

Corporal punishment of children in South Africa



Global Initiative to
End All Corporal Punishment
of Children

Report prepared by the Global Initiative to End All Corporal Punishment of Children (www.endcorporalpunishment.org)

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Child population

19,084,000 (UNICEF, 2015)

****South Africa is committed to reforming its laws to prohibit corporal punishment in all settings.****

South Africa's commitment to prohibiting corporal punishment

South Africa expressed its commitment to prohibiting corporal punishment in the home and other settings in accepting clearly the recommendation to do so made during the Universal Periodic Review of South Africa in 2012. The Department of Social Development supported proposals to include prohibition in the review of the Children's Act and in 2014 issued a media statement reaffirming its commitment to prohibition. In 2017, the Department sent in a submission to the High Court of Gauteng supporting the ruling of unconstitutionality of the defence of "reasonable chastisement". Most recently in 2017, the Government 'noted' (did not accept) recommendations to prohibit corporal punishment in all settings which were extended during the Universal Periodic Review. We are seeking to establish whether the Government is still committed to prohibition in all settings, including the home.

Summary of necessary legal reform to achieve full prohibition

Prohibition is still to be achieved in the home.

Under common law, parents have the power "to inflict moderate and reasonable chastisement on a child" (*R v Janke and Janke* 1913 TPD 382), and this power may be delegated to a person acting in the parent's place (except teachers and others specifically prohibited in legislation from using it in alternative care settings). A 2017 High Court decision held that the common law defence of "moderate and reasonable chastisement" was unconstitutional, but this is still to be confirmed in legislation. The near universal acceptance of corporal punishment in childrearing necessitates clarity in law that no level of corporal punishment is acceptable. The common law defence should be explicitly repealed, and prohibition enacted of all corporal punishment and other cruel or degrading forms of punishment.

Detailed country report

Current legality of corporal punishment

Home

Corporal punishment is lawful in the home. In October 2017, the High Court of Gauteng ruled that the common law defence of “reasonable or moderate chastisement” breached children’s rights upheld by the 1996 Constitution and as such was unconstitutional.¹ The common law recognised parents’ power “to inflict moderate and reasonable chastisement on a child for misconduct provided that this was not done in a manner offensive to good morals or for objects other than correction and admonition”.² This power could be delegated to a person acting in the parent’s place, though not in the case of teachers. But despite this ruling of unconstitutionality, the near universal acceptance of corporal punishment in childrearing necessitates clarity in law that no level of corporal punishment is acceptable. An explicit prohibition of all corporal punishment of children must be enacted in legislation. Freedom of Religion South Africa (FORSA), which acted as amicus curiae during the hearing, has applied for leave to appeal the decision, arguing that there is a clear and fundamental difference between moderate chastisement by a parent motivated by “love” and physical violence.³

The Children’s Act 2005 defines abuse in relation to a child as “any form of harm or ill-treatment deliberately inflicted on a child” including “assaulting a child or inflicting any other form of deliberate injury to a child” and “exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally” (art. 1), but the Act does not explicitly prohibit all corporal punishment. Similarly, provisions against violence and abuse in the Constitution 1996 and the Domestic Violence Act 1998 are not interpreted as prohibiting all corporal punishment in childrearing.

The Children’s Act was amended in 2007 to provide for prevention and early intervention programmes which must focus on, among other things, “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” (art. 144(1)(b)); a clause which would have prohibited corporal punishment in the home was removed from the Amendment Bill before it was passed by Parliament, pending further investigation.

The Government signalled its commitment to law reform in accepting the recommendation to prohibit corporal punishment in the home and other settings made during the Universal Periodic Review (UPR) of South Africa in 2012⁴ and in the support of the Department of Social Development for proposals to include explicit prohibition made in the context of the review of the Children’s Act. The Government reiterated its intention to prohibit corporal punishment in 2014.⁵ Amendments to the Children’s Act were drafted which would explicitly prohibit all corporal punishment and repeal the common law defence of “reasonable chastisement”. But in May 2015, the Minister of Social Development tabled the Children’s Amendment Bill and the Children’s Second Amendment Bill in Parliament, neither of which includes prohibition of corporal punishment or repeal of the “reasonable chastisement” defence. According to the South African Human Rights Commission, the purpose of the Bills was primarily to align the Children’s Act with Constitutional Court judgments, and a Children’s Third Amendment Bill addresses corporal punishment in the home though there are no

¹ *YG v. The State*, High Court of Gauteng Local Division, Case No. A263/2016

² *R v Janke and Janke* 1913 TPD 382

³ See <https://www.iol.co.za/news/south-africa/gauteng/ngo-seeks-leave-to-appeal-spanking-judgment-11951332>, accessed 13 November 2017

⁴ 9 July 2012, A/HRC/21/16, Report of the working group, para. 124(88)

⁵ National Department of Social Development, Media Statement, 3 June 2014

indications when this Bill will be published for public engagement.⁶ The prohibition clause proposed in this Third Amendment Bill states that “no child may be subjected to corporal punishment or be punished in a cruel, inhuman or degrading way” and “the common law defence of reasonable chastisement ... is hereby abolished”: it was expected to be tabled in 2016.⁷ As at March 2018, it has not yet been introduced in Parliament. The Government’s 2017 report to the African Committee of Experts on the Rights and Welfare of the Child mentioned a Child Protection Policy being developed as a first step towards the amendment of the Children’s Act to prohibit corporal punishment in the home. However, the report also stated that “further indigenous research is still needed to obtain objective views”.⁸

On 21 January 2016, the South African Human Rights Commission published its decision on a complaint brought against the Joshua Generation Church concerning its promotion of corporal punishment by parents in “disciplining” children.⁹ The Commission ruled against the Church and, in doing so, called on the state to meet its human rights obligations by initiating law reform to prohibit corporal punishment in the home.

The Government ‘noted’ recommendations to prohibit corporal punishment in all settings during the Universal Periodic Review in September 2017.¹⁰ Also in 2017, the Department of Social Development sent in a written submission to the High Court of Gauteng supporting the view that reasonable chastisement was incompatible with the Constitution and referring to a draft policy promoting a ban on corporal and humiliating punishment of children in all settings, together with the promotion of positive discipline. South Africa is a Pathfinder country with the Global Partnership to End Violence Against Children, which was established in 2016. This commits the Government to three to five years of accelerated action towards the achievement of Target 16.2 of the Sustainable Development Goals. In this context, we are seeking to clarify whether the Government is still committed to prohibition in all settings, including the home.

Alternative care settings

Regulations under the Children’s Act 2005 explicitly prohibit corporal punishment and other forms of humiliating and degrading punishment in foster care (art. 65), cluster foster care schemes (art. 69) and child and youth care centres (arts. 73 and 76). National Norms and Standards for Drop-In Centres states that corporal punishment should not be used (s1).

Day care

National Norms and Standards for Early Childhood Development Programmes (s3) state that corporal punishment should not be used and it is prohibited in preschool and educational day care provision under education legislation (see under “Schools”).

⁶ South Africa Human Rights Commission, communication with the Global Initiative, October 2015

⁷ Information provided to the Global Initiative, November 2015

⁸ [2017], Second report to the African Committee of Experts on the Rights and Welfare of the Child, paras. 8(e), 153 and 157

⁹ *South African Human Rights Commission in the matter between Adrian Mostert, Hannah Mostert, Sonke Gender Justice and Carol Bower (Complainants) and Joshua Generation Church (Respondent)*, File Ref. No.: WP/1213/0887, published 21 January 2016

¹⁰ 19 September 2017, A/HRC/36/16/Add.1, Report of the working group: Addendum, para. 32

Schools

Corporal punishment is prohibited in schools in the South African Schools Act 1996 (art. 10): “(1) No person may administer corporal punishment at a school to a learner. (2) Any person who contravenes subsection (1) is guilty of an offence and liable on conviction to a sentence which could be imposed for assault.” Prohibition is also included in the National Education Policy Act 1996 (art. 3) and the Further Education and Training Colleges Act 2006 (art. 16). In 2000, the Constitutional Court dismissed a bid by 196 Christian schools to make an exception to the prohibition on grounds of religious conviction.¹¹

Penal institutions

Corporal punishment is unlawful as a disciplinary measure in penal institutions. The Correctional Services Second Amendment Act 1996 abolished disciplinary corporal punishment in prisons in respect of civil debtors, though there is no explicit prohibition of corporal punishment in the Correctional Services Act 1998. Regulations under the Children’s Act 2005 explicitly prohibit corporal punishment in child and youth care centres and put a duty on the manager and staff of such centres to promote positive discipline (arts. 73 and 76). The Child Justice Act 2008 states that in applying the Act “the rights and obligations of children contained in international and regional instruments, with particular reference to the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child” must be taken into account (art. 3(i)).

Sentence for crime

Corporal punishment is prohibited as a sentence for crime under the Abolition of Corporal Punishment Act 1997, enacted following a Constitutional Court judgment in 1995 that whipping is unconstitutional, stating that “at this time, so close to the dawn of the 21st century, juvenile whipping is cruel, it is inhuman and it is degrading” and “[a] culture of authority which legitimates the use of violence is inconsistent with the values for which the Constitution stands”.¹² The judgment also states: “There is no dignity in the act [of corporal punishment] itself; the recipient might struggle against himself to maintain a semblance of dignified suffering or even unconcern; there is no dignity even in the person delivering the punishment. It is a practice which debases everyone involved in it.”¹³ There is no provision for corporal punishment in the Child Justice Act 2008.

Universal Periodic Review of South Africa’s human rights record

South Africa was examined in the first cycle of the Universal Periodic Review in 2008 (session 1). The following recommendation was made:¹⁴

“Recommended to South Africa to commit not only to removing the defence of reasonable chastisement but also to criminalizing corporal punishment with the concomitant pledges towards raising awareness and providing the necessary resource to support parents in adopting positive and alternative forms of discipline (Slovenia)”

The Government neither accepted nor rejected the recommendation, stating that corporal punishment in the home is addressed under existing legislation on domestic violence.¹⁵

¹¹ *Christian Education South Africa v Minister of Education*, 2000 (4) SA 757 (CC)

¹² *S v Williams et al*, 1995 (3) SA 632 (CC), para. 52

¹³ *S v Williams et al*, 1995 (3) SA 632 (CC), para. 89

¹⁴ 23 May 2008, A/HRC/8/32, Report of the working group on the Universal Periodic Review: South Africa, para. 67(1)

Examination in the second cycle took place in 2012 (session 13). The following recommendation was made:¹⁶

“Prohibit and punish corporal punishment both in the home, as well as in public institutions such as schools and prisons (Mexico)”

The Government accepted the recommendation but implied that existing law is adequate, stating: “Corporal punishment is outlawed in the South African government system and perpetrators of this inhumane form of punishment and violence are reported to law enforcement and accordingly punished.”¹⁷

South Africa’s third cycle examination took place in 2017 (session 27). The following recommendations were made:¹⁸

“Adopt legislation to prohibit all forms of corporal punishment in the private sphere (Israel);

“Expedite the adoption of legislation to prohibit all forms of corporal punishment in the home, including “reasonable chastisement” and ensure that those who perpetrate corporal punishment are held accountable (Liechtenstein)”

The Government ‘noted’ (did not accept) the recommendations, explaining generally that ‘noted’ recommendations were those “which South Africa is in the process of considering and cannot commit to at this stage”.¹⁹

Recommendations by human rights treaty bodies

Committee on the Rights of the Child

(27 October 2016, CRC/C/ZAF/CO/2, Concluding observations on second report, paras. 35 and 36)

“The Committee welcomes the prohibition of corporal punishment of children in detention and in alternative care settings under the Children’s Act, of 2005. However, it is concerned that corporal punishment in the home has not been prohibited and is widely practised, and that corporal punishment in schools persists in practice despite the legal prohibition. The Committee is also concerned about the lack of data on incidents of corporal punishment in childcare facilities.

“With reference to its general comment No. 8 (2006) on the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment, the Committee recommends that the State party:

(a) Expedite the adoption of legislation to prohibit all forms of corporal punishment in the home, including “reasonable chastisement”;

(b) Develop, adopt and implement a national strategy to prevent and eradicate all forms of corporal punishment;

(c) Strengthen its efforts to raise the awareness and build the capacity of families, of communities and of professionals working for and with children, including teachers and caregivers, on positive, non-violent and participatory forms of child-rearing and discipline;

¹⁵ 23 May 2008, A/HRC/8/32, Report of the working group, para. 67(1); 1 September 2008, A/HRC/8/52, Report of the Human Rights Council on its eighth session, para. 567

¹⁶ 9 July 2012, A/HRC/21/16, Report of the working group, para. 124(88)

¹⁷ 18 September 2012, A/HRC/21/16/Add.1, Report of the working group: Addendum, annex

¹⁸ 18 May 2017, A/HRC/WG.6/27/L.14, Draft report of the Working Group, paras. 6(233) and 6(234)

¹⁹ 19 September 2017, A/HRC/36/16/Add.1, Report of the working group: Addendum, paras. 4 and 32

- (d) Regularly and systematically collect data on corporal punishment in all settings, including in the home, in schools and in childcare facilities, and use such data as a basis for effective prevention and eradication of corporal punishment;
- (e) Promote regular consultations between students and teachers on how to deal with disciplinary issues in a human rights-sensitive manner;
- (f) Ensure that those who perpetrate corporal punishment are held accountable.”

Committee on the Rights of the Child

(23 February 2000, CRC/C/15/Add.122, Concluding observations on initial report, paras. 3, 8 and 28)

“The Committee expresses appreciation for the efforts made by the State party in the area of legal reform.... [T]he Committee notes with appreciation the additional legislation enacted to bring about greater harmonization between domestic legislation and the Convention, including ... the Abolition of Corporal Punishment Act (1997)....

“The Committee appreciates the State party’s initiatives within the school environment. In this regard, it welcomes the enactment of the South African Schools Act (1996) which has led to enhanced participatory rights for children within the educational system; the right of children to choose their own language of learning (multilingualism); and the abolition of corporal punishment in schools....

“While the Committee is aware that corporal punishment is prohibited by law in schools, care institutions and the juvenile justice system, it remains concerned that corporal punishment is still permissible within families and that it is still regularly used in some schools and care institutions as well as generally within society. 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.”

Human Rights Committee

([April 2016], CCPR/C/ZAF/CO/1 Advance Unedited Version, Concluding observations on initial report, paras. 24 and 25)

“The Committee is concerned that corporal punishment in the home is not prohibited, and is traditionally accepted and widely practiced, and that it is still lawful in private education institutions and continues to be used in certain schools as a means of discipline, despite its legal prohibition (arts. 7 and 24).

“The State party should take practical steps, including through legislative measures, where appropriate, to put an end to corporal punishment in all settings.”

Committee Against Torture

(7 December 2006, CAT/C/ZAF/CO/1, Concluding observations on initial report, para. 25)

“While noting that the State party’s legislation, as well as the jurisprudence of the Constitutional Court (*S v. Williams and Others*, of 1995), prohibits corporal punishment, the Committee remains

concerned at even its infrequent use in some schools and other public institutions and at the absence of an oversight mechanism to monitor these institutions (art. 16).

The State party should ensure that legislation banning corporal punishment is strictly implemented, in particular in schools and other welfare institutions for children, and establish a monitoring mechanism for such facilities.”

African Committee of Experts on the Rights and Welfare of the Child

([October 2014], Concluding observations on initial report, paras. 34 and 35)

“The Committee appreciates the measures undertaken by the State Party to prohibit corporal punishment in all spheres of the public life of the child. The Committee also takes note of the ongoing process to amend the Children’s Act, among others, with a view to explicitly prohibit corporal punishment in the home setting.

“The Committee recommends that the State Party expedite the process of amending the Children’s Act to explicitly ban corporal punishment in all settings including in the home. The Committee also calls upon the State Party to promote positive disciplining, to support families through awareness raising, and to train those who are working for and with children such as teachers and care givers. Moreover, the Committee advises the Government of South Africa to harmonize its national laws such as the common law which entitle parents to reasonably punish their children.”

Prevalence/attitudinal research in the last ten years

A social audit of school safety and sanitation was conducted in the Western Cape during September-November 2015, involving 912 learner questionnaires, 220 administrator interviews, and 229 physical inspections. The audit found that despite a ban on corporal punishment in South African schools, learners are beaten at 83% of schools sampled. Learners report that it occurs daily in 37% of schools and at least once a week in 59% of schools. Of the learners sampled, 64% have personally been abused or seen a fellow learner abused by a teacher weekly, and 30% experience or witness corporal punishment daily. Of the schools with corporal punishment, learners report teachers using a weapon (stick, baton, pipe, etc) to abuse them in 91% of these schools. The most common means of assault by teachers on children in their charge is with a ruler or other small stick (75%), their open hand or fist (61%), or a pipe (44%).

(Equal Education (2016), *Of “Loose Papers and Vague Allegations” A Social Audit Report on the Safety and Sanitation Crisis in Western Cape Schools*, Western Cape: Equal Education)

The General Household Survey 2015 found that nationally 11.3% of children experienced corporal punishment at school in 2015, down from 16.7% in 2011. Corporal punishment was most prevalent at schools in KwaZulu-Natal (20.2%), Eastern Cape (16.7%) and North West (13.6%), and was least likely to occur in Western Cape (1.7%) and Gauteng (2.7%).

(Statistics South Africa (2016), *General Household Survey 2015*, Pretoria: Statistics South Africa)

The number of complaints relating to corporal punishment in South African schools has increased in the past two years, despite being outlawed. The South African Council of Educators (SACE) received 245 reports of corporal punishment against teachers in the 2014-2015 financial year, compared to 202 reported cases in 2013-2014. The organisation has conducted 36 investigations in the last year, all of which resulted in disciplinary hearings; 30 teachers were convicted for administering corporal punishment while the rest received advisory notes or letters. It is unclear whether corporal punishment or reporting of it is on the rise, as more people become aware of SACE and its functions.

(Reported in “Corporal punishment rising”, *The New Age*, 17 September 2015, <http://thenewage.co.za/>)

Nationally, 244 complaints of misconduct for corporal punishment were filed against educators between April 2014 and February 2015 (out of a total of 525 complaints of misconduct).

(Parliamentary response, reported in "Tardy pupils 'beaten with pipes'", *IOL News*, 29 June 2015, www.iol.co.za)

The General Household Survey 2014 shows that 13.5% of children attending school in South Africa experienced corporal punishment, despite a ban. Regionally, corporal punishment at school was found to be most prevalent in the Eastern Cape and KwaZulu-Natal, with 21% of school-going children experiencing corporal punishment; this figure was at 12% in Limpopo, 11% in the Free State and the Northern Cape, 10% in North West, 5.8% in Mpumalanga, 3.3% in Gauteng and 2.8% in the Western Cape.

(Statistics South Africa (2015), *General Household Survey 2014*, Pretoria: Statistics South Africa)

According to Government statistics published in 2014, 13.5% of school students experienced corporal punishment at school in 2013. School corporal punishment was most prevalent in Eastern Cape (experienced by 24.1% of school students), KwaZulu-Natal (22.2%) and Free State (16.6%).

(Statistics South Africa (2014), *General Household Survey 2013*, Pretoria: Statistics South Africa)

During the 2012-2013 financial year, the South African Council of Educators received 182 complaints about school corporal punishment.

(South African Council of Educators (2013), *Annual Report 2012-2013*, Centurion: SACE)

During the 2012-2013 financial year, the South African Human Rights Commission received 125 allegations of corporal punishment in schools, compared to 117 allegations during the 2011-2012 financial year.

(Reported in *IOL News*, 22 July 2013)

The 2012 National School Violence Study revealed the continued use of physical punishment within South African schools. Overall, a total of 49.8% of the 5,939 learners surveyed had been caned or spanked by an educator or principal. This percentage was up from 47.5% in 2008, suggesting that little headway had been made in reducing corporal punishment in schools. Provincial rates of corporal punishment ranged from 22.4% to 73.7%, with the highest levels of corporal punishment in KwaZulu-Natal (73.7%).

(Burton, P. & Leoschut, L. (2013), *School Violence in South Africa: Results of the 2012 National School Violence Study*, Cape Town: The Centre for Justice and Crime Prevention)

The 2011-2012 annual report of the South African Council for Educators (SACE) reported that 174 cases of corporal punishment were reported to SACE in 2011-2012, compared with 100 cases in 2010-2011.

(South African Council for Educators (2012), *Annual Report 2011-2012: Promoting Excellence in the Teaching Profession*, Centurion: SACE)

The Statistics SA General Household Survey 2011, which involved 30,000 households between July and September 2011, found that 17% of students in South Africa had experienced corporal punishment at school in the past year. The highest percentage of students experiencing corporal punishment was in the Eastern Cape, where there was an increase from 23% in 2010 to 30% in 2011. In Limpopo, the percentage of students experiencing corporal punishment rose from 9% in 2010 to 19% in 2011. In the Northern Cape, North West and Gauteng, the percentage of students experiencing corporal punishment declined since 2010. The lowest percentage of students experiencing corporal punishment was in the Western Cape (4%).

(Statistics South Africa (2012), *General household survey 2011*, Pretoria: Statistics South Africa)

A survey by Statistics SA revealed that the use of corporal punishment in schools declined overall between 2009 and 2010, from 17% of students experiencing corporal punishment in 2009 to 14% in 2010. However, in some areas the use of corporal punishment increased: in the Northern Cape, from 5.6% to 17.5%, and in the North West, from 12.7% to 21.7%.

(Reported in "Disturbing rise in corporal punishment – survey", *News24*, 5 May 2011, www.news24.com)

In 2008 the Centre for Justice and Crime Prevention released its report on the National Schools Violence Study, which provides a baseline from which to monitor school violence in the future. Over 12,000 students took part in the survey, as well as nearly 800 principals and educators at 245 primary and secondary schools. The study found that, despite prohibition in schools, 71% of primary school children and 47.5% of secondary school children experienced corporal punishment. Rates of corporal punishment varied by province, with 90% of primary school educators or principals in the Northern Cape using corporal punishment, 81% in Limpopo and 78% in the Eastern Cape. Secondary school principals and educators were most likely to use corporal punishment in the Free State (61.8%), Gauteng (61%) and the Eastern Cape (58.5%). The report notes a strong correlation in provinces between high rates of corporal punishment and use of violence by students. Almost half (47.3%) of primary school children suffered corporal punishment in the home. Students who experienced corporal punishment at home were more likely to report experiencing violence at school than those who did not experience corporal punishment at home.

(Burton, P. (2008), *Merchants, Skollies and Stones: Experiences of School Violence in South Africa*, Cape Town: Centre for Justice and Crime Prevention, www.cjcp.org.za/admin/uploads/NSVS-final-internet-ready.pdf, accessed 1 July 2010)

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