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COUNCIL OF EUROPE  
CONSEIL DE L'EUROPE

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

1 October 2013

**Case No. 3**

**Association for the Protection of All Children (APPROACH) Ltd v. Ireland**  
Complaint No. 93/2013

**SUBMISSIONS OF THE GOVERNMENT  
ON THE MERITS OF THE COMPLAINT AND ON  
THE REQUEST FOR IMMEDIATE MEASURES**

**Registered at the Secretariat on 27 September 2013**



Council of Europe

European Committee of Social Rights

**Collective Complaint No. 93/2013**

**Association for the Protection of All Children**

**v.**

**Ireland**

**Observations of Ireland on the merits of the complaint  
and on the request for immediate measures**

27 September 2013

## **Introduction**

1. Ireland (the Respondent) rejects the contention of the Association for the Protection of all Children (APPROACH, the Applicant) that no effective measures have been taken to address the issues raised by the Committee in its decision regarding complaint no. 18/2003. In particular, the Respondent rejects the suggestion of the Applicant that it gives a low priority to protecting successive generations of Irish children from violent punishment.
2. The agenda of supporting children's rights has been significantly progressed through the setting up of a dedicated Department of Children and Youth Affairs, the enactment of a suite of legislation in relation to child protection, the holding of a referendum to amend the Irish Constitution in relation to children's rights and the publication of legislation to set up the Child and Family Support Agency. Full details of this extensive work programme are set out below.
3. In relation to the specific issue of legislating for a complete ban on corporal punishment in all settings, the position of the Respondent has always been that the matter would be kept under review.
4. The difficulties posed by the Irish Constitution in relation to legislating for an outright ban on corporal punishment in all settings arising from the special protection afforded to the family in the Constitution, were referred to in a previous submission to the Committee. A referendum to include a specific reference to children's rights in the Constitution was put before the Irish people in November 2012. Further considerations of the implications of the proposed referendum on children's rights on the issue of corporal punishment are necessarily suspended pending the outcome of the challenge to the Provisional Referendum Certificate, details below.

## **The chronology of the collective complaint**

5. The Applicant registered their complaint with the Executive Secretary of the European Committee for Social Rights on 4 February 2013. At its 18-21 March 2013 session the European Committee of Social Rights (the Committee) decided that it wished to receive the Respondent's observations on the admissibility of the complaint no later than 3 May 2013. By letter dated 3 May the Respondent notified the Committee that it did not

contest the admissibility of the application. On 2 July, the Committee adopted a decision declaring the complaint admissible and invited the Respondent to submit its written observations on the merits of the complaint by 27 September 2013. By letter dated 19 July the Respondent was notified that the President of the Committee wished to receive observations from the Respondent on the request for immediate measures by 6 September 2013. By letter dated 1 August 2013 the Respondent wrote to the Committee seeking to join their submissions on the immediate measures with the date for submissions on the merits on the basis that the two were closely linked. By letter dated 6 August 2013, the Committee replied to inform that the deadline for Respondent's submissions on the immediate measures had been extended to 27 September 2013.

### **The collective complaint**

6. The application is based on a previous complaint against the Respondent on the issue of corporal punishment: *OMCT v Ireland* Complaint No 18/2003. In its decision on the merits, the Committee noted:

*“...that the corporal punishment of children within the home is permitted in Ireland by virtue of the existence of the common law defence of reasonable chastisement. Although, the criminal law will protect children from very serious violence within the home, it remains the fact that certain forms of violence are permitted. The Committee therefore holds that the situation is in violation of Article 17 of the Revised Charter.*

*As regards the situation of children in foster care, residential care and certain childminding settings, the Committee takes note of the fact that there exist guidelines, standard, registration schemes and inspections. However, it notes that these do not have the force of law and do not alter the existence of the common law defence which remains prima facie applicable. It therefore finds that children in these situations are not adequately protected against corporal punishment. It therefore holds that the situation constitutes a breach of Article 17 of the Revised Charter.”*

Following the Committee's decision on the merits in December 2004 the Committee of Ministers adopted Resolution ResChs(2005)9 on 8 June 2005. The Committee of Ministers took:

*“...note of the intention of the Department of Health and Children to seek legal advice in relation to amending the regulations to make more explicit the prohibition of corporal punishment of children in care, and on the need for any change required in primary legislation.*

*Takes note of the intention of the government to keep the introduction of an outright ban on corporal punishment under review.”*

7. The application is largely comprised of extracts of decisions of the Committee, statements of the Council of Europe Commissioner for Human Rights and relevant United Nations Treaty Monitoring Bodies and ignores developments in Ireland. In addition, the Applicant makes a number of emotive statements which are not supported in their written complaint eg *“Research suggests that millions of Ireland’s youngest citizens are subjected to punitive assaults”, “The Irish Government appears to give a very low priority to protecting successive generation of Irish Children from violent punishment.”* In relation to the first of these assertions, the Respondent would seek to be given the details of the relevant research. In the case of the second assertion, this submission will contend that the level of protection afforded to Irish children against assault is significant, and details of the specific actions taken in relation to the protection of children are set out below.
8. The Respondent suggests that the use of unfounded assertions such as those set out above, is unhelpful in seeking to have a constructive and balanced debate about the rights of children.

### **The Law in Ireland**

9. Having regard to the lack of balance and context in the complaint lodged, the Respondent is compelled to repeat that no law or statute specifically permits corporal punishment in the home setting.
10. On the contrary, section 246 of the Children Act 2001 provides clear legal deterrents regarding assaults which cause unnecessary suffering or injury to a child’s health or his or her well-being. The section in full is as follows:

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

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

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

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

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

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

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

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

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

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

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

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

11. Notwithstanding the common law defence of “*reasonable chastisement*” persons are regularly prosecuted in the criminal courts and convicted for offences under section 246.
12. Section 9 (1) of the Child Care (Pre-School Services) (No 2) Regulations 2006 (**Appendix 1**) provides that ‘A person carrying on a pre-school service shall ensure that no corporal punishment is inflicted on a pre-school child attending the service’.
13. As regards children in care, while there is no specific legal prohibition of corporal punishment under the Child Care Act 1991, or under the associated regulations, the provisions of section 246 of the Children Act 2001 apply equally to children in care. In addition, significant protections exist for children in foster care and in residential care against the use of corporal punishment, through the standards and inspection systems, further details of which are set out below.

#### *Foster care*

14. The Health Service Executive (HSE)’s Foster Care Policy, Procedure and Best Practice Guidance sets out criteria against which foster care/relative applicants are assessed. One of these is the ability to manage children’s behaviour without the use of physical or demeaning punishments.
15. The formal contract between the HSE and all foster carers provides that the carer “shall undertake not to use any form of physical punishment as a means of sanction on the child.” (emphasis added).
16. Every foster carer also has a social worker, known as a link worker, to support and supervise them. The link workers’ responsibilities include ensuring that foster carers receive all relevant information and advice about the children including background history, health and education. The link worker organises training, provides regular supervision and support for foster carers and their children and ensures that foster carers are aware of and operate within relevant standards, policies and guidance of the HSE.



17. The link worker also provides foster carers with specific written information on and explanations of HSE procedures should a complaint or allegation be made against them and the supports available in such an event.
18. Foster carers are inspected against the non-statutory National Standards for Foster Care (**Appendix 2**) which include an explicit reference to corporal punishment, as follows:

“Link workers advise foster carers on the appropriate use of sanctions and ensure that they understand that corporal punishment in any form, for example, slapping, smacking, shaking or any form of humiliating treatment is unacceptable and prohibited.” (emphasis added).

#### *Residential care*

19. The Health Information and Quality Authority [HIQA] inspect residential care facilities against the National Standards for Children’s Residential Centres (**Appendix 3**), which were developed for the purpose of inspecting residential centres across the country. The guidelines state that young people should not be subjected to any form of treatment that is humiliating or degrading. Staff are encouraged to consider the underlying causes of inappropriate behaviour and day-to-day practices should be in place to support children in managing their behaviour.

#### *Guidelines for Physical Restraint*

20. These guidelines, which apply to all residential care and special care units provide that the method of physical restraint is approved for use and endorsed by the relevant statutory body and that the method is child centred and not punitive or hurtful.

### **Key developments since the decision of the Committee in complaint No. 18/2003**

#### *The Establishment of the Department of Children and Youth Affairs*

21. As a reflection of the importance attached to the protection, welfare and well-being of children, the Department of Children and Youth Affairs (DCYA) was established on 2 June 2011. The Department consolidates a range of functions which were previously responsibilities of the then Ministers for Health, Education and Skills, Justice and Law Reform and Community, Rural and Gaeltacht Affairs.

22. The Department brings together a number of key areas of policy and provision for children and young people including the Office of the Minister for Children and Youth Affairs (OMCYA), and from January 2012 the detention schools operated by the Irish Youth Justice Service (IYJS).
23. The mission of the Department of Children and Youth Affairs is ‘*To lead the effort to improve the outcomes for children and young people in Ireland*’. The responsibilities of the Department encompass a wide range of policy and service activity, both direct and indirect, for children and young people in Ireland. It has a complex mandate, comprised of a number of separate, but interrelated strands:
- the direct provision of a range of universal and targeted services;
  - ensuring high-quality arrangements are in place for focused interventions dealing with child welfare and protection, family support, adoption, school attendance and reducing youth crime;
  - the harmonisation of policy and provision across Government with a wide range of stakeholders to improve outcomes for children, young people and families.

*Research on corporal punishment*

24. As referred to by the Applicant in its observations, the Respondent commissioned research on parenting styles and discipline from both parents and children’s perspectives, which was published in 2010 (Halpenny et al 2010<sup>1</sup>). The Applicant has chosen to selectively quote from the report. The Respondent wishes to draw attention to the following findings also contained in the Report:
- Non-aggressive, inductive discipline strategies were used most frequently by the majority of parents in Ireland (Halpenny et al 2010, pg 4);

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<sup>1</sup> Halpenny, AM., Nixon, E. & Watson, D. (2010) Parenting Styles and Discipline: Parents’ and Children’s Perspectives: Summary Report. Office of the Minister for Children and Youth Affairs, Dublin: Government Publications (**Appendix [ ]**).

- Parents' use of physical punishment, according to self-reports of these parents, was low (25%) when compared with similar reports in Scotland (51%) and England (58%) (Halpenny et al 2010, pg16).
25. The respondent also wishes to bring to the attention of the Committee the findings of the *Growing Up in Ireland* (**Appendix 5**), the national longitudinal study funded by the Department of Children and Youth Affairs. Children's reports of smacking at 9 years highlights that 58% were 'never' smacked by their mother which is consistent with the mother's self-reported use of smacking as a discipline technique (57%). There is some discrepancy between child and mothers reports where 'always' is used to describe mothers use of smacking as a discipline technique, 0% of mothers report that they use smacking 'always' compared with 3.5% of children who state that smacking is 'always' used as a discipline technique (Table 3.1, p45, Table 3.14, p47)
  26. Further *Growing Up in Ireland*<sup>2</sup> findings published on 20 September 2013 provide data from primary caregivers of the three year old study children. This indicates that the least used discipline technique, less than 1%, was smacking.
  27. The statistical information available publicly gives an accurate picture as to the situation in Ireland and stands testament to the considerable progress that is being made in eliminating virtually all forms of violence against children in Ireland and in encouraging parents to use alternative non-violent forms of discipline in the family setting.

#### *Establishment of the Child and Family Agency*

28. Efforts are currently being made to fundamentally reform the delivery of child protection services by removing child welfare and protection from the Health Service Executive (the HSE) and creating a dedicated child welfare and protection agency, reforming the model of service delivery and improving accountability to Dáil Éireann (the House of Representatives). Legislation (initiated in November 2012) is currently being progressed through the Oireachtas (the national parliament) to establish the Child and Family Agency. It will have responsibility for the following:

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<sup>2</sup> The latest report of the National Longitudinal Study of Children provides data from the second wave of the infant cohort, collected when the child was three years of age. This report will be available from [http://www.dcy.gov.ie/viewdoc.asp?fn=/documents/GrowingUpInIreland/GUII\\_Child\\_Cohort.htm](http://www.dcy.gov.ie/viewdoc.asp?fn=/documents/GrowingUpInIreland/GUII_Child_Cohort.htm)

- Child welfare and protection services currently operated by the HSE including family support and alternative care services;
- Child and family-related services for which the HSE currently has responsibility including pre-school inspections and domestic, sexual and gender-based violence services;
- Services provided by the Family Support Agency, which currently operates as a separate body under the Department of Children and Youth Affairs;
- Services provided by the National Educational Welfare Board, which also currently operates as a separate body under the Department of Children and Youth Affairs;

29. Notably, the new Agency will have a discrete focus on family functioning. This is intended, inter alia, to focus on supporting families in their parenting role - including through preventative parenting supports. The legislation also brings under the one Agency functions related to the provision of care and protection for victims of domestic violence, whether in the context of the family or otherwise, and the provision of services relating to the psychological welfare of children and their families. This integration of service provision will give a unique opportunity to work with both the child and the family where there are concerns regarding the use of physical punishment in the home in the context of the Agency's role in promoting the welfare and protection of children.

30. This range of responsibilities is considered to contribute to achievement of the overall vision for the Agency which is seeking to bring about greater integration of services for children and families and a more consistent focus on early intervention and community engagement.

#### *The Proposed Children First Legislation*

31. The Children First National Guidance for the Protection and Welfare of Children (**Appendix 6**) provides clarity and guidance for individuals and organisations in

identifying and responding appropriately to child abuse and neglect. It also sets out what organisations that care for or work with children should do to ensure they are safe whilst in the care of the organisation.

32. The Government is in the process of developing legislation to put on a statutory basis certain provisions of the Children First: National Guidance for the Protection and Welfare of Children. The legislation will place a legal requirement on certain categories of individuals to report child protection concerns to the relevant authorities. An extensive consultation process, including deliberations by the Joint Committee on Health and Children, has taken place, and the legislative proposals are well advanced.

*Other Legislative developments*

33. The Applicant seeks to suggest that the Respondent has shown a profound lack of commitment to respecting children's human rights. The Respondent rejects such suggestions and wishes to bring to the Committee's attention that a suite of legislation has been enacted to provide additional safeguards to protect children which includes:

- Section 176 of the Criminal Justice Act 2006 (**Appendix 7**) introduces an offence of reckless endangerment of children. This provision makes it an offence for a person having authority or control over a child or an abuser, to intentionally or recklessly endanger a child by causing or permitting the child to be placed or left in a situation which creates a substantial risk to the child of being a victim of serious harm or sexual abuse, or to fail to take reasonable steps to protect a child from such a risk, where they know the child is in that situation;
- The Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012 (**Appendix 7**) creates an offence of withholding information on serious offences where those offences are committed against a child or a vulnerable adult.<sup>3</sup>

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<sup>3</sup> Serious offences are offences which carry a penalty of imprisonment for 5 years or more. They include most sexual offences and offences such as assault causing harm, abduction, manslaughter or murder.

- The National Vetting Bureau (Children and Vulnerable Adults) Act, 2012 (**Appendix 7**) assures greater protection for by ensuring that those applying for work with children and vulnerable adults are properly. The Act makes it mandatory for persons working with children or vulnerable adults to be vetted by An Garda Síochána.

*The proposed amendment to Article 42 of the Constitution*

34. In 2012 an amendment to the Irish Constitution to insert Article 42A into the Irish Constitution was proposed. It reads as follows:

“ Children

1. The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.

2. 1° In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.

2° Provision shall be made by law for the adoption of any child where the parents have failed for such a period of time as may be prescribed by law in their duty towards the child and where the best interests of the child so require.

3. Provision shall be made by law for the voluntary placement for adoption and the adoption of any child.

4. 1° Provision shall be made by law that in the resolution of all proceedings- brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or concerning the adoption, guardianship or custody of, or access to, any child, the best interests of the child shall be the paramount consideration.

2° Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.

Section 5 of Article 42 of the Constitution shall be repealed.”

35. A referendum took place on 10 November 2012 and fifty-eight percent of voters accepted the proposal. Subsequent to the publication of the Provisional Referendum Certificate in *Iris Oifigiúil* (the official journal), proceedings challenging the result and proceedings challenging the constitutionality of provisions of the Referendum Act 1994 were brought in the High Court. The oral hearing regarding the challenge to the result has taken place and judgment is awaited. Referral of the Bill to the President for signing into law, and to give effect to the Constitutional changes concerned must await the judgement of the Courts.
36. The central aim of the proposed new Article 42A is to directly recognise children in their own right within the Constitution; the proposed amendment gives firmer recognition to the rights of children under the Constitution and affirms the State’s obligation, as far as practicable, to protect those rights. The amendment gives constitutional recognition to the principle that the best interest of the child should be the key consideration in decision making in child welfare and protection proceedings brought by the State and in proceedings concerning adoption, guardianship, custody and access.
37. The proposed Amendment provides an affirmation of each individual child’s inherent rights and a clear statement that children’s rights need to be protected and vindicated; while continuing to respect and preserve the rights of the family as set out in the existing Article 41 (**Appendix 8**).
38. The objective is to give children special protection having regard to their young age and their potential vulnerability.

39. In bringing forward the proposal to amend the Constitution the Respondent has demonstrated commitment to providing firmer recognition to the rights of children under the Constitution and to affirm the State's obligation to protect those rights.
40. Further considerations of the implications of the proposed referendum are necessarily suspended pending the outcome of the challenge to the Provisional Referendum Certificate, referred to above. Judgment is expected at an early date. This significant development has not been referred to by the applicant organisation in the complaint lodged.

### **Request for immediate measures pursuant to Rule 36**

41. In its complaint as lodged, the applicant organisation urges the Committee to “*seek appropriate immediate measures: an immediate commitment to bring forward legislation to remove the “reasonable chastisement” defence and to ensure explicit and effective prohibition of corporal punishment and other cruel or degrading punishment of children in their homes and in all forms of alternative care, and to work with due diligence towards the elimination of such punishment.*”
42. The Respondent contends that the request of the applicant organisation for immediate measures is without justification. Before the Committee can indicate any immediate measures, as required by its own Rules, it must be satisfied that they are “*...necessary with a view to avoiding the risk of a serious irreparable injury and to ensuring the effective respect for the rights recognised in the European Social Charter.*” The Applicant has not demonstrated that there is any risk of serious irreparable injury in the absence of immediate measures.
43. It is legitimate to draw comparisons between the immediate measures Rule as detailed in Rule 36 of the Committees Rules and interim measures detailed in Rule 39 provided for in the Rules of Court of the European Court of Human Rights. The European Court of Human Right's rule on interim measures operates without prejudice to the ultimate conclusion of an application and is confined to situations where there is a risk to the right of individual application. In the present application there is no threat to the application being fully considered by the Committee.



44. Further, the Respondent contends that the immediate measures being sought in fact go to the merits of the complaint and for that reason the Committee should decline the request for immediate measures. The position of the Respondent has been that the matter of corporal punishment is being kept review. The agenda of supporting Children's rights has been progressed through a host of measures, detailed above. The Applicant's assertion is that the Respondent gives a low priority to protecting Irish Children from violent punishment and the imposition of the immediate measures ("*...an immediate commitment to bring forward legislation...*") would be to accept the Applicant's submission without fully considering the application and the Respondent's response.

### **Conclusion**

45. The Respondent's response to the decision of the Committee in Case 18/2003 was that the issue of corporal punishment would be kept under review and the Respondent has actively done so. Further, a significant programme of work to underpin child welfare and protection, up to and including a proposed amendment to the Constitution in relation to children's rights has been undertaken. Consequently, the Respondent contends that the application should be rejected.

46. As regards the request for immediate measures, the Respondent contends that this must be refused. First, the applicant organisation has not demonstrated any risk of serious irreparable harm (a requirement of the Rule); Secondly, there is no threat to the application being fully considered in the absence of a direction for immediate measures; Finally, imposition of the immediate measures requested would simply be to accept the merits of their application without a proper consideration of the issues.

