

Submission on Amendments to the Children's Act: Corporal Punishment

July 2013

Introduction

The Children's Institute (CI) was established in 2001 as a multi-disciplinary policy research unit located in the Faculty of Health Sciences of the University of Cape Town built on the foundation of its predecessor the Child Health Policy Institute (CHPI). The founding goal of the CI was to "promote effective development of policies and interventions" that address the major needs of children and to realise rights for all children in South Africa. The CI was established with the specific intention to conduct child focused policy research, teaching and advocacy aimed at improving the situation of children and adolescents. Of major concern to the Children's Institute is the high level of violence experienced by children in South Africa. The United Nations Committee on the Rights of the Child (CROC) has called on "*all States parties to move quickly to prohibit and eliminate all corporal punishment...as a key strategy for reducing and preventing all forms of violence in societies*".¹ The Children's Institute supports this call and advocates for the total prohibition of corporal punishment.

South Africa has prohibited corporal punishment as a sentence for children convicted of crimes, in all forms of detention (e.g. prisons), and as method of controlling behaviour of children in alternative care (foster care, temporary safe care and child and youth care centres)². Similarly, the Schools Act prohibits the use of corporal punishment in public and private educational institutions by educators³. However, corporal punishment in the home is protected by the law via a parent's common law right to raise the defence of reasonable chastisement if charged with the crime of assault.

Corporal punishment no matter how light is violence

The United Nations Convention on the Rights of the Child (UNCRC), the African Charter on the Rights and Welfare of the Child (ACRWC) and the South African Constitution all recognize children's best interests and their rights to respect of their human dignity, physical integrity and equal protection

¹ General Comment No. 8 (2006) The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia). Para 2 and 3.

² Children's Act Regulations 65(1)(h) and 76(2)

³ The Schools Act (no 84 of 1996). Section 10.

under the law. South Africa has a duty to respect, promote and protect these rights. The CROC has explicitly stated that corporal punishment is inconsistent with these rights. In fact CROC defines corporal punishment as violence and no matter how light and considers it to be a violation of children's right to dignity:

The Committee is of the opinion that physical violence includes:

(a) All corporal punishment and all other forms of torture, cruel, inhuman or degrading treatment or punishment;⁴

The Committee defined "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. Most involves hitting ("smacking", "slapping", "spanking") children, with the hand or with an implement - a whip, stick, belt, shoe, wooden spoon, etc. But 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...⁵

In the view of the Committee, corporal punishment is invariably degrading.⁶

All corporal punishment is "inappropriate"

Both Parliament and the Department of Social Development (DSD) have committed to considering an amendment to the Children's Act prohibiting corporal punishment⁷. However, the discussion paper presented by DSD at the National Child Care and Protection Forum on 21 May 2013⁸ appears to take a more cautious approach. The discussion paper was presented along with a series of submissions from child protection organisations calling for a ban, and religious organisations defending the right of parents to use "appropriate corporal punishment"⁹. The discussion paper states that "The proposal is that South Africa's policy initiatives should be modest and not overly ambitious," and distinguishes between 'appropriate' and 'inappropriate' corporal punishment. The CROC has repeatedly stated that all forms of corporal punishment are deemed to be harmful, degrading and a form of violence against children. **All corporal punishment is inappropriate.**

The CROC has also stated explicitly that all forms of corporal punishment violate children's rights and are not in the best interests of the child:

⁴ General comment No. 13 (2011) The right of the child to freedom from all forms of violence. Para 22.

⁵ See note 1. Para 11.

⁶ See note 1. Other specific forms of corporal punishment are listed in the report of the independent expert for the United Nations study on violence against children See note (A/61/299, para 56, 60 and 62).

⁷ Portfolio Committee on Social Development (2007) Children's Amendment Bill [B19B-2006] Report. Accessed at <http://www.pmg.org.za/docs/2007/071024draft.htm>; and Minister of Social Development response to Question 2023 or written reply, August 2012.

⁸ Department of Social Development Discussion Document: *Corporal punishment and discipline in the home by parents and caregivers* (May 2013).

⁹ Christian Action Network. *The Right of Parents to Discipline their Children*. Presentation to the National Child Care and Protection Forum 21 May 2013.

“When the Committee on the Rights of the Child has raised eliminating corporal punishment with certain States during the examination of their reports, governmental representatives have sometimes suggested that some level of “reasonable” or “moderate” corporal punishment can be justified as in the “best interests” of the child. The Committee has identified, as an important general principle, the Convention’s requirement that the best interests of the child should be a primary consideration in all actions concerning children (art. 3, para. 1). The Convention also asserts, in article 18, that the best interests of the child will be parents’ basic concern. But interpretation of a child’s best interests must be consistent with the whole Convention, including the obligation to protect children from all forms of violence and the requirement to give due weight to the child’s views; it cannot be used to justify practices, including corporal punishment and other forms of cruel or degrading punishment, which conflict with the child’s human dignity and right to physical integrity.”¹⁰

There are alternative child rearing methods to promote discipline rendering corporal punishment unnecessary.

The impact of violence against children

The World Report on Violence Against Children conceptualises children’s experiences of violence as occurring across a variety of settings; ranging from the home, school, care and justice system as well as the community and has major implications for the child’s development and wellbeing.¹¹ Violence against children is considered to be a pervasive problem that affects large numbers of children in South Africa¹². Yet, the true magnitude of children exposed to violence is unknown as there is no reliable national prevalence or incidence data, and our knowledge base rests on smaller scale studies and retrospective studies with the adult population. Of note, South Africa lacks a systematic exploration of this problem. Nevertheless the most common forms of violence reported in South Africa are children’s experience of physical and sexual violence in the home and community. Under-reporting of children’s experiences of violence is widespread. Young children lack the capacity to report, children fear reporting abuse if it is a person close to them for fear of being harmed and the social acceptance of practises such as corporal punishment allow for it to go unreported.

A community based study in the Eastern Cape reported, 89.3% of young women and 94.4% of young men, disclosed experiencing harsh physical punishment before the age of 18¹³. Physical punishment or corporal punishment in the home is often used under the guise of discipline and more than one in four children experienced a time when they were physically punished daily or weekly with sticks,

¹⁰ See note 1. Para 26.

¹¹ Pinheiro, P.S. (2006). *World report on violence against children: Report of the independent expert for the United Nations study on violence against children*. Presented at the sixty first session, Item 62 (a) of the provisional agenda, Promotion and protection of the rights of children. Geneva: United Nations (A/61/299).

¹² Richter, L.M., & Dawes, A.R.L. (2008). ‘Child abuse in South Africa: Rights and wrongs’. *Child Abuse Review*, 17(2), 79-93

¹³ Jewkes, R., Dunkle, K., Nduna, M., Jama, N., & Puren, A. (2010). ‘Associations between childhood adversity and depression, substance abuse and HIV and HSV2 incident infections in rural South African youth’. *Child abuse & neglect* 34 (11), 833-841



belts and other instruments with many children suffering physical injuries¹⁴. Similarly, although corporal punishment has been prohibited a recent study on violence in schools estimates that 50% of learners still experience corporal punishment in school¹⁵.

Violence against children has major public health consequences. Children's experiences of violence in South Africa are often across settings and not once off. The impact of violence is beyond the physical injuries and visible scars as evidence has shown lasting psycho-social consequences.¹⁶ Psychological consequences such as depression, anxiety disorders, substance abuse, suicidality as well as unwanted pregnancy are all associated with child victimisation for girls, while boys are at increased risk for externalising behaviour such as truancy, gang involvement and crime.¹⁷ Violence is intergenerational with children exposed to violence in their early years at risk for revictimisation as they get older.¹⁸ Girls in particular are at risk for sexual assault as they get older and at increased risk as victims of intimate partner violence, in addition it also impacts on their emotional availability as parents.¹⁹ Boys have been shown to be at increased risk for perpetration of violence both as perpetrators of rape and intimate partner violence, as well as increased risky behaviour within the community context.²⁰

South Africa has an obligation under international law to prohibit corporal punishment

*The Committee emphasizes that eliminating violent and humiliating punishment of children, through law reform and other necessary measures, is an **immediate and unqualified** obligation of States parties. (emphasis added)²¹*

The Children's Act has been in force since April 2010 and includes measures to support parents to learn alternatives to corporal punishment:

144 (1) (b) developing appropriate parenting skills and the capacity of parents and care-givers to safeguard the well-being and best interests of their children, including the promotion of positive, non-violent forms of discipline;

The Children's Institute is of the view, however, that clause 144 of the Children's Act does not give sufficient protection to children, as parents can still invoke a common law right to raise the defence of reasonable chastisement if charged with the crime of assault. This defence is not consistent with the UNCRC and CROC has reminded States of their duty to remove it:

¹⁴ See note 13.

¹⁵ P Burton & L Leoscutt (2013) *School Violence in South Africa: Results of the 2012 National School Violence Study*. Centre for Justice and Crime Prevention. Monograph Series, No 12 Cape Town, March 2013.

¹⁶ Maniglio, R.(2009). The impact of child sexual abuse on health: a systematic review of reviews. *Clinical psychology review*, 29(7), 647-57.

¹⁷ Callendar, T. and Dartnall, L. (2010). *Mental Health Responses for Victims Of Sexual Violence And Rape In Resource-Poor Settings*, Sexual Violence Research Initiative.

¹⁸ See note 17

¹⁹ Bordin I.A., Duarte C.S., Peres C.A., Nascimento R., Curto B.M., and Paula C.S. (2009). Severe physical punishment : risk of mental health problems to poor urban children in Brazil. 87, 336-344.

²⁰ Abrahams, N and Jewkes R. (2005). What is the impact of witnessing mother abuse during childhood on South African men's violence as adults? *American Journal of Public Health*; 95:1811-1816.

²¹ See note 1. Para 22.

“the defence of “lawful”, “reasonable” or “moderate” chastisement or correction has formed part of English common law for centuries, as has a “right of correction” in French law. At one time in many States the same defence was also available to justify the chastisement of wives by their husbands and of slaves, servants and apprentices by their masters. The Committee emphasizes that the Convention requires the removal of any provisions (in statute or common - case law) that allow some degree of violence against children (e.g. “reasonable” or “moderate” chastisement or correction), in their homes/families or in any other setting.”²²

It is claimed by the Christian Action Network for Reformation and Revival that doing away with the “defence of reasonable chastisement” will result in many parents being brought before the courts to face criminal charges. This is very unlikely, because it is possible to charge parents under the current law, but in reality this rarely happens. Again it is useful to consider the advice of CROC:

*“The principle of equal protection of children and adults from assault, including within the family, does not mean that all cases of corporal punishment of children by their parents that come to light should lead to prosecution of parents. The **de minimis** principle – that law does not concern itself with trivial matters – ensures that minor assaults between adults only come to court in very exception circumstances, the same will be true of minor assaults on children. States need to develop effective reporting and referral mechanisms. While all reports of violence against children should be appropriately investigated and their protection from significant harm assured, the aim should be to stop parents using violent or degrading punishment through supportive and educational, not punitive, interventions.”²³*

The intention is not to criminalize parents, but rather to ensure that children are afforded the same protection as adults. Prohibiting corporal punishment will allow social service professionals to assist families and even allow the courts to order parents to attend prevention and early intervention programmes.

Recommendations

The UN Special Representative of the Secretary-General on Violence against Children recommends:

“A general legal prohibition of violence must be reinforced and complemented by detailed provisions in specific pieces of legislation, both to address distinct forms of violence, such as sexual abuse and exploitation, bullying, trafficking, corporal punishment or harmful traditional practices, and to tackle violence in different settings, including schools, care and justice institutions, the community and the home.”²⁴

In its concluding observations on South Africa’s country report in 2000 CROC advised the South African government to take steps to ban corporal punishment in the home:

²² See note 1. Para 31.

²³ See note 1. Para 40.

²⁴ *Annual report of the Special Representative of the Secretary-General on Violence against Children*, presented to the Human Rights Council, Nineteenth Session, 13 January 2012. A/HRC/19/64

“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.”²⁵

To meet its commitments in respect of the UNCRC the ACRWC, and to fulfil children's rights in the Constitution the Children's Institute recommends banning corporal punishment in the home. This can be achieved through the insertion of the following clause into the Children's Act:

Social, cultural and religious practices

12.

....

(11) Corporal punishment of children is prohibited.

(12) The common law defence of reasonable chastisement available to persons charged of assaulting a child in any court proceeding is hereby abolished.

Child in need of care and protection

150.

...

(5) Reports of persons who subject children to corporal punishment must be referred to a designated social worker for an investigation contemplated in section 155(2) in order to establish if the child is need of care and protection.

(6) A parent, care-giver or any person holding parental responsibilities and rights in respect of a child who is reported for subjecting such child to inappropriate forms of punishment must be referred to an early intervention service as contemplated in section 144.

(7) Prosecution of a parent or person holding parental responsibilities and rights in respect of a child who is reported for subjecting such child to corporal punishment should only be instituted:

(a) when early intervention services or family preservation programmes have failed, or

²⁵ Concluding observations of the Committee on the Rights of the Child on South Africa's report. CRC/C/15/Add. 122, para 28, dated 23 February 2000.

(b) when early intervention services or family preservation programmes are deemed by the prosecutor, having had due regard to the recommendations of a social worker, to be inappropriate.

For further information please contact Lucy Jamieson or Prof Shanaaz Mathews.

Children's Institute

University of Cape Town

Tel: 021 689 5404

Email: Lucy.Jamieson@uct.ac.za or Shanaaz.Mathews@uct.ac.za