

A victory for children's rights: Prohibition of physical punishment in the home

The Children's Institute (CI) has been advocating for a complete prohibition of physical punishment since the deliberations on the Children's Act. In 2003, the CI set up the Children's Bill Working Group which played a central role in promoting the participation of the children's sector in the making of the Children's Act. After intense advocacy work across the country, a prohibition of physical punishment in all spheres was finally inserted into the Children's Bill in 2006 – only to be removed again by the Portfolio Committee on Social Development due to pressure from the Presidency in 2007.

In 2017, a decade later, the CI was involved in a court case where the presiding judges questioned whether parents should be allowed to use physical punishment in the home and which ultimately led to the prohibition of physical punishment in the home. The court case involved a father who had been charged with assault for physically disciplining his 13-year old son. In the criminal trial, the father admitted to hitting his son but raised the defence of 'moderate and reasonable chastisement'.* He argued that the hitting had been 'moderate' and had therefore not been unlawful. After the Johannesburg Regional Court found that the assault fell outside the bounds of the defence of 'moderate and reasonable chastisement' and convicted the father for assault, he appealed to the South Gauteng High Court.

During the appeal proceedings, the South Gauteng High Court thought it necessary to consider whether the common law defence of 'moderate and reasonable chastisement' was consistent with the Constitution and invited organisations that have an interest in the matter to make submissions to the court. The CI, Quaker Peace Centre and Sonke Gender Justice, legally represented by the Centre for Child Law, joined the proceedings as *amici curiae* ('friends of the court'). The amici developed a litigation strategy and decided that the CI should submit an expert affidavit which would accompany the legal submissions of the *amici*. The Director of the CI drafted an expert affidavit highlighting the detrimental short- and long-term effects of physical punishment and the links between physical punishment and other forms of violence against children. The expert affidavit drew on several research projects conducted by the CI over a number of years thus providing the court with a solid piece of evidence. Together with the CI's expert affidavit the *amici* consulted on and submitted detailed legal submissions which argued that the defence of 'moderate and reasonable chastisement' was inconsistent with children's constitutional rights and therefore unconstitutional.

In addition to the submissions by the CI, Quaker Peace Centre and Sonke Gender Justice, the High Court received written submissions from the Department of Social Development (DSD),

which shared the view that the defence was unconstitutional. DSD's submission was remarkable in two ways. First, the Department's position on physical punishment had previously been ambiguous. Second, DSD's submissions stressed that the Concluding Recommendations of the UN Committee on the Rights of the Child required the South African government to prohibit all forms of physical punishment. The acknowledgment of this particular Concluding Recommendations is noteworthy because the UN Committee on the Rights of the Child had drafted this recommendation as a result of the continuous and intense advocacy efforts by the CI and its coalition partners.¹ In addition to these submissions, the High Court received opposing submissions from the organisation Freedom of Religion South Africa (FOR-SA) which argued that the defence was constitutional.

In August 2017, oral argument on the question of the constitutionality of the defence was heard. The Centre for Child Law presented the joint submissions of the CI, Quaker Peace Centre and Sonke Gender Justice in court. The accused, the NPA and FOR-SA made oral submissions, all of which argued that the defence was constitutional. DSD did not appear in court for oral submissions. In October 2017, the High Court ruled that the common law defence of 'moderate and reasonable chastisement' was inconsistent with children's constitutional rights and struck down the defence. The joint submissions of the CI, Quaker Peace Centre and Sonke Gender Justice thus trumped the three opposing submissions. The judgment was widely reported on in the media and the CI produced numerous media outputs for print, radio and TV.

As a result of the judgment, parents are no longer allowed to use any form of physical discipline. This is a critical first step in curbing the use of physical punishment – one of the most widespread forms of violence against children – in South Africa. This landmark judgment is a major advocacy victory for the CI, Centre for Child Law, Quaker Peace Centre and Sonke Gender Justice. The judgment is also an example of how the CI together with its partners kept the issue on the agenda and remained responsive to advocacy opportunities.

FOR-SA has approached the Constitutional Court to appeal the judgment. The Constitutional Court has not yet decided whether it will grant the appeal.

** The common law defence of moderate and reasonable chastisement allowed parents to use physical punishment as long as such punishment was 'moderate' and 'reasonable'. Although hitting, spanking, or smacking a child constitutes an assault, the common law gave parents a defence that they could raise if charged with assault that allowed them to avoid criminal liability. Put simply, the defence allowed parents to use moderate physical force to discipline their children. The common law defence was based on the judgment **R v Janke and Janke** which dates back to 1913.*

¹ Bower C, Waterhouse S, Lake L & Mentor-Lalu V (eds) (2015) *Alternate Report to the UN Committee on the Rights of the Child in response to South Africa's Combined 2nd, 3rd and 4th Periodic Country Report on the UN Convention on the Rights of the Child*. Cape Town: Alternate Report Coalition – Children's Rights South Africa; Alternate Report Coalition – Children's Rights South Africa (2016) *Supplementary submissions to the United Nations Committee on the Rights of the Child following the Government of South Africa's written replies to the List of Issues*. Cape Town: Alternate Report Coalition – Children's Rights South Africa.