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Ms Tshivhase
Chairperson
Portfolio Committee on Social Development
Parliament

07 June 2007

Honourable Chair and Members of the Committee

RE: Submission on Children's Amendment Bill Clause 139 "Discipline of Children"

Please find attached a brief submission relating to the abovementioned clause in the Children's Amendment Bill. The submission is made by a collection of organisations that focus on the realisation of children's rights.

Our submission commends the NCOP on its approach to the issue of discipline of children. We note that the prohibition on corporal punishment of children is an important step. In addition we support provisions relating to education on positive discipline and the emphasis on prevention and early intervention.

It is our position that the prosecution of parents is not always in the best interests of children and we thus support the intention of clause 139(7) which upholds the principle of ensuring that parents are not prosecuted as a first resort. However we are concerned with the current formulation of this clause which states that prosecution of a parent may only be instituted if the punishment constitutes abuse of a child. We feel this confuses subsections (2) and (3) and effectively means that children will still not have equal protection under the law. We note that in all assault cases the legal principle that the law does not concern itself with trivial matters applies and that this principle can be applied equally to adults and children who are victims of assault.

We recommend that the wording of sub clause (7) be amended to state that prosecution of a parent should only be instituted if this is in the best interests of the child. We believe that this revision will allow for prosecution of serious cases where it is necessary as well as for early intervention strategies in cases where that will be of more benefit to the child and the family.

We thank you for your attention to this matter. Please don't hesitate to contact me should you require any further information on the issue.

Yours Sincerely

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SUBMISSION¹ TO THE PORTFOLIO COMMITTEE ON SOCIAL DEVELOPMENT ON THE CHILDREN'S AMENDMENT BILL: DISCIPLINE OF CHILDREN

This submission is made on behalf of the Sub-Group on Corporal Punishment and Positive Discipline, a sub-group of the Children's Bill Working Group. Membership of the sub-group includes:

Centre for Child Law, University of Pretoria
Childline South Africa
Community Law Centre, University of the Western Cape
Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN)
Management of Schools Training Programme (MSTP)
Mthatha Child Abuse Resource Centre (UCARC)
Save the Children Sweden
South African Council of Churches

1 Introduction

The Sub-Group on Corporal Punishment and Positive Discipline has noted with appreciation that the Children's Act Amendment Bill contains a clause [139 (2)] which expressly prohibits the corporal punishment of children. We wish to acknowledge and commend the far-sightedness of the decision-makers in taking this stand.

2 In response to clause 139

We are particularly pleased to note the wording that the Select Committee has approved, referring as it does to "discipline of children" rather than "punishment", and to note that the common law defence of "reasonable chastisement" has been abolished. We also commend the NCOP on its stance with regard to education and awareness-raising around issues of appropriate discipline.

We further commend the Select Committee on the emphasis on prevention and early intervention evidenced in the wording of this clause.

3 A concern

We do, however, have one concern about the wording of the clause. This is the reference in 139 (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* (our italics)".

Our concern relates to the use of the term "abuse of a child". Firstly, it is the right of all children (as it is of all adult South Africans), to be protected from all forms of physical and mental violence from either public or private sources. They therefore have a right not to be subject to physical discipline – and any physical attack on another person is a violation of their rights under the Constitution and under international law, including the Convention on the Rights of the Child. This constitutes assault. The requirement that the punishment must constitute "abuse" before prosecution is instituted undermines children's right to equal protection under the law.

We do concur with the view that decisions to prosecute parents for less serious assaults on their children need to be taken very carefully and in the best interests of children, however we caution against stating a defence in the law. Our law as it stands already deals with those instances where it will not be appropriate to institute criminal proceedings. This relates to the principal in our law of *de minimis curat lex* - the law does not concern itself with that which is trivial.

Then, the use of the word "abuse" in this context tends to affirm the notion that some arbitrary level of corporal punishment is acceptable. This notion is very entrenched in South African society – the

¹ Submission Drafted by Carol Bower

members of the Sub-Group have all experienced situations in which they are challenged as to whether or not parents have the right and duty to administer physical punishment to their children AS LONG AS THEY DO NOT ABUSE THE CHILD. Thus, we are concerned that parents and others who have care of children can interpret this clause as meaning that physical punishment is acceptable as long as it does not go too far. This will undermine the intention of clause 139(2) and 139(3) which clarify the position and create confusion regarding what is and is not acceptable, extending the existing grey area that leaves children more vulnerable to abuse. In effect it could be interpreted as re-introducing a defence of "non-abusive" corporal punishment.

4 Suggested wording for clause 139 (7)

Our suggested wording is based on the advice in the Committee on the Rights of the Child's General Comment No. 8 on "The right of the child to protection from corporal punishment", paras. 40 – 42.

139 (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~~ this is in the best interests of the child.

5 Conclusion

We would like to respectfully suggest that the wording of clause 139 be adjusted to ensure the rights of children and to create the space we need, as government and non-governmental organisations, to work towards a society which protects the rights of all its citizens – including the little ones.