



South African Human Rights Commission

SUBMISSION ON THE CHILDREN'S ACT AMENDMENT BILL [B19B – 2006]

Clause 139 – Discipline of Children

To the Portfolio Committee on Social Development, National Assembly, 8 August 2007

Introduction

The South African Human Rights Commission (the Commission) welcomes clause 139 of the Children's Act Amendment Bill [B19B – 2006] because it seeks to advance a society in which children are free to develop in an atmosphere that promotes a culture of non-violence. The Commission commends the NCOP Select Committee on Social Services for its efforts to uphold the rights of all children to dignity, equality, and freedom and security of the person by ensuring that corporal punishment is prohibited, that the defense of reasonable chastisement is abolished; and, the State will support parents through programmes on appropriate discipline and education and awareness raising about the benefits of raising children in environments free from all forms of violence.

1. The Mandate of the South African Human Rights Commission

The mandate of the Commission is to respect, promote, and protect the rights in the Bill of Rights. Section 184 of the Constitution states:

'The South African Human Rights Commission

Functions of the South African Human Rights Commission

184. (1) The South African Human Rights Commission must—

- (a) promote respect for human rights and a culture of human rights.
- (b) promote the protection, development and attainment of human rights; and
- (c) monitor and assess the observance of human rights in the Republic.¹

¹ The Constitution of the Republic of South Africa Act 108 of 1996 Section 184.

2. Clause 139 – Discipline of Children

The Children’s Act Amendment Bill seeks to provide a regulatory framework to promote and protect the rights of children within South Africa. Section 139 of the Children’s Act Amendment Bill addresses discipline of children in South Africa. It reads as follows:

Discipline of children

139. (1) A person who has care of a child, 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 section 12(1)(c), (d), and (e) of the Constitution.

(2) No child may be subjected to corporal punishment or be punished in a cruel, inhuman, or degrading way.

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

(4) No person may administer corporal punishment to a child or subject a child to any form of cruel, inhuman, or degrading punishment at a **[any]** child and youth care centre, partial care facility or shelter or drop-in centre.

(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 throughout the Republic; and

(b) programmes promoting appropriate discipline are available throughout the Republic.

(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 referred to in subsection (6) may be instituted if the punishment constitutes abuse of the child.²

As constituted, subsection 139(1) of the Children’s Bill addresses the protection of the child’s bodily well being and psychological welfare. The Commission applauds the NCOP Select Committee for recognizing both of these critical aspects of childhood development and for adopting the modern human rights standard set forth in international law. In South Africa, children are afforded protection like all citizens but beyond that, children occupy a special space because of their vulnerability.

² The Children’s Bill [B19-2003] section 139.

3. International Law and the Protection of Children

The United Nations Convention of the Rights of the Child (CRC) places emphasis on the development of the child. At the heart of the CRC is the recognition of the personal autonomy of the child. In other words, the rights of the child under the CRC are separate and independent of that of their parents.³ Article 19 of the CRC states that the child has the right to be free from all forms of physical and mental violence.⁴

United Nations Convention of the Rights of the Child and General Comment 8

“The state is further under a constitutional duty to take steps to help diminish the amount of public and private violence in society generally and to protect all people especially children from maltreatment, abuse or degradation. More specially, by ratifying the United Nations Convention on the Rights of the Child, it undertook to take all appropriate measures to protect the child from violence, injury or abuse. [our emphasis]⁵

By ratifying the CRC the state undertook to take all appropriate measures to ensure that the child is free from all abuse and maltreatment. As South Africa is a signatory to the CRC⁶ it has recognized that the child has the right not to be subject to corporal punishment.

In 2006 the CRC Committee issued General Comment 8 which seeks to provide guiding principles to state parties on “the Rights of the Child to Protection from Corporal

³ Altson P, *The Best Interest of the Child Reconciling Culture and Human Rights* Oxford Clarendon press, 1994 1-26.

⁴ The CRC article 19 states as follows:

Article 19

1. 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 neglect treatment, maltreatment or exploitation, including sexual abuse, while in the care of the parent(s), legal guardian(s), or any other person who has the care of the child.
2. Such protective measures should, as appropriate, include effective procedure for establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

⁵ *Christian Education South Africa v the Minister of Education* 2002 (2) SA 794 CC at para 40.

⁶ South Africa ratified the CRC in 1995.

Punishment and other Cruel or Degrading Forms of Punishment.”⁷ It made the following recommendations:

- Corporal punishment is incompatible with the CRC.⁸ The Committee finds that corporal punishment is cruel and degrading treatment⁹ and therefore it cannot be compatible with the CRC.
- All children have the inherent right to human dignity and to be free from all forms of cruel and degrading treatment.¹⁰
- It is recommended that legislative and other measures must be enacted to eradicate corporal punishment.¹¹ There is also a duty upon the government to monitor and evaluate the implementation of General Comment 8.¹²
- Finally the Committee expects of state parties (which includes South Africa) to include in their periodical report under the Convention information on the measures and steps which the state has taken to eradicate corporal punishment.¹³ This means that South Africa has to report on the steps which it has taken to eliminate corporal punishment in the home.

The United Nations Global Study on Violence against Children

The United Nations Global Study on Violence against Children was initiated in 2001 when the General Assembly of the United Nations requested the Secretary General to conduct an in depth study on the question of violence against children.¹⁴ The study was conducted by a panel of independent experts¹⁵ It was conducted amongst a wide range of

⁷ United Nations Committee on the Rights of the Child ‘General Comment No 8 (2006): **The Right of the Child to Protection from Corporal Punishment and other Cruel or Degrading Forms of Punishment (article 19, 28(2) and 37 *inter alia*)**’ 15 May -2 June 2006.

⁸ Ibid note 7 above at page 3 para 7.

⁹ Ibid note 7 above at page 4 para 12.

¹⁰ Ibid note 7 above at page 5 para 18 reads as follows:

18. Article 37 of the Convention requires State to ensure that: “No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment”. This is complemented by and extended by article 19, which requires States to “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.”

¹¹ Ibid note 7 above at page 9 para 30.

¹² Ibid note 7 above at page 15.

¹³ Ibid note 7 above at page 16 at para 53.

¹⁴ United Nations General Assembly Item 62(a) of the Provisional Agenda , Promotion and Protection of the Rights of Children, 29 August 2006 A/61/299 <www.violencestudy.org/IMG/pdf/English.pdf>

¹⁵ Ibid note 14 above page 1.

stakeholders which included state parties and civil society role players.¹⁶ The process also included input from children on how violence affects them.¹⁷

African Charter on the Rights and Welfare of the Child: Corporal punishment and the right to cultural and traditional practices

Supporters in favour of corporal punishment might be of the view that corporal punishment is central to African beliefs and cultural practices.¹⁸ Corporal punishment is not central to African culture and traditional practice when one considers the spirit and ethos of the African Charter on the Rights and Welfare of the Child (the Charter).¹⁹ South Africa is a signatory to the Charter. Article 20 (1)(c) of the *Charter* demands that parents administer discipline with humanity and in a manner, which is consistent with the inherent dignity of the Child.²⁰ It states as follows:

“Article 20: Parental Responsibilities

1. Parents or other persons responsible for the child shall have the primary responsibility of the upbringing and development [of] the child and shall have the duty:
 - (a)...
 - ...
 - (c) to ensure that domestic discipline is administered with humanity and in a manner consistent with the inherent human dignity of the child.²¹

The *Charter* places a duty upon state parties to ensure that domestic discipline is administered in a manner that is consistent with the inherent dignity of the child. Thus to argue that the practice of corporal punishment is in line with the cultural manner of raising children would be contrary to the instruction and spirit of the Charter.

¹⁶ Ibid note 14 at page 6.

¹⁷ Ibid note 14 at page 8.

¹⁸ Rapcan Waterhouse S “It never did me any harm” page 3.

¹⁹ A strong criticism against the prohibition of corporal punishment in home is that it entrenches a Eurocentric approach to raising the child and it attacks and eradicates African culture. The Commission is sensitive to diversity when it seeks to meet its constitutional obligation. It is in light of this that we seek to determine the value of corporal punishment under the African Charter on the Rights and Welfare of the Child.

²⁰ African Charter note 19 above article 20 (1) (c) reads as follows:

“Parents or other persons responsible for the child shall have the primary responsibility of the upbringing and development the child and shall have the duty:

...

(c) to ensure that domestic discipline is administer with humanity and in a manner consistent with the inherent dignity of the child...”

²¹ Ibid.

4. The Constitution

Child protection is further entrenched in relevant sections of the South African Constitution which include:

- ❑ Section 9 – equality
- ❑ Section 10 – inherent human dignity
- ❑ Section 12 – right to be free from violence (public or private sources): not to be treated or punished in a cruel, inhuman or degrading manner.
- ❑ Section 28 (1) (d) – right to be protected from maltreatment, neglect, abuse or degradation
- ❑ Section 28 (2) - the best interest of the child

5. The Constitutional Court

The Constitutional Court (the Court) has expressed its' concerns about the effects of corporal punishment on the self esteem of the child. It has stated:

“...One would have thought that it is precisely because a juvenile [the child] is of a more impressionable and sensitive nature that he should be protected from experiences which may cause him to be coarsened or hardened. If the State, as a role model par excellence treats the weakest, most vulnerable amongst us in a manner which diminishes rather than enhances their self-esteem and human dignity, the danger increases that their regard for a culture of decency and respect for the rights of others will be diminished.”²²

6. Commission Submissions

6.1. The Commission strongly supports the prohibition of corporal punishment

It is clear that in terms of our international law obligations and the values and rights set forth in our Constitution corporal punishment should be prohibited. The Commission therefore strongly commends the legislature for the bold steps which has taken in this direction. At the same time, the Commission emphasizes that parents and care-givers need support on appropriate and alternative forms of discipline that will promote healthy relationships between children and adults and ensure the realization of every child's potential. This too has been recognized by the legislature and the Commission welcomes these provisions. Section 139 (5) (a) (b) refers to education and awareness

²² *S v Williams* 1995 (3) SA 632 at para 47.

raising programmes and programmes which will promote appropriate disciplinary measures in the home. This initiative is commendable and will bring about a lasting mindset shift in terms of child discipline in the home. Its implementation will have to be carefully monitored and a concerted multi – sectoral approach will be needed with adequate human and financial resources being committed.

6.2. Subsection 139(7) ought to be removed

The Commission is of the view that subsection 139(7) ought to be removed from the Amendment Bill. This ought to be done for two reasons, namely:

1. The inclusion of section 139(7) has the potential to undermine the provision as a whole
2. Section 139 (7) is superfluous as the *de minimis non curat lex* rule could be advanced by parents and care givers as a defence.

1. The inclusion of section 139 (7) in the provision undermines the provision as a whole

The use of the term “abuse of the child” is inconsistent with the language of subsections 139(1) through (4) which seeks to promote the physical and psychological freedom of the child as set out in section 12(2) of the Constitution. By requiring that punishment constitutes “abuse”, the provision shifts the language of the provisions as a whole. Whilst it may not be the intention of the legislature, the effect of this clause as it now stands may undermine the prohibition contained in the section. It may also lead to great uncertainty amongst caregivers and parents as to what does and does not constitute abuse. This in turn may place pressure on government officials to give parents a wide and generous berth in interpreting which acts of physical and psychological discipline do not constitute corporal punishment. The legislature ought to be clear in its prohibition so as not create any ambiguity.

Subsection (7) introduces another standard of behavior not defined within the language of the previous subsections. This will ultimately give parents and care-takers of children the impression that physical and psychological discipline is acceptable as long as it does not constitute “abuse.” There is an implication that some forms of corporal punishment are acceptable whilst at the same time it appears very uncertain as to what would fall within this acceptable category. Sub-clause 7 thus departs from the spirit of section 12 of

the Constitution. There is a need to ensure that there is no ambiguity about the prohibition of corporal punishment. Subsection 139(7) is inconsistent with the provision as a whole.

2. *The inclusion of section 139(7) is superfluous as the de minimis non curat lex rule will apply*

The *de minimis non curat lex* rule means that the law will not prosecute trivial matters. The Commission is concerned that any action under sub-clause 7 would be so trivial that it would not be prosecuted by the State. The Commission agrees that prosecution of parents for less serious actions against their children may not always be in the best interest of the child and the family as a whole. In addition, South African law already provides for the exclusion of such cases through the principle of *de minimis non curat lex*.²³ The law would allow for trivial assaults to be disregarded that do not meet the standard that subsections (1) through (4) of section 139 set forth regarding unacceptable disciplinary conduct against children. For these reasons it would be superfluous to include sub clause 7 in the Bill.

Should the legislature not see fit to remove sub-clause 139(7) in its entirety then the Commission would argue that the word “the punishment constitutes abuse of the child” be replaced with the words “it is in the best interests of the child”. This is a standard that is enshrined in our Constitution (section 28) and a concept that is already well developed by our law. It takes into account the nature of the relationship between a parent and/or care giver and a child.

Conclusion

The Commission encourages the Social Development Portfolio Committee to support clause 139 with the amendments that have been discussed above.

The tabling of clause 139 of the Bill before parliament comes at an opportune time. The Commission has always supported prohibition on corporal punishment and commends the State’s initiatives to seek a ban on corporal punishment in the home as the State has a duty to act to protect children from all forms of violence.

²³ p. Burchell, Jonathan. Principles of Criminal Law, p. 222.