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Office of the Director of Public Prosecutions

The National Prosecuting Authority of South Africa
Igunya Jikelele Labatshutshisi baMzantsi Afrika
Die Nasionale Vervolgingsgesag van Suid-Afrika

Ref: 9/2/P
Enq: Mrs A Lotz

11 October 2007

The Portfolio Committee on Social Development
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SUBMISSION ON CHILDREN'S AMENDMENT BILL CLAUSE 139 "DISCIPLINE OF CHILDREN"

I refer to the hearings held by the Committee on the 9 October 2007, when I presented oral submissions on behalf of the NPA in respect of the abovementioned matter, and hereby submit further written submissions to supplement those already presented by me.

Although it is submitted that sub-sections 139(1), (2), and (4) are merely reinforcement of public policy, from a purely legal perspective, in order to criminalise corporal punishment, the only provision that needs to be retained in the draft Amendment Bill is sub-section 139(3) i.e. the abolishment of the common law defence of the reasonable right of chastisement. This will mean that all alleged perpetrators who have committed relevant offences may be prosecuted under Laws of South Africa since the defence of reasonable chastisement will not be available to them.

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It must be pointed out however, that the stance of the NPA is that *all* matters must be considered for prosecution where there is sufficient evidence. Prosecution may be instituted as an offence has been committed when corporal punishment is inflicted no matter how minor the infringement. There may be factors, however, that may influence the decision whether a prosecution is instituted or not. Each case needs to be decided on its own merits and in this regard prosecutors have a discretion.

Assault would not be regarded as a trivial matter by the prosecution, as the integrity of a person must also be taken into consideration when deciding to prosecute. Furthermore, the rights of the victim, in this case the child, would also have to be taken into account. However, in cases of a minor nature, alternative mechanisms of dealing with perpetrators may be considered i.e. diversion to rehabilitation programs, community service, corrective counseling, the option of an admission of guilt fine etc. The committee should also consider the extent to which matters of this nature, particularly the more trivial ones, would contribute to increasing the already high victimization rate in South Africa.

Furthermore, due consideration should also be given by the Committee to the potential constraints on the part of the South African Police Services and the Department of Social Development in matters of this nature. It is envisaged that all complaints would have to be formally investigated by the South African Police Services in the normal way (amongst others, opening of police docket, taking witness statements etc) and a probation officers report would have to be compiled in respect of each case. Also, it may be necessary to obtain psychological assessment reports for the purpose of the investigation.

Regarding the provisions of sub-section 139(7) of the Bill, a parent or person holding parental responsibilities and rights referred to in sub-section (6), may be prosecuted if the punishment constitutes abuse of the Child. This wording, in my view, undermines the earlier intention to ensure that all South African citizens receive equal protection under the law, by once again requiring a test of whether 'abuse' has been committed or not. It is recommended that either the wording of the subsection be changed as follows:

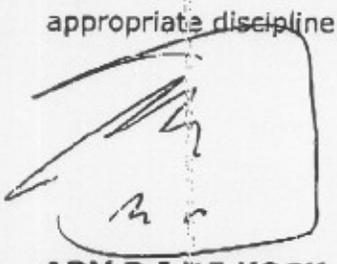
'139(7) Prosecution of a parent or person parental responsibilities and rights referred to in subsection (6) may be instituted if it is in the best interests of the child',

or that this subsection is deleted as it superfluous. It is suggested that a prosecution only be instituted if it is in the best interests of the child to do so.

The object of this act is to *"promote the preservation and strengthening of families"*. We support the provision for early intervention services that provide education and support as an alternative to prosecution, as stated in sections 139(6) and 144, in appropriate cases.

Prosecutorial policy guidelines should be developed by the NPA to assist prosecuters managing corporal punishment matters, should the Committee propose the subsection 139(3) be retained in its present form. In this event, it is suggested that that the promulgation of section 139 (3) should be delayed for a determined period of time in order to allow for the NPA to draft the guidelines in consultation with appropriate role-players who may be affected by this section i.e. South African Police Services and Social Development.

The delay in the implementation of the section will also ensure that education and awareness-raising programs concerning the effect of subsections (1), (2), (3) and (4) are implemented throughout the Republic; and *(b)* programs promoting appropriate discipline are available throughout the Republic.



ADV R J DE KOCK

DIRECTOR OF PUBLIC PROSECUTIONS: CAPE OF GOOD HOPE

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Christian Education South Africa v Minister of Education

Case CCT 4/00

Decided on 18 August 2002

Media Summary

The following media summary is provided to assist in reporting this case and is not binding on the Constitutional Court or any member of the Court.

The central question in this case is whether Parliament, by prohibiting corporal punishment in all schools, has unconstitutionally limited the religious rights of parents of children in independent schools who, in line with their religious convictions, had consented to what they termed the "corporal correction" of their children by teachers.

The appellant is a voluntary association of 196 independent Christian schools with a total of approximately 14 500 pupils. It contended that "corporal correction" was an integral part of the Christian ethos in its schools, and hence the blanket prohibition imposed by section 10 of the Schools Act should be declared invalid to the extent that it limited the individual, parental and community rights of the parents to practise their religion. The respondent, the Minister of Education, contended that it was the infliction, not the prohibition, of corporal punishment that infringed the constitutional rights of children and their rights to equality, human dignity and freedom and security of the person. Alternatively, if the prohibition limited the religious rights of the applicant, such limitation was justifiable.

Sachs J on behalf of a unanimous court said that he would assume in the appellant's favour that religious and community rights of the appellant had been limited. He said that the question then was whether such limitation was justifiable. The case raised difficult questions which required weighing considerations of faith against those of reason, and of separating out what aspects of an activity are religious and protected by the Bill of Rights and what are secular and open to regulation in the ordinary way. He stated that believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the state should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or respectful of the law.

In order to put the child at the centre of the school, he held, and to protect the learner from physical and emotional abuse, the legislature had prescribed a blanket ban on corporal punishment. The judgment emphasises that the present case does not require a decision on whether moderate corporal correction by parents in the intimate atmosphere

of the home violates the constitution. It deals only with corporal punishment in the detached and institutional environment of the school. Sachs J emphasises that he does not underestimate in any way the very special meaning that corporal correction in school has for the self-definition and ethos of the religious community in question. Yet their schools of necessity function in the public domain so as to prepare their learners for life in the broader society. Just as it was not unduly burdensome to oblige them to accommodate themselves as schools to secular norms regarding health and safety, payment of rates and taxes, planning permissions and fair labour practices, and just as they were obliged to respect national examination standards, so was it not unreasonable to expect them to make suitable adaptations to non-discriminatory laws that impacted on their codes of discipline. The parents were not being obliged to make an absolute and strenuous choice between obeying a law of the land or following their conscience. They could do both simultaneously. What they were prevented from doing was to authorise teachers, acting in their name and on school premises, to fulfill what they regarded as their conscientious and biblically-ordained responsibilities. Similarly, save for this one aspect, the appellant's schools were not prevented from maintaining their specific Christian ethos.

When all these factors were weighed together, the scales came down firmly in favour of upholding the generality of the law in the face of the appellant's claim for a constitutionally compelled exemption. The appeal was accordingly dismissed.

Sachs J added that it was unfortunate that a curator had not been appointed to represent the interests of the children. The result was that the voices of the children themselves have not been heard.