

**SUBMISSION**

**BY SAVE THE CHILDREN SWEDEN TO THE**

**DEPARTMENT OF SOCIAL DEVELOPMENT**

**ON THE CHILDREN'S BILL**

**(AS DATED 12 AUGUST 2003)**

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# **SUBMISSION ON THE SECTION IN THE CHILDREN'S BILL RELATING TO CORPORAL PUNISHMENT**

## **INTRODUCTION**

The South African law prohibits corporal punishment of children in care institutions and foster care, the juvenile justice system and in schools. However, parents in South Africa are still allowed to administer corporal punishment as a method of childrearing. This is made possible by the right of parents charged with assault to evoke the right to reasonable chastisement of their children as a defence in court.

Save the Children Sweden believes that corporal punishment of children in all its forms violates the human rights of children to physical integrity and human dignity upheld in the UN Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child as well as the South African Constitution.

This submission relates to section 139 regarding corporal punishment in the Children's Bill dated 12 August 2003.

## **BACKGROUND OF THE ORGANISATION**

Save the Children Sweden is a non-governmental organisation, independent of any political party or religion, working for the rights of the child all over the world. Save the Children Sweden advocates a child-friendly society and empowers and supports children as to achieve lasting improvements in their lives. The United Nations Convention on the Rights of the Child is fundamental to all the work carried out by the organisation. Save the Children Sweden is an active member of the International Save the Children Alliance, the world's leading child rights organisation and an umbrella organisation of 30 member organisations which are working together in over 120 countries around the world.

In South Africa, Save the Children Sweden primarily works with and funds local civil society partners to promote children's rights. Emphasis is placed on strategic issues such as children exposed to violence and abuse, including corporal punishment, children who are discriminated against on the basis of gender and/or disability as well as children infected and affected by HIV/Aids. Save the Children Sweden also promotes the UN Convention on the Rights of the Child with a focus on child friendly laws, child poverty, human rights for children as well as children's mobilisation, participation and involvement in family life, decision-making and the media.

Save the Children Sweden has comprehensive experience in work relating to the abolition of corporal punishment in Sweden and other countries around the world.

## **LEGAL OBLIGATIONS TO PROHIBIT ALL FORMS OF CORPORAL PUNISHMENT**

Corporal punishment breaches fundamental human rights to respect for human dignity and physical integrity. The existence of special defences in state laws excusing violence by parents breaches children's rights to equal protection under the law.

The UN Convention on the Rights of the Child, Article 19, protects children from all forms of physical and mental violence and this protection extends to corporal punishment<sup>1</sup>. The Committee

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<sup>1</sup> Article 19 of the UNCRC 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

on the Rights of the Child, which monitors implementation of the Convention, has emphasised that corporal punishment in the family, or in schools and other institutions, or in the penal system is incompatible with the Convention. The Committee has also proposed that legal reforms be coupled with awareness raising and education campaigns in positive discipline of children to support parents, teachers and others. In examining South Africa's initial State Party report on the implementation of the Convention, the Committee recommended that South Africa takes effective measures to prohibit by law the use of corporal punishment in the family<sup>2</sup>.

The African Charter on the Rights and Welfare of the Child also protects children from all forms of physical and mental abuse (Article 16)<sup>3</sup> and thereby prohibits all forms of corporal punishment of children.

South Africa has ratified both the UN Convention and the African Charter and it is thus bound by its obligations to abolish corporal punishment of children.

Moreover, the Constitution of South Africa Section 12 in the Bill of Rights states that everyone has the right to freedom and security of the person, including freedom from all forms of violence from either public or private sources, and that everyone has the right to bodily and psychological integrity. Section 10 confirms the right to human dignity. These provisions are also for the protection of children since Section 9 sets out that everyone is equal before the law and that discrimination on the basis of age is prohibited. Furthermore Section 28 (1)(d) of the Bill of Rights protects children from neglect, maltreatment, abuse and degradation. The right of parents to administer corporal punishment is thus in contradiction of the Constitutional protection of children's rights to bodily integrity, protection from violence and abuse and everyone's equality before the law.

An early case before the Constitutional Court found judicial corporal punishment to be unconstitutional<sup>4</sup> and since, the Constitutional Court has confirmed that the ban of corporal punishment in schools is in conformity with the Constitution<sup>5</sup>.

## **AN EXAMPLE FROM SWEDEN**

Sweden is one of ten countries that so far have prohibited the use of corporal punishment of children in all spheres of society.

In the 1950's the Swedish Penal Code still exempted a person from punishment in the event that the person, in the course of exercising his or her legal right to beat someone under his or her guardianship, caused injury of a minor nature. This provision was repealed in 1957, and there were similar changes in the civil law in the 1960s. In 1979 a provision was included in the Swedish Parental Code explicitly banning physical punishment or other degrading treatment of children. The provision was not linked to a rule of prosecution or with any penalty for violating the provision. Its purpose was to tell parents that chastisement is not an acceptable way to bring up children, and to emphasise that the criminal law on assault applied equally to "disciplinary" assaults of children by their parents. The ban of corporal punishment in the Parental Code went hand in hand with

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negligent treatment, maltreatment or exploitation including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has care of the child."

<sup>2</sup> CRC/C/15/Add.122, 23 February 2000

<sup>3</sup> Article 16 of the African Charter provides that "States Parties to the present Charter shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury and abuse, neglect or maltreatment including sexual abuse, while in the care of the child."

<sup>4</sup> State v Williams and others 1995(3) SA 632 (CC)

<sup>5</sup> Christian Education South Africa v Minister of Education 2000 (4) SA 757 (CC)

awareness raising and a recurrent general parental education programme. A small group of parents in Sweden, who opposed the law, turned to the European Commission of Human Rights, appealing that the ban affected their rights to family life and religious freedom. However, the European Commission dismissed the application<sup>6</sup>.

An opinion poll conducted in the beginning of the 1970s revealed that 30 % of the Swedish population considered physical punishment an indispensable tool in the upbringing and education of children. The prohibition of corporal punishment was thus introduced despite lack of strong public support. However, legal reform together with awareness raising and training has changed public opinion. Recent research (2000) indicates that an overwhelming majority of the population (92%) are opposed to all forms of physical punishment of children<sup>7</sup>.

## CHILDREN'S OWN VIEWS

Research and surveys conducted both internationally and in South Africa show that corporal punishment in the home is of major concern to many children.

In 1992 a group of South African children were gathered to formulate the Children's Charter of South Africa. They suggested that:

*"All children should have the right to freedom from corporal punishment at schools, from the police and in prisons and at the home"*<sup>8</sup>

In preparation for the report on the new Children's Bill, the South African Law Commission undertook consultations with children. Here children themselves raised the matter of corporal punishment. When asked what rights children should have (in addition to the rights which everyone has) an important common response was the right to be protected from harm. A number of children explicitly identified the right not to be beaten as being significant<sup>9</sup>.

In 2002 Save the Children Sweden conducted a nation-wide Opinion Poll with a representative sample of 1200 children in South Africa. In the Opinion Poll, children were asked what rights are most violated in their lives. One of the most important violations of children's rights is lack of protection from abuse, including corporal punishment from teachers, parents and other caregivers such as uncles and brothers<sup>10</sup>.

*"Parents, they should stop beating children. They must learn a better way of dealing with children"*  
Girl in primary school

It has also become clear that even a "light" blow by an adult is a shocking event for a child. A survey in England asked children: "What does a smack feel like?"<sup>11</sup>

*"It feels like someone banged you with a hammer"*  
Girl aged five

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<sup>6</sup> Save the Children Sweden, The first anti-spanking law in the world, Stockholm

<sup>7</sup> Ibid

<sup>8</sup> Children's Charter of South Africa, Article 5, adopted at the Children's Summit in Cape Town, June 1 1992

<sup>9</sup> Save the Children Sweden, Hitting Children is Wrong – a plea to end corporal punishment in South Africa, Pretoria, November 2002

<sup>10</sup> Save the Children Sweden, Children's Poll - South African Child Rights Survey, Pretoria, June 2002

<sup>11</sup> C. Willow and T. Hyder, Save the Children UK and the National Children's Bureau, The UK, December 1998

*“It hurts and it’s painful inside – it’s like breaking your bones”*  
Girl aged seven

## **THE PROVISION IN THE CHILDREN’S BILL ON CORPORAL PUNISHMENT**

While the South African Law Commission’s (SALC) version of the Bill did not include an explicit prohibition of corporal punishment by parents in the home, it did try to address the situation of corporal punishment by parents by abolishing the common law defence of reasonable chastisement which is currently available to parents. This would have been achieved by Section 142 (2) of the SALC version of the Bill, which states that:

***“142 (2) The common law defence of reasonable chastisement available to persons referred to in subsection (1) in any court proceedings is hereby abolished.”***

Section 142 (2) of the SALC version of the Bill thus has the effect that when parents are charged with assault against their children, they would no longer be able to rely on the defence of reasonable chastisement. The inclusion of this section would therefore prevent a parent charged with assault from escaping liability for physically punishing their child and would give children equal protection under the law.

Section 139 in the Department’s draft Children’s Bill dated 19 August 2003 does not include the above-mentioned section 142(2). This means that parents who administer corporal punishment can still rely on the common law defence of reasonable chastisement and use this as a ground of justification in any court proceedings.

In addition, reference to “*schools*” in section 142 (4) of the SALC version of the Bill is deleted in the new section 139(3) in the Department’s version. The South African Schools Act 84, Section 10 of 1996 outlaws the use of corporal punishment in schools and thus prevents all persons from using corporal punishment on learners. The inclusion of the word “schools” in the new section 139(3) of the Children’s Bill would thus reinforce and support the provisions in the Schools Act.

## **DISCUSSION**

In line with international and regional human rights treaties, there is now an international move towards abolishing all forms of corporal punishment of children whether in care institutions, juvenile justice systems, schools or within the family.

Research into harmful physical and emotional effects of corporal punishment and into links with the development of other forms of violence in childhood and later in life add further compelling arguments for legal reform.

Both the UN Convention on the Rights of the Child and the South African Constitution clearly state that the best interest of the child is of paramount importance in every matter concerning the child<sup>12</sup>. Violence and abuse of children in whatever form and lack of equal protection of children from abuse under the law cannot be considered to be in the best interest of the child.

In South Africa interpersonal violence is endemic and conflicts are in many instances resolved by violent means. The right of parents to use corporal punishment contributes to a perception from an early age that violence is an appropriate response to conflict and unwanted behavior. A total ban of corporal punishment would be one way of combating crime and violence in South Africa. It would

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<sup>12</sup> The UN Convention on the Rights of the Child, Article 3 and the Constitution of South Africa, Chapter 2, Section 28 (2)

also be in line with South Africa's progressive approach to human rights and all persons' equality before the law.

Legislation will not end the use of corporal punishment on its own. To eliminate the use of corporal punishment legal reform has to go hand in hand with awareness raising and public education to change attitudes and to promote positive non-violent forms of discipline. However, legal reform is essential to send a clear message that corporal punishment is no longer an acceptable form of child rearing. This is a key issue on which politicians need to lead, not follow, public opinion, on the basis of human rights. Research also shows that public attitudes change rapidly when legal change is accompanied by awareness raising and education. As long as the law allows corporal punishment, it will be used as a defense to continue to administer corporal punishment.

## **SUBMISSION**

By ratifying the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child South Africa has committed itself to ensure children's rights to equal protection from violence and abuse and to take legislative measures to prohibit all forms of corporal punishment of children. Furthermore, the South African Constitution is clear in its message that all children should be protected from any form of violence and abuse and to have their human dignity protected. The existence of laws and special defences in laws excusing any form of corporal punishment of children thus contravenes the spirit and letter of the Constitution.

South Africa has now an opportunity to act on its commitments and prohibit corporal punishment within the family environment in the Children's Bill.

In view of this Save the Children Sweden would like to submit the following:

1. A new paragraph is added to section 139 explicitly prohibiting all forms of corporal punishment or any other degrading treatment of children, including corporal punishment administered by parents.

Even if this explicit ban is not linked to a penalty for violating the provision, it gives a clear message that corporal punishment is not an acceptable way of child rearing. A prohibition of all forms of corporal punishment in the Children's Bill will also provide a clear legal basis for awareness raising and training.

2. That the clause abolishing the defence of reasonable chastisement included in the SALC's version of the Bill be reinserted in the Children's Bill and thus stating that: "The common law defence of reasonable chastisement available to persons referred to in subsection (1) in any court proceedings is hereby abolished.". The inclusion of this paragraph in the Bill would prevent parents charged with assaulting their children from escaping liability for physically punishing their children.
3. The word "schools" should be reinserted in section 139(3) of the Department's draft Children's Bill in order to support the prohibition in the South African Schools Act 84 from 1996.