

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



10 May 2004

**Collective Complaint No. 19/2003
Organisation against Torture (OMCT)
v. Italy**

Case Document No. 5

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

registered at the Secretariat on 5 May 2004

Collective complaint 19/2003

World Organisation against Torture v Italy

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

Summary

1. In its observations, the Italian Government does not dispute that Article 17 of the Revised Social Charter requires legislative and other action to effectively prohibit all corporal punishment and all other forms of degrading punishment or treatment of children.
2. Article 17 of the Revised Social Charter requires states "... to take all appropriate and necessary measures designed: ... (1(b)) to protect children and young persons against negligence, violence or exploitation..."
3. The Committee has emphasised in its case law that "the aim and purpose of the Charter, being a human rights protection instrument, is to protect rights not merely theoretically, but also in fact".¹ The Italian Government's Observations focus on the Italian Constitution, the ratification by Italy of the UN Convention on the Rights of the Child and the Italian Civil and Criminal Codes. They do not address the reality of the situation facing Italian children, and the general public's understanding of the law.
4. Regrettably, there has been little research into the prevalence of corporal punishment and other forms of degrading punishment and treatment of children within the family in Italy. But the large 1998 study quoted in the complaint found that "physical punishment is a general behaviour in Italy..." In addition, in April 2004 a survey was commissioned on our behalf to determine public attitudes to the use of less severe forms of corporal punishment in Italy and on whether such punishment is considered to be unlawful. The results (from a nationally representative sample of 1009 adults aged 14-plus) show that overall seven in 10 (69 per cent) of Italians believe it is acceptable for parents to smack their children. Seven per cent believe it is always acceptable, in disciplinary situations, for parents to smack their children. 62 per cent believe there are some

¹ see, eg, Decision on the Merits, Complaint 1 1998, International Commission of Jurists v Portugal, para. 32.

circumstances where it is acceptable for parents to smack their children. Just 25 per cent believe it is unacceptable for parents to smack their children in any circumstances.

5. Half of Italians think that the law in Italy does not allow parents to smack their children; a quarter don't know and a quarter think the law allows smacking. Those educated to university level are the most likely to believe the law in Italy allows parents to smack their children (40 per cent vs. 25 per cent overall). Those aged 55 plus are more likely than those aged 16 – 44 to believe the law does not allow parents to smack their children (54 per cent vs. 46 per cent).
6. As we acknowledged in the complaint, there has been a positive decision of the Court of Cassation in 1996, stating that corporal punishment can no longer be considered a legitimate method of discipline and thus cannot be defended under the persisting right to correction (*jus corrigendi*). But this decision has not been confirmed in legislation and Article 571 of the Criminal Code continues to recognise a right of correction by parents and other carers. Various Bills have been presented to remove or amend this Article but have not received sufficient support (see para.16 below).
7. Without the removal of Article 571 of the Criminal Code and an explicit prohibition of corporal punishment and of any other forms of degrading punishment or treatment of children in the Civil Code, covering parents and all others with care or control of a child, linked to widespread awareness-raising and public education, Italy is not providing effective protection and remains not in conformity with article 17 of the Revised Social Charter. These are “appropriate and necessary” measures in the terms of the article.
8. **Given the scale and extent of the breaches of children’s right to protection suggested by the quoted research, we therefore ask the Committee to uphold the complaint. We hope the Committee will emphasise the urgency of providing children, as a particularly vulnerable group, with effective and explicit legal protection against corporal punishment and any other forms of degrading punishment or treatment and of taking necessary other awareness-raising and educational measures.**

Comments on the Italian Government’s Observations

The Italian Constitution and ratification of UN Convention

9. OMCT would like to emphasise that it recognises the Italian Government’s commitment to respect for human rights, illustrated by its ratification of the Revised Social Charter and its acceptance of the Collective Complaints procedure. It is clear that the Government has taken significant steps towards providing children with effective protection of their rights. We hope that the Government will accept that this complaint is made in good faith with the purpose of improving the effective enforcement of children’s right to protection from all corporal punishment and any other forms of degrading punishment or treatment.

10. The constitutional principles referred to in the Observations are normal and welcome provisions, but not clearly interpreted as prohibiting all corporal punishment. Similarly, the confirmation of Italy's ratification of the UN Convention on the Rights of the Child in Act No. 176 (1991) is welcome but in itself sends no clear message that all corporal punishment and all other forms of degrading punishment and treatment are prohibited. All member states of the Council of Europe have ratified the UN Convention, but corporal punishment and other forms of degrading punishment and treatment of children remain rife in many of them. The Treaty Body for the Convention, the Committee on the Rights of the Child, has recommended to Italy an explicit ban on corporal punishment in the family (see complaint, page 5).

The Criminal Code and the “right of correction” in Article 571

11. Article 571 of the Criminal Code recognises a right of correction of children by parents and some others. The Article states: “Whoever misuses means of correction or discipline to harm a person subject to his authority, or entrusted to him for purposes of education, instruction, treatment, supervision or custody, or for the exercise of a profession or an art, is punished with imprisonment for up to 6 months if the fact results in a physical or mental injury. If the abuse results in grievous bodily harm the penalties applied are the ones established in articles 582 and 583 reduced by one third; if the abuse results in death, the penalty applied is imprisonment from three to eight years.” (*unofficial translation*)
12. In the complaint, we acknowledged the 1996 decision of the Supreme Court of Cassation (no. 4904) which concluded, interpreting Article 571 of the Criminal Code, that “the use of violence for educational purposes can no longer be considered lawful”. We described it as “very positive and rooted in human rights”, but emphasised that this decision has not been reflected in legislation. Judgments of the Court of Cassation have the power to establish the state of law only between the parties of the particular judgment and do not have far-reaching consequences; they may in any case be contradicted by subsequent judgments. Power to amend legislation rests exclusively with Parliament.
13. Thus, while the Court of Cassation has positively interpreted the right of correction as not including any use of violence, the clear implication of Article 571 is that a right of correction including some degree of violence is recognised by the law. The Article does not establish a penalty for correction unless it results in physical or mental injury. It reduces the penalties, if the context is judged to be abuse of correction, in cases involving grievous bodily harm or death.
14. Indeed, the report accompanying the adoption of the Penal Code states that the use of violence can be considered as being legitimate if it has educative purposes (“*La semplice percossa non può costituire la materialità del*”).

reato perché la vis modica è mezzo di correzione lecito”). It also justifies lower penalties for extreme offences, where the context was discipline or correction (“*il reato di abuso dei mezzi di disciplina è caratterizzato dal fine correttivo che l’agente si propone, che sminuisce il disvalore oggettivo dell’offesa all’integrità personale o alla vita della persona offesa, sì da escludere un autonoma punibilità di tale offesa*”).² This section of the Criminal Code was adopted in 1930 and has not been amended since. While there have been other amendments to the Code and introduction of specific acts reflecting recognition of social changes and human rights developments, the Code has not been appropriately amended to reflect children’s status as equal holders of human rights. Italy’s Second Report under the Convention on the Rights of the Child identified this: “...It is also to be noted that, in contrast to the civil system and family law, the criminal system presents notable failings in the protection of the children and appears very outdated” (para. 302).

15. The subsequent Article in the Criminal Code, Article 572, “Ill-treatment in the family or against children”, underlines the exception which the law is making in Article 571 for violence in the context of correction or discipline: “Whoever, with the exclusion of the cases mentioned in the previous article [our emphasis], ill-treats a person of the family, or a child under 14, or a person subject to his authority or entrusted to him for purposes of education, instruction, treatment, supervision or custody, or for the exercise of a profession or an art, is punished with imprisonment from one to five years. If the act results in grievous bodily harm the penalty applied is imprisonment from four to eight years, if the act results in extremely grievous bodily harm the penalty is imprisonment from seven to fifteen years, if the abuse results in death, the penalty applied is imprisonment from twelve to twenty years” (*unofficial translation*).
16. In a 1986 judgment, the Court of Cassation explicitly confirmed the existence of a legal power to use violent punishment: “*L’abuso dei mezzi di correzione previsto e punito nell’art. 571 presuppone un uso consentito e legittimo di tali mezzi tramutato per eccesso in illecito (abuso) [...]*”.³ And this interpretation is confirmed in various commentaries on the Criminal Code.⁴
17. Reflecting the clear purpose of this legislation, the general interpretation of this Article is that parents, adoptive parents, foster-parents and legal guardians have the power to use moderate violence (*vis modica*) in disciplining or correcting children. It is noteworthy that the abuse of correctional measures has been outlawed by law or administrative acts in every other environment except for the parent/child relationship: between husband and wife (article 29 of the Constitution); in the workplace (Act

² see *Relazione al Progetto definitivo di un nuovo codice penale, in Lavori preparatori del codice penale e del codice di procedura penale*, V, parte II, Roma, 1929, 357 ss.

³ Court of Cassation, Penal Section, 9 May 1986.

⁴ Antolisei F., *Manuale di diritto penale, Parte speciale*, I, 1999, pp.497s.

Antolisei F., Osservazioni in tema di ius corrigendi, in *Scritti di diritto penale*, Milano, 1955, p.388

300, 1970); in detention (Act 354, 1975); and in elementary schools (Royal Decree 1297, 1928).

18. It is also highly significant that a number of Bills have been proposed either by the Government or by MPs to repeal or amend article 571, but none has received sufficient support to be transformed into law: among the more relevant ones are Bill 384, approved by the Committee of Ministers on 29 January 1988; Bill 163, presented to the Senate on 22 September 1993; Bill 65, 1994; Bill 111, presented to the Senate on 9 May 1996; Bill 200, 1996.
19. The persisting “right of correction” enables judges to interpret arbitrarily what level of violent correction is acceptable. Thus the Court of Cassation, also in 1996, confirmed the applicability of article 571 to a case in which people in charge of a “community house” (*casa-famiglia*) had used for the purpose of correcting the children a carpet beater and a horsewhip, of having submitted them to humiliating and disgusting work, used hypnosis techniques and caused injuries to a girl. In this case, article 571 served the purpose of lessening the penalties rather than considering the legal guardians even more responsible for their abusive conduct, in the light of their relationship with the victims.⁵
20. Finally, in making a comparison between articles 571 and 572, the jurisprudence has suggested in several cases that the articles differ in relation to the motivation of the perpetrator, with the abuse of the means of correction being present in article 571 and absent in 572.⁶
21. It is obvious that there is still at the least confusion and lack of harmonisation in interpretation of this law, underlining the need for legislative reform. This can be demonstrated by comparing two judgments of the Court of Cassation adopted in the same year - 1996 - but grounded on very different principles:

JUDGMENT No 4904, 18 MARCH 1996 (this is the judgment referred to in the complaint and in the Government Observations as positively declaring that the right of correction does not include the right to use violence):

“As regards the relationship between the cases referred to in Articles 571 and 572 of the Penal Code, subjective intention cannot bring within the scope of the less serious case what is subjectively excluded from it. The link between the means and the purpose of punishment must be evaluated objectively, with reference to the cultural context and to the legislation system provided by the legal order, not the intention of the actor.”

⁵ Cassazione, sez VI, 16 January 1996, Carbone; See also another sentence of the Assize Court of Rome, 3 July 1991, Fiorentino, in Riv. Pen., 1992, 373. The mother who caused the death of her child by “accidentally hitting her with a broom” was charged with abuse of means of correction and not for manslaughter.

⁶ Cassazione penale, sez. II, 26 novembre 1957, Fusillo; Cassazione penale, sez. II, 12 dicembre 1962, Pandolfi; Cassazione penale, sez. VI, 11 aprile 1996, Carbone.

JUDGMENT No 3536, 11 APRIL 1996

“In order to establish whether an act constitutes the offence of abuse of means of punishment or discipline or that of maltreatment within the family or towards children, both the objective element of the specific case, that is, the correlation between the means and methods used and the disciplinary educative purpose, and the subjective element, that is, whether the determining motive of the actor is disciplinary and corrective, must be taken into account.”

22. There have been other judgments of the Court of Cassation since 1996 which persist in treating violence against children differently when it is perceived as “abuse of correction” (Court of Cassation, Penal Section VI, 7 November 1997, No. 3789; Court of Cassation, Penal Section V, 19 July 2000, No. 7224). These too underline the importance of repealing Article 571, to remove any doubt that the criminal law on assault applies equally to “disciplinary” assaults on children.
23. The Government’s Observations state (page 4): “Concerning the question of the provision on the abuse of ‘correctional’ or disciplinary measures in Article 571 of the Criminal Code, only an intentionally malicious interpretation can take this to imply that corporal punishment is common in our country.” We do not imply the high prevalence of corporal punishment from the state of the law; we argue that the lack of clarity in the law contributes to the persistence of a belief in Italian society that less severe forms of corporal punishment are acceptable. Only detailed interview research with parents and children can reveal the full extent of violence within the family in any country; the research carried out to date in Italy does suggest a high rate of approval for and prevalence of corporal punishment and other maltreatment, and this has indeed been confirmed elsewhere by the Italian Government (see para. 24). It is a concern in itself that there has not been more detailed and government-sponsored research.
24. In the final paragraph of its Observations, the Italian Government refers to “the allegation that violence in the family is on the increase in Italy”. Our complaint does not make this allegation, but refers to an increase in the prevalence of identified maltreatment. The Italian Government’s Second Report under the Convention on the Rights of the Child, referring to the prevalence of maltreatment and sexual abuse of children, states (para. 289): “Unfortunately, phenomena of this type are present in Italy and cut across all strata of society. Italy is still without a complete monitoring of the real incidence of these phenomena because the only accurate data are, at present, those deriving from the judicial statistics which, obviously, cannot be completely exhaustive...”
“For crimes of violence, abuse and exploitation of children, reports to the judicial authority are few:
 - Not all the victims are willing to report the fact in order to avoid unpleasant publicity and in order to avoid reliving, in the course of the trial, experiences which are often devastating;
 - Much of the violence is perpetrated in the closed sphere of the family and this impedes detection because it is feared that

public revelation will dissolve the bond existing between the adults;

- A code of silence between adults to the detriment of children covers often disquieting situations;
- The person is at a formative age or does not perceive the abuse as such or, in any event, often does not have the capacity or the courage to report the abuse to the outside world.”

25. Given the widespread and traditional acceptance of corporal punishment as a legitimate form of discipline of children in Italy (confirmed by the research we quote in the complaint and also by the new survey carried out in April 2004 – see para. 4 and annex), it is clear that parents, children and others are not receiving a clear message that all corporal punishment and any other forms of degrading punishment and treatment are unlawful.
26. We do recognise that Italy, while leaving untouched Article 571 of the Criminal Code, has introduced positive measures via Law 154/2001, against violence in family relations, both into the Criminal Procedure Code (article 282 bis) and into the Civil Code (articles 342 bis and 342 ter), enabling child protection measures to be taken when a child is injured or at risk of injury. While welcome, these are normal child protection measures that do not amount to a prohibition of all corporal punishment and of any other forms of degrading punishment or treatment.

Public education and awareness-raising

27. The Government’s Observations do not refer to any activities by the Government aimed at explicitly discouraging all corporal punishment. Italy’s Second Report under the Convention on the Rights of the Child (para. 307) acknowledges a lack of “measures of an educational character directed at promoting positive, non-violent forms of discipline, care and treatment of the child”.

ANNEX A

Report on Research Study “Attitudes towards smacking children” in Italy, April 2004

Introduction

This summary report contains the findings of a survey conducted by Market & Opinion Research International (MORI) for the Association for the Protection of All Children Ltd among the general public in Italy.

Two questions were placed on an Omnibus survey, and a nationally representative sample of adults (aged 14+) was interviewed. A total of 1,009 telephone interviews were carried out using CATI (Computer Assisted Telephone Interviews), between 5 and 8 April 2004. Data has been weighted to reflect the population profile of Italy.

Presentation and Interpretation of the Data

Results are presented as percentages. Where percentages do not add up to 100%, this may be due to rounding of figures or where respondents were able to provide more than one answer to a question.

As a sample of the population rather than the whole population was interviewed, results are subject to sampling tolerances, and not all differences between subgroups may be statistically significant. In the computer tables, sub groups (such as gender, age) are represented with an alphabetical letter. Statistically significant differences between sub groups are displayed by a letter next to the percentage in the corresponding column.

An asterisk (*) in the table denotes a value of less than 0.5%, but greater than zero. Mean score calculations are derived from raw data.

Publication of the Data

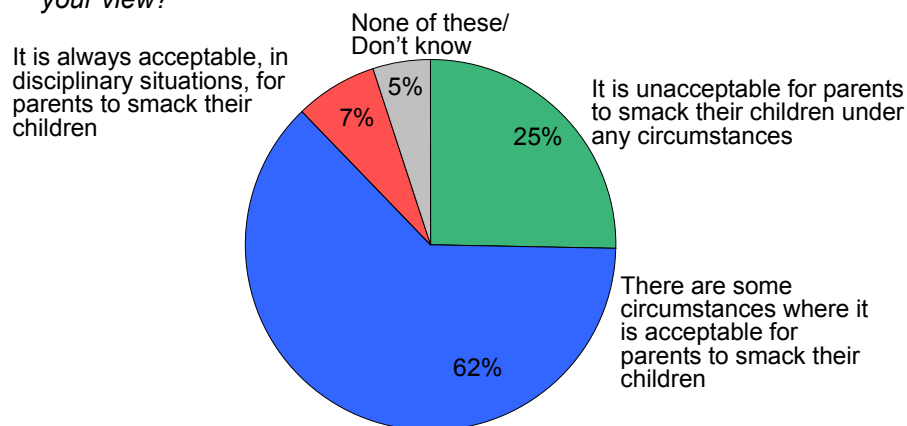
MORI's Standard Terms and Conditions apply to this study, as to all those that we undertake. No press release or publication of the findings from this study shall be made without the prior approval of MORI. Such approval will only be refused on the grounds of inaccuracy or misrepresentation of the research findings.

Summary of Findings

- Overall, seven in ten (69%) Italians believe it is acceptable for parents to smack their children.
- Just over six in ten believe that there are some circumstances where it is acceptable for parents to smack their children. Seven per cent believe it is always acceptable, in disciplinary situations, for parents to smack their children.
- A quarter of Italians believe it is unacceptable for parents to smack their children under any circumstances.

Attitudes towards Smacking Children

Q We would like to ask you some questions about parents' rights to smack their children. Which, if any of the following statements comes closest to your view?



Base: All respondents (1,009)

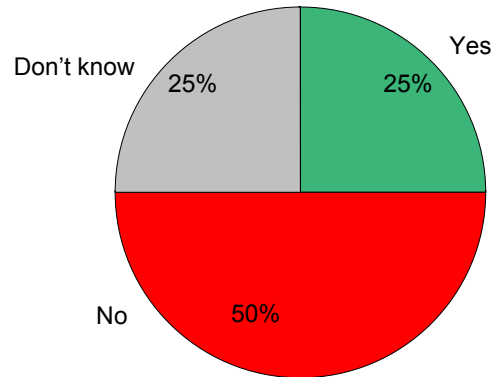
Source: MORI

- Those aged 16-34 are more likely than those aged 45+ to believe that there are some circumstances where it is acceptable for parents to smack their children (73% vs. 54%).

- Half of Italians think that the law in Italy does not allow parents to smack their children. A quarter believe that the law does allow smacking, while a further quarter are unsure.

National Laws on Smacking Children

Q *Do you think that the law in Italy allows parents to smack their children or not?*



Base: All respondents (1,009)

Source: MORI

- Those without children in the household are more likely than those who have children to believe the law does not allow parents to smack their children (52% vs. 45%).
- Those aged 55+ are also more likely than those aged 16-44 to believe the law does not allow parents to smack their children (54% vs. 46%).
- Those educated to university level are the most likely to believe the law in Italy allows parents to smack their children (40% vs. 25% overall).

Sampling Tolerances

When only a sample of a population has been interviewed, we cannot be certain that the figures obtained are exactly those we would have found had everybody been interviewed (the 'true' values). However, for any percentage given, we can estimate 'confidence levels' within which the true values are likely to fall. For example, on a question where 30% of the people in a sample of 1,000 respond with a particular answer, the chances are 95 in 100 that this result would not vary by more than three percentage points from complete coverage of the entire population using the same procedures. However, the 'actual' result (95 times out of 100) is statistically more likely to be closer to the result obtained from the survey than to be anywhere between 27% and 33%. The following table shows that sampling tolerances vary with the size of the sample and the percentages involved.

Approximate sampling tolerances applicable to percentages at or near these levels			
	10% 90% ±	or	30% 70% ±
		or	50% ±
1,000	2		3

Source: MORI

Tolerances are also involved in the comparison of results from different parts of the sample and study. In other words, a difference must be of at least a certain size to be considered statistically significant. The following is a guide to these sampling tolerances.

Differences required for these percentages	10% 90%	or	30% 70%	or	50%
Children in household (291 vs. 718)	4		6		7
Male vs. female (476 vs. 533)	4		5		6

Source: MORI

These are the questions used in the survey in Italian:

Vorrei farle adesso due brevi domande sul diritto dei genitori di punire i propri figli

Q1 Quali di queste tre frasi si avvicina di più al vostro modo di pensare?

(LEGGERE, RUOTARE, UNA SOLA RISPOSTA)

- a) E' sempre inaccettabile che i genitori sculaccino o schiaffeggino i propri figli
- b) In alcune occasioni è accettabile che i genitori sculaccino o schiaffeggino i propri figli
- c) E' sempre accettabile che i genitori sculaccino o schiaffeggino i propri figli per motivi disciplinari

Nessuna di queste

Non sa/ Non risponde/Nessuna opinione

Q2 Secondo Lei la legge Italiana consente ai genitori di sculacciare/schiaffeggiare i propri figli o no?

- Si
- No
- Non so

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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".⁷ 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:⁸
- 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

⁷ Complaint NO. 1/1998 : International Commission of Jurists against Portugal, Decision on the merits, para. 32.

⁸ European Committee of Social Rights, Introduction to Conclusions XV- 2, Volume 1, 2001

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 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.”⁹

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.

⁹ European Committee of Social Rights, Conclusions XV-2, Vol. 2, page 537

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 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.¹⁰
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”.¹¹

¹⁰ 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

¹¹ Committee on the Rights of the Child documents available at <http://www.unhchr.ch/html/menu2/6/crc/>

18. The Committee on Economic, Social and Cultural Rights has also condemned corporal punishment and recommended prohibition. In 1999, the CESCR adopted 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.¹² 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.”¹³
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) 2.¹⁴

¹² 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>)

¹³ 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

¹⁴ Council of Europe Committee of Ministers : all recommendations are available at http://www.coe.int/t/E/Committee_of_Ministers/Home/Documents/

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 mothers used implements to beat their three to five year-old children.¹⁵ 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.¹⁶ 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.¹⁷
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.¹⁸
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.¹⁹

¹⁵ 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

¹⁶ 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.

¹⁷ 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.

¹⁸ 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.

¹⁹ 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

Views of human rights institutions for children

23. The European Network of Ombudspersons 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 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.