Common law (also known as case law or precedent) is law developed by judges through decisions of courts and similar tribunals. It does not allow corporal punishment to be used as a ‘training tool’. Hitting children as a ‘training tool used to teach’ them good behaviour (much like circus animals), is not in fact legal, even in common law.

Common law also decrees that corporal punishment must be ‘moderate’ and ‘reasonable’. What is ‘reasonable’ is determined by the obligations (arising from morals or honour that may be enforced by law) of society as laid down in the Constitution where the value and bodily integrity of each individual is protected. This means that exceptions to the general rule that any assault on another person is a criminal offence, while legal, can only be considered in the most extreme cases.

It is an open question whether the current exceptions to the prohibition against assault are constitutional, given South Africa’s international legal obligations which demand the prohibition of corporal punishment in all settings.

Religious groups in South Africa cannot cite religious reasons or a violation of the freedom of religion to support corporal punishment as the courts have already determined that, where the practice of religion is damaging to people, it can and will be prohibited.
The common law rule that allows parents to use ‘moderate’ physical violence on children infringes on the rights of the child – in particular the rights protected by sections 12 and 28 of the Bill of Rights.

Section 12(1)(c) states that everyone has the right to freedom and security of the person, which includes the right “to be free from all forms of violence from either public or private sources”. Section 12(2)(b) also guarantees for everyone the right to bodily and psychological integrity which includes the right “to security in and control over their body”.

These sections must be interpreted with reference to South Africa’s Constitution and international law obligations. Section 39(1)(b) of the Constitution states that international law must be considered when interpreting the provisions of the Bill of Rights. Given this, there is little doubt that the present legal regime infringes on the rights of children. Parliament therefore has a legal duty to take steps to ‘respect, protect, promote and fulfil’ all the rights in the Bill of Rights – to abolish corporal punishment of children.