

BANNING CORPORAL PUNISHMENT

THE SOUTH AFRICAN EXPERIENCE

Carol Bower



“ I urge States to prohibit all forms of violence against children, in all settings, including all corporal punishment [...] and other cruel, inhuman or degrading treatment or punishment, as required by international treaties, including [...] the Convention on the Rights of the Child. I draw attention to general comment No. 8 (2006) of the Committee on the Rights of the Child on the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (articles 19, 28, para. 2 and 37, inter alia) (CRC/C/GC/8). Prohibiting violence against children by law and initiating a process to develop reliable national data collection systems should be achieved by 2009.”

— *Paulo Sérgio Pinheiro, independent expert for the United Nations study on violence against children, in his report to the General Assembly (GA/A/61/229 [item 62]), August 2006*

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Foreword

It is a privilege to introduce this publication on the experiences and challenges of the Working Group on Positive Discipline related to prohibiting corporal punishment through the Children's Act as Amended during the law reform process in South Africa over the past decade.

In spite of the failure of the legislation to prohibit parental corporal punishment, the advocacy campaign is none-the-less considered to have achieved a number of successful outcomes. In addition there are many lessons that have been learnt by members of the network through this process. It is these lessons that we are hoping to share with other organisation working towards policy or law reform on socially contentious children's rights issues, through the dissemination of this publication.

The work of the working group is by no means done and strategies have been identified for moving the campaign towards social, institutional and legal reform regarding the use of parental corporal punishment against children in South Africa forward over the coming years.

This report sets out the background to the legislative reform process and the establishment of civil society networks to mobilise advocacy regarding these reforms. It sets out the objectives and strategies that were employed by the Working Group on Positive Discipline and outlines the important lessons that were learnt in the advocacy process.

RAPCAN and Save the Children Sweden believe that documenting processes of this nature is of great importance in order to contribute to the available body of knowledge and to ensure learning across contexts. This publication is thus shared in the spirit of taking this learning forward to strengthen advocacy on children's rights in Africa.

*Samantha Waterhouse, RAPCAN
January 2009*

Acronyms

ACDP	African Christian Democratic Party
ANC	African National Congress
DoSD	Department of Social Development
NA	National Assembly
NACCW	National Association of Child and Youth Care Workers
NCOP	National Council of Provinces
NPA	National Prosecuting Authority
PC	Portfolio Committee in the National Assembly
RAPCAN	Resources Aimed at the Prevention of Child Abuse and Neglect
SACC	South African Council of Churches
SALRC	South African Law Reform Commission
SASPCAN	South African Society for the Prevention of Child Abuse and Neglect
SAHRC	South African Human Rights Commission
UCARC	Umtata Child Abuse Resource Centre
UNICEF	United Nations Children's Fund
WGPD	Working Group on Positive Discipline

1

The legal framework of corporal punishment in South Africa in 1998

South Africa ratified the United Nations Convention on the Rights of the Child in 1995. The adoption in 1996 of the South African Constitution promised children protection against “*maltreatment, neglect, abuse or degradation*” (s 28 [1] [D]), and ensured that “(a) child’s best interests are of paramount importance in every matter concerning the child” (s 28 [2]).

The use corporal punishment within the *school setting* was prohibited by the South African Schools Act of 1996. The use of corporal punishment as a *judicial sentence* was prohibited by the Abolition of Corporal Punishment Act of 1997. The use of corporal punishment in *alternate care settings* was prohibited by amended regulations enacted under the Child Care Act in 1998.

South Africa adopted the African Charter on the Rights and Welfare of the Child in 1998.

The defence of reasonable chastisement of children by their parents existed in South African common law. Work on the Children’s Bill began in 1998 – at which time, corporal punishment was banned in all spheres of a child’s life except the home.

2

The societal context in South Africa in 1998

Despite the ban on corporal punishment in educational settings, corporal punishment continues to be used in schools. In fact, the prohibition was challenged (unsuccessfully) by Christian Education South Africa in 2000. Research and anecdotal evidence suggests that it is also used extensively in the home environment.

South Africa is a violent country, with among the highest recorded statistics for sexual abuse, family murder, domestic violence and intimate femicide. In addition, there are high levels of poverty, and the country is the epicentre of the HIV pandemic. Thus, it is a country with high levels of violence against children.

Views that “children have been given too many rights” and that children are increasingly undisciplined are common in South Africa. The experience of civil society organisations in both rural and urban settings is that traditional, cultural and religious convictions support the continued use of corporal punishment of children in all spheres, including the home.

3

The process of the Children's Bill

The South African Law Reform Commission (SALRC) began its work on new children's legislation in 1997. The commitment was to the development of a single comprehensive children's statute, which included provisions on parental rights and responsibilities; children in need of special protection, the age of majority; surrogacy; artificial insemination; prevention and early intervention; early childhood development; partial care; the health rights of children; and the rights of children as consumers. In May 1998 an extensively workshopped Issue Paper was published for general information and for comment. Many individual and civil society organisations made submissions on the issue of parental corporal punishment.

The Draft Children's Bill was released late in 2002 by the SALRC. It did not explicitly prohibit corporal punishment in the home, but contained a clause revoking the common law defence of reasonable chastisement, with a recommendation that "an educative and awareness-raising approach be followed, in order to influence public opinion on the issue of corporal punishment".

In October 2003, the Bill was split into two sections, namely, the Children's Bill (commonly known as the "Section 75 Bill") and the Children's Amendment Bill (commonly known as the "Section 76 Bill"). Those parts of the Bill which did not relate to national competencies within the South African government structure were left for the Amendment Bill which would be processed immediately after the piece dealing with national competencies was completed. The issue of parental corporal punishment was left for the Children's Amendment Bill.

The Children's Act was passed in November 2005. Work then began on the Children's Amendment Bill, tabled by the Department of Social Development (DoSD) in August 2006. It did not include a clear prohibition of corporal

punishment, nor did it abolish the common law defence available to parents which was contained within the original SALRC version of the Bill. In clause 139, it addressed only the issue of corporal punishment in public life, and made no reference to corporal punishment by parents, leaving the status quo unchanged.

Initially, the Children's Amendment Bill¹ was tabled in the National Council of Provinces (NCOP), and public hearings were held in most of South Africa's nine provinces between November 2006 and February 2007. Submissions in support of the prohibition of corporal punishment were made by a range of organisations in the provinces where hearings were held. Subsequent to these hearings, clause 139 was amended to reflect many of the recommendations of these submissions, and the version of the Amendment Bill that was then referred to the National Assembly contained the following:

- ▶ Provision for the explicit prohibition of all corporal punishment of children (subsection 2);
- ▶ The abolition of the common law defence of reasonable chastisement (subsection 3); and
- ▶ A commitment by the Department of Social Development to ensuring the availability of appropriate parenting programmes across the country (subsection 5 b).

The Portfolio Committee (PC) in the National Assembly held community consultations on the Bill in eight communities and four provinces in August 2007. Submissions for and against the prohibition of corporal punishment were again made. These included submissions by children themselves calling for prohibition and for the promotion of positive relationships between parents and children.

The PC then debated the Bill extensively between September and October 2007. The debate was heated and the PC was divided on the issue. The prohibition was supported by key ANC members, while the ACDP led a group, which included members of the DA and some ANC members, supporting rights to "reasonable chastisement" if carried out under certain circumstances.

1 B19B of 2006

Three different versions of clause 139 were then drafted to reflect the different positions of the members of the PC, and presented on 18 October 2007. All three required the DoSD to provide education and awareness of the ban, and programmes on appropriate discipline and positive parenting.

The first version of the clause was the one originally tabled by the NCOP, and clearly abolished corporal punishment. The second version retained corporal punishment, and set out the circumstances and manner in which corporal punishment could be applied – essentially, this was a text book set of instructions for hitting children. The third version also retained corporal punishment but did not spell out the circumstances as version two did.

In late October 2007, clause 139 was excised from the Amendment Bill. The reasons given by the PC for the excision were as follows:

- ▶ The recognition of the need for further investigation of the matter ahead of the proposed second Amendment Bill; and
- ▶ That this matter should have been tagged as one of national competency by the Joint Tagging Mechanism when the comprehensive Children's Bill was introduced in 2003.

The PC emphasised that the existing law regulating inappropriate forms of discipline of children remained in place and urged that the programmes envisaged in the Bill aimed at promoting positive parenting skills be implemented by the DoSD.

The Children's Amendment Bill was passed by Parliament in November 2007.

4

Advocacy for Prohibition

In early 2003, once the Draft Children’s Bill was released by the SALRC, the Children’s Bill Working Group (CBWG) – an extensive network of civil society organisations working with and for children – was set up. The CBWG was co-ordinated by the Children’s Institute (CI), supported by a secretariat comprised of representatives from RAPCAN, Childline South Africa and the South African Society for the Prevention of Child Abuse and Neglect (SASPCAN).

The CBWG divided itself into sub-groups so that organisations with specific knowledge and expertise could work on different sections of the Bill, depending on the area of work at issue. Included were sub-groups dealing with children living and working on the street, child labour, children with disabilities, prevention, early intervention, early childhood development, alternate care settings (child and youth care), protection, children infected and affected by HIV, and trafficking of children. The Sub-Group on Corporal Punishment was one of these.

Members of the sub-group were RAPCAN, Childline South Africa, and the Child Rights Project (within the Community Law Centre [CLC] at the University of the Western Cape). Save the Children (Sweden) provided financial support.

There was dissent within the CBWG with regard to corporal punishment – some participating organisations wished to advocate for total prohibition of parental corporal punishment, while others felt that this issue was not the most critical for South Africa’s children, that the fact that the issue is so controversial would detract from the rest of the work that needed to be done on the Bill, and that the country was not yet ready to legislate a total prohibition. While there were no organisations within the CBWG who advocated *for* corporal punishment, advocating for its prohibition proved to be divisive. Thus, it was agreed from the outset to “agree to disagree” on this issue, and

that the sub-group working on the issue would continue to do so but without the broad support of the CBWG.

When the composite Bill was split into its two parts, the sub-group working on corporal punishment temporarily shelved its activities pending the recommencement of work on the second part of the Bill, which then was named the Children's Amendment Bill.

With the finalisation of the first part of the Children's Bill, the Sub-Group on Corporal Punishment renewed its focus on the prohibition of corporal punishment, in March 2006. At this stage, the group was still known as the Sub-Group on Corporal Punishment, but included a number of new members, namely, the South Africa Human Rights Commission; the South African Council of Churches Childline South Africa; the Centre for Child Law, University of Pretoria; and Umtata Child Abuse resource centre (UCARC).

The Sub-Group made extensive submissions to the hearings convened by both the National Council of Provinces and the National Assembly during the period November 2006 to October 2007.

After the submission by the National Prosecuting Authority in October 2007, there was a public outcry over the erroneously communicated statement that parents would be fined for hitting their children. The ruling ANC was, at this stage, facing a time of uncertainty. Just ahead was the 2007 National Conference in Polokwane, at which it was clear that far-reaching changes to ruling party's policies were to be considered, and a general election was to take place within 18 months. The timing of the public outcry over clause 139 combined with the uncertainties within the ANC itself at this stage led to the passage of the entire Bill being threatened. The Sub-Group was clear that it did not wish to see the processing of the Bill held up because of disagreements about one clause – aspects of the total Bill were urgently needed to address more broadly the vulnerability of children, exacerbated by poverty and the HIV/AIDS pandemic. Neither did it wish to see either of the versions proposed as alternatives to the clause as it existed at that point “win the day”. The Sub-Group therefore accepted the excision of clause 139.

All was not lost – the Children's Amendment Act, very importantly, retains a clause on building parenting capacity as a prevention strategy, in clause 144.

The Sub-Group on Corporal Punishment

The Sub-Group on Corporal Punishment took up the issue of the prohibition of corporal punishment because it saw this as an important children's rights issue. This importance was perceived as going beyond the actual prohibition, to include addressing parenting more broadly and as a strategy for preventing violence against children.

In addition, Sub-Group members were aware that, despite the ban on corporal punishment within the education system, it was still widely practiced in that setting, and that levels of resistance to prohibition were high. It was felt that civil society was in the best position to lead an awareness campaign on the negative consequences of corporal punishment, and that such a campaign would facilitate the implementation of the ban in schools as well as promote changing attitudes and behaviour with regard to child-rearing.

The objectives of the Sub-Group

There was always a tension between legal prohibition via the removal of the defence of reasonable chastisement, on the one hand, and explicit prohibition (which would, of course, have included the legal prohibition) on the other.

At a meeting early in 2006 the Sub-Group agreed that first prize would be an explicit prohibition but that, if this turned out to be impossible, it would accept the removal of the defence. There was a strong feeling that the experience of other countries which had chosen the route of removing the defence had left parents unclear of the law and with the impression that "reasonable corporal punishment" was acceptable.

In addition, the Sub-Group was clear that support for parental corporal punishment is a complex issue and incorporates a complex range of behaviours arising from a complex context. Thus, advocacy for prohibition was always

linked to advocacy for an extensive training and awareness-raising component within the legislation.

The activities of the Sub-Group

The issue of prohibition was considered important in a wider sense as a key strategy for preventing violence against children, and the Sub-Group also stressed, in all its advocacy work, the need for the allocation of resources to prevention – including the need to provide programmes on positive parenting and non-violent discipline. This emphasis was a key element of all the submissions made.

Some organisations represented on the Sub-Group were also involved in endorsing and making submissions on several other sections of the Amendment Bill in their organisational capacities, as members of the broader Children's Bill Working Group. In all these submissions, prevention as a strategy, and the prevention of violence in particular, was a key feature.

As has already been clarified, the resistance to prohibition was clear even among members of the broader CBWG, and members of the Sub-Group strove successfully to change attitudes within that grouping.

The fact that the prohibition of corporal punishment was tagged as a section 76, rather than as a section 75 issue, was problematic from the start of the work on Amendment Bill. The consequence of this was that the issue was dealt with as a service delivery rather than a rights issue. Although they were equally controversial, other rights issues (such as the regulation of virginity testing) were passed in the Children's Act. It is likely that the prohibition of corporal punishment would also have gone through had it been dealt with in the same way. Further, this incorrect tagging was given as a reason for the excision of clause 139.

Much of the activity, including interactions with the DoSD and Parliament, was aimed at ensuring that the prosecution of parents, seldom in the best interest of children, was seen as a last resort, and that there was significant emphasis on diversion of parents from the criminal justice system, and on building capacity to parent appropriately.

Members of the Sub-Group were intensively involved in public awareness-raising, appearing on radio talk show programmes and television, as well as

writing letters to the press and being interviewed by national newspapers. Eight press releases were issued, and the Sub-Group conducted a media briefing. Significantly, due to the efforts of the Sub-Group, the representation of the issue in the press was very balanced, with arguments being made for and against prohibition.

Throughout the period until clause 139 was excised, the Sub-Group was assured by both DoSD officials and Members of Parliament that the clause was safe, and there was a clear commitment to prohibiting corporal punishment in the home, supported by the prevention strategies related to developing positive parenting in the country.

6

Key role-players

During the process of working on the Children’s Amendment Bill, the Sub-Group was comprised of the following:

- ▶ Childline South Africa;
- ▶ Centre for Child Law, University of Pretoria;
- ▶ Community Law Centre, University of the Western Cape;
- ▶ Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN);
- ▶ South African Human Rights Commission (SAHRC);
- ▶ South African Council of Churches (SACC);
- ▶ Umtata Child Abuse resource centre (UCARC); and
- ▶ Carol Bower, former executive director of RAPCAN and an independent child-rights consultant.

The wealth of experience and knowledge that grew out of the involvement of a relatively wide range of sectors played a pivotal role in the work undertaken.

For example, much of the opposition to prohibition came from the religious right, and the involvement of the faith-based sector and the support of the SACC proved to be a critical positive factor in the work undertaken.

The presence of organisations delivering services to vulnerable children, such as Childline South Africa and UCARC, considerably enriched the work undertaken by ensuring that the direct experiences of children informed the work done.

The fact that the group had access to legal expertise from the Centre for Child Law and the Community Law Centre ensured the appropriate legislative level to the work done.

The in-depth knowledge and experience of those organisations focused on child rights (such as the SAHRC and RAPCAN) contributed a clear rights focus

as well as knowledge of the situation with regard to prohibition at the regional and global levels.

And finally, members of the Sub-Group were all experienced in dealing with government officials and parliamentarians, and had between them several years' experience of making oral and written submissions in relation to the development of new law and policy. Some of the Working Group members (notably the Centre for Child Law, Childline South Africa and Carol Bower) had existing political connections which they were able to use in various ways in the process.

7

Strategies

During the course of the period of advocacy, the Sub-Group hosted several *national meetings* during which the issues at hand were debated and discussed. These were aimed at different audiences and dealt with a range of issues:

- ▶ The legal strategy for achieving prohibition;
- ▶ Strategic direction after the passing of the Children's Act in 2005;
- ▶ The latest developments and models of positive discipline in educational and home settings;
- ▶ International and regional rights position with regard to corporal punishment;
- ▶ Responding to religious and cultural arguments for corporal punishment; and
- ▶ Strengthening the network and promoting positive parenting programmes.

The Sub-Group devoted considerable energy to the *development and wide dissemination of resources and evidence-based information* to members of the DoSD, the Portfolio Committee in Social Development in the National Assembly, and the Select Committee on Social Development in the National Council of Provinces. These resources can be found on the website of Sub-Group, www.rapcan.org.za, and include a position paper developed by the SACC in support of the prohibition of corporal punishment in the home.

The Sub-Group ensured that it had regular *contact and engagement with officials within the DoSD* responsible for the development of the Children's Amendment Bill. Departmental officials were encountered at numerous meetings and consultations held by the department through the long period in which the Bill was developed, finalised and passed. Every opportunity to discuss prohibition and its implications with these officials was utilised, and the Sub-Group made a formal submission to the DoSD.

There was also *engagement with political and other leaders*. A series of

letters was written to ministers and deputy ministers in the Departments of Social Development, Justice, Health, and Education, as well as to the leaders of opposition parties explaining the reasons for the Sub-Group seeking prohibition and asking for their support. Key influencers of public opinion were also targeted.

Capacity-building of local organisations was a key feature and several meetings were held with partner organisations to inform and build their capacity to advocate for prohibition.

The Sub-Group made very **innovative use of the media**, and worked with a media company which facilitated the placement of opinion pieces and press releases in the local press. In addition, they monitored media coverage of the issue, and were very useful in alerting the Sub-Group to what was being said in the public domain. The Sub-Group also engaged in proactive media work through press releases.

The Sub-Group, it is generally agreed, **held the media space** very well for the almost 12-month-long period between November 2006 and October 2007. While there were strong opinions on both sides of the argument, there was much balanced and thoughtful debate on the issue. It was only when the press misrepresented the submission by the NPA that the media space was lost. This happened over a period of two to three days (between the NPA submission, the press reports and the ANC Caucus meeting).

The parliamentary process of law-making in South Africa lends itself to the involvement of civil society, and members of the Working Group made several **submissions to both the Portfolio Committee and the Select Committee**. These submissions highlighted the key messages contained in the documentation developed by the Working Group. In general, the submissions were made by the individual organisations involved, but they were endorsed by the other members of the group. It was a strength of this strategy that submissions were made by a wide range of organisations, including from a wide range of community-based services in the provinces as well as national NGOs.

One of the strategies used as the Sub-Group geared up again for renewed work following the passing of the section 75 portion of the Act was to **increase the membership** of the Sub-Group. Working on the principle of “preaching to the converted”, six more organisations joined, including the faith-based sector and service delivery organisations. The network was further expanded after

the passing of the Amendment Act in December 2007, and any renewed activity with regard to prohibition is likely to involve them also.

Lessons learned

Significantly increased awareness

Significant progress was made towards the long-term goal of the reduction of violence within society. The Sub-Group played a significant role in generating discussion about the issue, within civil society and within government, resulting in heightened awareness of the issue and the increased amount of “airtime” it received. The media is also now much more aware of the issues, even if it is not always in agreement with prohibition.

The support base for prohibition was also significantly broadened, with the domestic violence sector and organisations involved with parents and parenting issues coming on board.

The involvement of the faith-based sector

The support of the SACC was key, both in terms of addressing the arguments of the religious right and in terms of support from within it to carry the “message” of the possibility and desirability of raising children without violence.

Law and policy

The promotion of parenting skills and the emphasis on prevention in the final Act were a significant achievement, and the existence of Clause 144 has strengthened its prevention focus and commitment to non-violent discipline. Both UNICEF in South Africa and the DoSD now place emphasis on parenting and parenting programmes.

Co-ordination and resourcing

The amount of time, energy and passion committed to the Sub-Group by its members was an achievement in its own right, and meant that much could be achieved with relatively small amounts of financial support. It is clear though, that having some financial resources for this kind of work is essential, and that having a co-ordinating organisation (RAPCAN in this case) was very helpful

Lack of a strong political champion

The process whereby the clause was lost highlighted that fact that, although it had gained the support of members of both the Portfolio Committee and the DoSD, the Sub-Group did not succeed in getting the support of a strong political champion. With an issue as personal and controversial as this, it was necessary to garner such support. There was no clear position on the issue within the ANC, and the Sub-Group should have focused more of its attention on ensuring that influential ANC members were “on board” with regard to prohibition.

“Criminalisation” of parents

The high profile that the possible criminalisation of parents acquired was a real problem, and the Sub-Group was unable to respond sufficiently quickly to address the issue. This was exacerbated by the fact that, due to serious time and other practical constraints, members of the Sub-Group were unable to be in Parliament as the debate turned, although members of the broader CBWG were present.

In addition, the fact that the Sub-Group strongly supports building capacity to parent was not always obvious to the public at large and the media. The fact that the entire complex and wide-ranging Bill became known colloquially as “the smacking Bill” is evidence of this.

Lack of consistent civil society commitment to prohibition

The fact that not all children's organisations were "on board", and especially that Child Welfare SA disagreed with advocating for prohibition at that time, probably diluted the effect of the Sub-Group. In addition, although the SACC was a strong member of the Working Group, none of the other religious groups (for example, the Jewish and Muslim groups) were.

Concerns about who was "driving" the process

It is clear that the person who brings the message is very important. Several interviewees for this evaluation raised a point made during the process of passing another piece of child-related legislation, the Child Justice Bill, that "NGOs over-played their hand on the corporal punishment issue", and that this had contributed to losing the clause. If DoSD officials had been carrying the day, the prohibition is more likely to have remained in the Act. To some extent, the impression was created that the Parliamentarians were the mouth-piece of the Sub-Group. This was exacerbated by the impression that the Sub-Group was funder-driven. This issue was raised by a number of interviewees.

Timing

The timing of the final developments and passage of the Amendment Bill was unfortunate, with the ruling ANC's Polokwane Conference a matter of weeks away, and the natural conservatism of the ANC asserting itself. Party politics was stronger than the commitment of the members of the Portfolio Committee, not all of whom were committed to prohibition in any event. While the Chair of the Portfolio Committee and one other strong member were highly committed, the decision to excise the clause would be made "behind closed doors" and would have the support of most of the Portfolio Committee.

Implications for future advocacy

Even the achievement of the outright prohibition of all forms of corporal punishment would have signalled only one step in the campaign, and that the

most important work would lie ahead – the implementation of an effective ban requires a sea change in attitudes towards children and child-rearing. In a real sense, then, nothing has been lost. The Sub-Group (now known as the Working Group on Positive Discipline) will continue to do the important work of changing hearts and minds, either as individual organisations or collectively, and there is no doubt that one day the ban will be achieved.

The work it has already done has laid a good foundation for future advocacy to prohibit corporal punishment in the home. Indeed, even the excised clause 139 was in itself a significant achievement, encompassing as it did both the protection of children and an emphasis on training and capacity-building.

9

The way forward

The Working Group on Positive Discipline agreed to the following for 2008 and beyond:

- ▶ Strengthening the national alliance and support base towards the promotion of positive discipline in families – visible and articulated support is essential.
- ▶ Targeted advocacy with key individuals.
- ▶ Engagement with the DoSD on positive parenting programmes.
- ▶ Engagement with the Department of Education on positive parenting in the life-skills curriculum.
- ▶ Engagement with Parliament and the courts regarding law reform towards the removal of common law defence and prohibition.