

**SUBMISSION TO THE PARLIAMENTARY PORTFOLIO COMMITTEE
ON SOCIAL DEVELOPMENT
ON THE CHILDREN'S AMENDMENT BILL
(B 19B of 2006)**

**SUBMITTED BY THE CHILDREN'S RIGHTS PROJECT, COMMUNITY LAW CENTRE,
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INTRODUCTION

This submission relates particularly to section 139 of the Children's Amendment Bill (B19B of 2006), which prohibits all forms of corporal and humiliating punishment of children, as passed by the National Council of Provinces on the 29th of May 2007 and it supports the total prohibition of corporal punishment within all settings including that which is practiced by persons who have parental rights and responsibilities. In support of this section this submission highlights South Africa's international and constitutional obligations to ensure that children are protected from all forms of violence including that which occurs within the family setting. However, concern is expressed on the wording contained in section 139(7) where it is stated that prosecution of a parent or person holding parental responsibilities and rights may be instituted if the punishment constitutes **abuse** of the child and this concern is discussed in greater detail in this submission.

BACKGROUND OF THE ORGANISATION (CHILDREN'S RIGHTS PROJECT)

The Children's Rights Project was established in 1990. It is based at the Community Law Centre, a human rights research institute attached to the Faculty of Law, University of the Western Cape.

The Children's Rights Project has in the decade of its existence played an important and influential role in securing the legal development of children's rights in South Africa in accordance with the UN Convention on the Rights of the Child (CRC). The Project contributed to constitutional drafting of a children's rights clause, to law reform specific to children through involvement with two projects of the SA Law Commission, it has assisted Parliament with drafting legislation to protect children in especially difficult circumstances, and assisted in many other respects to further the implementation of the rights contained in CRC, such as through the production of publications, through evaluations of research reports and by advocacy. In relation to the issue of corporal punishment of children, the Project produces a publication, *Article 19* which aims to promote positive forms of discipline and to create awareness on the harmful effects of corporal punishment in an effort to lobby for the abolition of all forms of corporal punishment. The research function of all of the Centre's projects seeks to ensure that advocacy, lobbying, drafting and interpretation of the implications of law are based on a thorough understanding of international, constitutional and domestic law requirements, on prevailing socio- economic conditions, and the real position of children and vulnerable people living in South Africa.

SUBMISSION ON SECTION 139: DISCIPLINE OF CHILDREN

The Children's Rights Project wishes to highlight that it supports the prohibition of all forms of corporal and humiliating punishment against children contained in section 139 as this is in line with South Africa's international and constitutional obligations which are discussed hereunder.

1. INTERNATIONAL AND CONSTITUTIONAL OBLIGATIONS

The United Nations Convention on the Rights of the Child

Firstly, South Africa, by ratifying the United Nations Convention on the Rights of the Child in 1995, committed itself to fulfilling all the obligations under the Convention. One such obligation is to protect children from all forms of physical and mental violence as outlined in Article 19¹ and this protection extends to corporal punishment in all settings including within the family.

The United Nations Committee on the Rights of the Child² has interpreted article 19 of the Convention to extend to protection of children while in the care of their parents and has emphasized that corporal punishment in the family is incompatible with the provisions of the Convention. It has further expressed concern at laws which protect children against serious physical assaults defined as child abuse, but allow for parents or other caregivers to use physical forms of punishment on children provided it is reasonable and moderate. The Committee has therefore recommended and called for a clear prohibition of all corporal punishment and this includes that which is imposed by parents. In addition, it has proposed that legal reforms be coupled with education campaigns in positive discipline to support parents, teachers and others.

General Comment 8 on corporal punishment and other cruel or degrading forms of punishment

In addition, the Committee on the Rights of the Child recently released a General Comment (Number 8) particularly relating to the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment.³ This comment specifically deals with the nature of the State Party's obligations regarding articles 19, 28(2)⁴ and 37⁵ and seeks to guide State Parties in understanding the provisions concerning the protection of children against all forms of violence. It also highlights the obligation of all State Parties to move quickly to prohibit and eliminate all corporal punishment and all cruel or degrading forms of punishment of children and to outline the legislative and other awareness-raising and educational measures that States must take.

¹ Article 19 of the UN CRC provides that "States parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian (s) or any other person who has the care of the child."

² See UNICEF, Implementation Handbook for the Convention on the Rights of the Child (Rachel Hodgkin and Peter Newell) 1998; Also see Committee's response to Spain's (Spain, IRCO, Add.28, para 10 and 18) and the United Kingdom's (UK IRCO Add 34, paras 16 and 31) Initial Report- in UNICEF Handbook.

³ General Comment No: 8, Committee on the Rights of the Child, Forty Second Session, Geneva, 15 May -2 June 2006, GRC/C/GC/8 (Advanced unedited version).

⁴ Article 28(2) provides that "States parties shall take all appropriate measures to ensure that school discipline, is administered in a manner consistent with the child's human dignity and in conformity with the present Convention."

⁵ Article 37(a) provides that "no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment."

The Comment notes that the Committee defines “corporal” or “physical” punishment as “any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light.”⁶ This involves hitting (smacking, slapping, spanking) children with the hand or with an implement such as a whip, belt, shoe, wooden spoon, etc. However, it can also involve kicking, shaking or throwing children, scratching, pinching, biting, pulling hair or boxing ears, forcing children to stay in uncomfortable positions, burning or forced ingestion such as washing children’s mouths out with soap or forcing them to swallow hot spices.⁷ The Committee views corporal punishment as invariably degrading and also recognizes that there are other non-physical forms of punishment which are also cruel and degrading and thus incompatible with the Convention. These include punishment which belittles, humiliates, denigrates, threatens, scares or ridicules the child.

The Comment notes that corporal punishment and other cruel or degrading forms of punishment of children take place in many settings including within the home and family. However, it should be noted that the Comment highlights that in rejecting any justification of violence and humiliation as a form of punishment for children, the Committee is not in any sense rejecting the positive concept of discipline.⁸ It notes that the healthy development of children relies on parents and other adults for necessary guidance and direction, in line with children’s evolving capacities, to assist their growth towards responsible life in society. The Committee further recognizes that parenting and caring for children, especially babies and young children, demands frequent physical actions and interventions to protect them and that this is quite distinct from the deliberate and punitive use of force to cause some degree of pain, discomfort or humiliation – and adults know the difference between a protective physical action and a punitive assault. The Committee recognizes further that there are exceptional circumstances where one, for example teachers and child-care workers, may be confronted by dangerous behaviour which justifies the use of reasonable restraint to control it, but there is a clear distinction between the use of force motivated by the need to protect a child or others and the use of force to punish.

African Charter on the Rights and Welfare of the Child

Further, article 16 of the African Charter on the Rights and Welfare of the Child also provides for the protection of children from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of a parent and others.

The Constitution of the Republic of South Africa, 1996 (Act 108 of 1996)

It should also be noted that there are provisions contained in the South African Constitution (Act 108 of 1996) which aim to protect children from neglect, maltreatment, abuse and degradation,⁹ provide for the right not to be treated or punished in a cruel, inhuman or degrading way,¹⁰ the right to be free from all forms of violence from either public or private sources,¹¹ the right not to be tortured in any way¹² and provides that everyone has inherent dignity and the right to have their dignity respected and protected.¹³

⁶ General Comment No: 8, op cit, p 4.

⁷ General Comment No: 8, op cit, p 4.

⁸ General Comment No: 8, op cit, p 4.

⁹ Section 28 (1)(d) of the Constitution Act 108 of 1996.

¹⁰ Section 12(1)(e) of Act 108 of 1996.

¹¹ Section 12(1)(c) of Act 108 of 1996.

¹² Section 12 (1)(d) of Act 108 of 1996.

¹³ Section 10 of Act 108 of 1996.

Furthermore the constitution provides that everyone has the right to equality¹⁴, which includes equal protection and benefit of the law, full and equal enjoyment of all rights and freedoms and that the State may not unfairly discriminate against anyone on the grounds of, (amongst others) age. All of these provisions apply equally to children.

2. CURRENT SITUATION IN SOUTH AFRICA

The Legal Status of Corporal Punishment in South Africa

Despite these provisions and obligations, South Africa has, to date, only abolished the use of corporal punishment of children in the public life of a child, namely, the imposition of corporal punishment as a sentence by the court,¹⁵ in schools¹⁶ and regulations to the Child Care Act (74 of 1983) prohibits its use in children's homes, places of safety, shelters, schools of industry and even foster parents are not allowed to impose physical punishment on foster children within their care. The Constitutional Court has also ruled that corporal punishment of children infringes their rights to dignity and their right to be protected from cruel, inhuman and degrading treatment or punishment.

However, while there is an international move towards abolishing all forms of corporal punishment of children including that which is imposed in the home or by parents,¹⁷ in South Africa, this practice (imposition of corporal punishment by parents) still remains and is allowed in terms of the common law in the form of moderate or reasonable chastisement. The general rule is that a parent may inflict moderate and reasonable chastisement on a child for misconduct provided that this is not done in a manner offensive to good morals or for other objects than correction and admonition.¹⁸ This chastisement can include the imposition of corporal punishment that must be restrained and tenable.¹⁹ If a parent or person acting *in loco parentis* (in the place of the parent, for example, a step-parent)²⁰ exceeds the bounds of moderation or acts from improper or ulterior motives or from a sadistic propensity, such parent or person can face both criminal and civil liability.²¹ In deciding whether or not the punishment falls within the boundaries of being moderate, reasonable, fair and equitable, the court will take various factors into account. These include the nature of the offence; the physical and mental condition of the child; the motive of the person administering the punishment; the severity of the punishment (that is the degree of force applied); the object used to administer the punishment and the age, sex and build of the child.²²

¹⁴ Sections 9(1), (2) and (3) of Act 108 of 1996.

¹⁵ *S v Williams* 1995 (3) SA 632 (CC).

¹⁶ Section 10 of the South African Schools Act of 1996.

¹⁷ To date, 18 countries have abolished all forms of corporal punishment of children including the imposition of corporal punishment in the home or by parents. These countries include Austria, Croatia, Cyprus, Denmark, Finland, Latvia, Norway, Sweden (being the first country to abolish this form of corporal punishment as early as 1979), Germany, Italy, Israel, Portugal, Belgium, Iceland, Ukraine, Bulgaria, Hungary and Romania". See "Corporal punishment from an international perspective" Paper delivered at a National Workshop on Corporal Punishment in South Africa by Mali Nilsson, 20-21 February 2002 and also see www.endcorporalpunishment.org.

¹⁸ *R v Janke and Janke* 1913 TPD 382 as quoted in *Corporal Punishment: The Perspective of the South African Law Commission*, paper presented by Gordon Hollomby at a National Workshop on Corporal Punishment held on 20-21 February 2002 page 2.

¹⁹ Pete, S "To smack or not to smack? Should the law prohibit South African parents from imposing corporal punishment on their children" in SAJHR (1998) p 444.

²⁰ A parent has the right to delegate the authority to punish a child to a person *in loco parentis* and the decision whether and how to punish a child may also be delegated – *Du Preez v Conradie* 1990 (4) SA 46 (B). However, a parent may no longer delegate the power to administer corporal punishment to a child's teacher as this form of punishment in schools has been forbidden by section 10 of the Schools Act 84 of 1996.

²¹ See *S v Lekghate* 1982 (3) SA 104 (B) and *Du Preez v Conradie* 1990 (4) SA 46 as quoted by G Hollomby in *Corporal Punishment: The Perspective of the South African Law Commission*, op cit, page 2 and also see "Hitting people is wrong-and children are people too" EPOCH South African Handbook, page 6.

²² See Pete S, SAJHR 1998, op cit, page 444.

Despite the existence of common law crimes such as assault, assault with the intention of causing grievous bodily harm and attempted murder in South Africa, parents charged with these crimes against their children can raise the defence of reasonable chastisement and avoid being held liable for physically punishing their children. Thus, while parents can currently be criminally charged for physically punishing their children, they can escape being held responsible for their actions by raising the defence of reasonable chastisement as a ground of justification for their actions. The court will then decide whether it is a valid defence in the circumstances.

Therefore, in light of the above, the Children’s Rights Project is pleased that section 139 of Bill B19B of 2006 now contains an express prohibition of all forms of corporal and humiliating punishment against children, even that which is imposed by persons who have the care or have parental rights and responsibilities in respect of a child.

3. OUR CONCERN²³

However, we do have one concern about the wording of the section, particularly section 139(7) which states that “Prosecution of a parent or person holding parental responsibilities and rights referred to in subsection (6) may be instituted if the punishment ***constitutes abuse of the child*** (our italics)”.

Our concern relates to the use of the term “abuse of a child”. Firstly, it is the right of all children (as it is of all adult South Africans), to be protected from all forms of physical and mental violence from either public or private sources. They therefore have a right not to be subjected to physical discipline – and any physical attack on another person is a violation of their rights under the Constitution and under international law, including the Convention on the Rights of the Child. This constitutes assault. The requirement that the punishment must constitute “abuse” before prosecution is instituted undermines children’s right to equal protection under the law.

We do concur with the view that decisions to prosecute parents for less serious assaults on their children need to be taken very carefully and should be in the best interests of children, however we caution against stating a defence in the law.

We wish to point out that the use of the word “abuse” in this context tends to affirm the notion that some arbitrary level of corporal punishment is acceptable. Thus, we are concerned that parents and others who have care of children can interpret this clause as meaning that physical punishment is acceptable as long as it does not go too far. This will thus undermine the intention of section 139(2) which clearly states that no child shall be subjected to corporal or other humiliating punishment and in effect, section 139(7) could be interpreted as re-introducing a defence of “non-abusive” corporal punishment.

4 SUGGESTED WORDING FOR CLAUSE 139 (7)

We thus suggest that section 139(7) should be redrafted as follows:

139 (7): “Prosecution of a parent or person holding parental responsibilities and rights referred to in subsection (6) may be instituted if the punishment constitutes abuse this is in the best interests of the child.”

²³ See SUBMISSION TO THE PORTFOLIO COMMITTEE ON SOCIAL DEVELOPMENT ON THE CHILDREN’S AMENDMENT BILL: DISCIPLINE OF CHILDREN made on behalf of the Sub-Group on Corporal Punishment and Positive Discipline, a sub-group of the Children’s Bill Working Group – drafted by Carol Bower. The Children’s Rights Project is a member of this sub-group.