SUBMISSION BY THE CENTRE FOR CHILD LAW ON THE CHILDREN'S BILL AND THE ISSUE OF CORPORAL PUNISHMENT

The Centre for Child Law is a non-governmental organization based at the University of Pretoria. The Centre undertakes litigation work relating to children rights.

1. Introduction

In 2005 the Centre for Child Law represented a fourteen year old girl who murdered her four year old half-sister. She was assessed by a psychologist who found that she had been subjected to severe corporal punishment by her mother over an extended period of time. She had tried to run away several times, but was always taken back, she had told other people but no-one helped her. In a terrible and desperate act, she turned the violence towards her younger sister. Her explanation was that she wanted to get the message to her mother not to hit her anymore. The child was charged with murder and pleaded guilty. Her mother has never been charged for assaulting her. If she was charged, she would have a special defence under our common law, which is called the "defence of reasonable chastisement". This means that if a parent can convince the court that they were acting reasonably to chastise or punish a child, he or she may be acquitted. This case illustrates that children who are treated violently may themselves become violent. Indeed, they may come to see violence as the only solution.

The above example is very extreme, but every day children are being exposed to corporal punishment. Also last year, the Centre for Child Law assisted two little boys whose parents were murdered by car hi-jackers some years before. The parents' will allocated guardianship to an uncle and aunt who unfortunately were physically and psychologically abusive to the children. The children were eventually removed through the intervention of a social worker and placed with other family members. The adults were not charged, though the abuse had been going of for years. If they had been charged, they would have been able to rely on the defence of reasonable chastisement.

2. What should be included in the Children's Bill/ Act?

It is clear from stories like those above that our law needs to help children in these situations. What should be included in the Children's Bill to ensure that they are assisted?

2.1 An examination of Section 139

Section 139 of the Children's Bill says the following:

139. (1) A person who has control of a child, including a person who has parental responsibilities and rights in respect of the child, must respect to the fullest extent possible the child's right to physical integrity as conferred by section 12 (1) (c), (d) and (e) of the Constitution.

It is important to look at those sections of the Constitution to see what is being said here.

Section 12(1)(c) provides everyone the right “to be free from all forms of violence from either public or private sources”. The inclusion of the words “private sources” means that people should be protected from violence in their own homes and families.

Section 12(1)(d) says that every person has the right “not to be tortured in any way”, and section 12(1)(e) says that every person has the right “not to be treated or punished in a cruel, inhuman or degrading way”.

The Centre for Child Law is of the view that clause 139, especially with its references to the Constitution is a good clause that should be maintained. It is also reflective of the national and regional instruments which South Africa has ratified.

The United Nations Convention on the Rights of the Child provides, at Article 19, that children should be protected from

“all forms of physical or mental violence, injury or abuse, neglect or negligent treatement, 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”.

The African Charter on the Rights and Welfare of the Child has a similar provision at Article 16:

“States Parties to the present Charter shall take specific legislative, administrative, social and education measures to protect the child from all

forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatement including sexual abuse while in the care of a parent, legal guardian or school authority …".

2.2 Defence of "reasonable chastisement" should be done away with

The Centre is of the view, however, that clause 139 of the Children's Bill does not go far enough. Our concern lies with the fact that a very ancient English law concept remains part of our common law. This is called the "defence of reasonable chastisement". This is a rule which says that if a parent is charged with assaulting his or her child, then the parent can raise a special defence – that he or she did hit the child, but that this was excusable because it was done as part of "reasonable chastisement".

No other person has such a defence other than a parent. So if a child hits another child, for instance, that child must face the full consequences of the law (if he or she is old enough to have criminal capacity).

In the view of the Centre it is unacceptable that parents who beat their children should be given the benefit of a special defence under the law. We believe that parents should be put on the same footing as all other people. If they hit their children, and are charged, they should not have a special defence. Our view is based on children's constitutional right to be treated with dignity, and that they have the right to have at least the same protection in law

as other people do. In fact, they actually deserve increased legal protection because they are young and vulnerable.

This is not only the view of the Centre, but is an internationally held view by many organizations that protect children's rights. The United Nations Committee on the Rights of the Child, which is the body to which all countries that have ratified the Convention must present regular reports, has recently issued a General Comment[1] about corporal punishment of children. On page 10 of that document the following is said:

"In its examination of reports, the Committee has noted that in many States there are explicit legal provisions in criminal and/or civil (family) codes which provide parents and other carers with a defence or justification for using some degree of violence in 'disciplining' children. For example, 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 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) which allow some degree of violence against children (e.g. 'reasonable' or 'moderate chastisement or correction), in their homes/families or any other setting."[2]

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[1] The UN Committee on the Rights of the Child from time to time issues a "General Comment" on matters that they consider to be very important. At the Committee's 42nd session in May 2006, it adopted a new General Comment on Corporal Punishment.

[2] Emphasis not in the original text, highlighted here to demonstrate the Committee's insistence that the Convention requires such legal rules to be removed.

The Centre for Child Law recommends the following wording to be added to the Children's Bill, as section 139(2):

"The common law defence of reasonable chastisement available to persons referred to in subsection 139(1) in any court proceeding is hereby abolished".

2.3 The primary aim is not to educate, not punish

Some people may be worried that doing away with the "defence of reasonable chastisement" will result in many parents being brought before the courts to face charges. This is very unlikely, because it is possible to charge parents under the current law, but in reality this is not often done. It is also not the intention to criminalize parents, but rather to place children on the same footing with adults as far as their legal protection is concerned. Again it is useful to consider the General Comment[3] from the United Nations Committee on the Rights of the Child (p 12-13):

> "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

[3] See note 1 above.

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."

With this in mind it is important that methods of positive discipline should be instilled. The current clause 139 (4) refers only to the Department (meaning the Department of Social Development). It is proposed that the Department of Education and the Department of Health should also be involved in ensuring eduation and awareness raising with regard to positive discipline methods.

The following further clauses are recommended for inclusion in section 139(4):

<u>Reports of persons who subject children to inappropriate punishment must be referred to a designated social worker for and investigation contemplated in section 155(1)(i) in order to establish if the child is need of care and protection.</u>

<u>A parent, care-giver or any person holding parental responsibilities and rights is 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.</u>

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

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

(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.

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