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

17 January 2014

Case Document No. 5

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

**RESPONSE BY APPROACH
TO THE GOVERNMENT'S SUBMISSIONS
ON THE MERITS**

Registered at the Secretariat on 17 January 2014

APPROACH Ltd

Response to the Observations of the Government of Ireland on the merits of Complaint No. 93/2013, Association for the Protection of All Children (APPROACH) Ltd v. Ireland

January 2014

I. Introduction

1. This is the response of APPROACH Ltd to the Observations of Ireland on the merits of Complaint No. 93/2013, dated 27 September 2013. We first highlight that there is no prohibition of corporal punishment of children in Ireland in the family home, most residential care, foster care and some day care. We then summarise the research evidence which shows that large numbers of children in Ireland continue to experience violent punishment, before going on to emphasise the Government's failure to take action on the issue in the past nine years.

II. The lack of prohibition of corporal punishment of children in Ireland

2. The legality of corporal punishment is unchanged since Complaint No. 18/2003: there is no prohibition of corporal punishment of children in the family home, residential care, foster care or some day care settings. In its Decision on Complaint No.18/2003, the Committee commented that:

“The Committee notes 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, standards, 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.” (paras. 65-66)

3. The situation today remains exactly the same: the common law “right” to use “reasonable and moderate chastisement” has not been repealed, meaning that this defence is still available to parents, other family members, adults working in most residential care settings, foster carers, some childminders and other adults providing informal care for children.
4. In its Observations on the merits, the Government lists various legislative and non-legislative measures which it claims constitute “a significant programme of work to underpin child welfare and protection” (para. 45). We discuss these measures below,

highlighting that they are not adequate to protect children from all violent punishment.

A. General measures

5. The Irish Government quotes section 246 of the Children Act 2001, appearing to suggest that it provides adequate protection for children. But as the Committee has already stated in its Decision on Complaint No. 18/2003, and as the Government itself acknowledges in its Observations on this more recent Complaint, this section does not apply to all corporal punishment, but only that which reaches a certain threshold (“assaults which cause unnecessary suffering or injury to a child’s health or his or her well-being” (para. 10)).
6. The Government goes on to suggest that “notwithstanding the common law defence of ‘reasonable chastisement’ persons are regularly prosecuted in the criminal courts and convicted for offences under section 246” (para. 11). The Child Law Clinic of University College Cork has reviewed Irish law and policy referred to by the Government in its Observations on this Complaint, seeking to respond to the question, “Does the domestic law and policy referred to in the Irish Government submission constitute an effective or adequate response to physical violence against children in light of the stated position of the Committee?” In relation to this comment of the Government’s it remarks that,

*“It could also be said ... that other potential prosecutions of acts of violence do not successfully proceed because of the availability of the defence. It is indicative of a disquieting ambivalence on the part of the Irish Government regarding violence against children that it puts forward the defence that some instances of violence attract legal sanction in response to a complaint that highlights that not all instances of violence do.”*¹
7. The Irish Government refers in para. 33 to section 176 of the Criminal Justice Act 2006 on recklessly or intentionally endangering children. However, this legislation covers only very severe acts of violence against children: namely cases that involve sexual abuse or “serious harm”, meaning injury which creates a substantial risk of death or which causes permanent disfigurement or loss or impairment of the mobility of the body as a whole or of the function of any particular member or organ.
8. The Government also cites the proposed Children First legislation and two associated Acts, the Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012 and the National Vetting Bureau (Children and Vulnerable Adults) Act 2012 (paras. 31-33). This legislation is concerned with the management, identification and reporting of child protection concerns and would have no impact on the legality of corporal punishment.
9. The Government suggests that the establishment, in 2011, of its Department of Children and Youth Affairs, is a “reflection of the importance attached to the protection, welfare and well-being of children” (para. 21). However, the establishment of this department is clearly a general measure which is of little relevance to the subject of this Complaint: the legal status of violent punishment. Similarly, the establishment of the Child and Family Agency (discussed by the Government in

¹ Child Law Clinic (2013), *Review of Irish Law and Policy referred to in the Irish Government Submission of the 1st October 2013, Complaint No. 93/2013, Association for the Protection of All Children (APPROACH) Ltd against. Ireland*, p. 7

paras. 28-30 of its Observations) results in the transfer of existing services, including some child protection services, to a new agency, but does not increase children's legal and other protection from violence.

10. As the Child Law Clinic states,

*“Law and Policy developments in the area of Child Protection such as the creation of a Child and Family Agency and Children First and related legislation fail to address instances of harmful violence perpetrated against children that continue to be endorsed under law. Fundamentally ... proposed legislation will definitively not affect the continuation of violence perpetrated against children that is currently endorsed by Irish law. As long as the defence of reasonable chastisement remains in place, this legislation remains prima facie inadequate as a means of effectively combating violence against children.”*²

B. Residential care

11. In its Observations on the merits of this Complaint, the Government admits that, although various non-statutory guidelines, standards etc state that corporal punishment should not be used, “as regards children in care ... there is no specific legal prohibition of corporal punishment” (para. 13). In light of the horrific history of widespread severe violence against children in residential care and foster care in Ireland, the Government's continuing failure to prohibit violent punishment in these settings is particularly shocking.
12. As noted in our Complaint, the only residential care settings in which corporal punishment is prohibited in Ireland are the three Special Care Units, which together have capacity to accommodate 25 children. These Special Care Units are regulated by the Child Care (Special Care) Regulations 2004 which prohibit “corporal punishment or any form of physical violence”. But the Child Care (Placement of Children in Residential Care) Regulations 1995, which regulate the children's residential centres which accommodate the vast majority of children in residential care in Ireland, do not prohibit corporal punishment: there is no prohibition in these centres.
13. The Government refers to the non-legislative National Standards for Children's Residential Centres, against which the Health Information and Quality Authority inspects residential care facilities. These standards state that young people should not be subjected to humiliating or degrading treatment but do not explicitly state that physical punishment must not be used. There are concerns about the application of these standards and about the effectiveness of the inspection regime: in more than 18% of children's residential centres inspected in 2012, the Health Service Executive failed to ensure that adequate arrangements were in place to enable an authorised person to monitor the centres.³ Moreover, where inspections were carried out, there was only 15% compliance with the standard of “responding to and managing some children's behaviour”.⁴
14. It is clear that these general standards and the associated inspection regime are inadequate to provide children in residential care with clear legal and other protection from violent punishment. Even if clear standards were systematically applied through

² Child Law Clinic (2013), op cit, p. 11

³ Health Information and Quality Authority (2013), *Overview of findings of 2012 children's inspection activity: foster care and children's residential services*, Dublin: HIQA

⁴ Health Information and Quality Authority (2013), op cit, p. 14

an effective monitoring and inspection regime, this would be undermined by the existence of the “reasonable chastisement” defence and the lack of prohibition in law of all corporal punishment. This, as the Committee has repeatedly made clear, is required to comply with article 17 of the Charter.

C. Foster care

15. In paras. 14-18 of its Observations on the merits, the Government mentions various aspects of the organisation of foster care services: guidance on the assessment of foster care applications, which states that applicants should be able to manage children’s behaviour without the use of physical or demeaning punishments; contracts which state that foster carers undertake not to use physical punishment; the provision of training, information and advice to foster carers; and the inspection of carers against non-statutory standards which state that corporal punishment may not be used. While welcome, these non-legislative measures do not amount to a prohibition in law of violent punishment – as the Committee recognised in its Decision on Complaint No. 18/2003:

“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, standards, 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.”

16. As in residential care settings, there are concerns about the implementation of even the existing weak protections for children. The Health Information and Quality Authority’s overview of findings of inspections of foster care services in 2012 found that some foster carers were offered very little training in dealing with children’s “challenging behaviour”, and that some children continued to live in households “where the carers had not been approved as foster carers, even where allegations had been upheld against adults in the home”.⁵
17. It is clear that the non-legislative measures mentioned by the Government are entirely inadequate to fulfil children’s right to protection from all violent punishment. The fact that some children are living in foster care placements which have not been assessed and are thus not afforded even the weak, non-legislative protection of training, guidelines and standards further underlines the need for prohibition of violent punishment in all settings.

D. Day care

18. The Irish Government states that,

“Section 9 (1) of the Child Care (Pre-School Services) (No. 2) Regulations 2006 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’.” (para. 12)

19. We do not dispute that corporal punishment is prohibited in pre-school services, but, as our Complaint notes, these regulations do not cover all forms of day care. Under section 58 of the Child Care Act 1991, childminders caring for the children of

⁵ Health Information and Quality Authority (2013), op cit, p. 27

relatives, children of the same family or not more than three children of different families are exempt from these regulations. The defence of “reasonable chastisement” is thus available to some childminders, as well, of course, as to all those providing informal day care for children such as nannies, babysitters, etc.

III. The urgent need for prohibition and elimination of corporal punishment

20. In its Observations, Ireland requests details of the research showing that millions of Ireland’s youngest citizens are subject to punitive assaults, suggesting that research on the issue is quoted selectively in the Complaint (paras. 7, 24). It goes on to claim that statistics in fact show that progress is being made in eliminating corporal punishment (para. 27).
21. As noted in the response to Ireland’s Observations on our request for immediate measures, in a 2013 government-commissioned study of nearly 10,000 three year olds, 45% of their primary caregivers “smacked” them sometimes.⁶ Similarly, government-commissioned research in 2010 found that 37% of parents of two to four year olds sometimes physically punished them.⁷ In research in 2007-2008, 42% of nine year old girls and 41% of boys the same age said they were “sometimes” or “always” smacked by their mother.⁸ The 2010 study – the only one to cover children of all ages – found that a quarter of parents involved had used some form of physical punishment in the past year.
22. It is likely that the actual prevalence of corporal punishment is significantly higher than the already shockingly high figures in these self-report studies. Since all three studies cover corporal punishment by only one parent, none gives a clear picture of children’s overall experience, since children may be punished by both parents, or only by the parent not included in the studies. And children may also be physically punished in the family home and elsewhere by a wide range of adults other than their parents – including parents’ partners, grandparents, other family members, babysitters, nannies and others. Moreover, two of the three studies cover only “smacking”, leaving other forms of corporal punishment – such as shaking, pushing, pinching and grabbing children – invisible. Given these considerations, the already high proportions of children shown in government research to experience corporal punishment and Ireland’s estimated child population of 1,137,000, it seems highly probable that in the past nine years, millions of children have experienced physical punishment.
23. Despite its accusation that we quote research on the issue selectively, the Government goes on to quote selectively from its own reports, suggesting that the study published in 2013 showed that “the least used discipline technique, less than 1%, was smacking” (para. 26). This figure in fact refers to frequency rather than to prevalence of corporal punishment as the Government’s reference suggests – the report itself states that “less than 1 per cent of Primary Caregivers said they used smacking as a discipline

⁶ Williams, J. et al (2013), *Growing Up in Ireland: Development from Birth to Three Years – Infant Cohort*, Department of Children and Youth Affairs

⁷ Halpenny, A. M., Nixon, E. & Watson, D. (2010), *Parenting Styles and Discipline: Parents’ Perspectives on Parenting Styles and Disciplining Children*. Dublin: The Stationery Office/Office of the Minister for Children and Youth Affairs

⁸ Williams, J. et al (2009), *Growing Up in Ireland: National Longitudinal Study of Children – The Lives of 9-Year-Olds*, Dublin: Office of the Minister for Children and Youth Affairs, Department of Health and Children

technique always or regularly, although in total 45 per cent used it rarely or now and again”.⁹

24. Given these figures, the Government’s suggestion that research on the issue shows that “considerable progress... 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” (para. 27) is wrong. While non-violent discipline may be commonly used, as it is in every country, it is clear that large numbers of children continue to experience painful and humiliating physical assaults in the guise of “discipline”. As the Child Law Clinic suggests,

*“... the unpalatable indication given by the Government submission is that physical punishment is used against a significant proportion of the child population. The level of violence indicated suggests that cumulatively and over time, just as the complaint points out, millions of Irish children are subject to punitive assaults.... it is ... disquieting and arguably indicative of a worrying ambivalence regarding violence against children that the Government quotes such evidence in support of the assertion that considerable progress is being made in eliminating virtually all forms of violence against children in Ireland rather than acknowledging the culture of physical punishment it reveals.”*¹⁰

IV. The priority given by Ireland to children’s protection from violent punishment

25. The Government dismisses as an “emotive statement” and an “unfounded assertion” (paras. 7-8) our assertion that it gives a low priority to protecting Irish children from violent punishment. The lack of any change whatsoever to the relevant legal situation in the nine years since the Committee found that Ireland’s lack of prohibition of corporal punishment was in violation of the Charter seems to us to demonstrate a low priority.
26. We are of course aware of the proposed amendment to the Irish Constitution, the referendum and the continuing legal challenges (see Government’s Observations, paras. 34-40). We see that in the introduction to its Observations the Government again suggests that there are “difficulties posed by the Irish Constitution in relation to removal of the ‘reasonable chastisement’ defence” (para. 4). Nearly ten years prior to this, in 1994, the Irish Law Reform Commission’s report on non-fatal offences against the Person, albeit not in specific reference to the constitutional situation in Ireland, stated that “it may be doubted that the right to family privacy overcomes the child’s rights to security of the person, having regard to the fact that the law makes no such allowance for other crimes committed within the family”. The report did not definitively comment on the constitutionality of prohibiting corporal punishment, and although the Government, could, through the Attorney General, ask the Law Reform Commission to examine the matter, or ask Ireland’s Special Rapporteur on Child Protection for legal advice, it appears it has not done so.
27. In any case we would emphasise that the state of a country’s laws, including its Constitution, does not in itself provide any excuse for failing to fulfil obligations under international instruments it has accepted. We note, for example, that Ireland has

⁹ Williams, J. et al (2013), op cit, p. 81

¹⁰ Child Law Clinic (2013), op cit, p. 10

made no reservations or declarations relating to its Constitution in ratifying the Convention on the Rights of the Child.

28. The Government's inaction in relation to the lack of prohibition in residential care settings is particularly striking. In its 2005 resolution following the Decision on Complaint No. 18/2003, 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.”*¹¹

29. Yet, despite this apparent commitment (misleadingly worded, since as the Government itself accepts there is no prohibition), no action appears to have been taken (although we see that the Government itself quotes this in para. 6 of its Observations). As the Child Law Clinic notes, this is despite the fact that the supposed constitutional difficulties clearly do not apply to prohibition in residential and foster care:

*“Notwithstanding the Government's failure to clarify or rectify constitutional uncertainty, it is notable that the Government, in failing to unambiguously prohibit corporal punishment in foster care and residential care settings, has not legislated even to the extent permitted by any potential constitutional impediment that applies only within the constitutional family.”*¹²

30. Although the Government claims in its Observations on this Complaint that “considerable progress ... is being made in ... encouraging parents to use alternative non-violent forms of discipline in the family setting” (para. 27), it provides no evidence that it has made further efforts to encourage parents to use non-violent discipline or otherwise to prevent violent punishment. (In any case, any such efforts would necessarily be undermined by the lack of prohibition of corporal punishment.)
31. As our Complaint underlines, keeping a matter “under review” is a wholly inadequate response to a clear and repeatedly confirmed human rights obligation. In addition to disregarding its obligations under the Charter, in failing to prohibit corporal punishment Ireland is also ignoring successive recommendations to prohibit and an expression of “deep concern” from the UN Committee on the Rights of the Child¹³ and an expression of grave concern and similar pressure to prohibit from the UN Committee against Torture.¹⁴
32. We note that Ireland's failure to act on the issue occurs in the context not only of international pressure, but also of sustained pressure from children's rights advocates nationally. The Children's Rights Alliance, a coalition of over 100 organisations working to secure the rights of children in Ireland, has long campaigned for prohibition. In its 2013 submission included in Ireland's latest report to the UN Committee on the Rights of the Child, it recommends that the Government “remove

¹¹ Committee of Ministers Resolution ResChS(2005)9 of 8 June 2005

¹² Child Law Clinic (2013), op cit, p. 11

¹³ 4 February 1998, CRC/C/15/Add.85, *Concluding observations on initial report*, paras. 16 and 39; 29 September 2006, CRC/C/IRL/CO/2, *Concluding observations on second report*, paras 39 and 40

¹⁴ 17 June 2011, CAT/IRL/CO/1, *Concluding observations on initial report*, para. 24

the defence for parents and child-minders to the use of corporal punishment”,¹⁵ identifying this as one of a few areas which are “key priorities in the short term”, and on which it calls on the Government to take action before Ireland’s next examination by the Committee on the Rights of the Child. In his latest report, Ireland’s Special Rapporteur for Child Protection recommended that Ireland “continue the encouraging steps taken towards increasing protection for children against physical punishment. Remove the reasonable chastisement defence at common law”.¹⁶

33. We note that in its 2005 report to the Committee on the Rights of the Child, the Government, while noting that prohibition was an issue which was “being kept under review”, also stated: “It is the Government’s view that there will be an appropriate time for the introduction of an outright ban, which would be widely accepted and endorsed by all of society”.¹⁷ In its most recent report to the Committee on the Rights of the Child, it repeats that the matter is “under review” but states only that “a specific proposal for a prohibition in the home setting has not been brought forward to date”.¹⁸ And as we noted in our Complaint (p. 11) we are deeply concerned that in its response on this issue during its 2011 Universal Periodic Review, the Government appears to have retreated further from acceptance of its immediate obligations.

V. Conclusion

34. In Complaint No. 18/2003, the Committee found that Ireland was in violation of the Charter because corporal punishment was not prohibited and in its conclusions in 2012, it repeated this finding. The Government of Ireland has failed to prohibit corporal punishment and to work with due diligence to eliminate it in practice: there is no prohibition of corporal punishment of children in the family home, most residential care, foster care and some day care and violent punishment remains widely accepted and practiced.
35. Ireland’s failure to bring its law into conformity with the Charter since the Committee’s Decision on Complaint No. 18/2003 prompted us, in this Complaint, to request that the Committee indicate immediate measures to the Government: 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. In our response to the Government’s comments on our original request for immediate measures (Case Document No. 4, registered on November 25 2013), we explained in detail why we believed the adoption of such measures was 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. We concluded that it could be appropriate to defer consideration of such measures until the Decision on the merits had been made.

¹⁵ Department of Children and Youth Affairs (2013), *Ireland’s Consolidated Third and Fourth Reports to the UN Committee on the Rights of the Child*, Dublin: DCYA, p. 152

¹⁶ Shannon, G. (2013), *Sixth Report of the Special Rapporteur on Child Protection: A Report Submitted to the Oireachtas*, p. 15

¹⁷ *Ireland’s second periodic report under the Convention on the Rights of the Child*, CRC/C/IRL/2, 9 December 2005, para. 40.

¹⁸ Department of Children and Youth Affairs (2013), *op cit*, para. 341

36. While noting the ECSR's Decision on the request for immediate measures, we would like to draw the Committee's attention once again to the inaction since its last Decision on Ireland and the evidence of the risk of irreparable injury to children. We hope the Committee will find Ireland to be in violation of the Charter and will do whatever is in its power to request immediate action.