# Position Paper on section 12A: Discipline of children

# Draft Children’s Amendment Bill (version 29 Nov 2018)

Written by Stefanie Röhrs (Children’s Institute)

**Endorsed by: Children’s Institute; Peace Centre; Global Initiative to End All Corporal Punishment of Children; Sonke Gender Justice; Umtata Child Abuse Resource Centre**

19 November 2018

On 29 October, the Minister of Social Development published the draft Children’s Amendment Bill for comment. Submissions are due by 29 November 2018. We are concerned that the draft amendments do not prohibit all forms of corporal punishment and other degrading punishment, as envisioned in the Child Care & Protection Policy. This position paper explains our concerns. If you agree, please include these concerns in your own organisation’s submission. The more submissions the Department receives, the more likely they may change the amendment.

# Introduction

We propose to delete the proposed section 12A in its entirety and replace it with a clause based on the August version of the Children’s Amendment Bill as presented at the provincial consultations and supported by the public in Western Cape, Eastern Cape, Northern Cape, Gauteng and Kwa-Zulu Natal. We propose slight amendments to the August version: (a) an **explicit** prohibition of corporal punishment in subsection 12A(1); and (b) the addition of **awareness-raising on positive discipline and capacity building** to subsection 12A(4). The proposed provision reads:

*S 12A(1) A person who has care of a child, including a person who has parental responsibilities and rights in respect of a child, must not subject the child to corporal punishment or treat or punish the child in a cruel, inhuman or degrading way, to ensure the child’s right to physical and psychological integrity as conferred by section 12(1)(c), (d), (e) of the Constitution.*

*(2) The common law defence of reasonable chastisement available in any court proceeding to a person contemplated in subsection(1) is hereby abolished.*

*(3) A parent, guardian, care-giver or any person holding parental responsibilities and rights in respect of a child who is reported for subjecting such child to any inappropriate form of punishment, including corporal punishment, must be referred to a prevention and early intervention programme as contemplated in section 144.*

*(4) The Department in partnership with relevant stakeholders, must ensure*

*(a) the implementation of education and awareness-raising programmes across the Republic concerning–*

*(i) the effect of subsections (1) and (2);*

*(ii) positive forms of discipline;*

*(b) the availability of programmes promoting positive discipline at home and in alternative care across the Republic; and*

*(c) capacity building of all relevant government and civil society role-players to understand their role in the promotion of positive discipline*

*(5) When prevention and early intervention services have failed, or are deemed to be inappropriate, and the child’s safety and wellbeing is at risk, the designated social worker must assess the child in terms of section 110.*

# Submission

For the submission, organisations are required to use the ‘framework for input’ (see table below) provided by the Department of Social Development. The proposed clause is in the second column (‘Proposal’). We have included some bullet-points as motivation, but organisations can obviously use their own motivations.

|  |  |  |
| --- | --- | --- |
| **Clause commented on** | **Proposal** | **Motivation** |
| Section 1 | Add a definition for ‘corporal punishment’:  ‘Corporal punishment’ or ‘physical punishment’ means any punishment in which physical force or action is used and intended to cause some degree of pain or discomfort, however light. It involves, but is not limited to, hitting (‘smacking’, ‘slapping’, ‘spanking’) children in any environment or context, including the home setting, with the hand or instruments such as a whip, stick, belt, shoe or wooden spoon. It can also involve, for example, kicking, shaking or throwing children, scratching, pinching, biting, pulling hair or boxing ears, caning, forcing children to stay in uncomfortable positions, burning, scalding, or forced ingestion. | * A definition is required to give effect to the changes proposed to section 12A – the proposed definition is based on SOUTH AFRICA’S CHILD CARE AND PROTECTION POLICY August 2018, as approved by Cabinet. It also reflects the definition used in General Comment No. 8 by the United Nations Convention on the Rights of the Child. |
| Section 12A(1) | Delete in its entirety and replace with following clause:  S 12A(1) A person who has care of a child, including a person who has parental responsibilities and rights in respect of a child, must not subject the child to corporal punishment or treat or punish the child in a cruel, inhuman or degrading way, to ensure the child’s right to physical and psychological integrity as conferred by section 12(1)(c), (d), (e) of the Constitution. | * SOUTH AFRICA’S CHILD CARE AND PROTECTION POLICY August 2018 as approved by Cabinet states “The Children’s Act will have to be revised to prohibit corporal punishment and any other form of cruel, inhuman or degrading treatment or punishment.” P 122. * Important to have explicit reference to corporal punishment – the most common form of cruel punishment – to make it absolutely clear that corporal punishment by parents/caregivers is prohibited * If no explicit mention of corporal punishment, the provision will be interpreted inconsistently with some courts arguing that ‘cruel, inhuman or degrading’ punishment includes corporal punishment while other courts will say the opposite. |
|  | (2) The common law defence of reasonable chastisement available in any court proceeding to a person contemplated in subsection(1) is hereby abolished. | * Even ‘moderate’ corporal punishment violates children’s rights and evidence shows that it increases children’s risk to experience more severe forms of physical abuse. Therefore the common law defence must be removed. * It is important to clarify that the common law defence of reasonable chastisement is removed through this Act. The South Gauteng High Court judgment is currently not in effect due to an appeal. It’s unclear whether and, if so, when the Constitutional Court will rule on the matter. The law should be clear on the status of the reasonable chastisement defence. |
|  | (3) A parent, guardian, care-giver or any person holding parental responsibilities and rights in respect of a child who is reported for subjecting such child to any inappropriate form of punishment, including corporal punishment, must be referred to a prevention and early intervention programme as contemplated in section 144. | Parents/caregivers should be referred to prevention and early intervention programmes so that they can get parenting support to develop non-violent discipline. These programmes are outlined in section 144 of the Children’s Act. |
|  | (4) The Department in partnership with relevant stakeholders, must ensure  (a) the implementation of education and awareness-raising programmes across the Republic concerning–  (i) the effect of subsections (1) and (2);  (ii) positive forms of discipline;  (b) the availability of programmes promoting positive discipline at home and in alternative care across the Republic; and  (c) capacity building of all relevant government and civil society role-players to understand their role in the promotion of positive discipline | * DSD is responsible for protecting children from violence and assisting those children who have experienced violence. A prohibition of corporal punishment and other cruel, inhuman and degrading punishment in itself will not change behaviour. Therefore, it needs to be accompanied by adequate programmes to change behaviour. * The proposed subsection 12A(4)(a) will ensure that DSD budgets for and undertakes education and awareness-raising programmes. These should not only focus on the prohibition of corporal punishment, but also include information on positive discipline to inform caregivers about non-violent discipline. * The proposed subsection 12A(4)(c) emphasises that all role-players need to understand what their role is in ensuring positive discipline. The Department therefore needs to equip all relevant government and civil society role-players in promoting positive discipline in the home and alternative care. Given the widespread acceptance of corporal punishment in society, role-players need to understand the rationale behind the prohibition and their role in promoting the prohibition. |
|  | (5) When prevention and early intervention services have failed, or are deemed to be inappropriate, and the child’s safety and wellbeing is at risk, the designated social worker must assess the child in terms of section 110. | In general, criminalisation of parents for using corporal punishment should be considered a last resort. There may however be instances in which it is necessary to prosecute parents/caregivers. Where corporal punishment and other degrading punishment constitutes physical abuse according to section 110(1) of the Children’s Act, social workers must follow the process outlined in section 110(8) of the Children’s Act and must report the possible commission of an offence to the police. |

# Supporting arguments for the proposed section 12A

The prohibition of corporal punishment in the home is critical for the following reasons:

* corporal punishment violates children’s rights;
* corporal punishment is linked to more severe forms of physical child abuse;
* corporal punishment can have numerous negative effects on children;
* corporal punishment is not effective in changing children’s behaviour; and
* corporal punishment leads to more violence against women and children in the long-term.

In the following section, we will explain these reasons in brief. The briefing paper also reflects on the common misconception that corporal punishment is necessary to teach children discipline. Lastly, the paper discusses whether the proposed prohibition of corporal punishment will criminalise parents.

# *Corporal punishment violates children’s rights*

South Africa has ratified the United Nations Convention on the Rights of the Child (UNCRC) and the African Charter on the Rights and Welfare of the Child (ACRWC). Both of these conventions call on governments to protect children from physical violence, abuse and maltreatment while in the care of parent(s), legal guardian(s) or any other person who has the care of the child (s 19(1) of the UNCRC; s 16(1) of the ACRWC). Furthermore, both the UN Committee on the Rights of the Child and the African Committee of Experts on the Rights and Welfare of the Child have asked the South African government to enact legislation that prohibits corporal punishment in all settings, including in the home.[[1]](#footnote-1)

In its ruling in *YG v S[[2]](#footnote-2)* the South Gauteng High Court confirmed that corporal punishment also violates a number of rights protected in the South African Constitution:

1. Corporal punishment violates the constitutional **right to dignity** because it is inherently degrading. Its use against children means that children are considered to have less worth than adults.
2. Corporal punishment violates the constitutional **right to be protected from all forms of violence from public and private sources, the right not be treated or punished in a cruel, inhuman or degrading way and the right to bodily and psychological integrity**. By allowing parents to hit their children, government fails to protect children from violence in their home.
3. Providing parents with a legal defence that allows them to use corporal punishment the law affords children less protection than adults. All assaults against adults are considered an assault. The legal defence therefore violates children’s constitutional **right to equality and equal protection of the law**.
4. The Constitution includes a **special right for children to be protected from maltreatment, neglect, abuse, and degradation**. Allowing parents to use corporal punishment means that children’s are considered less worthy.
5. The Constitution protects the **best interest of the child principle**. As will be shown below, corporal punishment is not in the best interest of children because it has numerous negative effects.

SOUTH AFRICA’S CHILD CARE AND PROTECTION POLICY August 2018, as approved by Cabinet, calls for “protection against, and criminal sanctioning of, harmful practices […] including the use of corporal punishment in all settings, the home included” (p41). The policy also states that the child care and protection system must be designed to give effect to the following principles:

“Recognition of children’s right to be free from all forms of violence in all spheres of life: No child may be subject to corporal punishment or be punished in a cruel, inhuman or degrading way. Hitting a child is assault” (p74).

# *Corporal punishment increases the risk for more severe forms of child abuse*

Proponents of corporal punishment argue that corporal punishment is different from physical child abuse. However, the divide between corporal punishment and physical abuse is blurry. Studies show that most physical child abuse takes place in the context of discipline: 75% of physical abuse of children occurs during episodes of discipline using corporal punishment, and children who are spanked by their parents are seven times more likely to also be severely assaulted by their parents.[[3]](#footnote-3) The link between corporal punishment and more severe forms of physical child abuse has also been confirmed in a meta-analysis reviewing 88 studies that were conducted over 62 years.[[4]](#footnote-4)

# *Corporal punishment has negative effects for children’s health and development*

Because of the overlap of corporal punishment and physical abuse, prohibiting corporal punishment is critical to prevent more severe forms of child abuse. In addition to an increased risk of severe child abuse, corporal punishment should be prohibited because it increases the risk of children developing aggressive, delinquent and antisocial behaviours. Corporal punishment also undermines the parent-child relationship and can lead to negative mental health impacts (e.g. anxiety; depression). Research in several countries suggests that even ‘mild’ forms of physical punishment such as spanking and slapping are associated with a number of unwanted outcomes (see Figure 1).



*Figure 1:* Associations between corporal punishment and negative outcomes.

Figure based on Gershoff ET (2002) Corporal punishment by parents and associated child behaviours and experiences: A meta-analytic and theoretical review. *Psychological Bulletin,* 128(4): 539-579.

Not all children will experience negative effects such as increased child aggression or anxiety. Whether or not the child will suffer from negative effects depends on a number of mediating factors (e.g., frequency and severity of corporal punishment; age of child; sensory arousal of child; child’s and parent’s characteristics; etc.).

# *Corporal punishment feeds into the intergenerational cycle of violence*

Corporal punishment should be prohibited because it feeds the cycle of violence. In many families, corporal punishment co-occurs with domestic violence; it also shares some of the same risk factors as domestic violence.[[5]](#footnote-5) Research shows that male children who experience physical punishment or witness intimate partner violence against their mother are more likely to perpetrate violence against their intimate partner and children later in life (i.e. as adults).[[6]](#footnote-6) Female children who experienced maltreatment are at an increased risk of becoming victims of intimate partner violence in adulthood.[[7]](#footnote-7) The experience of corporal punishment (and other forms of violence) during childhood is thus linked to the perpetration and experience of violence in adulthood. To stop the intergenerational cycle of violence we need to stop hitting children.

# *Corporal punishment is not effective in changing children’s behaviour*

Parents who use corporal punishment mostly have two goals: (1) immediate compliance, in other words, parents want to stop a certain undesirable behaviour of their child; and (2) long-term compliance, in other words parents want the child to not repeat this behaviour in future. Research shows that corporal punishment is effective in stopping a child’s behaviour. But other forms of discipline, for instance time-out, are just as effective. In terms of long-term compliance, research shows that corporal punishment does not change children’s behaviour for the better. In fact, more spanking is associated with **less** long-term compliance and evidence of ‘conscience’.[[8]](#footnote-8) In other words, corporal punishment does not teach children better behaviour.

# *Are we going to criminalise parents if we prohibit corporal punishment?*

Some proponents of corporal punishment argue that if we prohibit corporal punishment, we will criminalise parents. It is unlikely that the prohibition of corporal punishment will lead to increased prosecution and imprisonment of parents. The intention of the proposed amendments to the Children’s Act is to enable parents to be referred to parenting courses and other early intervention programmes. Imprisoning parents for hitting their child is – in most instances – not in the best interest of the child and will therefore not be the preferred option for dealing with parents who use corporal punishment. The Children’s Act provides for different types of early intervention measures that can be used to assist parents to develop alternative forms of discipline. Furthermore, prosecutors will continue to have discretion whether or not to prosecute a cases of assault. According to the legal principle *de minimis non curat lex*, the law does not concern itself with excusable and/or trivial conduct. It is therefore very unlikely that the prohibition of corporal punishment will lead to a surge in the prosecution of parents.

1. United Nations Committee on the Rights of the Child (2016) *Concluding Observations on the Second Periodic Report of South Africa*. Geneva: UNCROC; African Committee of Experts on the Rights and Welfare of the Child (2014) *Concluding Recommendations by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on the Republic of South Africa Initial Report on the Status of Implementation of the African Charter on the Rights and Welfare of the Child*. Addis Ababa: ACERWC. [↑](#footnote-ref-1)
2. *YG v S* 2018 (1) SACR 64 (GJ) [↑](#footnote-ref-2)
3. Durrant J & Ensom R (2012) Physical punishment of children: lessons from 20 years of research. *Canadian Medical Association Journal*, 184(12): 1373–1377. [↑](#footnote-ref-3)
4. Gershoff ET (2002) Corporal punishment by parents and associated child behaviours and experiences: A meta-analytic and theoretical review. *Psychological Bulletin*, 128(4): 539-579. [↑](#footnote-ref-4)
5. Fulu E, Miedema S, Roselli T, McCook S, Chan KL, Haardörfer R & Jewkes R (2017) Pathways between childhood trauma, intimate partner violence, and harsh parenting: Findings from the UN Multi-country Study on Men and Violence in Asia and the Pacific. *Lancet Global Health,* 5:e512-522. [↑](#footnote-ref-5)
6. Fulu (n 4 above). [↑](#footnote-ref-6)
7. Fulu (n 4 above). [↑](#footnote-ref-7)
8. Gershoff, E. T. 2013. Spanking and Child Development: We Know Enough Now to Stop Hitting Our Children *Child Development Perspective* 7(3):133-137. [↑](#footnote-ref-8)