



## Promoting Effective Enforcement of the Prohibition Against Corporal Punishment in South African Schools

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CENTRE FOR CHILD LAW



**Promoting effective enforcement of the  
prohibition against corporal punishment  
in South African schools**

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University of Pretoria, January 2014

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# PREFACE

South Africa can boast that it was the second country on the African continent (after Namibia) to ban corporal punishment when it passed the South African Schools Act in 1996. Almost two decades later, as the South Africa government prepares to present reports to the African Committee of Experts on the Rights and Welfare of the Child and to the UN Committee on the Rights of the Child, a grave truth must be admitted. The General Household Survey for 2012 showed that 15.8% of all children reported having experienced corporal punishment in school during that year. That amounts to 2.2 million children being hit in South African schools within one year. Practice simply does not reflect the law's promise.

This report considers the prevalence of corporal punishment in schools, and depicts the forms that it takes through numerous documented examples. Official ambivalence and weak regulatory systems are identified as part of the country-wide problem. Improvements in some provinces are highlighted, and these are linked to deliberate programmatic responses, giving rise to hopes that corporal punishment, if effectively tackled, can ultimately be eradicated. In the conclusion to this report, Faranaaz Veriava prescribes a platform for action by government, the South African Human Rights Commission and other civil society role players. It is time for action.

**Professor Ann Skelton**

Director: Centre for Child Law

UNESCO Chair: Education Law in Africa

## **ACKNOWLEDGMENTS**

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The pictures used on the cover of this publication were provided courtesy of Save the Children South Africa.

## EXECUTIVE SUMMARY

The prohibition against corporal punishment is an integral part of the broader transformation of South African education. The prohibition seeks to replace South Africa's violent and authoritarian past with an ethos respectful of human dignity and bodily integrity.

The legal framework encapsulated primarily in the South African Schools Act 84 of 1996 and its subsidiary legislation establishes a 'coherent and principled system of discipline'. This system includes a prohibition against corporal punishment. It also includes the requirement that school governing bodies (SGBs) develop codes of conduct at schools through participatory processes. These codes prescribe the rules of a school that learners must adhere to. The codes also establish disciplinary processes where learners have transgressed rules. The prohibition against corporal punishment is entrenched at both a national and a provincial level in South Africa.

The ban against corporal punishment seeks to give effect to learners' rights in the Constitution. Section 10 guarantees everyone's right to dignity. Section 12(1) states that everyone has the right to freedom and security of person which includes the right: (c) to be free from all forms of violence; (d) not to be tortured in any way and; (e) not to be treated or punished in a cruel, inhuman or degrading way. Section 28 (1)(d) states that every child has the right to be protected from maltreatment, neglect, abuse or degradation.

This was confirmed in the Constitutional Court case of *Christian Education SA v Minister of Education*. The prohibition also seeks to give effect to South Africa's international obligations most notably, in terms of the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC).

Despite the protection afforded to learners against corporal punishment, the practice is rife in South Africa schools. According to Statistics South Africa's latest GHS data, 15,8 per cent of all learners experienced corporal punishment in schools in 2012. This figure amounts to approximately 2.2 million learners who experienced corporal punishment in 2012. In some provinces the incidence is significantly higher than in others. Moreover, in some provinces the incidence is increasing.

A survey of some of the cases currently in the public domain suggests that incidents of corporal punishment are not confined to examples of controlled caning or 'corrective discipline'; nor do they occur only in instances where educators may feel threatened by learners. Incidents of corporal punishment are often acts of intimidation, and of uncontrolled and excessive use of force. Many of these acts result in serious injuries to learners and cause psychological damage. As such, many of the cases surveyed debunk the myth that educators administer corporal

punishment as the only viable means of classroom control because they feel 'disempowered' in the current context of unruly and ill-disciplined learners.

This report finds that there is a clear tendency for the number of learners that are experiencing some form of corporal punishment in schools to exceed the number of educators who are being sanctioned for practising corporal punishment. This is as a result of the fact that most cases of corporal punishment go unreported.

The report attributes the ongoing, and in some provinces increasing, incidence of corporal punishment to a lack of support for the prohibition amongst certain educators and parents. This has produced what has been termed an 'official ambivalence' to the ban. This in turn has resulted in ineffective legal mechanisms for enforcing the ban. This is most apparent in the failure to adequately sanction educators who are perpetrators of corporal punishment. It is also apparent in the failure to implement educational programmes that can facilitate a mind shift amongst educators and parents that continue to support the use of corporal punishment in schools.

In order to facilitate this process the report recommends that:

(a) The South African Human Rights Commission (SAHRC) should convene an inclusive dialogue on shifting attitudes to corporal punishment. Members of the Department of Basic Education (DBE), educator unions, associations of school governing bodies, academics and civil society experts that have been involved in research on school-based violence, and in developing alternatives to corporal punishment should be invited participate in this dialogue, aimed at:

- Reviewing the content of the current manual on alternatives to corporal punishment.
- Reviewing the coverage of the manual. In particular, hot spots of corporal punishment must be identified and prioritised in training initiatives.
- Exploring the development of more comprehensive and multi-faceted programmes that would facilitate an attitudinal shift in respect of corporal punishment.
- SGB training to empower parents to: (a) be more involved in learner disciplinary processes and; (b) effectively report and take action against cases of corporal punishment where they occur.

(b) The SAHRC must also advocate for the establishment of a national protocol, or regulations, for the effective enforcement of the corporal punishment ban. The protocol should include the following elements:

- A national database of incidents of corporal punishment.
- A definition of corporal punishment.
- Mandatory reporting by principals and other educators of incidents of corporal punishment in compliance of section 110(1) Children's Amendment Act 41 of 2007.
- A step-by-step procedure for the management of corporal punishment complaints by education officials.
- Such a procedure must include a mandatory referral procedure by Provincial Education Departments (PED's) to the South African Police Services (SAPS) and the South African Council for Educators (SACE).
- Representation of learners during disciplinary procedures against educators.



- A list of the types of cases that would justify an educator being placed on Part B of the National Protection Register in terms of the Children's Act.
- In identified cases, a mandatory process for the placing of an educator's name on the Register.
- An outline of possible processes for collaboration in investigative, disciplinary and sentencing procedures between PEDs and SACE.
- A mechanism for the protection of learners in independent schools. This must include a mandatory referral to SACE. It may also consider the withdrawal of the registration of independent schools, or subsidies to independent schools, where such schools persistently fail to act against perpetrators of corporal punishment.

Public interest litigation organisations may also identify and pursue cases that expose lacunas in existing legal mechanisms for the effective enforcement of the prohibition against corporal punishment.

## **ABBREVIATIONS & ACRONYMS**

|         |   |
|---------|---|
| ACRWC   | African Charter on the Rights and Welfare of the Child        |
| CDE     | Centre for Development and Enterprises                        |
| CRC     | United Nations Convention on the Rights of the Child          |
| DBE     | Department of Basic Education                                 |
| EEA     | Employment of Educators Act                                   |
| GDE     | Gauteng Department of Education                               |
| GHS     | General Household Surveys                                     |
| IECSR   | International Covenant on Economic Social and Cultural Rights |
| ISASA   | Independent Schools Association of South Africa               |
| LDoE    | Limpopo Department of Education                               |
| MEC     | Member of the Executive Council                               |
| NASGB   | National Association of School Governing Bodies               |
| SACE    | South African Council for Educators                           |
| SADTU   | South African Democratic Teachers Union                       |
| SAHRC   | South African Human Rights Commission                         |
| SAPS    | South African Police Services                                 |
| SASA    | South African Schools Act                                     |
| SCA     | Supreme Court of Appeal                                       |
| SGB     | School Governing Body   |
| StatsSA | Statistics South Africa                                       |
| PASA    | Principals Association of South Africa                        |
| PED     | Provincial Education Department                               |
| WCED    | Western Cape Education Department                             |



# CHAPTER 1

## INTRODUCTION

---

### 1.1 The purpose of the report

Section 10 of the South African Schools Act 84 of 1996 (SASA) prohibits the administration of corporal punishment in South African schools. This prohibition has been reaffirmed in the Constitutional Court case of *Christian Education South Africa v Minister of Education (Christian Education)*.<sup>1</sup> Despite this legal clarity, the practice of corporal punishment remains rife in South African schools.

The Centre for Child Law (the 'Centre') has commissioned this report within the context of the ongoing high incidence of corporal punishment in South African schools. The Centre is based at the Faculty of Law at the University of Pretoria. The Centre contributes towards establishing and promoting the best interests of children in our community through education, research, advocacy and litigation. In the last few years the Centre has become increasingly involved in the promotion of the education rights of learners.

The main objective of this research project is to determine the efficacy of current measures to enforce the prohibition against corporal punishment in schools. It therefore aims to:

- Establish the extent of the prevalence of corporal punishment in South African schools.
- Provide an overview of the laws, policies and any other measures to enforce the ban against corporal punishment.

1 2000 (4) SA 757 (CC).

- Provide an analysis of the efficacy of these measures.
- To the extent that measures to enforce the ban are ineffective, to recommend alternative strategies for the effective enforcement of the ban against corporal punishment.

Ultimately, the report aims to inform a future strategy in developing systemic solutions to the problem of corporal punishment. At an education roundtable on corporal punishment hosted by the South African Human Rights Commission (SAHRC) on 4 July 2013, it was also resolved that the findings of this research would inform possible future interventions by the SAHRC to protect learners from corporal punishment.

## 1.2 Methodology

The data and other information that informs this report were obtained through a two-pronged process. This included:

(a) Interviews and correspondence with individuals and officials who have knowledge, expertise or insight into issues of corporal punishment. The list of these persons is attached as an addendum to the report.

(b) Research. This entailed research and analysis of:

- The latest statistical data relating to the incidence of corporal punishment and the prosecution of cases.
- Relevant legislation and policy on corporal punishment in South Africa.
- Case law dealing with corporal punishment in South Africa. This includes constitutional, labour law and delictual cases.
- Academic articles and research reports relating to school-based violence and corporal punishment in South African schools.

## 1.3 Structure of the report

**Chapter 2** of the report provides a historical overview of corporal punishment in South Africa. It discusses the rationale for the prohibition against corporal punishment. It also reflects on current debates in respect of corporal punishment and the apparent reasons for the failed adherence to the ban in South Africa.

**Chapter 3** provides an overview of the incidence of corporal punishment in South Africa. It discusses the most recent statistical data detailing the

incidence of corporal punishment. It discusses data relating to the sanction of educators who administer corporal punishment. It provides an overview and analysis of current cases that have been dealt with by public interest organisations and which have been reported on in the media.

**Chapter 4** outlines the legal protection of learners against corporal punishment. It outlines the legal and policy framework for the sanction of educators when administering corporal punishment. Finally it discusses the specific policies of the Western Cape and Gauteng, as case studies in enforcing the ban against corporal punishment in South Africa.

**Chapter 5** is a discussion of the enforcement of the corporal punishment prohibition at independent schools. It provides an overview of independent schooling in South Africa. It analyses law and policy for the sanction of educators at independent schools. Finally, it discusses options for improved enforcement of the ban.

**Chapter 6** maps out a way forward for the development of appropriate legal and educational programmes for enforcing the ban against corporal punishment. The first section of this chapter discusses some of the concerns in respect of current initiatives to transform attitudes and to implement alternatives to corporal punishment in schools. It then makes recommendations for reviewing these initiatives. The second part of the chapter notes the deficits in the legal enforcement of the prohibition. It then makes recommendations for remedying these deficits. The third part of the chapter makes recommendations for strategies that could be employed by the SAHRC and public interest litigation organisations in promoting more effective legal and educational programmes to enforce the ban against corporal punishment.

## CHAPTER 2

### CORPORAL PUNISHMENT IN CONTEXT

---

#### 2.1 A historical overview of corporal punishment in South Africa

Prior to 1994, and pursuant to an ethos of Christian Nationalist Education and a culture of authoritarianism, corporal punishment was an integral part of South Africa's education system. According to Morrell:

It was used exclusively in white single-sex boys' schools and liberally in all other schools except in single-sex girls' schools where its use was limited. The introduction of Bantu Education in 1955 exposed black children ... to school beatings. Unlike white girls, African girls were not exempted from beatings.<sup>2</sup>

The dawn of democracy brought with it a Constitution that entrenched a culture of a Bill of Rights. It also resulted in a significant transformation of education in South Africa. This included the shift from Christian Nationalist and Bantu Education to an Outcomes-Based curriculum (OBE) designed to facilitate more participative forms of learning, infused with a human rights culture.<sup>3</sup> It also produced a new legal framework for schooling encapsulated in the SASA and the National Education Policy

2 R Morrell 'Corporal punishment in South African schools: A neglected explanation for its persistence.' (2001) 21 *South African Journal of Education* 292-292.

3 See for example U Hoadley 'Knowledge, knowers and knowing: Curriculum reform in South Africa' in L Yates & M Grumet (eds) *Curriculum in today's world: Configuring knowledge, identities, work and politics* (2011) 139-154.

Act 27 of 1996. This legal framework created a single, unified system of schooling in South Africa.<sup>4</sup>

Its key features include: the desegregation of schools, nine years of compulsory schooling, a new system of funding for all schools, the democratisation of the governance of schools through the establishment of school governing bodies (SGBs) that include parents and learners in school governance,<sup>5</sup> and the prohibition against corporal punishment. One of the functions of a SGB is to play an integral role in the discipline of learners.

The banning of corporal punishment is therefore an integral part of the transformation agenda for South African education. This was confirmed in some of the early cases of the Constitutional Court that dealt specifically with the issue of corporal punishment. These cases emphasised that the abolishment of corporal punishment was necessary to break with South Africa's violent and authoritarian past and replace it with an ethos respectful of human dignity and bodily integrity.

In *S v Williams*,<sup>6</sup> the Constitutional Court declared section 294 of the Criminal Procedure Act 51 of 1977 that provided for the whipping of child offenders in criminal sentencing to be unconstitutional. In this case the Court discussed the reasoning for the prohibition against corporal punishment as being a break with South Africa's violent past.<sup>7</sup> In particular, the late Chief Justice Pius Langa found that a culture of authority which legitimates the use of violence is inconsistent with the values of the Constitution.<sup>8</sup> He went on to say:

The deliberate infliction of pain with a cane on a tender part of the body as well as the institutionalised nature of the procedure involved an

4 Under apartheid there were at least 14 different education administrations. This included separate administrations for White, Indian, Coloured and African children, as well as the administrations of the former 'homeland' states. State education expenditure was determined according to race with White learners receiving the most and African learners receiving the least.

5 In *Head of Department, Mpumalanga Education Department v Hoerskool Ermelo* 2010 (2) SA 415 (CC) para 57 the Court said: 'A governing body is democratically composed and is intended to function in a democratic manner. Its primary function is to look after the interest of the school and its learners. It is meant to be a *beacon of grassroots democracy* in the local affairs of the school. Ordinarily, the representatives of parents of learners and of the local community are better qualified to determine the medium best suited to impart education and all the formative, utilitarian and cultural goodness that comes with it.' (my emphasis).

6 1995 (3) SA 632 (CC).

7 *Williams* paras 51-52.

8 *Williams* para 52.



element of cruelty in the system that sanction[ed] it. The activity is planned beforehand, it is deliberate. Whether the person administering the strokes has a cruel streak or not is beside the point. It could hardly be claimed, in a physical sense at least, that the act pains him more than his victim. The act is impersonal, executed by a stranger, in alien surroundings. The juvenile is, indeed, treated as an object and not as a human being.<sup>9</sup>

In *Christian Education* the Constitutional Court had to determine whether or not the prohibition against corporal punishment violated the rights of parents of children in independent schools, who, in line with their religious convictions, had consented to its use. Justice Sachs reiterated the sentiments set out in the *Williams* case. He then went on to say, with regard to section 12 of the final Constitution, that:

It should be noted that these rights to be violence-free are additional to and not substitutes for the right not to be punished in a cruel, inhuman or degrading way. Under section 7(2) the state is obliged to 'respect, protect, promote and fulfil' these rights. It must accordingly take appropriate steps to reduce violence in public and private life. Coupled with its special duty towards children, this obligation represents a powerful requirement on the state to act.<sup>10</sup>

## 2.2 Debates on corporal punishment

The prohibition against corporal punishment in schools in South Africa follows the trend adopted by many democracies such as Sweden, Norway, Denmark, Finland, Australia, the United Kingdom and Namibia, where corporal punishment was banned in favour of alternative models of positive discipline.<sup>11</sup>

Underpinning this development has been the increasing availability of evidence of the harmful effects of corporal punishment. Evidence suggests that corporal punishment is psychologically harmful to a child. That is, it causes emotional damage, affects the self-esteem of learners and impacts

<sup>9</sup> *Williams* para 90.

<sup>10</sup> *Christian Education* para 47.

<sup>11</sup> Subsequent to South Africa prohibiting corporal punishment in schools, Algeria, the DRC, Mali, Zambia, Ethiopia and Kenya also banned it in schools.

negatively on their academic performance.<sup>12</sup> According to a study on Durban secondary schools, even where learners saw corporal punishment as an effective punishment, they nevertheless felt sad, hurt and angry when beaten. By contrast, they felt more positive about 'consultative mechanisms of discipline'.<sup>13</sup>

Evidence also suggests that rather than acting as a deterrent, corporal punishment breeds aggression and hostility. According to research, often the same learners are beaten for the same offence over and over again. Corporal punishment also makes learners unhappy; this in turn contributes to absenteeism and learners dropping out of school.<sup>14</sup>

Proponents of corporal punishment on the other hand argue that it is not corporal punishment that is problematic but rather the misapplication of corporal punishment. According to this view, while the uncontrolled or excessive use of violence can never be justified, corporal punishment administered justly and in the context of a trusting educator-learner relationship is essential to discipline. Thus the old saying of 'spare the rod and spoil the child' applies. According to this view, learners who receive corporal punishment are more conscientious in the learning environment and by corollary, the banning of corporal punishment has led to reduced levels of learner discipline and increased levels of violence.<sup>15</sup>

This is not borne out by the evidence. There have in recent years been numerous reports discussing school-based violence in South Africa. These reports do not attribute school-based violence to the ban on corporal punishment but rather to the socio-economic conditions in which schools are located, and the surrounding violence in the communities in which many of these schools are situated. The SAHRC report of the public hearings into school-based violence for example stated that 'violence within schools is instead a symptom of the overall social dysfunction of the

12 Morrel (n 2 above) 292. See also Human Rights Watch 'Corporal punishment in schools and its effect on academic success' Joint HRW/ACLU Statement 15 April 2010.

13 Morrel (n 2 above) 292.

14 K Porteus et al *Alternatives to corporal punishment: Growing discipline and respect in our classrooms* (2001) 9-22.

15 M Smit 'Compatibility of democracy and learner discipline in South African schools' (2013) 46 *De Jure* 345.

community in which the school is situated'. It went on to say, 'a school is often a mirror image of the community and families it serves'.<sup>16</sup>

### 2.3 An 'official ambivalence' to the prohibition

Academics suggest that there exists an 'official ambivalence' to the prohibition against corporal punishment.<sup>17</sup> This is largely due to a lack of support for the ban amongst educators, and amongst certain parent communities.

A predominant theme linked to the 'official ambivalence' is the so-called absence of alternatives for educators in maintaining discipline in the classroom. According to Smit:<sup>18</sup>

Educators feel disempowered in the human rights environment because one of the traditional measures to maintain order and discipline, corporal punishment, has been abolished.

Smit attributes the high-levels of school-violence to the ban on corporal punishment. He also states that 58 per cent of educators favour the reinstatement of corporal punishment and many continue to use corporal punishment out of necessity to maintain classroom discipline.<sup>19</sup> Representatives of the Principals Association of South Africa (PASA) at a roundtable meeting also expressed similar sentiments of educators feeling disempowered and threatened by learners on corporal punishment hosted by the SAHRC on 4 July 2013.<sup>20</sup>

According to the South African Democratic Teachers Union (SADTU) representative at the roundtable the persistence of corporal punishment was symptomatic of a bigger problem, that is, that teachers are struggling to keep control of their classrooms.

Another reason for the 'official ambivalence' to the ban is the continued use of corporal punishment as a means of discipline within

16 South African Human Rights Commission *Report of the public hearing on school-based violence* (2006) 16. See also P Burton & L Leoschut *School violence in South Africa: Results of the 2012 National School Violence Study* (2013).

17 Morrel (n 2 above) 292.

18 Smit (n 15 above) 346.

19 Smit (n 15 above) 346-347.

20 See also V Mecoamere 'Banning corporal punishment [in South African Schools] has created tough challenges' *Sowetan* 12 February 2008.

certain communities. Thus, parents from these communities continue to use corporal punishment in the home and explicitly, or tacitly, consent to its use in the classroom.

According to the sentiments expressed during an interview with Chief Executive of the Governing Body Foundation, a body that represents approximately 700 schools across the country, while the ban is adhered to in most schools falling under the membership of the Foundation, the ban is not adhered to where corporal punishment is a cultural practice. According to him, in some schools corporal punishment continues to be sanctioned as part of a discipline ethos in many white conservative schools. He states further that in poorer black and rural schools not imposing corporal punishment is often viewed as a 'weakness'.<sup>21</sup>

Another reason for the 'official ambivalence' to the ban appears to be simply that in a context where there are so many other challenges in education, enforcing the ban seems to have quietly slipped down the education agenda, despite its centrality to the transformation project in South Africa. Thus, for example academic research suggests that it has been de-prioritised in government policy. The example of the 'Safe-Schools' project is mentioned. While this project aims to rid schools of violence such as gender-based violence, reducing corporal punishment is not included within its ambit.<sup>22</sup>

Similarly, in an interview with the legal representative of the South African Council for Educators (SACE), he stated that in the context of limited financial and human resources, SACE investigations against educators tended to prioritise cases of sexual abuse rather than corporal punishment given the high prevalence and seriousness of the sexual abuse in schools.

21 Similar sentiments were expressed in many of the interviews and meetings conducted during the course of this research. According to Morrell corporal punishment continues in black, working class families. He suggests further that there is a strong link between home and school forms of discipline. R Morrell (n 2 above) 293-294.

22 R Morrell (n 2 above) 293-294.

## CHAPTER 3

### THE INCIDENCE OF CORPORAL PUNISHMENT IN SOUTH AFRICA

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#### 3.1 An overview of statistical data

The National Department of Basic Education (DBE) does not have a national database documenting complaints of corporal punishment or how these have been dealt with.

##### 3.1.1 The General Household Surveys

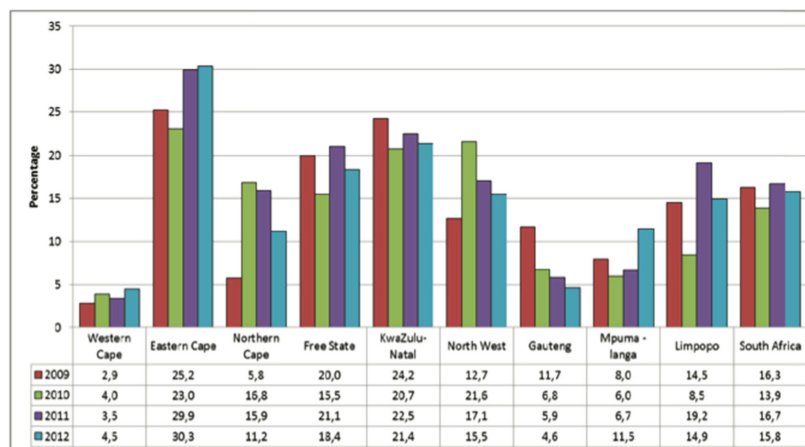
The General Household Surveys<sup>23</sup> (GHS) produced by Statistics South Africa (StatsSA) annually include figures as to the amount of learners that have experienced corporal punishment at schools in that particular year. In the latest 2012 figures, the number of learners indicating that they experienced corporal punishment at school in 2012 decreased from 16,3 per cent in 2009 to 15,8 per cent in 2012. At the same time, large increases are evident in some provinces, such as the Eastern Cape (25,2 per cent to 30,3 per cent) and in Mpumalanga (8 per cent to 11,5 per cent). The incidence of corporal punishment is the highest in the provinces of the Eastern Cape (30,3 per cent), KwaZulu-Natal (21,4 per cent) and the Free State (18,4 per cent). While in the Western Cape (4,5 per cent) and Gauteng (4,6 per cent) the incidence is low. In Gauteng the figures have reduced significantly from 2009 (11,7 per cent) to 2012 (4,6 per cent). The trends over the last three years are reflected in figure 1 below.<sup>24</sup>

23 The GHS has been published annually since 2002. Its purpose is to measure the level of development in the country and to measure performance of projects that were implemented to address these needs.

24 Statistics South Africa *General Household Survey 2012* (2013) 11.

Thus, while the percentage of learners who experienced corporal punishment at school has decreased nationally since 2009, the actual numbers of learners experiencing corporal punishment remains high. The figure of 15,8 per cent amounts to approximately 2.2 million learners being exposed to corporal punishment in 2012. The GHS data also evidences that the practice of corporal punishment has been on the increase steadily in particular provinces.

**Figure 1 (GHS: 2012) Percentage of learners who experienced corporal punishment, 2009 - 2012**



### 3.1.2 The 2012 School Violence in South Africa Study

According to the 2012 School Violence in South Africa Study (the School Violence Study) that was undertaken by the Centre for Justice and Crime Prevention, a total of 49,8 per cent of learners surveyed experience corporal punishment at school. This percentage was up from 47,5 per cent in a similar study undertaken by the Centre in 2008.<sup>25</sup>

Increases in the use of corporal punishment between 2008 and 2012 were noted for Mpumalanga (43,6 per cent to 63,5 per cent), the Eastern Cape (58,5 per cent to 66,9 per cent), KwaZulu-Natal (48,7 per cent to 73,7 per cent) and the Western Cape (17,1 per cent to 22,4 per cent). The most

<sup>25</sup> Burton & Leoschut (n 16 above) 29.

significant decrease in the rates of corporal punishment reported by learners was observed in Gauteng, with rates dropping from (61 per cent to 22,8 per cent). While the difference between male and female learners was not very high, males (50,4 per cent) did report slightly higher levels of corporal or physical punishment than female learners (49,4 per cent).<sup>26</sup>

While the figures presented in GHS data and the School Violence Study differ, presumably due to the different methodologies adopted in the these two studies, both studies reflect the same provincial trends.<sup>27</sup> In particular, both studies reflect similar patterns in changes in incidence. Both studies also reflect similar patterns in highlighting which provinces have the highest incidence of corporal punishment and which have the lowest.

The GHS data and the data from the school violence study are instructive in guiding future policy and programmatic interventions. That is, in provinces such as the Eastern Cape, KwaZulu-Natal and Mpumalanga where the incidence of corporal punishment is high and increasing, current programmes should be reviewed and strengthened. In addition, the more successful practices of provinces such as Gauteng and the Western Cape could be examined and reproduced in other provinces.

### 3.1.3 SACE data in respect of the sanction of educators

SACE is a statutory body that was established to develop and maintain ethical and professional standards for educators.<sup>28</sup> All educators are required to register with SACE and to abide by its Code. Educators that are found to be in breach of the Code are sanctioned by SACE. SACE's annual report provides a breakdown of all complaints of alleged breaches of the code.<sup>29</sup> Below is a breakdown of the number of corporal punishment

<sup>26</sup> Burton & Leoschut (n 16 above) 30.

<sup>27</sup> The GHS survey is a sample study comprising of 25 653 private households. The School Violence Study is a sample study of secondary schools in nine provinces and comprises of 5939 learners, 121 principals and 239 educators. The GHS survey refers to the number of learners who experienced corporal punishment in 2012, while the School Violence Study refers to the number of learners who experienced corporal punishment within the course of their schooling careers.

<sup>28</sup> The South African Council for Educators Act 31 of 2000 and the South African Council for Educators Code of Professional Ethics.

<sup>29</sup> Breaches of the code other than corporal punishment that are investigated by SACE include: verbal abuse, victimisation, harassment, defamation, sexual misconduct including rape, fraud, theft, financial mismanagement, racism, unprofessional conduct, alcohol abuse, absenteeism, negligence and murder.

complaints received per province by SACE in its 2011-2012 Annual Report.

**Table 1**

| PROVINCE      | TOTAL NUMBER OF COMPLAINTS RECEIVED | NUMBER OF CORPORAL PUNISHMENT/ ASSAULT COMPLAINTS |
|---------------|-------------------------------------|---|
| KwaZulu-Natal | 84                                  | 14  |
| Northern Cape | 6                                   | 1   |
| Eastern Cape  | 33                                  | 11  |
| Limpopo       | 25                                  | 6   |
| Mpumalanga    | 58                                  | 6   |
| North West    | 18                                  | 6   |
| Gauteng       | 103                                 | 31  |
| Free State    | 24                                  | 5   |
| Western Cape  | 174                                 | 99  |
| <b>TOTAL</b>  | <b>525</b>                          | <b>179</b>  |

In terms of SACE's 2011-2012 Annual Report, there were 179 cases of corporal punishment dealt with by SACE during that period. The highest number of cases was received from the Western Cape (99) and the lowest from the Northern Cape (1). As noted earlier the Western Cape is the province with the lowest incidence of corporal punishment.

In the provinces where the incidence of corporal punishment is highest such as in the Eastern Cape, where according to the GHS data approximately 640 000 learners experienced corporal punishment, and KwaZulu-Natal, where approximately 665 000 learners experienced corporal punishment, the number of cases being received and dealt with by SACE are extremely low. In the 2011-2012 year, there were 11 and 14 cases from each of these provinces respectively. Similar trends are evident in earlier Annual Reports.<sup>30</sup>

Thus, there is a great variance between the number of learners experiencing corporal punishment in a province and the number of cases that are eventually reported and investigated. This GHS data read with the SACE data suggests that provinces which tend to be the more developed,

30 The South African Council for Educators *Annual Report* 2011-2012.



urbanised provinces with better run schools are also the provinces that appear to be more effective at taking steps to reduce corporal punishment in schools. At the same time the provinces with the greater incidence of corporal punishment appear to be the provinces that are more likely to tolerate corporal punishment in their schools.

This was in essence confirmed by the SACE legal representative. According to him, the reason why SACE has the highest number of cases from the Western Cape is because the WCED has the most efficient referral system of cases from the provincial department to SACE. A strong correlation is apparent between having effective measures in place to address corporal punishment in schools and a lower incidence of corporal punishment. The measures employed by the Western Cape and Gauteng provinces are discussed in the next chapter.

### **3.2 A sample study of corporal punishment cases**

Below is a table of cases of corporal punishment. These include complaints received by public interest organisations dealing with education rights issues. It also includes details of cases obtained from media reports. The details of cases being dealt with by public interest organisations were obtained through interviews and discussions with lawyers from these different organisations. As such, details as to the facts of the cases are slightly uneven. Because many of the cases are currently ongoing, the names of learners and the schools, or the educators implicated, are not disclosed.

The table serves as a detailed sample of corporal punishment cases being experienced across the country. Many of the investigations in respect of these cases were initiated from about 2011 and are still ongoing. The purpose of the table is to analyse the nature of the punishments being meted out, the severity of the punishments and the contexts in which these punishments occur.

**Table 2: Summary of cases**

| Organisation or newspaper article | Factual Summary   |
|-----------------------------------|---|
| Section 27                        | The complaint was received in January 2012. The school shoes of a 12-year-old learner attending a farm school in the North West Province had been damaged. He therefore wore his takkies instead and took the damaged shoes to school to show the educator that he could not wear them. The mother of the learner had also written a note for the educator explaining the situation. The educator was not satisfied with this and punished the learner for not wearing school shoes by hitting him until he fell. The learner lost his hearing. When a co-learner asked the educator why he hit the learner, the co-learner was also hit until his jaw broke. The matter was finalised in February 2013. The educator was disciplined by PED and received a demotion. A request for a precautionary suspension was rejected. The families of both learners were reluctant to lay criminal charges against the educator. |
| Section 27                        | The complaint was received in late 2011. Learners at a school in Gauteng were hit with a broken pipe until they agreed to have sex with the educator. The educator was found guilty of gross misconduct. He appealed the finding but it was upheld in April 2013. The educator was arrested but no criminal charges were pursued.   |
| Section 27                        | The complaint was received in February 2012. A learner at a school in Gauteng was threatened with a knife until she agreed to go home with the educator. On the way the learner was hit unconscious by the educator and then raped. In May 2013 the educator was found not guilty in the disciplinary hearing. The SAPS investigation is still ongoing.   |
| Section 27                        | The complaint was received in March 2013. At a school in Limpopo, 3 former learners were allegedly giggling during a sex education class. The principal is alleged to have hit and expelled the boys. In October 2013 the principal was found guilty of misconduct. A request has been made for his dismissal. The decision as to a sanction is still pending.  |
| LRC – JHB                         | The complaint was received in January 2012. A group of Grade 4 learners in a Limpopo school were disciplined for not doing their homework by being forced to stand in a 'motorbike' position on their toes. The complainant learner had a steel metal plate in his toes from an accident. When he could not stand as he was told to do because of his injury he was beaten. The matter was reported to the principal but no action was taken. The learner had to be treated for the injury to his foot. He was taken out of school for a period. The school then withheld the learner's report. A registered letter that was sent by the LRC to the circuit and district managers was returned unopened. The LRC is taking renewed instructions.  |

|                      |  |
|----------------------|--|
| Centre for Child Law | A complaint was received from an employer on behalf of his domestic worker's child following an incident in February 2013. An educator slapped a 6 year old grade R pupil at a primary school in Mpumalanga across the face with such force that it ruptured the child's eardrum. Criminal charges were laid against the educator. The child was so traumatised by the event that he was terrified of returning to school. Repeated visits to the hospital were required. There appears to be partial hearing loss that needs a specialist to assess and hopefully repair. A complaint was laid at school level. The educator and the principal subsequently came to see the parent and apologise. The parent no longer wants to take the matter further.  |
| Centre for Child Law | A report was received from a social worker in April 2013. The social worker had received a complaint that the owner of an independent school in Mpumalanga had visited the school and beaten grade 12 learners because he was unhappy with their academic performance. The social worker visited the school where the principal confirmed that the learners had been beaten. He also informed the social worker that parents consent to corporal punishment in the admission forms when learners are admitted to the school. The social worker has made detailed recommendations advising parents of the various legal options that may be pursued. Recommendations have also been made as to meeting with the school to change the policy whereby parents are forced to grant permission for learners to be beaten. |
| SAHRC – JHB          | The complaint was received in March 2012. There is CCTV footage of an educator at a school in Gauteng physically and verbally abusing a learner. Parents have complained to both the school and SAPS. No further action was taken by either. The SAHRC is meeting with the family to take instructions.  |
| SAHRC – JHB          | The complaint was received in September 2013. A child was harassed and verbally abused by an educator at a school in Gauteng for wearing a religious red string in accordance with the child's religious beliefs. The educator was suspended for a short period. The educator and principal are married and the principal continues to make intimidating statements like: 'I don't get angry, I get even.' The SAHRC is unhappy with the GDE's involvement and believes there is a need for stronger intervention. The possibility of further interventions and the nature of such interventions are therefore being discussed.  |
| SAHRC – JHB          | A complaint was received in April 2013 after the complainant had seen an article in the newspaper. According to the article, children from a Gauteng primary school were allegedly called by the principal into his office and beaten with a hosepipe. Girls were hit on the hands and boys on the buttocks. The newspaper printed pictures of learners with bruises on their buttocks. The matter is currently being investigated by the GDE and the SAHRC awaits a report from them.   |
| SAHRC – Mpumalanga   | A complaint was received in August 2011. An educator at a combined school in Mpumalanga complained about the use of corporal punishment on other learners. An investigation was instituted by the PED. However the father of a learner refused to allow his son to give evidence in the proceedings.   |

|                      |   |
|----------------------|---|
| SAHRC – Mpumalanga   | The SAHRC instituted an investigation in June 2012 following a newspaper article. An educator had administered corporal punishment to a learner for missing a day of school. The learner subsequently died and the <i>post mortem</i> report revealed that the learner died of unnatural causes. Criminal charges were withdrawn due to insufficient evidence. The PED has reported to the SAHRC that the educator was dismissed following a disciplinary inquiry.  |
| SAHRC – Mpumalanga   | A complaint was received in July 2012. The boarding master of the academy administered corporal punishment to a learner after he found pictures of the learner kissing a girl. The SAHRC requested that the PED investigate the matter. Following the disciplinary hearing the boarding master received a sentence of the option of a three year suspension or pay a fine of R 45 000.  |
| SAHRC – Limpopo      | The SAHRC instituted an investigation following an article in a newspaper in June 2012 that an educator at a primary school assaulted a grade 4 learner for making a noise and being disruptive in class. The PED has confirmed to the SAHRC that the matter is being investigated.   |
| SAHRC – Limpopo      | The SAHRC instituted an investigation following an article in the newspaper that an educator at a primary school hit a 13-year-old over the head with a board duster. The PED has confirmed to the SAHRC that the matter is being investigated.   |
| SAHRC – Western Cape | The complaint was received in May 2011. A parent complained that her child was victimised and assaulted by an educator. The learner was suspended after the incident with the teacher. The SAHRC referred the matter to the WCED for investigation in May 2012. The WCED advised that the matter was investigated and the learner had been placed at an alternate primary school and was also provided with psychological support.  |
| SAHRC – Western Cape | The complaint was received in August 2011. A parent alleged that her son at a special needs school had been assaulted by a staff member with a stick at the school hostel. The SAHRC referred the matter to the WCED for investigation in September 2012. In October 2013 the SAHRC met with the WCED and grandmother who is the primary caregiver of the learner. The grandmother advised that the matter had been resolved. The WCED report has been sent to the parent who lives in Johannesburg and the SAHRC awaits further instructions from her. |
| SAHRC – Western Cape | The complaint was received in April 2012. The complainant alleged that learners at a school of industry were being physically abused by the school caretaker. The matter was reported to the SAPS and the district office but no action was taken. The SAHRC therefore sent a letter to the WCED in September 2012. The WCED has requested to know the identity of the complainant. The SAHRC has requested permission from the complainant to reveal this information and is awaiting the response.  |

|   |  |
|---|--|
| SAHRC – Western Cape                            | Six separate complaints were received between January and February 2011 against a high school principal in the Western Cape. All the complaints alleged that the principal had expelled learners without due process and that he had humiliated and verbally abused learners. Several letters were sent by the SAHRC to the WCED between 2011-2013 requesting that the WCED intervenes in the matters and that the WCED meets with the SAHRC. The SAHRC is awaiting a response from the WCED.                          |
| SAHRC – Western Cape                            | A complaint was received in May 2013. A parent alleged that her son was assaulted by an educator who slammed the learner's head against a desk. The parent only became aware of this when her son experienced headaches. She also learnt that this was not the first incident. The complainant alleges that the SAPS has not been of assistance in this matter. Following the SAHRC intervention a criminal case has been opened. The SAHRC is currently awaiting a report back from WCED regarding its investigation. |
| SAHRC – Eastern Cape                            | In November 2013 a Youtube clip showed a female teacher at a school in the Eastern Cape caning 13 girls on their hands. A newspaper article about this alleged that the teacher had ordered the girls to clean the classroom and she was dissatisfied with their efforts. The SAHRC is investigating.  |
| <i>Mail &amp; Guardian</i> article <sup>a</sup> | An article in March 2012 documents particularly serious cases of corporal punishment. These include: teachers at a school in KwaZulu-Natal beating a learner so severely that he needed surgery to his testicles, a Gauteng learner being lashed 340 times resulting in internal bleeding and possibly kidney damage, a Pretoria learner having papers stuffed in his mouth before being beaten.   |
| <i>Sowetan</i> article <sup>b</sup>             | An article in April 2012 reported in the case of Diversity High School in Gauteng. Videos had emerged of corporal punishment at the school. One was of a female teacher repeatedly striking a 16-year-old girl on the knuckles with a blackboard duster. The other was of the principal striking a grade 8 learner four times with a hosepipe.   |
| <i>Times</i> article <sup>c</sup>               | An article in May 2013 reported that a teacher in the Eastern Cape was caught on camera hitting a class of Grade 8 learners and swearing at them for failing to produce their Math's homework.   |
| <i>Legalbrief</i> <sup>d</sup>                  | An article in October 2013 reported that a teacher forced a five-year-old learner to eat his own faeces at a school in Mpumalanga.   |

a. V John 'Crisis at schools goes unreported' *Mail & Guardian* 30 March 2012.

b. T Monoma 'Lenient sentence for "abuse"' *Sowetan* 16 March 2012.

c. Sapa 'Eastern Cape teacher filmed beating pupil' 22 May 2013 [www.timelive.co.za/local/2013/05/22/eastern-cape-teacher-filmed-beating-pupil](http://www.timelive.co.za/local/2013/05/22/eastern-cape-teacher-filmed-beating-pupil) (accessed 8 January 2014).

d. 'Teacher faces ban for forcing pupil (5) to eat excrement' *Legalbrief* 13 September 2013.

### 3.3 Observations from the corporal punishment cases

These cases appear to debunk the myth that corporal punishment is used by educators as the only viable means of classroom control in a context where learners are threatening, unruly and ill-disciplined. Most of the cases are not instances of 'corrective discipline' for acts of ill-discipline. Instead many of these cases are examples of corporal punishment being administered to assert power and control. An example of this is that of learners being hit with a broken pipe until they agree to have sex with the educator.

Furthermore, many of the cases that are described above are not examples of 'controlled' caning within the context of a caring educator-learner relationship. Instead many of these cases are examples of an excessive and uncontrolled use of force, and of sadistic abuse. The cases are examples of learners being assaulted and abused, sometimes sustaining serious and long-term injuries. In one of the SAHRC cases the corporal punishment led to the death of the learner. The case of the 5-year-old learner being forced to eat his own faeces is an example of extreme cruelty that has presumably caused much trauma for the young learner.

It cannot be denied that some learners do threaten educators. The recent highly publicised story of a Grade 8 learner at Glen Vista High in Gauteng beating his teacher is an example of this.<sup>31</sup> These cases cannot be condoned and educators must be protected. However brutal beatings and assaults by educators are not the appropriate response. There are both legal and psychosocial mechanisms for addressing learner misconduct.<sup>32</sup> This is discussed later in the report. However, most of the cases highlighted in the table are not of educators responding to learners that are threatening them in any way. Many are young learners at primary school. As such they do not appear to present a 'threat' to the educators.

The data cited suggests that corporal punishment is rife and most cases go unpunished. According to the *Mail & Guardian* article referred to in the table most learners do not report incidents of corporal punishment as they fear being victimised.<sup>33</sup> It appears therefore that where cases are reported

31 R Thlabi 'Punishment alone will not solve classroom violence' *Sunday Times* 22 September 2013.

32 Some of the training manuals for alternatives to discipline also discuss exploring the underlying psychosocial reasons for the learners' behaviour.

33 John (n 31 above).

or publicised in the public domain, this is because the injuries are too serious to go unnoticed and unreported. Cases are also increasingly being made public as incidents are recorded with cell phone video cameras. The case of Diversity High School in South Hills in Southern Johannesburg and the recent case of the educator in the Eastern Cape are examples of this.

What is evident from the cases highlighted is that a definition of corporal punishment must be wide enough to cover all forms of punishment being inflicted on learners. Thus, a learner being forced to eat faeces or to stand in a 'motorbike' position for an extended period of time must also be considered as acts of corporal punishment.

Many of the cases on the table are also of learners being verbally abused, and humiliated. There should therefore also be appropriate mechanisms to deal with incidents of verbal abuse and intimidation of towards learners.

Many of the corporal punishment cases occur in the context of learners being assaulted and victimised, and then suspended or expelled without due process. The process for suspensions and expulsions is clearly prescribed in SASA. This is discussed later in the report. It appears therefore that schools are failing to abide by the law not only in respect of the corporal punishment ban but also in respect of other areas of discipline. Addressing issues of corporal punishment can therefore not occur in isolation of the other laws regulating learner discipline.

There does not appear to be a uniform way of dealing with complaints in the various provincial education departments (PEDs). In fact, in many instances, it is the intervention of a public interest organisation that instigates action on the part of the PED or the South African Police Services (SAPS). According to SAHRC legal representatives, often their primary role is that of a facilitator of the process to ensure that a complaint is effectively investigated and dealt with. This suggests that there needs to be a standardised mechanism by PEDs for dealing with corporal punishment cases once a complaint has been made.

The criminal, PED disciplinary process and SACE processes are all separate processes. According to one of the lawyers interviewed, in an incident where a KwaZulu-Natal educator was found guilty of rape in criminal proceedings, the PED nevertheless refused to proceed with the

investigation. According to the lawyer, these processes should happen in tandem. The criminal case was decided beyond a reasonable doubt yet the PED did not proceed with an investigation determined on a balance of probabilities.

In one of the cases highlighted in the table the disciplinary proceeding against the educator could not be pursued because the father did not want his child to testify at the proceeding. Interviews and discussions for this report indicate that at disciplinary hearings a trade union representative always assists educators while the learner has no representation. Lawyers interviewed also indicated that there are incidents of the chairperson and witnesses being intimidated. There is therefore an imbalance of power during these proceedings, in terms of which witnesses, especially learners feel intimidated. These procedures should therefore be revised to be more learner-friendly.



## **CHAPTER 4**

# **THE LEGAL AND POLICY FRAMEWORK GOVERNING THE PROHIBITION AGAINST CORPORAL PUNISHMENT IN SOUTH AFRICA**

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### **4.1 The protection of learners against corporal punishment**

#### **4.1.1 International law**

The South African government ratified the Convention on the Rights of the Child (CRC) in 1995. As such South Africa is obliged to undertake reforms that harmonise South African child law with the CRC.

Article 19(1) requires that:

States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, 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.

Article 28(2) requires state parties to the CRC to take steps ‘to ensure that school discipline is administered in a manner consistent with a child’s human dignity’.

In 2000 the South African government ratified the African Charter on the Rights and Welfare of the Child (ACRWC). Article 16(1) of the ACRWC contains a similar provision to Article 19(1) of the CRC. Article 11(5) of ACRWC further states that:

States Parties to the present Charter shall take all appropriate measures to ensure that a child who is subjected to schools or parental discipline shall

be treated with humanity and with respect for the inherent dignity of the child and in conformity with the present Charter.

Thus ‘appropriate measures’, in the context of corporal punishment, would include ‘legislative measures’ to protect learners from ‘physical or mental abuse’. It would also include the public education programmes for the promotion of positive discipline.

#### **4.1.2 The Constitution**

Various rights in the Constitution protect learners from being subjected to corporal punishment. This was confirmed in *Christian Education*. Section 10 states that everyone has the right to human dignity. Section 12(1) states that everyone has the right to freedom and security of person which includes the right: (c) to be free from all forms of violence; (d) not to be tortured in any way; and (e) not to be treated or punished in a cruel, inhuman or degrading way. Section 28 (1)(d) states that every child has the right to be protected from maltreatment, neglect, abuse or degradation.

In *Christian Education*, the parents averred that ‘corporal correction’ was an integral part of the practice of their Christian faith and that the blanket prohibition of its use in schools violated their individual, parental and community rights to freely practice their religion. In particular, they claimed that their right to freedom of religion, belief and opinion in terms of section 16 and their religious, cultural and linguistic rights as a community in terms of section 31 were infringed by the prohibition. They therefore sought an exemption from the prohibition.

The Constitutional Court, in making its finding, engaged in a balancing exercise by weighing the rights of the parents against those of their children.

In particular, Justice Albie Sachs stated that corporal punishment is a violation of the rights of the child to human dignity (section 10), freedom and security of the person (section 12), and the rights of the child to be protected from maltreatment, neglect, abuse or degradation (section 28 (1)(d)). He therefore sought to determine whether the rights of the parents may be limited in terms of section 36 (the limitations clause) of the Constitution.

Justice Sachs found that the ban was part of a ‘national programme’ for the transformation of education, and that a ‘coherent and principled

system of discipline is integral to such development'.<sup>34</sup> Moreover, he acknowledged that:<sup>35</sup>

The state is further under a constitutional duty to take steps to help diminish the amount of public and private violence in society generally and to protect all people and especially children from maltreatment, abuse or degradation. More specifically, by ratifying the United Nations Convention on the Rights of the Child, it undertook to take all appropriate measures to protect the child from violence, injury or abuse.

He held further that:<sup>36</sup>

The parents are not being obliged to make an absolute and strenuous choice between obeying a law of the land or following their conscience. They can do both simultaneously. What they are prevented from doing is to authorise teachers, acting in their name and on school premises, to fulfil what they regard as their conscientious and biblically-ordained responsibilities for the guidance of their children. Similarly, save for this one aspect, the appellant's schools are not prevented from maintaining their specific Christian ethos

The court therefore upheld the prohibition and refused to grant an exemption to the Christian schools.

#### **4.1.3 Legislation and policy protecting learners from corporal punishment**

##### ***National Education Policy Act 27 of 1996***

Section 3(4)(n) of the National Education Policy Act states that the Minister of Education shall determine national policy for the:

[C]ontrol and discipline of students at education institutions: Provided that no person shall administer corporal punishment, or subject a student to psychological or physical abuse at any education institution.

34 Para 39.

35 Para 40.

36 Para 51.

***SASA & the Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners***

As stated in *Christian Education*, part of the transformation of education entailed the establishment of a 'coherent and principled system of discipline'. The prohibition against corporal punishment can therefore not be seen in isolation from the other provisions in SASA dealing with discipline.

Thus, Section 8 of SASA provides that an SGB must adopt a code of conduct for learners, 'after consultation with learners, parents and educators of the school'. Section 8(4) states that all learners attending a school are bound by the code of conduct of that school.<sup>37</sup>

The section further provides that the Minister may establish guidelines for the consideration of SGB's in adopting their codes of conduct. Pursuant to this provision in 1998, the then Minister of Education published the 'Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners' (the Guidelines).<sup>38</sup>

These Guidelines affirm that school codes of conduct abide by the Constitution and respect the rights of learners. The Guidelines require that school codes promote 'positive discipline' and not be 'punitive and punishment orientated'.<sup>39</sup> The Guidelines state further that:<sup>40</sup>

Corporal Punishment has been abolished. Educators and learners have to learn the importance of mediation and co-operation, to seek and negotiate non-violent solutions to conflict and differences and to make use of due process of law.

The Guidelines require that school codes: (a) inform learners of conduct that is permissible and conduct that is prohibited; (b) advise learners as to the grievance procedures and (c) advise learners of due process procedures during disciplinary hearings.<sup>41</sup> The Constitutional Court has stated in the

37 According to DBE representatives all learners attending the school are expected to sign a statement of commitment to the code of conduct.

38 GN 776 in GG18900 of 15 May 1998.

39 Para 1.4.

40 Para 4.4.1.

41 Para 3.4.

case of *MEC for Education: KwaZulu-Natal v Pillay*<sup>42</sup> that while these Guidelines are not mandatory, schools ‘must’ consider the Guidelines when an SGB adopts its code of conduct.

Sections 8(7)-8(9) of SASA make provision for the use of an intermediary in disciplinary proceedings if it appears to an SGB that a learner may suffer undue stress during a disciplinary hearing. Section 9 of SASA sets out the due process provisions in instances where a learner is suspended or expelled. Finally, section 10 of SASA prohibits the administration of corporal punishment against a learner. It also states that any person guilty of contravening the prohibition will be, ‘guilty of an offence and will be liable on conviction to a sentence which could be imposed for assault’.

Thus, there is a clear rights-based system of discipline envisaged by the legal framework. The fundamental tenets of the system include the prohibition of corporal punishment and the development of codes of conduct for schools through representative and negotiated processes.

### ***The Children’s Act 38 of 2005***

In terms of section 7(1)(h) of the Children’s Act, when applying the best interests of the child standard, the child’s physical and emotional well-being must be taken into consideration.

In terms of section 110(1) Children’s Act, an educator, who on reasonable grounds concludes that a child has been abused in a manner causing physical injury, must report that conclusion in the prescribed form to a designated child protection organisation, the provincial department of social development or a police official. Thus an educator is legally obliged by this Act to report acts of corporal punishment being administered by other educators where they cause physical injury.

42 2008 (1) SA 474 (CC) para 34. In this case a learner challenged the refusal by her school’s SGB to grant her an exemption from the prohibition against wearing nose-rings in the school’s code. The learner alleged that the wearing of the nose-stud was an expression of her South Indian Hindu religious faith. The Constitutional Court found that prohibition in the school’s code unfairly discriminated against the learner on the grounds of religion and culture. The Court therefore ordered the SGB to revise its code to accommodate the learner.

The Children's Act provides for the establishment of a National Protection Register.<sup>43</sup> Part B of the Register was established to have a record of persons who are unsuitable to work with children.<sup>44</sup> A court in a criminal or civil proceeding or, a 'forum established or recognised by law in any disciplinary proceedings concerning the conduct of that person relating to a child', may make finding that a person is unsuitable to work with children.<sup>45</sup> Such a finding may be made by the court or forum on its own volition or on application by a prosecutor or a person having sufficient interest in the protection of children.<sup>46</sup> In criminal proceedings, a person must be found unsuitable to work with children on conviction of a charge of murder, attempted murder or a charge of assault with intent to do grievous bodily harm with regard to a child.<sup>47</sup> Once a person's name appears on Part B of the Register, that person may no longer be employed at an institution dealing with children.<sup>48</sup>

#### ***Provincial protection of learners against corporal punishment***

The provincial education legislation of each of the provinces in South Africa contains a provision dealing with learner discipline. With the exception of the Eastern Cape Schools Education Act 1 of 1999 each province specifically prohibits corporal punishment in schools. See table below.

43 Sec 111.

44 Sec 118.

45 Sec 120(1).

46 Sec 120(2)(b) & (c).

47 Sec 120(4).

48 Section 123.

**Table 3**

|  |  |
|--|--|
| <b>Western Cape Provincial School Education Act 12 of 1997</b> | Section 46:<br>No person shall administer corporal punishment to a learner at a school.  |
| <b>Gauteng School Education Act 6 of 1995</b>                  | Section 23:<br>(1) No person shall administer corporal punishment to a learner at any public school or private school.<br>(3) Any person who intentionally or negligently contravenes subsection (1) shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months.            |
| <b>Eastern Cape Schools Education Act 1 of 1999</b>            | No specific mention of corporal Punishment. Section 50 states that discipline is to be handled in accordance with SASA.  |
| <b>Northern Cape Education Act 6 of 1996</b>                   | Section 22:<br>(1) No person shall administer corporal punishment to a learner at any public school or independent school.<br>(2) Any person who intentionally or negligently contravenes sub-section (1) shall be guilty of an offence and liable on conviction to a sentence which could be imposed for assault.                         |
| <b>KwaZulu-Natal School Education Act 3 of 1996</b>            | Section 63:<br>(1) No person shall administer corporal punishment to a learner at any public school or independent school.   |
| <b>School Education Act (Mpumalanga) 8 of 1995</b>             | The Act was amended in 1999 to insert the provision relating to corporal punishment. Section 20A states:<br>(1) No person may administer corporal punishment at a school to a learner.<br>(2) Any person who contravenes subsection (1) is guilty of an offence and liable on conviction to a sentence which could be imposed for assault. |
| <b>Northern Province School Education Act 9 of 1995</b>        | Section 21:<br>(1) No person shall administer corporal punishment to a learner at any public school or private school.   |
| <b>Free State School Education Act 2 of 2000</b>               | Section 33:<br>(1) No person shall administer corporal punishment to a learner at a school.<br>(2) A person who contravenes subsection (1) is guilty of an offence and liable on conviction to a sentence which could be imposed for assault.  |

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|--|---|
| <b>North-West Schools Education Act (3/1998): Regulations relating to the disciplinary proceedings dealing with misconduct of learners</b> | In terms of Reg 3(2)(c) an SGB must adopt a code consultation with the learners, parents and educators of the school. Such a code, must specify which punishment may be imposed in respect of the different categories of misconduct if a learner is found guilty: Provided that corporal punishment shall be prohibited. |
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## 4.2 The sanction of educators administering corporal punishment

Where there has been a complaint of corporal punishment against an educator at a school, the district office for that school will conduct preliminary investigations into the allegations.<sup>49</sup> Depending on the outcome of this investigation the district official will refer the case to the Labour Relations Directorate for further investigation and disciplinary hearings.

### 4.2.1 The Employment of Educators Act 76 of 1998

Schedule 2 of the Employment of Educators Act (EEA) governs the procedure for disciplinary hearings against educators. The schedule states that if the misconduct is also a criminal offence, separate and different proceedings will occur.<sup>50</sup> No provision is made for the legal representation of learners at disciplinary proceedings. Noteworthy, however, is the provision which enables the presiding officer to appoint an intermediary in instances where a witness is under 18 years of age and will suffer 'undue mental stress or suffering' during proceedings.<sup>51</sup>

In terms of section 17(1)(d) an educator is guilty of serious misconduct and must be dismissed if he or she is, 'found guilty of seriously assaulting, with the intention to cause grievous bodily harm to a learner, student or other employee'. In terms of section 18(1)(u) an educator is guilty of misconduct if he or she 'intimidates or victimises fellow employees, learners or students'. In terms of section 18(1)(r) an educator is guilty of misconduct if he or she 'assaults, or attempts to, or threatens to assault,

49 This information was obtained from correspondence with WCED officials, as well as from discussions with the GDE representative.

50 Sec 2(f).

51 Sec (10A)(a).



another employee or another person'. Section 18(5) provides that an educator *may* be dismissed if he or she is found guilty of contravening section 10 of SASA.

In terms of section 18(2) where an educator is found guilty of misconduct the following sanctions may be imposed: counselling; a verbal warning; a written warning; a final written warning; a fine not exceeding one month's salary; suspension without pay for a period not exceeding three months; a demotion; a combination of the above sanctions or a dismissal if the nature or extent of the misconduct warrants a dismissal.

While case law appears to be scant on the issue, there have been a few cases of educators being disciplined for administering corporal punishment to learners. Data in respect of the number of corporal punishment cases actually prosecuted by PEDs and SACE, as well as the types of sanction imposed in such cases is also limited. Below is a discussion of available case law and data.

### ***Case law***

In the *MEC for Education Department: Limpopo v Sebetha*,<sup>52</sup> an educator applied lashes to the head of a six-year-old child with a plastic pipe. The main injury was bruising to one side of the head. The reason given by the educator for the corporal punishment was that the child had been absent the day before. The matter was reported to the police and the educator pleaded guilty and was fined R300. The child was moved to another class. The LDoE instituted disciplinary proceedings against the educator in consequence of which she was dismissed. The educator referred the matter for arbitration. The arbitrator found that while there was a ban in place for corporal punishment, the penalty was too severe. He took into account the remorse she had shown, her length of service and the bruise that in his view was of a minor nature. The educator was reinstated. On appeal, the Labour Appeal Court had to decide on the appropriateness of the dismissal.

The Labour Appeal Court held that a dismissal could occur even if an educator was found guilty of misconduct rather than gross misconduct. According to the Court:<sup>53</sup>

52 (JA39/2006) [2008] ZALAC 20 (28 February 2008).

53 Paras 13-14.

What is relevant is that a serious violation of the child's rights was in fact caused by the assault administered by first respondent. These rights are now protected by our constitution and even more than previously would have been a case, courts have to take extremely seriously any violation of children's rights. Remorse after the fact in a case such as the present cannot surely be a sufficient basis for an employer never to dismiss an assaulter such as the first respondent particularly where it has a clear policy regarding corporal punishment and when the victim is a six year old child.

The employer in these cases, is certainly entitled to say, that notwithstanding any remorse, notwithstanding an impeccable record, given the violence perpetrated upon a minor child, dismissal may well be justified in such a case.

The reinstatement of the educator was nevertheless allowed on the basis that the LDoE's review was out of time by several years, and therefore could not be condoned.

In *Stander v Education Labour Relations Council*,<sup>54</sup> the educator had been teaching for over thirty years. He was found guilty of slapping a grade 11 learner and was dismissed. He took the disciplinary process on review. The court set aside the dismissal and referred the matter back to the Education Labour Relations Council.

The court held that the Commissioner had failed to take into account certain factors relevant to the substantive fairness of the dismissal. This included the length of service of the educator. The educator did not deny the commission of the offence. He had accepted that what he did was wrong and subjected himself to medical assessment and treatment. It was not in dispute that the offence was as a result of provocative behaviour on the part of the learner. The relationship with the school had not broken down. It would appear from the version of the school that disciplinary action was only taken because of pressure from outside the school. There was no evidence that he would commit a similar offence again.

### ***Sanctions imposed***

Attempts were made to obtain data relating to sanctions by PEDs from two provinces. In terms of data provided by the WCED on the prosecution of

54 (2011) 32 ILJ 978 (LC).

corporal punishment cases, in 2011/2012 a total of 117 cases of corporal punishment were dealt with. One hundred and four disciplinary hearings were finalised and 13 cases were withdrawn. In 2012/2013 125 cases of corporal punishment were dealt with. One hundred and ten disciplinary hearings were finalised and 15 cases were withdrawn. None of these cases resulted in dismissals. According to the WCED dismissals are only meted out in cases of grievous bodily harm.<sup>55</sup>

Similar statistics were not provided in Gauteng.<sup>56</sup> However, in the media report of the case of Diversity High School, the female teacher received a 'precautionary suspension' and the principal was suspended without pay for two months. The reports noted further that parents were outraged that these sentences were too lenient and that the principal would return to the school.

#### **4.2.2 The SACE code of professional ethics and disciplinary procedure**

The SACE Code of Professional Ethics (the Code) was developed in accordance South African Council for Educators Act 31 of 2000 (The SACE Act). In terms of the Code, an educator must '[avoid] any form of humiliation, and [refrain] from any form of abuse, physical or psychological' of a learner.<sup>57</sup>

SACE has a prescribed disciplinary procedure where there is a complaint of an alleged breach of the code. There is an initial investigation of the alleged breach. The matter may then be referred for a disciplinary hearing. The SACE disciplinary procedure has developed comprehensive rules to govern the disciplinary hearing, in terms of which the rules of natural justice apply. The procedure also provides for an appeal within SACE.

55 According to the SAHRC Report into school-based violence, during 2006, the WCED received 94 cases of which 54 were finalised by September 2006. Typical examples of cases included instances of educators attacking learners with canes or sticks, slapping them, flinging objects at them and even locking learners in small spaces as a form of punishment. The WCED stated that it has a 90% success rate in proving these cases. In most cases where the assaults were minor, the educators received fines together with a final written warning. SAHRC report 13.

56 On two occasions meetings were scheduled with a representative from the Labour Relations Department of the GDE. On both occasions, the meeting did not go-ahead as the representative was called away on urgent meetings.

57 Sec 3.5.

A noteworthy feature of the SACE procedure is that where a disciplinary panel decides to hear evidence, every party to the hearing may be represented at the hearing and can lead evidence and cross-examine witnesses. Thus, in theory, a learner is entitled to be represented and to lead evidence at a hearing.

SACE may impose the following sanctions where an educator is found to be guilty of a breach. These include: a caution or reprimand; a fine not exceeding one month's salary, or the removal of the educator's name from the register for a specified period or indefinitely or subject to specific conditions.<sup>58</sup>

### ***Sanctions imposed***

In the interview with the SACE legal representative, he stated that advisory letters (caution or reprimand) were the most common form of sanction that has been imposed in corporal punishment complaints. This was because SACE did not have the resources to hold disciplinary hearings in most corporal punishment cases. Advisory letters were therefore sent to educators instead of a disciplinary hearing being conducted. He stated further that the heavier sanctions were imposed only in the most exceptional corporal punishment cases. He also noted that where an educator did not intend to cause a serious injury to a learner, such as for example, where an educator strikes a learner using a cane and a flint of the cane causes eye damage to a learner, the educator will receive a lesser sanction on the basis that he or she did not intend to cause the eye damage.

According to the 2011/2012 Annual Report 525 cases were received by SACE during this period. Of these: 42 disciplinary hearings were finalised, 21 cases were mediated, 173 cases were referred and in 138 cases educators received advisory letters.<sup>59</sup> The Annual Report does not provide a breakdown of the types of cases according to these figures.

### **4.2.3 Analysis of sanctions imposed by PEDs and SACE**

It appears from the case law and from the discussions with government officials and with the SACE legal representative that there is no consistent approach to sanctioning educators for corporal punishment. The

<sup>58</sup> Sec 8.2 of SACE's 'Disciplinary Procedures'.

<sup>59</sup> The SACE Annual Report 2011/2012 27-30.

judgments referred to, and the discussion with the SACE legal representative, illustrate very different and subjective approaches to dealing with corporal punishment cases.

Moreover, what is apparent from the available information relating to the sanctioning of educators in the PED and SACE processes is that the sanction of educators found guilty of administering corporal punishment is often lenient.

An interesting anomaly of the PED and SACE processes that must be noted is that where an educator is dismissed from a position by a PED, that educator may no longer teach in that province but he or she may teach in another province, whereas once an educator's name is removed from the SACE register, that person is no longer an educator and is therefore not allowed to teach. Thus having a teacher de-registered by SACE is potentially useful in preventing an educator who commits a very serious act of corporal punishment from teaching again.

Section 120 of the Children's Act enables an educator's name to be placed on the National Protection Register for an act of corporal punishment that amounts to assault with intent to cause grievous bodily harm. This, however, is not an automatic process; a finding that the person is unsuitable to work with children must be made by the court or forum dealing with the matter. Currently, the EEA and the SACE rules specify the kinds of sanction that may be imposed in cases of corporal punishment. If placing an educator's name on the register is considered to be a sanction, it may be necessary to amend the EEA and SACE rules.

To do this in respect of the EEA would require a legislative amendment. A less cumbersome amendment would also be required to the SACE rules. According to the legal representative of SACE at a recent meeting between SACE and the different PED's, the issue of the placing of names of educators on Part B of the National Protection Register was discussed. No formal resolutions, however, appear to have been adopted in this regard.

### **4.3 Case studies: Western Cape and Gauteng**

As noted previously, the Western Cape and Gauteng are the provinces with the lowest incidence of corporal punishment. As such they may provide examples of appropriate policies and practices.

In 2002 the WCED developed a circular specifically to address incidents of corporal punishment.<sup>60</sup> This circular had to be read and signed by all WCED employees. The tone of the circular is peremptory and demands compliance from WCED employees.

The circular provides a relatively comprehensive definition of corporal punishment. It states:

Any deliberate act against a child that inflicts pain or physical discomfort to punish or contain him or her. This includes, but is not limited to, spanking, slapping, pinching, paddling, or hitting a child with a hand or with an object, denying or restricting a child's use of the toilet, denying meals, drink, heat and shelter, pushing or pulling a child with force, and forcing the child to do exercise.

The circular also warns against the use of psychological means to punish a learner. It warns educators that if they engage in acts of corporal punishment, these acts will be treated by the WCED as misconduct. It warns educators that acts of misconduct could lead to dismissals. It also warns that incidents of corporal punishment may be referred to the SAPS and that educators will be vulnerable to delictual claims from parents.

The circular further sets out a procedure for WCED employees to follow where an incident of corporal punishment is reported. The circular warns that principals, or other WCED officials, who do not observe the procedure set out in the circular will be charged by the WCED.

The WCED procedure as outlined in the circular does not mandate that complaints be referred SACE or SAPS. Although in practice it does appear that complaints are immediately referred by the WCED to SACE, but not SAPS.

Both the Western Cape<sup>61</sup> and Gauteng<sup>62</sup> have also developed policy guidelines that, while not dealing solely with the matter of corporal punishment, are meant to establish procedures that educators may follow to assist learners who are experiencing any form of neglect or abuse. The policies provide procedures for the reporting of parental abuse, third party

<sup>60</sup> Corporal Punishment Protocol WCED circular 95 2002 (8 August 2002).

<sup>61</sup> Western Cape Department of Education *Abuse no more: Dealing effectively with child abuse* (May 2007).

<sup>62</sup> Gauteng Department of Education *Guidelines and procedures for dealing with suspected and confirmed cases of child abuse* (2008) (Gauteng Guidelines).

abuse or abuse by other learners. The policies do not only provide for investigative and legal processes, but also for other interventions such as psychological support.

Noteworthy in the Gauteng Guidelines is that it reminds educators that in terms of section 110(1) of the Children's Act, where there is a reasonable suspicion that a child is being abused or neglected, an educator is legally obliged to report that suspicion.<sup>63</sup>

The Gauteng Guidelines outline a procedure where an educator abuses a learner. This procedure makes the reporting of the criminal matters mandatory. It reinforces that the criminal and internal labour processes will occur separately but simultaneously. It states that cases may be referred to SACE. It does not however make this mandatory save in circumstances where an educator is dismissed by the GDE for sexual misconduct.<sup>64</sup> The Gauteng Guidelines also remind educators that offenders must, in some circumstances, be registered in the Child Protection Register.

While both the Western Cape and Gauteng Guidelines may be used for dealing with incidents of corporal punishment, these documents appear to have been developed primarily for the management of cases of sexual abuse.<sup>65</sup> A concern with this is that it may not serve as an effective guide for corporal punishment cases.

Another concern is that these documents are not binding and therefore schools need not adhere to them. In Gauteng there is no 'binding' policy as in the case of the Western Cape that has the corporal punishment circular in place. However, according to the GDE representative interviewed for report, there is a consultation process underway to make the policy guidelines binding. Also according to the GDE official, principals in Gauteng have received training on the Guidelines, and booklets and posters explaining the procedures have been widely distributed. He also explained that where an incident does occur an intervention team will be sent to the school to deal with it. Thus, in the case of Diversity High, a psychosocial team was made available to address any

63 Gauteng Guidelines 11.

64 Gauteng Guidelines 23-24.

65 Most of the examples and references used in the Gauteng Guidelines are aimed at cases of sexual abuse and sexual violence.

trauma to learners. At the same time disciplinary processes against the principal and the educator were pursued.



## CHAPTER 5

### CORPORAL PUNISHMENT AT INDEPENDENT SCHOOLS

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#### 5.1 An overview of independent schools in South Africa

A recent report published by the Centre for Development and Enterprises (CDE), describes the diversity in independent schooling in South Africa.<sup>66</sup> Understanding this diversity is necessary for the enforcement of the prohibition against corporal punishment.

According to the CDE report, independent schools constitute about 6 per cent of South African schools. These are either registered independent schools or unregistered independent schools. The latter are illegal in terms of SASA. Registered independent schools may affiliate themselves with associations of private schools. The Independent School Association of Southern Africa (ISASA) is the largest association of independent schools in South Africa. In 2013 it had 706 member schools affiliated to it.<sup>67</sup>

There are non-profit schools that constitute the majority of independent schools but there is also a growing, group of 'for-profit' schools. Non-profit schools can receive state-subsidies depending on their fee level.

Finally there are high-fee schools, mid-fee schools and low-fee schools. Low-fee schools were identified to be a rapidly growing category in the

66 Centre for Development and Enterprises *Affordable private schools in South Africa* (2013) 5-6.

67 Information obtained from an ISASA representative during interview.

CDE report. These are made up of registered and unregistered schools. These are schools that are charging R7 500 a year or less.<sup>68</sup>

According to Ann Bernstein of the CDE:<sup>69</sup>

Low fee schooling in South Africa is growing rapidly. The Independent School Association of Southern Africa says there are more than 2 500 independent schools. Umalusi, the statutory quality assurance body says there are about 3 500 independent schools. No one knows the number of unregistered independent schools.

A number of low-fee schools have been established in abandoned buildings, factories, shopping centres or shacks. These schools are typically utilised not by the very poorest people, but by small business owners and working class parents.<sup>70</sup>

## 5.2 The legal framework governing independent schools

The *Christian Education* case confirmed that the prohibition against corporal punishment applies to both public and independent schools. Independent schools exist under conditions of more autonomy from the state than public schools. The enforcement of the ban is therefore more challenging in independent schools. Most notably, the EEA, which is the primary mechanism for initiating disciplinary action against educators in public schools, does not apply to independent schools. Alternative mechanisms for the enforcement of the ban are therefore necessary.

### 5.2.1 SASA and subsidiary legislation

Chapter 5 of SASA governs the state administration of independent schools. Particularly relevant are the sections that deal with the registration of independent schools, the withdrawal of registration of independent schools and the granting and withdrawal of subsidies to independent schools.<sup>71</sup> SASA empowers an MEC to grant subsidies to registered independent schools. It empowers the national Minister to determine

68 Centre for Development and Enterprises (n 70 above) 3.

69 A Bernstein 'The rise of low-fee private schools can only benefit South Africa' *BusinessDay* 1 August 2013.

70 Centre for Development and Enterprises *Promoting school choice for the poor* (2012).

71 Secs 46-48.

norms and standards for the granting of subsidies. It empowers an MEC to determine the conditions for registration of independent schools.<sup>72</sup> It also empowers an MEC to determine the conditions for both the withdrawal of registration and for the withdrawal of subsidies to independent schools. Finally, SASA sets out the due process provisions in respect of both the withdrawal of registration, and the withdrawal of subsidies, from independent schools.

The Norms and Standards for School Funding regulate both the allocation of funds to public schools and the granting of subsidies to independent schools.<sup>73</sup> These Norms then establish the criteria and conditions for eligibility of subsidies. The conditions of eligibility for registration, and the conditions for the withdrawal of subsidies are further elaborated on in provincial education legislation. Save for requiring that independent schools do not discriminate on any of the listed grounds in the Constitution, the conditions of eligibility are based mainly on financial and administrative considerations.<sup>74</sup>

The registration and withdrawal of registration of independent schools is also further elaborated on in the provincial legislation. In terms of which the registration and withdrawal of registration is made subject to prescribed circumstances set out in provincial regulations.

It is also not certain that regulations prescribing the conditions of withdrawal in all the provinces have been developed. Regulations were not available electronically for all nine provinces. Where regulations were accessible PEDs did not have uniform approaches to the registration and withdrawal of independent schools.

In certain provinces provision is made for PEDs to withdraw or close independent schools where there are 'reasonable grounds' to believe that a school is being 'managed or maintained in a manner or under circumstances that could be ... harmful to the physical, intellectual, or spiritual well-being' of the learners at the school.<sup>75</sup> In other provinces no

<sup>72</sup> Sec 50.

<sup>73</sup> National Norms and Standards for School Funding GN2362 in GG29178 31 August 2006.

<sup>74</sup> Norms and Standards for School Funding (n 77 above) paras 171-191.

<sup>75</sup> KwaZulu-Natal: Notice Regarding the Registration and Payment of Subsidies to Independent Schools GN 287 28 August 1999, Reg 3(1)(c). See also Regulations Regarding the Registration of Subsidies to Private Schools: Mpumalanga School Education Act GN 73 in PG 2147 5 March 2013 Reg 7(1)(a)(i).

similar provision is made and conditions of withdrawal relate more to administrative considerations.<sup>76</sup>

Thus, in those provinces where a school can be de-registered, or closed, if a learner's well-being is harmed, a PED may be able to de-register a school in circumstances where learners are receiving corporal punishment and the independent school fails to act.

### **5.2.2 SACE**

In terms of the SACE Act both public and independent schools may only appoint educators registered with SACE.<sup>77</sup> Thus a PED, parent or any other person may refer a complaint of corporal punishment against an educator at an independent school to SACE. The SACE investigative and disciplinary processes will then ensue. As noted previously, deregistration by SACE would effectively preclude an educator from teaching.

### **5.2.3 Codes of Practice of Independent Associations**

According to the ISASA representative interviewed for this report, all members must subscribe to its 'Principles of Good Practice'.<sup>78</sup> Section A8 prohibits the use of corporal punishment at member schools. According to the code where a member school is found to be in breach of these principles, the schools membership may come under review and may be terminated or suspended.

According to the ISASA representative however, in practice the association will not prescribe to schools. The approach of the association when it receives a complaint is to advise the complainant parents to exhaust the internal structures of the school. It will also not advise schools in the policy making process. For example, in terms of developing a code of conduct, ISASA will only make recommendations and advice on legalities.

<sup>76</sup> See for example Western Cape Regulations Relating to the Registration of and Subsidies to Independent Schools (Excluding Independent Primary Schools) GN 6919 4 November 2011.

<sup>77</sup> Sec 21.

<sup>78</sup> ISASA Conditions of Membership (July 2011).

### **5.3 Improving mechanisms of enforcement at independent schools**

The analysis of the legal framework suggests that there are fewer options for recourse where a learner has received corporal punishment at an independent school than at a public school. Moreover, learners at unregistered independent schools are particularly vulnerable due to the fact that they fall outside the protective legal and policy framework that regulates public schools, as will be discussed below.

SASA and its subsidiary legislation provide limited options for recourse for registered independent schools. In some instances a PED may be able to withdraw the registration of an independent school or close the school where a school does not protect learners from corporal punishment. Whether a PED will adopt this course of action however is dependent on the criteria for the withdrawal of registration of that particular province. As noted earlier, PEDs have different rules in this regard. There would also have to be a willingness on the part of the PED to adopt such an approach. Finally, the PED will have to follow the prescribed rules of due process in respect of de-registration. The courts have demonstrated that they will adopt a strict approach in this regard.<sup>79</sup>

The withdrawal of a subsidy of an independent school that receives a subsidy does not appear to be a viable option for recourse in circumstances where a school fails to protect its learners from corporal punishment. This is because the criteria for the withdrawal of subsidies are primarily of an administrative nature.

The strongest option for recourse appears to be to pursue disciplinary action against an educator through the SACE process. Thus, a PED or a parent or another interested party such as a public interest organisation could file a complaint with SACE.

Another potential option is to pursue a civil claim for damages against an independent school. Civil action against an independent school or against a PED, in the case of a public school will be discussed in more detail in the final chapter of this report.

<sup>79</sup> See for example *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, KwaZulu-Natal* 2013 (4) SA 262 (CC).

According to the CDE research cited, there is a growing group of low-fee unregistered schools. Learners at these schools are the most vulnerable to corporal punishment since these schools operate below the radar of any legal regulation and legal sanction. Due to the fact that they exist illegally, these schools need not ensure that educators are registered with SACE, and educators at these schools are accordingly not bound by SACE rules. Moreover, since these schools are not registered, they need not fear de-registration by PEDs where they fail to protect learners from corporal punishment.

Fewer cases of corporal punishment in independent schools are reported. According to SACE's legal representative, while there are some complaints from private schools, these do not occur often and mainly originate from incidents arising from low-fee private schools. According to the legal representative these schools generally have poor labour practices with schools often deducting money from teachers' salaries for different reasons. Thus where complaints do arise, these are referred directly by the independent schools mainly because the school seeks to get rid of a teacher.

## CHAPTER 6

### DEVELOPING EFFECTIVE ‘LEGAL AND EDUCATIONAL’ PROGRAMMES TO ENFORCE THE BAN AGAINST CORPORAL PUNISHMENT

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South Africa’s State Party report to the Committee on the CRC.<sup>80</sup>

[R]ecognises that efforts to eliminate violent disciplinary practices in schools require urgent attention.

There is therefore a recognition that South Africa has to refocus its efforts to end corporal punishment in schools. This requires developing ‘appropriate legal and educational programmes’ that will initiate change.

This report has suggested that one of the primary reasons for the continuation of corporal punishment in schools is the lack of support for the ban amongst the teachers and in certain communities. The first section of this chapter therefore discusses some of the concerns in respect of current initiatives to shift these attitudes, and to implement alternative forms of discipline in schools. It then makes recommendations for reviewing these initiatives.

This report has also suggested that another one of the reasons for the continuation of corporal punishment in schools is the absence of stronger legal mechanisms to enforce the ban. The second part of this chapter therefore discusses the deficits in the legal enforcement of the prohibition. It then makes recommendations for improving mechanisms to sanction educators guilty of corporal punishment and for the overall strengthening of mechanisms to enforce the ban.

80 South Africa’s Combined, Second, Third & Fourth Periodic State Party Report to the Committee on the Rights of the Child (2013) 11.

The third part of this chapter makes recommendations on strategies that could be employed by public interest litigation organisations and the SAHRC to improve the enforcement of the ban against corporal punishment.

## **6.1 Shifting attitudes and implementing alternatives to corporal punishment**

### **6.1.1 Current programmes**

The DBE identifies two strategies that have been put in place to promote alternatives to corporal punishment in schools.<sup>81</sup>

The DBE, in partnership with the Centre for Justice and Crime Prevention has developed a training manual on 'Positive Discipline and Classroom Management' (the manual).<sup>82</sup> According to a DBE representative:

[T]hese have been developed to equip principals and teachers with the necessary skills to engage learners exhibiting difficult behaviour in a more positive manner. The programme is designed to teach young people to become responsible, respectful and resourceful members of their communities. It teaches important social and life skills in a manner that is deeply respectful and encouraging for both children and adults (including parents, teachers).

The DBE has also developed and distributed to all provinces an example code of conduct for learners to serve as a guide to schools when developing their own context specific codes.<sup>83</sup> According to the DBE representative this prototype spells out the rules regarding learner behaviour at a school, and describes the disciplinary system to be implemented by a school in instances learners have transgressed the rules.

81 This information was provided by Dr Charles Wilson, whose assistance in the provision of information for the purposes of compiling this report was much appreciated.

82 Several unsuccessful attempts were made to obtain a copy of this manual from the DBE.

83 It was not clear whether this was the 'Guidelines for the Consideration of Governing Bodies in Adopting a Code of Conduct for Learners', or whether this was an actual example of what a code should look like.



### 6.1.2 Analysis of current programmes

What became evident during the course of research for this report is that the manual is widely viewed as insufficient in transforming attitudes and in sufficiently empowering educators to implement the alternatives that are recommended in the report.

At the SAHRC roundtable on corporal punishment DBE representatives stated that there had been comprehensive coverage of the manual in urban but not in rural areas.<sup>84</sup> Yet, interestingly, according to the SACE legal representative, it is in the rural areas where the practice is the most rife, and accordingly where the need for training is most necessary. This is also borne out by the statistics referred to earlier in the report. That is, the more developed, urbanised provinces have the lowest incidence of corporal punishment, while the mainly rural provinces have a higher or increasing incidence of corporal punishment. Furthermore, the claim of ‘comprehensive coverage’ has been disputed in many of the interviews and discussions undertaken for this report.

The SACE representative at the SAHRC roundtable also raised the concern that the manual had never been revised. The SADTU representative further suggested that more appropriate alternatives be explored.

There is also a concern that despite the emphasis on ‘positive discipline’ and more restorative strategies to correct ill-discipline, this approach is not being implemented in schools. Corporal punishment is often replaced by other punitive measures such as detention or writing lines. These forms of punishment are viewed as ineffective and therefore reinforce support for corporal punishment by educators, while other ‘consultative mechanisms’ or restorative mechanisms remain insufficiently explored.<sup>85</sup>

84 See also South Africa’s Report to the Committee on the Rights of the Child (n 84 above) 41-42: ‘The DBE has taken measures to reduce the increasing levels of corporal punishment in schools. The School Management Teams and School Governing Bodies in nine high-priority areas have received training on positive discipline and classroom management, and plans are in development for provinces to support “hot-spot” schools evincing a clear need for positive-discipline interventions. However, these efforts are hampered by parents’ and communities’ overall acceptance that corporal punishment is an effective way to discipline a child. As such, work is done with SGBs and parents to educate them on the negative impacts’.

85 Morrel (n 2 above) 296.

The manual on its own is also unlikely to transform deeply entrenched attitudes of educators and parents preferring corporal punishment as a form of discipline. A more comprehensive approach to changing attitudes should therefore be sought.

For example, the DBE must reprioritise addressing corporal punishment in its broader strategies and programmes. The example of the 'safe-schools' project is a case in point. It is also not clear to what extent approaches to discipline form part of the educator-training curriculum. Equipping a new generation of educators to approach discipline in the classroom in a non-violent manner that promotes 'positive discipline' is necessary.

At the SAHRC roundtable members of NASGB at the SAHRC revealed that parents feel a sense of powerless when they seek to protect their children from corporal punishment and other forms of abuse in the school environment. Parents also expressed similar sentiments in a recent radio talk show discussing corporal punishment.<sup>86</sup>

Empowering parents to protect their children requires ensuring that parents are aware of their roles in participative processes, such as in developing codes of conduct and in conducting disciplinary proceedings. It also requires parents to be aware of the avenues for complaint and redress where learners have received corporal punishment. This will enable parents to take complaints of corporal punishment forward.

There are current initiatives for the training of SGBs.<sup>87</sup> These programmes should be enhanced, and where necessary broadened to ensure parents are equipped to:

- (a) Participate in the development of school codes.
- (b) Actively and effectively participate in disciplinary proceedings against learners.
- (c) Ensure that such proceedings take place in accordance with due process.
- (d) Effectively lodge complaints against educators where learners experience corporal punishment and take those complaints forward.

<sup>86</sup> SAFM Talk Shop 17 September 2013.

<sup>87</sup> For example the training programmes provided to associations of SGBs at the Matthew Goniwe Institute of Governance and Leadership.

- (e) Monitor that processes proceed in a manner prescribed by law. In particular, that the correct criminal and disciplinary processes ensue.

### **6.1.3 A way forward**

Current initiatives to shift attitudes in respect of corporal punishment are failing. A dialogue is therefore required to review these initiatives. This dialogue must:

- (1) Review the content of the current manual. There are various manuals that have been developed by experts that may assist in providing substantive input into this process.<sup>88</sup> The WCED also has its own manual that is being used in training educators. All these different initiatives should be discussed and evaluated in revising the current manual.
- (2) Review the coverage of the manual. In particular, 'hot spots' of corporal punishment must be identified and prioritised to benefit from training initiatives.
- (3) Explore the development of a more comprehensive and multi-faceted programme that could facilitate an attitude shift in respect of corporal punishment.
- (4) Include a discussion on enhancing SGB training. Some of the potential needs in this area have been discussed.
- (5) Take place between the DBE and the different stakeholders such as teacher unions, SGB associations and experts involved in promoting alternatives to discipline.

In the longer term, there must be cognisance of the impact of the broader societal conditions on corporal punishment. Research suggests that behavioural problems are reduced where there is effective teaching and learning taking place. Again, this is borne out by the statistics referred to earlier in the report. The province experiencing the greatest difficulties with learning and teaching, the Eastern Cape, has the highest incidence of corporal punishment. By contrast, the provinces that have been producing the best results, Gauteng and the Western Cape, have the lowest incidence of corporal punishment.<sup>89</sup>

<sup>88</sup> Porteus et al (n 14 above).

<sup>89</sup> Porteus et al (n 14 above) 10.

Reduced overcrowding in the classroom will make educators feel less threatened and stressed in classroom sizes that are more manageable.<sup>90</sup> Finally, addressing the societal concerns that produce violent behaviour will also reduce the levels of school-based violence.

Currently there are plans afoot to amend the Children's Act to outlaw corporal punishment in the home. Such an initiative, if accompanied by appropriate enforcement mechanisms and educational programmes will go a long way to the eradication of corporal punishment.<sup>91</sup> Aligning modes of discipline in the home and school environment is necessary for the total eradication of the practice of corporal punishment in South Africa.

## **6.2 Improved mechanisms for the enforcement of the corporal punishment ban**

Current legal mechanisms in place to enforce the ban against corporal punishment are limited. The enforcement of the ban is inconsistent between the different provinces. There is no national data-base that provides information as to the number of cases of corporal punishment that have been received by a province or the nature of the sanction imposed where an educator is found guilty. Learners are not represented at the labour disciplinary hearings of PEDs. With a few exceptions, there is in general no obligation on PED's to report complaints to SACE or to the SAPS. The sanction of educators appears to be lenient. There is a no synergy between the PED and SACE processes in dealing with complaints of corporal punishment.

Where provinces do have processes in place for addressing corporal punishment complaints the incidence of corporal punishment is reduced. The example of the Western Cape circular on corporal punishment, while not perfect, nevertheless provides a useful blueprint for improved enforcement of the ban. A national protocol or regulations for enforcing the ban against corporal punishment is therefore recommended.

90 According to the SAHRC *Charter of Children's Basic Education Rights* (2013) 19, while a substantial number of schools have class sizes in excess of the prescribed 40 learners, at least 6% of schools have class in excess of 60 learners.

91 See A Hartley 'Spanking doctrine is child abuse, rights body insists' *The Star* 2 September 2013.

### **6.2.1 The establishment of a national protocol for the enforcement of the corporal punishment ban**

A national protocol or regulations must include the following:

- (1) The establishment of a national database. This should include a list of the number of complaints received from each province. It should also record the action taken and include the type of sanction imposed where an educator is found guilty. This will improve consistency in the sanctioning of perpetrators of corporal punishment. It will also assist in identifying hot spots for intervention by the DBE and PEDs.
- (2) There must be a definition of what constitutes corporal punishment. The definition of corporal punishment proffered by the WCED circular provides a useful precedent in this regard.
- (3) While the WCED circular does not include forms of verbal abuse within its definition of corporal punishment, it does warn against the use of a psychological means to punish a learner. A similar approach could be adopted in the protocol whereby educators are warned that verbal abuse may be construed as misconduct. This would be in keeping with the SACE rules and with section 17(1)(u) of the EEA. In terms of this section, intimidation or victimisation of a learner is included within the definition of misconduct. This would address those instances of verbal abuse of learners that do not fall within the definition of corporal punishment.
- (4) The protocol must make it mandatory for principals and other educators in a schooling environment to report incidents of corporal punishment where they are aware of it. Where the punishment results in physical harm, this is obligatory in terms of section 110(1) Children's Amendment Act.
- (5) The protocol must prescribe a detailed step-by-step process for the management of corporal punishment complaints.
- (6) This process must mandate that in addition to a complaint being investigated by the labour department of a PED, complaints of corporal punishment must also be reported to the SAPS and SACE.
- (7) The protocol must provide for the representation of learners during disciplinary procedures against educators. It must also develop child-friendly procedures for learners testifying in disciplinary proceedings. The protocol ought to be guided by the Children' Act in this regard.<sup>92</sup> The EEA should also be amended to accord with the protocol.

<sup>92</sup> Secs 60-61.

The protocol must determine the types of corporal punishment cases that would justify an educator being placed on Part B of the National Protection Register in terms of the Children's Act.

- (8) There must be a mandatory process for the placing of an educator's name on the Register where the educator is guilty of certain offences. The SACE rules and the EEA would have to be amended to provide for the imposition of such a requirement.
- (9) The protocol should investigate the possibility of improved synergy between SACE and PEDs. Thus, there should not only be mandatory referrals by PEDs to SACE but there could also be improved processes of collaboration in investigative, disciplinary procedures and in the imposition of sanction.
- (10) A mechanism for the protection of learners in independent schools. This must include a mandatory referral to SACE. It may also consider, the withdrawal of the registration of independent schools, or subsidies to independent schools, where such schools persistently fail to act against perpetrators of corporal punishment.

## **6.3 Proposed interventions**

### **6.3.1 The SAHRC**

The SAHRC is well placed to implement some of the recommendations made in this report given its powers and its long track record in matters relating to basic education and children's rights. Because of the numerous complaints of corporal punishment received by the SAHRC, it has already initiated a process to address corporal punishment in schools at a systemic level by hosting a roundtable in 2013.

The SAHRC should therefore convene a 'Dialogue on changing attitudes to corporal punishment'. Members of the DBE, educator unions, associations of school governing bodies, academics and civil society experts involved in research on school-based violence, and in developing alternatives to corporal punishment should participate in this dialogue. The purpose of this dialogue is to assist the DBE in the development of a more cohesive and multi-pronged programme for shifting attitudes to corporal punishment. Thus it should revisit the current manual on alternatives to corporal punishment. It should also develop broader programmes aimed at shifting attitudes to corporal punishment.

In 2002, the DBE published Regulations to Prohibit Initiation Practices.<sup>93</sup> The Regulations were developed pursuant to an SAHRC investigation into initiation practices at schools. Following the investigation, the SAHRC developed a report that was submitted to the DBE. The report highlighted the obligations of government in protecting learners at schools and the necessity for enforceable laws protecting learners from initiation practices. The response of the DBE was to develop the Regulations. A similar process may be adopted by the SAHRC in recommending a national protocol to address corporal punishment in schools.

In terms of section 5 of the Human Rights Commission Act, the SAHRC has established a standing committee to advise and assist in its work on matters affecting children's rights and the right to basic education. The members of the section 5 committee can therefore provide support to and partner with the SAHRC in convening the dialogue and advocating for the protocol.

### **6.3.2 Public Interest Litigation organisations**

In recent years certain public interest organisations have brought significant precedent setting impact litigation in the field of education law.<sup>94</sup> Such organisations can therefore develop a litigation strategy that aims to identify and pursue cases that expose lacunas in existing legal mechanisms to prevent corporal punishment in schools. Various options are considered below.

Cases of civil liability may be pursued against the DBE or the PEDs in instances where learners have been seriously injured. This would persuade these government departments to take stronger measures against educators that violate the corporal punishment prohibition.

Such civil action could include a case of vicarious liability against the PED's in matters involving educators in public schools, or a case of vicarious liability against private schools in matters involving educators in private schools. Consideration may also be given to pursuing a case establishing that the DBE has a duty of care to protect learners from

<sup>93</sup> GN 1589 in GG 24165 13 December 2002.

<sup>94</sup> These include the Centre for Child Law, Legal Resources Centre, CALS, Equal Education and Section 27.

corporal punishment and that it has failed to establish effective legal mechanisms to do this.

### ***Vicarious liability***

An employer is liable for delicts committed by an employee in the course and scope of his or her employment. Recently the Supreme Court of Appeal confirmed a High Court order which granted damages to a learner against the KwaZulu-Natal PED.<sup>95</sup> During June 2003 the learner, then a 15-year-old Grade 9 pupil suffered an injury to his right eye at the hand of one of his educators who was administering corporal punishment with a belt to another learner. The tip of the belt struck the learner on the side of his eye. After the incident the educator told him that the injury he suffered was caused 'by mistake'.

Neither the High Court nor the Supreme Court of Appeal questioned whether corporal punishment fell within the course and scope of the educator's employment. This appears to have been assumed and this case is thus a precedent for holding PED's vicariously liable for acts of corporal punishment by educators.

The Supreme Court of Appeal awarded damages to the learner to the value of R3 933 256.

### ***The duty of care***

In terms of the South African common law and the law of delict a person is liable for his or her failure to act if there existed a legal duty or 'duty of care' on his or her part to act positively to prevent harm from occurring.<sup>96</sup> The South African courts have acknowledged the existence of such a relationship between learners and schooling authorities.<sup>97</sup>

95 *Shange v MEC for Education, KwaZulu-Natal* (15860/08) [2013] ZAKZDHC 32 (17 May 2013).

96 *Minister van Polisie v Ewels* 1975 (3) SA 590 (A).

97 See *Rusere v The Jesuit Fathers* 1970 (4) SA 537 (R); *Wynkward NO v Minister of Education* 2002 (6) SA 564 (C); *Knouwds v Administrateur, Kaap* 1981 (1) SA 544 (C).



In *Carmichele v Minister of Safety and Security*<sup>98</sup> the common law principle of duty of care was developed in line with the Constitution. The Court stated that where:

[T]here is a duty imposed on the state and all of its organs not to perform any act that infringes these rights. In some circumstances there would also be a positive component which obliges the state and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection

Thus, it is possible to argue that there is a duty on the state to take reasonable and preventative measures to prevent learners from receiving corporal punishment and that the state has failed to do this.

### ***Representing the learner***

Public interest litigation organisations may consider representing learners in cases of corporal punishment in the various disciplinary and criminal processes. The purpose of this would be to raise awareness of the importance of protecting children from corporal punishment in schools and lowering the impunity of those who stand accused. It would also provide opportunities for improving mechanisms for enforcement of the corporal punishment ban. Thus, for example, the litigation organisation could represent a learner in a SACE disciplinary proceeding to argue for the appropriate sanction of an educator. Depending on the circumstances of the case this could include arguing that an educator's name should be placed on the National Protection Register.

Where corporal punishment in schools results in a criminal charge the prosecutor acts for the complainant, but public interest litigators could take up a watching brief in such cases in order to support the child, and bring the Children's Act provisions on the inclusion of the names of offenders on the Child Protection Register in appropriate cases.

98 2001 (4) SA 938 (CC) para 44, the applicant sued the state for damages resulting from a brutal attack on her by a man who was awaiting trial for having attempted to rape another woman. Despite his history of sexual violence, the police and prosecutor had recommended his release without bail. The applicant alleged that this had been an omission by the police and the prosecutor. She also relied on the duties imposed on the police by the interim Constitution and on the state under the rights to life, equality, dignity, freedom and security of the person and privacy. The lower courts held that the police and prosecution had no legal duty of care towards the applicant and could not as a matter of law be liable for damages to her. The Constitutional Court held that such a duty did exist.

## **CHAPTER 7**

### **CONCLUSION**

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Despite South Africa having outlawed corporal punishment in 1996, 2.2 million children complained of such treatment in South African schools during 2012. This report has suggested that there exists an 'official ambivalence' to the ban against corporal punishment. This has resulted in ineffective use of legal mechanisms for enforcement of the legal prohibition. This is most apparent in the failure to adequately sanction educators who are perpetrators of corporal punishment. It is also apparent in the failure to implement educational programmes that can facilitate a mind shift amongst educators and parents that continue to support the use of corporal punishment in schools.

This report has made practical recommendations that will promote the effective enforcement of the ban on corporal punishment in schools. Urgent work now needs to be done to revise current efforts to change attitudes to corporal punishment and, to strengthen legal mechanisms that can eliminate corporal punishment in schools.

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Mr James Ndlebe DBE  
Mr Anthony Meyers GDE  
Mr Makhonsandile Tim Nduzuo WCED  
Mr Tim Gordon Governing Body Foundation

Mr George Moroasui SACE

Ms Nicole Breen SAHRC

Prof Ann Skelton Centre for Child Law

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Mr Xolani Majola Isasa

Telephonic discussions were also held with attorneys at the different public interest organisations to discuss their corporal punishment cases. These include the Centre for Applied Legal Studies (CALS), the Legal Resources Centre (LRC) and the Equal Education Law Centre (EELC)

Stakeholder meeting at SAHRC on 4 July 2013 included discussions with representatives of NASGB, SADTU, PASA, SACE and the DBE on the issue of corporal punishment in schools