

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



12 July 2004

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

Case Document No. 7

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

registered at the Secretariat on 9 July 2004

532/228

9 July 2004

Mr. Regis BRILLAT
Secretariat General
Directorate General of Human Rights – DG II
Secretariat of the European Social Charter
The Executive Secretary
Council of Europe
F-67075 Strasbourg CEDEX
FRANCE

Re: European Social Charter, complaint no. 18/2003, World Organisation against Torture (OMCT) v. Ireland

Dear Mr. Brillat,

I refer to your letter of 3 June 2004 and am pleased to enclose herewith Ireland's additional observations on the merits of complaint no. 18/2003, World Organisation against Torture (OMCT) v. Ireland.

Yours sincerely

Denise McQuade
Agent of the Government of Ireland

EUROPEAN COMMITTEE OF SOCIAL RIGHTS

Collective Complaint No. 18/2003

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

**Additional Observations of Ireland
on the Merits of the Complaint**

9 July 2004

PRELIMINARY

1. The World Organisation against Torture (“OMCT”) lodged a complaint against Ireland on 28 July 2003 requesting that the European Committee of Social Rights (“the Committee”) should find that Ireland has failed to apply Article 17 of the revised European Social Charter (“the Revised Charter”) in a satisfactory manner, having regard to Ireland’s failure to introduce an express legislative prohibition on corporal punishment. Ireland submitted observations on the merits of the complaint to the Committee on 12 March 2004. The OMCT submitted a response to Ireland’s observations. By letter dated 3 June 2004, the Secretariat of the European Social Charter confirmed that a time limit of 9 July 2004 had been set for the submission on behalf of Ireland of additional observations on the merits.
2. Ireland does not propose to replicate the arguments made in its observations on the merits of the complaint. However, it wishes to address a limited number of issues which arise from the OMCT’s observations relating, principally, to the appropriate timing for legal reform, and the role of legal reform. Ireland then proposes addressing the manner in which it has, by administrative measures, discouraged corporal punishment by parents.

TIME FOR REFORM

3. Ireland, in its initial observations, indicated that the OMCT’s complaint seemed to be predicated on a view that law reform should, if necessary, precede societal norms or attempts made to modify those norms. The OMCT has, in its response, confirmed that this is its view. The OMCT suggests also that Ireland has in some way to date failed to fulfil its legal obligations undertaken when it ratified the Revised Charter. However, as is clear both from Ireland’s initial observations and the OMCT’s response, the Committee’s approach to Article 17(b) is very recent. The Explanatory Report to the Revised Charter never indicated that the aim of Article 17(b) was to prohibit corporal punishment. In effect, it was not until the adoption by the Committee of its Conclusion ((XV)-2) in 2001, that the Committee indicated, for the first

time, that Article 17 required a prohibition in legislation against any form of violence against children, including in the home. The OMCT acknowledges that the identification of the legality of corporal punishment of children as being in breach of certain international instruments is relatively recent, yet it nonetheless suggests that any reform of the law in Ireland, by way of criminalising corporal punishment, even within the home, is long overdue. There is, in Ireland's view, a clear inconsistency in the OMCT's approach.

4. The OMCT also appears to suggest that Ireland has taken little positive action since the publication by the Law Reform Commission of its 1994 report dealing with corporal punishment. However, the OMCT fails to acknowledge that the Law Reform Commission was not in fact in favour of the sudden introduction of criminal liability, such as that advocated by the OMCT. The Law Reform Commission clearly took a different view of the role of law reform than that of the OMCT. The Law Reform Commission viewed the re-education of parents as an important pre-requisite to any criminalisation of corporal punishment within the home. Consequently, it is simply not the case that Ireland has neglected the recommendations of the Law Reform Commission in relation to corporal punishment within the home. Ireland has taken the steps that it views as appropriate for the time being, which steps are outlined below.
5. Ireland has, of course, also acted on foot of the recommendations made by the Law Reform Commission regarding corporal punishment in contexts other than the home. These steps were outlined in Ireland's initial observations and are, in brief, as follows:
 - (a) The introduction of the Non-Fatal Offences Against the Person Act, 1997;
 - (b) The repeal of Section 37 of the Children Act, 1908;
 - (c) The updating and strengthening of the cruelty against children provisions at Section 246 of the Children Act, 2001;
 - (d) The detailed provisions relating to discipline of children in detention schools at Section 201 of the Children Act, 2001;

- (e) The provisions relating to corporal punishment in penal institutions;
 - (f) The adoption of the Child Care (Pre-School Services) Regulations, 1996.
6. On a broader level, the recent appointment of the Ombudsman for children is significant, as the Ombudsman will have the dual role of investigating complaints by children and promoting children's rights.
7. Consequently, it is quite clear that Ireland has fully accepted, endorsed and acted upon the recommendations made by its Law Reform Commission. It has kept the law under continuing review. However, it is not of the view that the appropriate reaction to the conclusion of the Committee in 2001 regarding corporal punishment in the home is the immediate criminalisation of all acts of corporal punishment within the home.
8. Ireland therefore respectfully submits that it is best placed to appreciate the appropriate pace of law reform within Ireland. It cannot accept OMCT's analysis of the existing state of the law as "*condoning corporal punishment*" as the OMCT suggests. As outlined in its observations on the merits, the defence of reasonable chastisement means that the physical punishment of a child by a parent constitutes an assault unless the parent's conduct comes within that which would be viewed as reasonable according to the customs of contemporary Irish society. It is, therefore, an evolving standard and one which can reflect and adjust to, developing social standards.
9. Notwithstanding the tone of the OMCT response, it appears that there may not be significant difference *in practice* between the position adopted currently in Ireland and that contended for by the OMCT. The OMCT does not see it as the primary purpose of the law to prosecute parents (paragraph 35). It states that: "*There are special and obvious reasons where prosecution of parents is very seldom in the interests of their children*". It seems reasonable to conclude, therefore, that the OMCT considers that even under the regime advocated by it, actual prosecution of parents would be the exception rather than the norm, as indeed is the case in Ireland now. Both under the current

law and under the OMCT proposed regime, the harassed parent administering a mild slap by way of rebuke to a child would not be the subject of criminal prosecution: any serious or persistent assault would be.

10. While there might be some dispute as to where the precise line may be drawn between these two extremes and perhaps more relevantly, how and by whom it should be drawn, the difference between the positions adopted by OMCT and Ireland hardly justifies the hyperbole that “*a generation of children has suffered from the perpetuation of this defence over the last decade*”. In truth, the major difference between the current law and that proposed by the OMCT is that under the OMCT proposal, **all** cases of parental chastisement will be treated as criminal, but most of those cases will not be the subject of criminal prosecution as a matter of prosecutorial discretion. Under the current law in Ireland, all such conduct constitutes an assault, unless a court determines that it was reasonable chastisement by a parent. The difference between these positions reflects a difference, not of concern for protection of children, but rather a difference of approach to the proper function and role of the criminal law.

THE ROLE OF LAW REFORM

11. Ireland fundamentally disagrees with the OMCT’s view of the role of law reform and, in particular, the role of the criminal law. The OMCT has repeatedly asserted in its response that its view is that the introduction of the criminal offence advocated by the OMCT is designed to “send a message” to the family. The absolute criminalisation of corporal punishment within the home is designed, it is claimed, not to permit prosecution of parents, but rather to send an explicit and clear message to parents.
12. Ireland does not agree that the role of the criminal law is merely or indeed primarily to “*send messages*”. The primary function of the criminal law is to provide for the prosecution of offences. It is undesirable to introduce offences which it is not intended to prosecute. It is generally highly undesirable that conduct should be criminalised and stigmatised but where decisions not to

prosecute are taken on a necessarily individual and possible arbitrary basis, in private. Indeed, it is open to question what precise “*message*” is sent by the enactment of a criminal prohibition of general application which is enacted on the basis that it is not intended to enforce it in the majority of cases to which it ostensibly applies. It is surely at least worth considering whether it is not more desirable to identify precisely the conduct which it is intended to subject to criminal prosecution and to ensure that it is captured by the criminal law and to seek other more effective and less distressing methods for the sending of messages to parents.

13. Ireland certainly agrees with the OMCT that it is important to send a clear message that corporal punishment within the home is unacceptable. Where it differs from the OMCT is, however, in viewing the continued existence of the reasonable chastisement defence to assault as constituting a “state endorsement” of the acceptability of corporal punishment. There is no evidence that this is the manner in which the existing law is perceived by parents. Further, the measures outlined below can leave parents in no doubt but that the use of corporal punishment within the home is not in any way endorsed, approved or encouraged by the State authorities. In this regard, Ireland views the measures outlined below as more appropriate measures for public education than the criminal law.

NON-STATUTORY MEASURES RELATING TO CORPORAL PUNISHMENT

14. In its initial observations, Ireland emphasised the statutory framework relating to corporal punishment in view of the OMCT’s criticisms of the Irish legal environment. At paragraph 6 of its response, the OMCT makes a more wide-ranging criticism of Ireland, stating that there is no evidence of active discouragement of corporal punishment by parents within the State. It is unclear what evidence the OMCT relies upon to support this new and unfounded allegation. In particular, it is unclear what government departments the OMCT made enquiries of. The OMCT indicates that it made such enquiries with “potentially responsible” government departments.

Ireland is happy to clarify the extent of the measures taken to date to discourage corporal punishment within the home.

15. In this regard, the Irish Government approved the National Children's Strategy in November 2000. This is a ten year plan of action which includes, as Objective L of the strategy, the aim that "*children will have the opportunity to experience the qualities of family life*". This strategy underlines that local family support should be provided and states that:

“quality parenting programmes are to be made available to all parents, with special emphasis on the needs of fathers, lone parents, ethnic minority groups, including Travellers and marginalised groups. As part of a policy of ending physical punishment, parenting courses will focus on alternative approaches to managing difficult behaviour in children”.

16. Consequently, it is clear that the ending of corporal punishment within the home forms a clear part of government policy. To achieve the government's aims, universal parenting support and education programmes are provided under the auspices of a number of government departments and by a range of agencies. For example, certain of the Family Resource Centres which operate under the auspices of the Department of Social and Family Affairs provide parenting programmes and parenting support. Education programmes are provided through schools and projects funded by vocational education committees.
17. The Department of Social and Family Affairs formally established the Family Support Agency in May 2003, pursuant to the Family Support Agency Act 2001. One of the agency's key tasks is the provision of information on parenting. Further, health boards provide targeted parenting programmes for at-risk children and their parents. This is done, for example, through the 22 Springboard Projects which have been established since 1998 and also through the Teen Parent Support Projects. These measures are all designed to meet the objective of the National Children's Strategy. Ireland views these measures as

appropriate and effective for sending a clear message to parents that recourse to corporal punishment is disapproved of and is undesirable. Ireland reiterates that it views itself as best placed to determine the most appropriate way to get this message across. It does not consider that the introduction of a criminal offence which might lie idle on the statute books is the most effective way of sending the right message.

18. Of course, Ireland's major child protection organisation, the ISPCC, is well aware of the measures designed to implement the Government's National Children's Strategy. Ireland accepts the OMCT's statement that the ISPCC has, of course, campaigned for the abolition of parents' rights to use corporal punishment. However, Ireland is unclear as to whether or not the OMCT is suggesting, at paragraph 11 of its observations, that the ISPCC actually supports the approach to law reform adopted by the OMCT.

IRELAND'S CONSTITUTIONAL FRAMEWORK

19. Ireland notes the points made by the OMCT in relation to the Irish constitutional framework. The OMCT places reliance on the approach to family rights adopted by the European Commission on Human Rights, seemingly to argue that the Irish Constitution would not pose any real problem for the criminalisation of corporal punishment within the home. Of course, the approach outlined by the European Commission on Human Rights related to Article 8 of the European Convention on Human Rights. Even in that respect, it is noteworthy that the European Court of Human Rights has not declared the absence of an absolute prohibition on corporal punishment by parents to be a breach of the Convention. In its observations on the merits Ireland sought to underline the extent to which the Irish Constitution acknowledges the fundamental role in Irish society of the family. In this regard, the Irish Constitution is acknowledged to provide very extensive protection to the family, and necessarily to parental decision making within a family, going beyond the protection provided by many national constitutions and, more particularly, going beyond the protection afforded to the family by international instruments such as the European Convention on Human Rights.

The OMCT is, of course, entitled to question whether the Irish Constitution would *preclude* the introduction of the criminal offence advocated for and in the absence of a binding precedent, it cannot be said with certainty, that the Constitution does or does not preclude such a course. However, it is likely that the introduction of such an offence would be the subject of intensive debate which could very well lead to a constitutional challenge. In the event of a determination by an Irish court that the introduction of such an offence breached the rights to family privacy guaranteed by the Constitution (an eventuality which certainly could not be ruled out as the issue would revolve around the proportionality of the measure in the light of the strong protection afforded to the family), a constitutional referendum would be required in order to allow the approach of the OMCT to be followed. There is no evidence to suggest that such a referendum would be successful. In the light of the applicable and recent case law, to which Ireland has referred (and which postdates the Law Reform Commission Report), it is respectfully submitted that the OMCT, which has no declared competence in matters of Irish Constitutional Law, might perhaps accept that the Irish State is entitled to have regard to this issue. In this regard, it is doubtful to what extent the Committee should rely on the very limited research evidence referred to by the OMCT or should speculate on the likely development of public opinion in Ireland or in any other Contracting State. By the same token, while the statement at paragraph 39 that “*children too are people and holder of human rights – simply smaller and more fragile people*” may have understandable attractions as a slogan, it does not begin to address the complexities of the issues here. The statement that children are “*simply smaller ... people*” does not, for example, explain the range of legislative and social provisions directed towards children, such as those compelling minimal educational requirements, restricting rights to vote or employment opportunities, prohibiting, before a certain age, marriage or consensual sexual relations and, on the other hand, providing for positive parental family and child support. It is, of course, possible to argue that any particular provision is not justified by the position of children in society, as contemplated by the Social Charter, the Irish Constitution or the European Convention of Human Rights: but none of these

issues can be resolved simply by the statement that children are “*simply smaller people*”.

CONCLUSION

20. Having regard to the above, Ireland contends that it is quite clear that it has taken a number of very significant positive steps since the publication of the Irish Law Reform Commission’s 1994 report dealing with corporal punishment. Ireland has changed its statutory regime to introduce clear prohibitions on the use of corporal punishment in varying contexts. In this regard it is noteworthy that the OMCT is incorrect when it states at paragraph 44 of its response that children’s foster care and residential care are not yet covered by legislation prohibiting all corporal punishment or any other form of degrading punishment. This issue was addressed in Ireland’s observations of the merits of the complaint (paragraph 7.4).
21. Ireland has not, however, criminalised the use of corporal punishment by parents within the home. The Law Reform Commission did not suggest that it should do so. However, it is official government policy to end the use of corporal punishment within the home. Ireland has adopted a number of administrative measures designed to send the message to parents that corporal punishment is unacceptable. Ireland hopes and expects that the measures designed to educate parents will result in a shift in Irish society’s perception of the acceptability of using corporal punishment in respect of children. Ireland does not view it as appropriate to use the criminal law to seek to “*send a message*” to parents. Furthermore, Ireland does not accept that the use of the criminal law would necessarily result in any clear message that corporal punishment is unacceptable being communicated to parents in circumstances where, for many obvious reasons, it is unlikely that prosecutions would be brought against parents for the smacking of their children. In the circumstances, Ireland respectfully asks the Committee to have regard to its views on the appropriate time for law reform and its views on the appropriateness of using the criminal law to deal with what is, undoubtedly, an issue of fundamental concern to the Irish Government.

Dated this 9th day of July 2004

Signed:

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To:

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