



## INTRODUCTION

This submission relates particularly to the section relating to corporal punishment, namely section 139 of the Children's Amendment Bill as introduced in the National Council of Provinces dated 30 June 2006. It focuses on 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 and thus calls for a total prohibition of corporal punishment within all settings including that which is practiced by parents.

PLEASE NOTE THAT THE COMMUNITY LAW CENTRE WISHES TO ADDRESS THE PROVINCIAL COMMITTEE AT ANY INTENDED PUBLIC HEARINGS AND ACCORDINGLY REQUESTS AN OPPORTUNITY TO DO SO.

## 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 CORPORAL PUNISHMENT – SECTION 139**

### **1. INTERNATIONAL COMMITMENTS**

#### **The United Nations Convention on the Rights of the Child**

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 19<sup>1</sup> and this protection extends to corporal punishment in all settings including within the family.

The United Nations Committee on the Rights of the Child<sup>2</sup> 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**

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.<sup>3</sup> This comment specifically deals with the nature of the State Party's obligations

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<sup>1</sup> 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."

<sup>2</sup> 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.

<sup>3</sup> 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).

regarding articles 19, 28(2)<sup>4</sup> and 37<sup>5</sup> and seeks to guide State Parties in understanding the provisions concerning the protection of children against all forms of violence. It also seeks to highlight 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.

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.”<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> 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

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<sup>4</sup> 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.”

<sup>5</sup> Article 37(a) provides that “no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.”

<sup>6</sup> General Comment No: 8, op cit, p 4.

<sup>7</sup> General Comment No: 8, op cit, p 4.

<sup>8</sup> General Comment No: 8, op cit, p 4.

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**

In addition, 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.

### **United Nations Study on Violence Against Children**

In response to the growing awareness of violence against children internationally, the United Nations General Assembly, in 2001, requested the Secretary General to conduct an in-depth study on the question of violence against children.<sup>9</sup> Acting upon this recommendation, in 2003, the Secretary General appointed Professor Paulo Sergio Pinheiro to lead this study. The purpose of this study was to provide a global picture of violence against children and propose clear recommendations for the improvement of legislation, policy and programmes relating to the prevention of and response to violence against children for consideration by States for appropriate action. The study was prepared through a participatory process which included regional,<sup>10</sup> sub-regional and national consultations, expert thematic meetings and field visits. A detailed questionnaire to governments on their approaches to violence against children was circulated and children's involvement during each of the regional consultations was also secured.

This study has been completed and the Secretary General's report was presented to the United Nations General Assembly (Third Committee) by his independent expert, Professor Pinheiro on 11 October 2006.<sup>11</sup> This report provides information on the incidence of the various types of violence against children within the family, schools, alternative care institutions and detention facilities, places where

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<sup>9</sup> United Nations resolution 56/138.

<sup>10</sup> In total, nine regional consultations were held of which three were convened for the African continent, namely, for West and Central Africa, Middle East and North Africa and for Eastern and Southern Africa. These consultations brought together government ministers and officials, parliamentarians, regional and international organizations, NGO's, national human rights institutions, civil society, media, faith-based organizations and children. See Secretary General's report of the independent expert for the United Nations Study on Violence Against Children, 61<sup>st</sup> session, United Nations General Assembly, dated 29 August 2006, p 6.

<sup>11</sup> The study is accompanied by a book which provides a more detailed account of the study.

children work and communities and the study found that shocking levels of violence affect children on all parts of the globe.

Some of the key findings, *inter alia*, include that the majority of violent acts experienced by children are perpetrated by people who are part of their lives such as parents, teachers, schoolmates, employers, boyfriends or girlfriends, spouses and partners; that between 80-98% of children suffer from physical punishment in their homes with a third or more experiencing severe physical punishment resulting from the use of implements; that harsh treatment and punishment in the family is common in both industrialized and developing countries, and that children in all regions reported the physical and psychological hurt they suffer are at the hands of their parents and caregivers.<sup>12</sup>

In seeking to provide the much needed guidance for States to prevent and respond to violence against children, the report concludes with certain overarching recommendations. These recommendations, *inter alia*, include that: States must take steps to prohibit all forms of violence against children, in all settings, including corporal punishment, harmful traditional practices, sexual violence, and torture and other cruel, inhuman or degrading treatment or punishment; States must prioritize prevention strategies and must provide recovery and social integration services to children and their families when violence is detected or disclosed; States must promote non-violent values and embark on awareness raising activities to transform those attitudes that condone or normalize violence against children and States must create accessible and child-friendly reporting systems for children, their representatives and others to report violence against them.<sup>13</sup>

Of even greater value, the report contains specific recommendations which apply in the different settings within which violence occurs.<sup>14</sup> These, among many other recommendations, include that States should support parents and caregivers to care for their children by developing education programmes that address child rearing and non-violent forms of discipline; that schools be encouraged to adopt and implement codes of conduct for staff and students, that principals and teachers use non-violent teaching and learning strategies and prevent and reduce violence in schools through specific programmes; that States prioritise reducing the rates of institutionalization of children by regularly reassessing placements and to establish effective complaints and investigation mechanisms to deal with

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<sup>12</sup> Secretary Generals' report, *op cit.* pages 9-22.

<sup>13</sup> Secretary General's report, pages 25-28.

<sup>14</sup> Secretary General's report, pages 28-32.

cases of violence in the childcare and criminal justice systems; and to address violence within the community, States should implement prevention strategies to reduce immediate risk factors.

The report concludes with a significant remark stating that while the primary responsibility for implementing these recommendations rests with the State, the participation of other actors at national, regional and international level (such as United Nations entities, civil society, national human rights institutions, community associations, educators, parents, professional bodies such as doctors' and nurses' association and children) is critical to assist the State to carry out its task.<sup>15</sup> From this it is clear that the responsibility to protect children from violence is a responsibility to be shared by all actors within a child's life and thus, no one, not even parents, shall have any defence or excuse for subjecting their children to any form of violence.

## **2. CURRENT SITUATION IN SOUTH AFRICA**

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

Provisions of the South African Constitution aim to protect children from neglect, maltreatment, abuse and degradation,<sup>16</sup> provide for the right not to be treated or punished in a cruel, inhuman or degrading way,<sup>17</sup> the right to be free from all forms of violence from either public or private sources,<sup>18</sup> the right not to be tortured in any way<sup>19</sup> and provide that everyone has inherent dignity and the right to have their dignity respected and protected.<sup>20</sup>

Furthermore the constitution provides that everyone has the right to equality<sup>21</sup>, 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.

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<sup>15</sup> Secretary General's report, op cit, p 32.

<sup>16</sup> Section 28 (1)(d) of the Constitution Act 108 of 1996.

<sup>17</sup> Section 12(1)(e) of Act 108 of 1996.

<sup>18</sup> Section 12(1)(c) of Act 108 of 1996.

<sup>19</sup> Section 12 (1)(d) of Act 108 Of 1996.

<sup>20</sup> Section 10 of Act 108 of 1996.

<sup>21</sup> Sections 9(1), (2) and (3) of Act 108 of 1996.

## The Legal Status of Corporal Punishment in South Africa

To date, South Africa has abolished the imposition of corporal punishment as a sentence by the court<sup>22</sup> and in schools.<sup>23</sup> Regulations to the Child Care Act (74 of 1983) also prohibit the use of physical punishment and other forms of humiliating or degrading punishment on children 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.

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,<sup>24</sup> in South Africa, this practice (imposition of corporal punishment by parents) still remains and is allowed in the home or by parents 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.<sup>25</sup> This chastisement can include the imposition of corporal punishment that must be restrained and tenable.<sup>26</sup> If a parent or person acting *in loco parentis* (in the place of the parent, for example, a step-parent)<sup>27</sup> 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.<sup>28</sup> 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

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<sup>22</sup> *S v Williams* 1995 (3) SA 632 (CC).

<sup>23</sup> Section 10 of the South African Schools Act of 1996.

<sup>24</sup> 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](http://www.endcorporalpunishment.org).

<sup>25</sup> *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.

<sup>26</sup> 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.

<sup>27</sup> 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.

<sup>28</sup> 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.



punishment (that is the degree of force applied); the object used to administer the punishment and the age, sex and build of the child.<sup>29</sup>

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. This situation denies children the equal protection of the law and provides parents with the potential to violate their child's bodily and physical integrity and dignity. The common law rules permitting reasonable chastisement do not protect children from assault.

### 3. UN COMMITTEE'S OBSERVATIONS

Having outlined what the current law is in South Africa, at this point it is important to mention one of the Committee's concluding observations on South Africa's report in 2000 relating to the issue of corporal punishment.

*"The Committee recommends that the State party take effective measures to prohibit by law corporal punishment in care institutions. The Committee further recommends that the State party reinforce measures to raise awareness on the negative effects of corporal punishment and change cultural attitudes to ensure that discipline is administered in a manner consistent with the child's dignity and in conformity with the Convention. **It is also recommended that the State party take effective measures to prohibit by law the use of corporal punishment in the family and, in this context, examine the experience of other countries that have already enacted similar legislation.**"<sup>30</sup>*

For this purpose, it would be useful to look at the ways in which various countries have proceeded to abolish all forms of corporal punishment of children. In this respect, it should be noted that law reform to abolish all forms corporal punishment in the home dates as far back as 1979 when Sweden took the

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<sup>29</sup> See Pete S, SAJHR 1998, op cit, page 444.

<sup>30</sup> Concluding observations of the Committee on the Rights of the Child on South Africa's report. Doc CRC/C/15/Add.122, para 28, dated 23 February 2000. Accessed from [www.unhcr.ch/tbs/doc.nsf](http://www.unhcr.ch/tbs/doc.nsf)

lead on this issue and was the first country to abolish all forms of corporal punishment. 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, Germany, Italy, Israel, Iceland, Ukraine, Bulgaria, Hungary, Belgium, Rumania, Greece and Sweden (being the first country to abolish all forms of corporal punishment).<sup>31</sup>

It should be noted that various strategies and steps were used to bring about this change in these countries.<sup>32</sup> Some initiated change by firstly abolishing corporal punishment in the public sphere. With regard to corporal punishment in the home, a first step included removing the defence of reasonable chastisement, which was available to the parents and this was then followed by a more explicit prohibition being included in the civil legislation.<sup>33</sup>

However, it is reported that merely removing the defence of reasonable chastisement (which indirectly had the effect of abolishing corporal punishment in the home) without also simultaneously explicitly prohibiting corporal punishment lead to much confusion amongst professionals and the public and parents still believed that physical punishment was legal.<sup>34</sup> Therefore, in order bring about real and constructive change, it would be necessary to have an explicit provision stating that corporal punishment in the home is not allowed.

In other countries such as Italy and Israel, corporal punishment in the home was abolished by court decisions when cases involving parental violence against the children were brought before it.

Despite the observations made by the UN Committee, the practice of corporal punishment by parents still remains in South Africa in terms of the common law and thus all necessary steps, including legislative reform, needs to be taken to ensure that this practice is prohibited.

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<sup>31</sup> See [www.endcorporalpunishment.org](http://www.endcorporalpunishment.org) for a list and discussion on these countries that have effected the total ban.

<sup>32</sup> Rowan Boyson (ed Lucy Thorpe) *Equal protection for children- an overview of the experience of countries that accord children full legal protection from physical punishment* NSPCC. Report accessed from [www.endcorporalpunishment.org](http://www.endcorporalpunishment.org) Also see *States with full abolition* accessed from [www.endcorporalpunishment.org](http://www.endcorporalpunishment.org) on 4 October 2003.

<sup>33</sup> For example, these countries include Sweden, Austria, Finland, Norway,

<sup>34</sup> Rowan Boyson report, op cit, p 23.

#### 4. Concerns and counter-arguments

It is recognized that the debate on this topic is a deeply personal one as it involves issues of parenting and most parents feel that they have the right to bring up their children as they see fit and this view often stems from very strong religious and moral beliefs and various other arguments in favour of the practice such as that children learn from smacking to respect their elders; that physical punishment is a necessary part of their upbringing; and that it never did them (parents) any harm. Another argument which also comes to the fore is that there is a difference between a vicious beating and the little smacks that parents give their children which do not cause real pain and cannot therefore be called abuse.

However, it can be argued that many of these arguments have no valid foundation, for example to merely say that parents themselves were hit as children and it did not do them any harm, does not make the practice right. Nor does it mean that this is the way children will learn to obey rules and become responsible adults. According to experts, corporal punishment can have serious psychological effects in that children feel humiliated and degraded and they become angry and resentful towards those who punish them this way and this leads to repressed anger which can be manifested in hatred towards themselves and others.<sup>35</sup> Further, there is no clear indication for drawing the line between reasonable and unreasonable chastisement or discipline. Often, in circumstances where parents do resort to corporal punishment, tempers are high and there are certainly no guarantees that parents have the insight or knowledge to determine factors that would inform the severity of the punishment.

Further concerns have also been raised as to:

- How the child protection system would deal with a blanket ban given that it currently lacks the resources to even properly respond to cases involving extreme forms of abuse and that perhaps resources need to be targeted where they are most urgently needed.
- Whether it is useful to criminalise parents? Instead there is a need to have far more support structures in place for families and the public education system needs to be at a far more advanced stage before we start on such a course of action. There is a need for a support orientated rather than a punitive approach.
- Whether a ban would open the floodgates to prosecution and parents would unnecessarily face charges even for trivial matters.

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<sup>35</sup> See *Hitting Children is Wrong-A plea to end corporal punishment in South Africa* Save the Children Sweden, November 2002, p 18.

While most of these concerns are valid ones, the lessons learnt and research undertaken in most of the countries that have to date abolished all forms of corporal punishment show that they can indeed be addressed and that some of them cease to be issues once law reform has happened and the law is changed. Further, most of these concerns can be countered when argued from the perspective that children should also enjoy the same protection from the law as adults do.

For example, with regard to the issue of resources, it is clear that greater resources will be needed to investigate the matter once a charge has been laid. This will require more police officials and social workers to carry out investigations. However, claiming that there are no resources to undertake investigations and afford children such protection is no reason to ignore and respect the rights of children. In this era, no one would argue that women should first wait for enough police officials and social workers to be appointed before they can claim protection in domestic violence matters.

As far the issue of criminalizing parents is concerned, the aim of reforming the law in this regard is not to open parents up to prosecutions or to criminalize them. Instead the aim of such reform in the civil law arena is to send a clear message that imposing physical punishment or other cruel and inhuman punishment on children is wrong and its purpose is to clarify those parental and other assaults in the name of 'correction' or 'discipline' are still assaults that are prosecutable under the criminal law. Such assaults are an infringement of the child's right to dignity and physical integrity. The purpose of creating laws is to prevent undesirable behavior in society and any institution of criminal proceedings indicates that a law has failed to achieve its aim in a particular case. A legal ban makes a clear statement of the wrongfulness of this form of punishment and will provide a vehicle for changing attitudes and behaviour through education on the development of other methods of disciplining children. Further, it is aimed at affording children equal protection from the law similarly to adults as provided for in criminal law.

With regard to the issue of opening up the "floodgates to prosecutions", the experiences in most countries that have undertaken law reform prohibiting corporal punishment has shown that the change in law did not result in an influx of prosecutions of parents. Instead, it brought to the fore the more severe forms of abuse of children that was already occurring. In Sweden, for example, the ban on physical punishment has not led to parents being prosecuted in droves for 'trivial' incidents of assaults.<sup>36</sup>

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<sup>36</sup> Rowan Boyson (ed Lucy Thorpe) *Equal protection for children- an overview of the experience of countries that accord children full legal protection from physical punishment* NSPCC, p 20. Report accessed from [www.endcorporalpunishment.org](http://www.endcorporalpunishment.org) Also see *States with full abolition* accessed from [www.endcorporalpunishment.org](http://www.endcorporalpunishment.org) on 4 October 2003.

In terms of the Swedish law, prosecutions can only proceed under the terms that define assault for adults and children alike, namely that there must be evidence of bodily injury, illness or pain and prosecutors would not generally pursue a case that would to all extents and purposes be considered petty.<sup>37</sup> Similarly, in South Africa, prosecutors also have the right to exercise prosecutorial discretion and can decline to prosecute petty or trivial incidents of corporal punishment. It is also doubtful whether every act of corporal punishment will result in a charge being laid and a prosecution being undertaken. For example, in Austria, the Austrian Federal Ministry of Justice reported that: “there has been no rush of children reporting their parents to the police for smacking them. State intervention in family life has certainly not increased as a result of the new law, but the public and especially the judges became sensitized to the view that beating children is an evil. There is a greater willingness of people to bring cases of maltreatment of children to the attention of the competent authorities.”<sup>38</sup> Criminal prosecution of parents for using corporal punishment should be considered as a last resort and only instituted when early intervention and prevention strategies have been tried and have failed.

## **5. HOW DOES SECTION 139 OF THE CHILDREN’S AMENDMENT BILL ADDRESS THE ISSUE OF CORPORAL PUNISHMENT?**

Section 139 of the Bill provides that:

- (1) A person who has control of a child, including a person who has parental responsibilities and rights in respect of the child, must respect to the fullest extent possible the child’s right to physical integrity as conferred by section 12 (1) (c), (d) and (e) of the Constitution.
- (2) Any legislation and any rule of common or customary law authorizing corporal punishment of a child by a court, including the court of a traditional leader, is hereby repealed to the extent that it authorizes such punishment.
- (3) No person may administer corporal punishment to a child at any child and youth care centre, partial care facility or shelter or drop-in centre.
- (4) The Department must take all reasonable steps to ensure that –
  - (a) education and awareness-raising programmes concerning the effect of subsections (1), (2), (3) and (4) are implemented across the country; and
  - (b) programmes promoting appropriate discipline at home and at school are available across the country.

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<sup>37</sup> Rowan Boyson report, op cit, p 20.

<sup>38</sup> Quoted and referred to in *Hitting Children is Wrong*, Save the Children, op cit, p 18.

While this section addresses the issue of corporal punishment in the public life of a child (i.e. in the residential care system and as a sentence by the courts), it does not explicitly address nor amend the common law situation regarding corporal punishment by parents. This means that parents can still administer reasonable and moderate corporal punishment to their children.

However, it should be noted that the South African Law Reform Commission's (SALRC) version of the Bill released in 2002, while it did not go so far as to expressly prohibit corporal punishment by parents in the home, it did seek to address this issue by including a clause that abolished the common law defence of reasonable chastisement which is currently available to parents in any court proceeding. Section 142 (2) of the SALRC version of the Bill provided that "the common law defence of reasonable chastisement available to persons ....in any court proceedings is hereby abolished". This clause indirectly prohibited the physical punishment of children by their parents as it had the effect of no longer allowing parents, when charged with assault against their children, to rely on the defence of reasonable chastisement. The inclusion of this section therefore prevented a parent charged with assault from escaping liability for physically punishing their child and also gave children equal protection of the law. Unlike the SALRC version, it is clear that section 139 of the Children's Amendment Bill does not at all address this issue and thus leave the status quo unchanged. South Africa, as a country that has ratified the UN Convention on the Rights of the Child, is thus failing in its obligation to ensure that children be protected from all forms of violence, including corporal punishment imposed within the family.

## **6. HOW SHOULD THE CHILDREN'S AMENDMENT BILL ADDRESS THIS ISSUE TO ENSURE THAT THE RIGHTS OF CHILDREN ARE PROTECTED?**

### **Section 139 Corporal Punishment**

It is proposed that in order to ensure that children are protected from all forms of violence as well as humiliating and degrading punishment, that the current wording of clause 139 (1) in the Bill be amended to reflect the South African Constitution and to ensure that they no person (including parents) is permitted to impose corporal punishment or other forms of humiliating and degrading treatment or punishment, upon children even in the name of correction.

It is proposed that the clause abolishing the defence of reasonable chastisement (as it appeared in section 142(2) of the SALRC version of the Bill) be reinserted into section 139 of the Children's Amendment Bill as this had the effect of prohibiting corporal punishment by parents. The reinsertion

would prevent parents who are charged with assaulting their children from escaping liability for physically punishing their children and would provide children with equal protection of the law.

We wish to point out that the provisions of subsections (2) and (3) are already contained in existing law. Subsection (2) is a restatement of the current law confirming that corporal punishment as a sentence or judicial corporal punishment is no longer allowed. In this respect the Abolition of Corporal Punishment Act (33 of 1997) repealed all statutory provisions or legislation which authorized the imposition of corporal punishment by courts of law. Subsection (3) confirms what is contained in regulation 32(3) to the Child Care Act – passed in 1998 in GG number 18770 Notice R 416- which lists various prohibitive behaviour management practices (including physical punishment, ridicule and humiliation) that shall not be used by any person in a children’s home, place of safety, school of industries or shelter and also extends to a foster parent. We propose that if these subsections are retained, then for the sake of comprehensiveness and consistency, the prohibition of corporal punishment in schools as contained in section 10 of the Schools Act (84 of 1997) also be included in this clause.

We support the provisions of clause 139(4) of the Children’s Amendment Bill in its promotion of education and awareness of positive discipline of children and propose that it be retained.

**It is proposed that the current clause be redrafted as follows:**

**139. (1) Any persons, including a person who has parental responsibilities and rights in respect of the child, must respect, promote and protect the child’s right to physical and psychological integrity as conferred by sections 12 (1)(c), (d) and (e) of the Constitution in that no child may be subjected to any form of violence, including corporal or other forms of cruel, degrading or humiliating punishment, from either public or private sources, torture or be punished in a cruel, inhuman or degrading way.**

**(2) The common law defence of reasonable chastisement available to persons referred to in subsection 139(1) in any court proceeding is hereby abolished.**

**(3) Any legislation and any rule of common or customary law authorizing corporal punishment of a child by a court, including the court of a traditional leader, is hereby repealed to the extent that it authorizes such punishment.**

**(4) No person may administer corporal punishment or any other form cruel, degrading or humiliating punishment to a child at any child and youth care centre, partial care facility or shelter or drop-in centre or school, and no foster parent may administer such punishment to his or her foster child .**

**(5) The Department must take all reasonable steps to ensure that—**

- (a) education and awareness-raising programmes concerning the effect of subsections (1),(2),(3) and (4) are implemented across the country; and**
- (b) programmes promoting appropriate discipline at home and at school are available across the country.**

This submission is endorsed by the following individuals and organizations:

1. Carol Bower, Independent consultant on children's rights
2. Save the Children Sweden (Pretoria office)
3. Umtata Child Abuse Resource Centre, Eastern Cape
4. Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN)