK*, admissibility decision, 7 September 2000

<sup>2</sup> Committee on the Rights of the Child documents available at <http://www.unhchr.ch/html/menu2/6/crc/>



a General Comment on “The Right to Education”, covering informal as well as formal education, in which it states: “In the Committee’s view, corporal punishment is inconsistent with the fundamental guiding principle of international human rights law enshrined in the Preambles to the Universal Declaration of Human Rights and both Covenants: the dignity of the individual...” The Committee refers to the jurisprudence of the Committee on the Rights of the Child.<sup>1</sup> In 2002, in its concluding observations on the UK’s fourth periodic report under the International Covenant on Economic, Social and Cultural Rights, the Committee advocated prohibition of corporal punishment in the family, stating: “Given the principle of the dignity of the individual that provides the foundation for international human rights law (see paragraph 41 of the Committee’s General Comment No. 13) and in light of article 10(1) and (3) of the Covenant, the Committee recommends that the physical punishment of children in families be prohibited, in line with the recommendation of the Committee on the Rights of the Child.”<sup>2</sup>

19. The Committee of Ministers of the Council of Europe first condemned corporal punishment of children in the family in a recommendation to member states on violence in the family adopted nearly 20 years ago in 1985. The recommendation notes in its preamble that “the defence of the family involves the protection of all its members against any form of violence, which all too often occurs among them”. Violence affects “in particular children on the one side and women on the other, though in differing ways” and “children are entitled to special protection by society against any form of discrimination or oppression and against any abuse of authority in the family and other institutions”. The recommendation proposes that member states should “review their legislation on the power to punish children in order to limit or indeed prohibit corporal punishment, even if violation of such a prohibition does not necessarily entail a criminal penalty”. The explanatory memorandum to the recommendation describes corporal punishment as “an evil which must at least be discouraged as a first step towards outright prohibition. It is the very assumption that corporal punishment of children is legitimate that opens the way to all kinds of excesses and makes the traces and symptoms of such punishment acceptable to third parties.” Other relevant recommendations include: “Social measures concerning violence within the family”, Recommendation R (90) 2, and “The medico-social aspects of child abuse”, Recommendation R (93) 2.<sup>3</sup>

### **Law reforms in member states**

20. In Sweden, the first country to institute law reforms to protect children from all corporal punishment in the family, research in the early 1950s found that a large majority of Swedish parents were using corporal punishment; 13 per cent of

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<sup>1</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 11 on “The Right to Education”, 1999, HRI/GEN/1/Rev.5, p.83 ; (all the Committee’s documents are at <http://www.unhchr.ch/html/menu2/6/cescr.htm>)

<sup>2</sup> Committee on Economic, Social and Cultural Rights, concluding observations on the UK’s Fourth Report under the International Covenant on Economic, Social and Cultural Rights, May 17 2002, E/C.12/1/Add.79, para. 36

<sup>3</sup> Council of Europe Committee of Ministers : all recommendations are available at [http://www.coe.int/t/E/Committee\\_of\\_Ministers/Home/Documents/](http://www.coe.int/t/E/Committee_of_Ministers/Home/Documents/)

mothers used implements to beat their three to five year-old children.<sup>1</sup> Law reform began in 1957 by removing from the Swedish Criminal Code a provision protecting parents who caused minor injuries through corporal punishment. The provision allowing “reprimands” in the Parenthood and Guardianship Code was removed in 1966. Despite some accompanying public education campaigns, Sweden found that these repeals did not send a clear message to the public or even to the courts (in 1975 a court acquitted a father accused of maltreating his three year-old daughter, on the grounds that it had not been proved that he had exceeded “the right to corporal chastisement that a parent has towards a child in his custody”). So in 1979, following a recommendation from a Children’s Rights Commission established by the Swedish Parliament in 1977, an explicit prohibition on corporal punishment and other humiliating treatment was added to the Parenthood and Guardianship Code.<sup>2</sup> By 2002, Government-commissioned research found that just 6 per cent of under 35 year-olds believed in any form of corporal punishment; children reported very low levels of corporal punishment.<sup>3</sup>

21. Since 1979 it appears that at least 10 and possibly 12 member-states of the Council of Europe have explicitly prohibited all corporal punishment, having previously removed defences or justifications in their criminal or civil codes or both. At least another 10 states have either removed an existing defence, or there has never been a defence – but these states have not as yet gone on to explicitly prohibit all corporal punishment.<sup>4</sup>
22. It is clear from Sweden’s well-researched experience that the combination of explicit legal reform, linked to public education, can achieve both rapid and substantial changes in public and parental attitudes and a reduction in violence against children in the family.<sup>5</sup>

### **Views of human rights institutions for children**

23. The European Network of Ombudspeople for Children issued in 1999 a position statement urging the Council of Europe and other European institutions and non-governmental organisations concerned with children to work collectively and individually towards ending all corporal punishment of children. The statement concludes: “We urge Governments without delay to introduce legislation prohibiting all corporal punishment, and initiate/support education programmes in positive, non-violent forms of discipline. We commit ourselves, as offices

<sup>1</sup> Stattin, H., Janson, H., Klackenber-Larsson, I., & Magnusson, D., (1995). *Corporal punishment in everyday life: An intergenerational perspective*, J. McCord, ed. pp 315-347, Cambridge University Press, Cambridge

<sup>2</sup> Swedish Children’s Rights Commission, first report : *The child’s right : 1 A prohibition against beating* ; Bill was passed by the Riksdag on 14 March 1979, coming into force on July 1.

<sup>3</sup> Staffan Janson, *Children and abuse – corporal punishment and other forms of child abuse in Sweden at the end of the second millennium, A scientific report prepared for the Committee on Child Abuse and Related Issues*, Ministry of Health and Social Affairs, Sweden.

<sup>4</sup> Summary table in Council of Europe Forum for Children and Families Document CS-Forum (2003) 5 rev; draft prepared for December 2003 meeting of the Forum from information collected by the Council of Europe and the Global Initiative to End All Corporal Punishment of Children.

<sup>5</sup> For a description of the process of reform in Sweden, see *Ending Corporal Punishment: Swedish experience of efforts to prevent all forms of violence against children – and the results*, Ministry of Health and Social Affairs and Ministry of Foreign Affairs, Sweden, 2001; for a review of research into the effects, see Joan E Durrant, *A Generation Without Smacking: The impact of Sweden’s ban on physical punishment*, Save the Children UK, 2000

committed to improving the lives of all children in Europe, to work actively on this fundamental human rights issue.” (See full text in Annex).

**ANNEX  
EUROPEAN NETWORK OF OMBUDSPEOPLE FOR CHILDREN (ENOC)  
POSITION STATEMENT ON ENDING CORPORAL PUNISHMENT - 1999**

“The European Network of Ombudsmen for Children (ENOC) urges the governments of all European countries, the European Union, the Council of Europe and other European institutions and non-governmental organisations concerned with children to work collectively and individually towards ending all corporal punishment of children.

“As spokespeople for the children of Europe, we believe that eliminating violent and humiliating forms of discipline is a vital strategy for improving children’s status as people, and reducing child abuse and all other forms of violence in European societies. This is a long overdue reform, with huge potential for improving the quality of lives and family relationships.

“Hitting children is disrespectful and dangerous. Children deserve at least the same protection from violence that we as adults take for granted for ourselves.

“While almost all European countries have eliminated corporal punishment from their schools and other institutions for children, it remains common and legally and socially accepted in the family home in most countries. Many States have laws which explicitly defend the rights of parents and other carers to use ‘reasonable’ or ‘moderate’ corporal punishment. Where the law is silent, corporal punishment tends to be accepted in practice.

“In a growing minority of countries across Europe, all corporal punishment has been prohibited, often as part of a statement of parents’ responsibilities. The purpose of these reforms is not to prosecute more parents, but to send out a clear signal that hitting children is no more acceptable than hitting anyone else.

“The United Nations Convention on the Rights of the Child, ratified by all European states, requires legal, educational and other action to protect children from ‘all forms of physical or mental violence’ while in the care of parents and others. The Committee on the Rights of the Child, the international committee of experts responsible for monitoring implementation, has stated that no level of corporal punishment is compatible with the Convention and has formally recommended prohibition, coupled with education programmes, to eliminate it.

“The Committee of Ministers of the Council of Europe, in a series of recommendations, has condemned corporal punishment and recommended legal reform (see in particular Recommendations R85/4; R90/2 and R93/2).

**“We urge Governments without delay to introduce legislation prohibiting all corporal punishment, and initiate/support education programmes in positive, non-violent forms of discipline. We commit ourselves, as offices committed to improving the lives of all children in Europe, to work actively on this fundamental human rights issue.”**

*ENOC, formed in June 1997, is a new voice for children in Europe. Through the Network, independent offices set up to promote children's rights and interests aim to work together, sharing strategies and collective approaches, and encouraging the fullest possible implementation of the Convention on the Rights of the Child. UNICEF currently provides the Secretariat for the Network.*