

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: CCT 320/17

In the matter between:

FREEDOM OF RELIGION SOUTH AFRICA Applicant

and

**MINISTER OF JUSTICE
AND CORRECTIONAL SERVICES** 1st Respondent

MINISTER OF SOCIAL DEVELOPMENT 2nd Respondent

**NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS** 3rd Respondent

YG 4th Respondent

THE CHILDREN'S INSTITUTE 5th Respondent

THE QUAKER PEACE CENTRE 6th Respondent

SONKE GENDER JUSTICE 7th Respondent

and

THE PARENT CENTRE 1st Amicus Curiae

**THE GLOBAL INITIATIVE TO END ALL
CORPORAL PUNISHMENT OF CHILDREN** 2nd Amicus Curiae

**DULLAH OMAR INSTITUTE FOR CONSTITUTIONAL
LAW, GOVERNANCE AND HUMAN RIGHTS** 3rd Amicus Curiae

AMICI CURIAE'S WRITTEN SUBMISSIONS

INTRODUCTION

1. The applicant's case hinges on a handful of legal and factual claims. It maintains that the common law should not be developed to abolish the defence of reasonable chastisement for the following reasons:

1.1. First, there is no evidence that reasonable physical chastisement is harmful to children or contrary to their best interests.¹ By contrast, it argues that the abolition of the defence would have a clear and detrimental effect on parents' rights to discipline their children as they see fit.

1.2. Second, there is no evidence that the common law defence of reasonable chastisement contributes in any way to child abuse in South Africa.²

1.3. Third, positive parenting is ineffective and does little to curb misbehaviour. It does not prepare children for the harsh reality of life or the punitive consequences of wrongful or illegal behaviour.³ Therefore, banning physical chastisement leaves parents with no effective tools for disciplining their children.

¹ FORSA Heads of Argument, p 8, para 17.

² FORSA Heads of Argument, p 9, para 20.

³ FORSA Heads of Argument, p 9 - 10, para 22.

1.4. Fourth, positive parenting and discipline is a luxury that is not available to families who live in poor areas and overcrowded accommodation.⁴

1.5. Fifth, the abolition of the defence of reasonable chastisement may criminalise responsible parents who love their children and only want what is best for them.⁵

2. These claims are wrong in law and fact. The first and second claims have been disproved by the CCL respondents (the fifth to seventh respondents).⁶ These submissions address and refute the third to fifth claims.⁷ We address each claim in turn.

POSITIVE PARENTING IS EFFECTIVE

3. The applicant asserts that positive parenting and non-violent punishment is ineffective and cannot prepare children for the punitive consequences of wrongful and/or illegal behavior.⁸ This betrays a fundamental misunderstanding of the nature of positive parenting and positive discipline.

⁴ FORSA Heads of Argument, p 10, para 23.1.

⁵ FORSA Heads of Argument, p 10, para 23.2.

⁶ Fifth to Seventh Respondents Heads of Argument.

⁷ The First to Third Amici (“the amici”) were admitted as *amici curiae* by order of this Court dated 9 November 2018.

⁸ Many expressed similar sentiments after South African Schools Act of 1996 outlawed corporal punishment in schools. This response is captured by a letter to ‘The Teacher’ (April 1999, p. 19):

“In the past, when you had the option of giving a hiding, the children were far more likely to behave and listen. I really dread to think of the caliber of adults we are going

4. Positive parenting involves the use of parenting techniques to effect behavioural change, including: emotional communication, specific labelled praise, simple tangible rewards, established household rules, problem solving, realistic consequences and positive instruction giving. These techniques improve outcomes in parenting such as: increased skills in positive parenting, improved monitoring and supervision, consistent limit-setting behaviour, reduced harsh or intrusive punishment, and improved skills in non-violent disciplining techniques. What the research shows is that improved parenting skills may directly improve outcomes for children including reduced child behaviour problems and improved socio-emotional regulation.⁹
5. In more practical terms, positive parenting includes positive reinforcement and involvement, warmth and affection and consistent non-violent discipline.¹⁰
 - 5.1. It requires parents to stop and think about their child's behaviour, to attempt to understand the reasons or factors influencing that behaviour

to be producing in the next ten years. I fear New Age philosophy is slowly eating away at the core of our moral fibre and destroying our children's lives."

Dawes, A *et al* (2004) *Partner violence, attitudes to child discipline and use of corporal punishment: A South African national survey* Cape Town: Child, Youth and Family Development, Human Sciences Research Council, p 32 (Bundle of Authorities, p 111). Over 20 years have passed since the abolition of corporal punishment in schools. The prediction that adults emerging from the school system would lack moral fibre or discipline has not come to pass.

⁹ Lachman, J M *et al* 'Integrating evidence and context to develop a parenting program for low-income families in South Africa' (2016) *Journal of Child and Family Studies* (Bundle of Authorities, p 226 and Fig. 1 at 227).

¹⁰ *Ibid*, (Bundle of Authorities, p 224).

and to react accordingly (rather than simply hitting the child). A useful example is a toddler who attempts to stick his or her fingers into the holes of a plug-point. The child acts this way out of curiosity, which is normal for his or her stage of development. The child does not act in this manner out of a desire to be spiteful, naughty or manipulative. If a parent hits the child in such circumstances, the child will be confused and will only learn that they must not stick their fingers into plug-points while their parent is present (rather than that plug points are dangerous). A better approach is to cover the plug points when they are not in use.

5.2. If the child is older and capable of verbal communication, the parent is encouraged to talk to the child, listen to their explanation, attempt to understand their feelings or motivations and reason with them. The parent should explain the impact of the child's behaviour on others. If this does not work, the parent may use non-violent forms of discipline such as withdrawing a privilege (for example, refusing permission for the child to visit his or her friends for the day or week).

5.3. Positive discipline must be coupled with positive parenting. This involves positive reinforcement when the child behaves well and maintaining open communication with the child. It encourages the parent to see the child as a person, rather than a subordinate, and to treat them with empathy and respect. This is consistent with the approach adopted in the Convention

on the Rights of the Child, which moves children from the status of objects to be cared for, to persons with rights of their own that must be articulated and enforced.¹¹

5.4. The aim of positive parenting and discipline is to develop an ethos or inner conviction in the child that will ensure that they behave well, even when their parents are not present.¹² It builds feelings of confidence and assertiveness rather than feelings of helplessness and humiliation (which are associated with physical chastisement).¹³

6. There is no persuasive evidence that children who are protected from physical violence become unmanageable anti-social adults or adolescents. On the contrary, many researchers argue that corporal punishment is ineffective and may be linked to negative outcomes for children. While the immediate effects may be compliance on the part of the child, the risk is that the child will not internalize the very morals and values that parents are attempting to teach them. Moreover, the researchers argue, corporal punishment serves to erode the parent-child relationship by inciting children to fear rather than trust their

¹¹ Polonko KA, Lombardo LX and Ian M. Bolling 'Law Reform, Child Maltreatment and the UN Convention on the Rights of the Child' (2016) *The International Journal of Children's Rights* Vol 24, Issue 1, p 30.

¹² Lachman, supra note 9, (Bundle of Authorities, p 224).

¹³ Dawes, supra note 8, p 41 (Bundle of Authorities, p 120)

parents.¹⁴ Gershoff *et al* maintain that spanking is not effective in addressing behavioral problems in children:

“Our findings are consistent with conclusions from a number of other longitudinal studies and with findings from several meta-analyses that have linked spanking with more, rather than fewer, behavior problems in children. Taken together, these studies meet the three criteria for reaching a causal conclusion that spanking predicts more behavior problems in children. Researchers who continue to insist that spanking is effective in promoting better child behavior do so in defiance of accumulated research evidence” (citations not included)¹⁵

7. On the other hand, studies show that children who are positively parented are more likely to likely to achieve their developmental potential, learn pro-social skills, and make a meaningful contribution to society. They are also more likely to transfer these skills to their own children, thus strengthening

¹⁴ Dawes, *supra* note 8, p 41 (Bundle of Authorities, p 120). See also Robinson, D H *et al* ‘Changing beliefs about corporal punishment: Increasing knowledge about ineffectiveness to build more consistent moral and informational beliefs’ (2005) *Journal of Behavioural Education* 117, p 118 (Bundle of Authorities, p 288).

¹⁵ Gershoff, E T *et al* ‘Strengthening causal estimates for links between spanking and children’s externalizing behaviour problems’ (2018) *Psychological Science* 110, p 118 (Bundle of Authorities, p 186, paragraph 1).

the intergenerational transfer of positive parent–child relationships and child development.¹⁶

POSITIVE PARENTING IS ACCESSIBLE

8. The applicant reduces positive parenting to sending a child to sit in a naughty corner or to taking away a privilege. It argues that poor families do not have such luxuries.¹⁷ As is explained above, this fundamentally misconstrues positive parenting and positive discipline. Positive parenting does not require material aids or expensive tools. It is about the relationship between the parent and child.
9. Socio-economically disadvantaged families do generally face a higher degree of stressors and challenges which elevate the risk of child maltreatment.¹⁸ However, this indicates a need for parenting programmes to empower parents as opposed to seeking a simple solution of physical punishment. Indeed, the risks already faced by children of socio-economically disadvantaged families support the promotion of alternative forms of non-violent punishment. There is evidence that positive parenting can buffer the effects of poverty on children.¹⁹

¹⁶ Lachman *et al* supra note 9 (Bundle of Authorities, p 224). Gould, C and Ward, C L ‘*Positive parenting in South Africa: Why supporting families is key to development and violence prevention*’ (2015) Institute for Security Studies, page 5 (Bundle of Authorities, p 195).

¹⁷ FORSA Heads of Argument, p 10, para 23.1.

¹⁸ Dawes, supra note 8, p 34 (Bundle of Authorities, p 113).

¹⁹ Gould and Ward, supra note 16, at p 5, Bundle of Authorities p 193.

10. The Parent Centre (the First *Amicus Curiae*) has had significant success in teaching positive parenting techniques to parents from poor communities on the Cape Flats.²⁰ Similarly, Knerr *et al* state that studies from South Africa, Pakistan and, to some extent, Brazil provide examples of high quality implementation of positive parenting programmes in low-resource settings, as well as showing a beneficial impact on parenting outcomes.²¹ The evidence shows that positive parenting programmes that are effective in high-income contexts can be equally effective with the most disadvantaged families.²²
11. It is critical that public education programmes of this kind are offered widely, in order to assist parents to find effective and reliable alternatives to physical chastisement. (thereby reducing reliance on and support for corporal punishment).²³ The State is under an obligation to fund and/or provide such programmes. Chapter 8 of the Children’s Act,²⁴ (particularly section 144) stipulates that the State must provide prevention and early intervention programmes that focus on:

²⁰ Application for admission as *Amici Curiae*, para 8 – 13.

²¹ Knerr, W *et al* ‘*Improving positive parenting skills and reducing harsh and abusive parenting in low- and middle-income countries: A systematic review*’ (2013) *Prevention Science* at page 17 (Bundle of Authorities paginated page 213).

²² Gould, *supra* note 16 at page 5, Bundle of Authorities p 193; Knerr, *supra* note 21, at page 4, Bundle of Authorities p 200-201.

²³ Boyson, R and Thorpe, L (2002) *Equal protection for children: An overview of the experience of countries that accord children full legal protection from physical punishment* National Society for the Prevention of Cruelty to Children (“**Boyson and Thorpe**”) at p 67 (Bundle of Authorities: p 71); Dawes, *supra* note 8, at p 10 (Bundle of Authorities, p 89.)

²⁴ Act 38 of 2005.

11.1. Developing appropriate parenting skills and capacity of parent and care-givers to safeguard the well-being and best interests of children, including the promotion of positive, non-violent forms of discipline; and

11.2. Promoting appropriate interpersonal relationships within the family.

12. If the State fulfils its obligations in this regard, there is no reason why parents in poor communities will be unable to practice positive parenting.

CRIMINALISATION OF PARENTS

13. The applicant raises the spectre that the state will involve itself unnecessarily in family life and that hundreds of parents will be imprisoned or criminalised for minor transgressions.²⁵ Such fears are unfounded.

14. The CCL respondents have explained that prosecutorial discretion and the *de minimis non curat lex* principle will act as a filter against the prosecution of petty or trivial charges.

15. In addition, there is no evidence to suggest that countries that protect children from physical punishment have experienced an increase in the prosecution of parents for minor lapses. A study covering a number of countries that have prohibited the physical chastisement of children in the home (Sweden, Finland, Denmark, Norway, Austria, Cyprus, Latvia, Italy and Israel) found that none of

²⁵ FORSA Heads of Argument, paras 42 and 85.

those countries experienced a significant increase in such prosecutions.²⁶ In some countries, cases of physical chastisement are generally addressed through the intervention of social workers and referral to support and preventative services, rather than criminal prosecutions (e.g. Sweden, Finland and Cyprus). In other countries, it appears that prosecutors exercise their discretion against trying minor transgressions.²⁷ A table capturing the findings in relation to these countries is attached to these submissions as Annexure “A”.

16. A 2013 study on the impact of the ban on corporal punishment in New Zealand demonstrates a similar pattern. It shows that there were only 8 prosecutions of parents for smacking in the five years following the enactment of legislation. Over the 5-year period, 143 incidents of smacking²⁸ and 435 ‘minor acts of physical discipline’²⁹ (which include slaps to the face and head) were

²⁶ Boyson and Thorpe, supra n 23; Durrant, J E (1999) *A generation without smacking: The impact of Sweden’s ban on corporal punishment* Save the Children, p 14 (Bundle of Authorities, p 161)(“ Together, these findings clearly indicate that the corporal punishment ban has not resulted in greater criminalisation of minor assaults by parents and other adults [in Sweden]”); Durrant, J E (1999) *A generation without smacking: The impact of Sweden’s ban on corporal punishment* Save the Children, p 6 (Bundle of Authorities p 153). Modig, C (2009) *Never violence: Thirty years on from Sweden’s abolition of corporal punishment* Government Offices of Sweden and Save the Children Sweden.

²⁷ Boyson and Thorpe, supra n 23.

²⁸ Smacking is defined as “a slap with the open hand on the buttocks or legs that does not result in any form of injury”.

²⁹ A Minor Act of Physical Discipline is defined as “a slap with the open hand on any other part of the body (including the face) that does not result in any form of injury”.

reported.³⁰ In many of the cases that did not result in prosecution, parents were referred to support services.³¹

17. Rather than leading to a flood of prosecutions for minor transgressions, the abolition of the defence of reasonable chastisement may assist authorities to detect and prosecute cases of child abuse.

17.1. In Sweden, one of the arguments that influenced the law reform process was that child protection professionals could not work effectively with unclear legislation: tackling real assault against children could be difficult when it was not perfectly clear that violence in any form was not permitted.³²

17.2. The same reasoning applies in the South African context. The South African Law Commission (when considering the draft Children's Bill) recommended the removal of the common law defence of reasonable chastisement. It did so on the basis that it raised the risk that parents accused of abuse could claim parental rights as a defence and get away with the violent treatment of their child.³³

³⁰ *11th review of the Crimes (Substituted Section 59) Amendment Act 2007* (2013) New Zealand Police, Bundle of Authorities, p 1 – 4.

³¹ *11th review of the Crimes (Substituted Section 59) Amendment Act 2007* (2013) New Zealand Police, p

³² Boyson and Thorpe, *supra* n 23, p 15 (Bundle of Authorities, p 24).

³³ Dawes, *supra* note 8, p 32 (Bundle of Authorities, p 111).

18. The abolition of the defence of reasonable chastisement may also, over time, lead to a decrease in incidents of child abuse.

18.1. The line between physical punishment and physical abuse is not clear.

Most accept that these acts must be situated along a continuum. In other words, physical abuse is a potential outcome of corporal punishment, particularly where the child is beaten frequently with an object such as a stick or belt.³⁴

18.2. The research shows that when a community accepts corporal punishment, parents feel justified in using it.³⁵ Corporal punishment in the home is widely accepted and practiced in South Africa. A study conducted by the Human Sciences Research Council in South Africa shows that 33% of parents report using severe corporal punishment (i.e. beating the child with a belt or stick). The most common age of children who are smacked is 3 years old and of children who are beaten with a belt or stick is 4 years old.³⁶ It is difficult to understand how such forms of punishment are in the best interests of the child or promote the harmonious development of the child.

³⁴ Dawes, supra note 8, p 13 (Bundle of Authorities, p 92).

³⁵ Dawes, supra note 8, p 32 (Bundle of Authorities, p 111).

³⁶ Dawes, supra note 8, at p 8 and 54 (Bundle of Authorities, p 87 and 133)

18.3. In countries where the physical chastisement of children has been banned, there has been a shift in support for and the use of corporal punishment.

18.3.1. In these countries, majority public opinion was against a ban on all forms of corporal punishment of children (with the exception of Finland). However, it is clear that the prohibition, once introduced, has hastened a decline in support for and use of physical punishment.³⁷ The law reform has helped to foster a culture in which children are accorded greater respect and have greater equality and protection from violence.

18.3.2. In New Zealand, the proportion of people who think that it is acceptable to physically punish children is declining steadily. In the 1980s, over 90% of respondents agreed physical punishment was acceptable and in the 1990s, 80% agreed. In 2008, 58% agreed and in 2013, only 40% agreed.³⁸

18.4. This research suggests that the abolition of the defence of reasonable chastisement may make the public more sensitive to the violent

³⁷ Boyson and Thorpe, *supra* note 23, p 64-65, (Bundle of Authorities, 68 – 69); Durrant, J E (1999) *A generation without smacking: The impact of Sweden's ban on corporal punishment* Save the Children, p 6 (Bundle of Authorities, p 153).

³⁸ Wood, B 'Physical punishment of children in New Zealand: Six years after law reform' (2013) *EPOCH New Zealand* (Bundle of Authorities, p 311).

punishment of children. This in turn, may render its use less acceptable and less widely practiced.

CONCLUSION

19. As is clear from above, a number of the core factual claims by the applicant are unfounded. In particular, there is no basis for the assertion that positive parenting and positive discipline is ineffective, inaccessible or Euro-Centric. Furthermore, there is no factual basis for the argument that the abolition of the defence of reasonable chastisement will result in a flood of prosecutions for minor transgressions by parents.

EMMA WEBBER

Chambers, Sandton

15 November 2018

ANNEXURE A

Country	Effect of criminalisation of corporal punishment on prosecutions	Reference*
Sweden	“The ban on physical punishment has not led to parents being prosecuted in droves for ‘trivial’ incidents of assault. ... As with adult cases of assault, prosecutors exercise restraint and would not generally pursue a case that was to all extents [sic] and purposes considered petty”	Page 20 Bundle of Authorities (“BoA”) page 28
Finland	“Supportive social work interventions, rather than prosecutions, are generally considered the appropriate response for cases of child maltreatment”	Page 26, BoA page 34
Norway	Cases of parental violence towards children are handled by the child protection system. Parents who physically punish their children may be prosecuted under the criminal code for assault, and there may also be recourse to justice under the statutory prohibitions against neglect or maltreatment Use of physical punishment may influence the outcome of custody cases. There is an absence of high-profile prosecutions and a general acceptance of the ban.	Page 29, BoA page 38
Austria	Non-serious violations of the ban are not immediately liable to punishment, but are taken into account when assessing the legal relationship between children and parents, for example in custody arrangements. Assault cases related to physical punishment incidents have been brought to court but one commentator has stated that it is difficult to secure convictions, because of the difficulty of proving the injuries and the sympathy still expressed towards parents who ‘lost control’ and hit their child. Assaults on children entail a higher degree of criminal liability under Austrian law because of children’s vulnerability.	Page 32 BoA page 40
Cyprus	Support and welfare intervention is considered the appropriate response for parental physical punishment. There are few prosecutions for mild physical punishment because of the problem of obtaining evidence, and the preference for using police and court time for cases of serious abuse.	Page 34 BoA page 42

Denmark	<p>The strongest objection to the 1997 reform was that it would lead to increased supervision of family life and unreasonable sentencing of parents. The response is that this fear is unfounded. In all other groups in society (other than parents) the legislature entrusts authorities to make a sound and reasonable judgment in borderline cases, and there is no reason to suspect that 'an overzealous enforcement of the law' would occur in the area of child protection, or be allowed to thrive.</p> <p>Enquiries made to the police and prosecutors by the National Council for Children indicate that no prosecutions for 'smacking' have occurred.</p>	Page 38 -39 BoA page 47 - 48
Latvia	There appear to have been no prosecutions for 'trivial' incidents of 'smacking'.	Page 41 BoA page 49
Croatia	Not noted	
Italy	Not specifically noted, but According to Save the Children Italy, 'corporal punishment of children is not as serious a problem in Italy as it is in Great Britain'	Page 48 BoA page 54
Israel	There have been no high-profile prosecutions since the Bako decision [<i>which effectively removed the defence of reasonable chastisement</i>], nor has there been a marked increase in relevant court cases.	Page 51 BoA page 57
Germany	The report published too soon after the enactment of the German law to assess effects thereof.	Page 55 BoA page 61

*All references to: Boyson, R and Thorpe, L (2002) *Equal protection for children: An overview of the experience of countries that accord children full legal protection from physical punishment* National Society for the Prevention of Cruelty to Children