

Submission on the proposed *Children's Third Amendment Bill*

September 2018

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GLOBAL INITIATIVE TO

**End All Corporal
Punishment of Children**

This submission on the Children's Third Amendment Bill will focus on article 8, which inserts section 12A in the Children Act 2005 to repeal the common law defence of reasonable chastisement that allowed parents and carers to lawfully subject children to corporal punishment. The Bill currently also prohibits cruel, inhuman or degrading treatment or punishment of children.

South Africa holds international and regional human rights obligations to prohibit all corporal punishment of children, including through the new global commitment to ending all violence against children in the context of the 2030 Agenda for Sustainable Development and Africa's Agenda for Children 2040. In view of this, this submission will argue for the insertion of an explicit prohibition of all corporal punishment of children, in all settings including the home, in addition to the existing removal of the common law defence of reasonable chastisement.

The Children's Third Amendment Bill

The Global Initiative welcomes the opportunity to comment on the Children's Third Amendment Bill currently being discussed in South Africa. We note that article 8 of the Bill is relevant to the issue of corporal punishment of children:

"Positive discipline of children

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

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

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

(4) The Department in partnership with relevant stakeholders, must take all reasonable steps to ensure that-

(a) education and awareness-raising programmes concerning the effect of subsections (1) and (2) are implemented across the Republic; and

(b) programmes promoting positive discipline at home and in alternative care are available across the Republic.

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

We welcome the inclusion of these provisions in the Bill, especially the explicit repeal of the "reasonable" chastisement defence. However, we are concerned that there is no explicit statement of a child's right to protection from all forms of corporal punishment. We believe that the above provisions do not send a sufficiently clear message that no child should be subjected to any form of corporal punishment, however light, and we offer the following comments on achieving the necessary prohibition.

Prohibition of all corporal punishment, without exception

Corporal punishment of children breaches their rights to respect for human dignity and physical integrity and to equal protection under the law. According to article 37 of the United Nations Convention on the Rights of the Child,¹ which the South Africa ratified in 1995, states have an obligation to ensure that *"no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment...."* States must *"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...."* (article 19(1)).

In 2006, the Committee on the Rights of the Child adopted General Comment No. 8 on "The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment", which emphasises the immediate obligation on states parties to explicitly prohibit all corporal punishment of children, including within the home.² The African Committee of Experts on the Rights and Welfare of the Child has also made it very clear that all corporal punishment of children must be prohibited and eliminated, including within the family.³

South Africa is lagging behind, with 53 states worldwide – including seven African states – which have prohibited all corporal punishment of children, including in the home, and a further 57 states which

¹ See the full text of the Convention at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>.

² The General Comment is available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f8&Lang=en.

³ See in particular for South Africa: [October 2014], Concluding observations on initial report of South Africa, paras. 34 and 35.

have committed to reforming their laws to achieve full prohibition.⁴ South Africa is a Pathfinder country under the Global Partnership to End Violence Against Children and, as such, has committed to accelerated action to end all violence against children (Target 16.2 of the Sustainable Development Goals), including implementation of the INSPIRE strategies at scale; the first INSPIRE strategy, “Implementation and enforcement of laws”, includes laws banning all corporal punishment of children.

As of today in South Africa, corporal punishment of children is still lawful in the home. The common law defence of “moderate and reasonable chastisement” was struck down as unconstitutional by a High Court judgment in October 2017 – however this decision has been appealed to the Constitutional Court. The Constitutional Court has yet to rule on the appeal.

In light of the above, we believe that in its current form the Bill would effectively repeal the “moderate and reasonable chastisement” defence through the insertion of article 12A(2) in the Children Act 2005 but it does not explicitly prohibit corporal punishment of children in all settings. **Prohibition of all corporal punishment is achieved when the repeal of the defence is accompanied by the insertion of a statement which explicitly prohibits it in all settings.** Because corporal punishment is almost universally accepted as a disciplinary measure in childrearing, general provisions protecting against cruel, inhuman and degrading treatments (proposed article 12A(1)) do not achieve the legal clarity required to convey the message that it is unlawful to subject a child to any form or degree of corporal punishment. The only way to ensure clear, uncompromising prohibition of all corporal punishment is to use an uncompromising and explicit language in legislation.

We set out in the next section a suggestion for amending article 8 of the Children’s Third Amendment Bill in order to achieve the necessary clarity.

Proposed amendment to the Children’s Third Amendment Bill

In light of the above concerns, and in line with the 2015 version of the Children’s Third Amendment Bill, we respectfully suggest the amendment of the Bill as follows, in order to fulfil South Africa’s international and regional human rights commitments and obligations:

“Positive discipline of children

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

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

⁴ Visit <https://endcorporalpunishment.org/countdown/> and <https://endcorporalpunishment.org/global-progress/> for full details.

We encourage the Government to enact this Bill to fully prohibit all corporal punishment of children, in line with its previous commitment, as urgently as possible. We would be pleased to provide further technical advice and support on all aspects of law reform to prohibit corporal punishment and the implementation of the future ban (email info@endcorporalpunishment.org).

This submission is endorsed by:

- Save the Children South Africa



- The Peace Centre



- Sonke Gender Justice



Wessel van den Berg, Children's Rights and Positive Parenting Unit Manager, and Co-coordinator at the MenCare Global Fatherhood Campaign

About the Global Initiative

The Global Initiative to End All Corporal Punishment of Children was launched in 2001 to speed action to prohibit and eliminate corporal punishment in all states. Our aims are supported by UNICEF, UNESCO, human rights institutions, and international and national NGOs. We have mapped the legality of corporal punishment worldwide and maintain detailed reports on every country in the world – see our report on South Africa attached and available [here](#) on our website. Visit our website for more information on [how we work](#).