

Corporal punishment of children in Australia: Briefing for the Universal Periodic Review, 37th session, November 2020



GLOBAL INITIATIVE TO
**End All Corporal
Punishment of Children**

From the Global Initiative to End All Corporal Punishment of Children, July 2020

The legality and practice of corporal punishment of children violates their fundamental human rights to respect for human dignity and physical integrity and to equal protection under the law. Under international human rights law – the Convention on the Rights of the Child and other human rights instruments – states have an obligation to enact legislation to prohibit corporal punishment in all settings, including the home.

In Australia, corporal punishment of children is still lawful despite repeated recommendations to prohibit it by the Committee on the Rights of the Child and the Committee Against Torture.

We hope the Working Group will note with concern the legality of corporal punishment of children in Australia. We hope states will raise the issue during the review in 2020 and make a specific recommendation that Australia draft and enact legislation as a matter of priority to explicitly prohibit corporal punishment of children in all settings, including the home and throughout the territory, and repeal any legal defences for its use.

1 Review of Australia in the 2nd cycle UPR (2015) and progress since

- 1.1 Australia was reviewed in the second cycle of the Universal Periodic Review in 2015 (session 23). The issue of corporal punishment of children was raised in the compilation of UN information¹ and in the summary of stakeholders' information.² Recommendations were made to “prohibit corporal punishment of children in the home and all other settings” and to “reinforce the measures (...) to eliminate corporal punishment”.³ The Government accepted the second of these but noted the first, stating it “will not further consider [it] at this time”.⁴
- 1.2 Since the review, there have been no changes at the federal level on the legality of corporal punishment, despite calls for a ban by the National Children's Commissioner in early 2020.⁵
- 1.3 **We hope the Working Group will note with concern the continued legality of corporal punishment of children in Australia. We hope states will raise the issue during the review in 2020 and make a specific recommendation that Australia draft and enact legislation as a matter of priority to explicitly prohibit corporal punishment of children in all settings, including the**

¹ 31 August 2015, A/HRC/WG.6/23/AUS/2, Compilation of UN information, paras. 7 and 18

² 10 August 2015, A/HRC/WG.6/23/AUS/3, Summary of stakeholders' views, para. 47

³ 13 January 2016, A/HRC/31/14, Report of the working group, paras. 136(165) and 136(193)

⁴ 29 February 2016, A/HRC/31/14/Add.1, Report of the working group: Addendum, paras. 47 and 48

⁵ See for example <https://www.tweedailynews.com.au/news/new-push-to-make-smacking-a-crime/3956058/>, last accessed 11 March 2020

home.

2 Legality of corporal punishment in Australia

Summary of current law and reforms needed to achieve prohibition

Corporal punishment in Australia is prohibited as a sentence for a crime but it is still lawful in the home, and in some states and territories in alternative care, in day care settings, in schools and in penal institutions. Legislation should be enacted in all states and territories to explicitly prohibit all corporal punishment in all settings, including the home, and repeal the right of “reasonable chastisement” and other similar provisions.

- 2.1 **Home (lawful):** Corporal punishment in the home is regulated at state level, and is lawful throughout Australia under the right of “reasonable chastisement” and similar provisions – in Australian Capital Territory under common law, Northern Territory the Criminal Code Act (s27), Queensland the Criminal Code Act 1899 (s280), South Australia the Criminal Law Consolidation Act 1935 (s20), Tasmania the Criminal Code Act 1924 (s50), Western Australia the Criminal Code 1913 (s257) and Victoria under common law rule. Under section 61AA of the New South Wales Crimes Act, as amended in 2001, physical punishment by a parent or caregiver is considered unreasonable if the force is applied to a child’s head or neck, or the force is applied to any part of the body in such a way as to cause, or threaten to cause, harm to the child which lasts more than a short period; in such cases the defence of “lawful correction” does not apply. In 2010, the NSW Government reviewed section 61AA and recommended that it be retained.
- 2.2 The Australian Family Law Act 1975 defines family violence as “violent, threatening or other behaviour by a person that coerces or controls a member of the person’s family (the family member), or causes the family member to be fearful” (art. 4). It protects a child from being exposed to family violence but not from direct suffering of violence in the form of physical punishment. The Family Law Act 1975 was comprehensively reviewed by the Australian Law Reform Commission in 2017-2019 to address family violence and child abuse,⁶ but the March 2019 final review report did not address corporal punishment of children.
- 2.3 The aims of the National Framework for Protecting Australia’s Children 2009-2020⁷ include ensuring children live in supportive families and communities and addressing risk factors for child abuse and neglect but it makes no reference to violent punishment of children. The Fourth Action Plan 2018–2020 under the National Framework for Protecting Australia’s Children 2009-2020 and the National Plan to Reduce Violence against Women and their Children 2010 – 2022⁸ also do not address corporal punishment. In May 2010, the Australian Children’s Commissioners and Guardians (ACCG) group agreed to a resolution which stated that children have a right to protection from all forms of violence “and that this extends to protection from physical punishment”. It stated that the ACCG “encourages all Australian Governments to ... collaborate to ensure that laws across Australia relating to the physical punishment of children

⁶ 9 November 2017, CCPR/C/AUS/CO/6, Concluding observations on sixth report, Advance unedited version, para. 21

⁷ Council of Australian Governments (2009), *Protecting Children is Everyone’s Business, National Framework for Protecting Australia’s Children 2009–2020*

⁸ Council of Australian Governments (2010), *National Plan to Reduce Violence against Women and their Children 2010 – 2022*; and Commonwealth of Australia Department of Social Services (2016)

are consistent with international human rights standards” and concluded with a note that “members of ACCG agree to pursue strategies to promote these rights ... in their individual jurisdictions”.⁹ In 2013, the Paediatric & Child Health Division of the Royal Australasian College of Physicians issued a position statement also calling for the repeal of the legal provisions defending the use of corporal punishment against children so that “the law protects children from assault to the same extent that it does all people”.¹⁰

2.4 Reporting to the UN Committee on the Rights of the Child in 2012, the Australian Government stated that it had not taken any steps towards prohibiting all corporal punishment, but that it does promote positive parenting.¹¹ The Government later effectively rejected the recommendation to prohibit corporal punishment in the home made during the Universal Periodic Review of Australia in 2015, stating that it “notes” the recommendation “but will not further consider [it] at this time”.¹² In March 2016, a ruling by the South Australian Supreme Court found in favour of “reasonable” corporal punishment of children by parents.¹³ In 2018, the Government reported to the Committee on the Rights of the Child that corporal punishment was “not accepted as a social norm in Australia”,¹⁴ but no progress has been made on enacting a legal prohibition at the federal or state level. The National Children’s Commissioner Megan Mitchell called for a prohibition of corporal punishment of children in February 2020.¹⁵

2.5 **Alternative care settings (partially lawful):** In residential centres, corporal punishment is prohibited in New South Wales in the Children and Young Persons (Care and Protection) Regulation 2000 (s35), in Queensland in the Child Protection Act 1999 (s122), in South Australia in the Family and Community Services Regulations 1996 (s13) and in Australian Capital Territory in the Children and Young People Act 2008 (s741). It is lawful in the Northern Territory under provisions for the use of force “to discipline, manage or control” a child in the Criminal Code Act (s27), in Tasmania under the authority to use force “by way of correction” in the Criminal Code Act (s50), in Victoria under common law and in Western Australia under the authority to use force “by way of correction” in the Criminal Code Act (s257).

2.6 In foster care, corporal punishment is prohibited in New South Wales in the Children and Young Persons (Care and Protection) Regulation 2000 (s35), in Queensland in the Child Protection Act 1999 (s122), in South Australia by licensing requirements and in Australian Capital Territory in the Children and Young People Act 2008 (s741). It is lawful in the Northern Territory under provisions for the use of force “to discipline, manage or control” a child in the Criminal Code Act (s27), in Tasmania and Western Australia under the authority to use force “by way of correction” in the respective Criminal Code Acts (s50 and s257) and in Victoria under common law.

2.7 **Day care (partially lawful):** Corporal punishment is prohibited in child care centres in Australian Capital Territory in the Children and Young People Act 2008 (s741), in New South Wales in the Children’s Services Regulation 2004 (s65), in Queensland in the Child Protection Act 1999 (s122), in South Australia in the Children’s Services (Child Care Centres) Regulations 1998 (s39), in Victoria in the Children’s Services Act 1996 (s28) and in Western Australia in the Child Care Services (Child Care) Regulations 2006 (s85), the Child Care Services (Family Day Care)

⁹ Alasdair Roy, Children & Young People Commissioner, ACT Human Rights Commission, in correspondence with the Global Initiative, March 2015

¹⁰ The Royal Australasian College of Physicians, Paediatric & Child Health Division (2013), *Position Statement on Physical Punishment of Children*

¹¹ 9 May 2012, CRC/C/AUS/Q/4/Add.1, Reply to list of issues, para. 53

¹² 29 February 2016, A/HRC/31/14/Add.1, Report of the working group: Addendum, paras. 47 and 48

¹³ *Police v Gray*, [2016] SASC 39, Judgment issued 21 March 2016

¹⁴ 22 November 2018, CRC/C/AUS/5-6, Fifth/sixth report, para. 115

¹⁵ See for example <https://www.tweedailynews.com.au/news/new-push-to-make-smacking-a-crime/3956058/>, last accessed 11 March 2020

Regulations 2006 (s69), the Child Care Services (Outside School Hours Care) Regulations 2006 (s66) and the Child Care Services (Outside School Hours Family Day Care) Regulations 2006 (s52). Corporal punishment is lawful in the Northern Territory under provisions for the use of force “to discipline, manage or control” a child in the Criminal Code Act (s27) and in Tasmania under the authority to use force “by way of correction” in the Criminal Code Act (s50).

2.8 As a result of legal reform in 2011/2012, explicit prohibition is also to be found in article 166 of the Education and Early Childhood Services (Registration and Standards) Act 2011 in South Australia, the Education and Care Services (National Uniform Legislation) Act 2011 in Northern Territory, the Education and Care Services National Law (Application) Act 2011 in Tasmania, and the Education and Care Services National Law Act 2010 in Victoria and the Children (Education and Care Services) National Law (NSW) No 104a 2010 in New South Wales. In Western Australia it is prohibited in the Education and Care Services National Law (WA) Act 2012. These laws apply to some but not all education and care settings and for children under 13 only.

2.9 **Schools (partially lawful):** In 2012, the Australian Government stated that it “does not endorse” corporal punishment in schools and that in 2011 it had launched the National Safe Schools Framework which promotes children’s safety from violence in schools and is endorsed by all education ministers.¹⁶ However, the Framework is silent on the issue of corporal punishment. The Government reiterated in 2018 that it did “not endorse corporal punishment as an approach to student behaviour management in schools”,¹⁷ but no progress has been made on enacting prohibiting legislation. In a 2018 shadow report to the Committee on the Rights of the Child, the Australian Human Rights Commission recommended that the Government ban corporal punishment in all educational and care settings.¹⁸

2.10 Legally, corporal punishment in schools is regulated at state level. It is prohibited in government and independent schools in Australian Capital Territory in the Education Act 2004 (s7), in New South Wales in the Education Act 1990 (s35(2a) and s47(1h)) and the Children (Education and Care Services) National Law (NSW) No 104a 2010, in Northern Territory in the Education Act 2015 (s162), in South Australia in the Education and Children's Services Act 2019 (s83) and the Education and Early Childhood Services (Registration and Standards) Act 2011, in Tasmania in the Education Act 1994 (s82A) and the Education and Care Services National Law (Application) Act 2011, and in Victoria in the Education and Training Reform Act 2006 (s4.3), the Education and Training Reform Regulations 2007 (reg14), and the Education and Care Services National Law Act 2010. It is prohibited in government schools in Western Australia in the School Education Regulations (s40) and the Education and Care Services National Law (WA) Act 2012. This was extended to non-governments schools in 2015 under section 131A of the School Education Regulations and chapter 12 of the Guide to the Registration Standards and Other Requirements for Non-Government Schools 2016. Section 257 of the Criminal Code Act still allows the use of force “by way of correction” for schoolteachers: this provision should be repealed. In Queensland, corporal punishment is lawful in schools under the provisions for reasonable force “by way of correction, discipline, management or control” in section 280 of the Criminal Code Act. It is reportedly prohibited in government schools at policy level, although we have been unable to identify this policy.

2.11 **Penal institutions (partially lawful):** Corporal punishment is unlawful as a disciplinary measure in penal institutions in New South Wales under the Children (Detention Centres) Regulations 2005 (s50), in Northern Territory under the Youth Justice Act (s153), in Queensland under the

¹⁶ 9 May 2012, CRC/C/AUS/Q/4/Add.1, Reply to list of issues, para. 66

¹⁷ [2018], CRC/AUS/5-6, Fifth/sixth report, page 14

¹⁸ 1 November 2018, Australian Human Rights Commission Submission to the CRC

Juvenile Justice Regulations 2003 (s17), in South Australia under the Family and Community Services Regulations 1996 (s7), in Tasmania under the Youth Justice Act 1997 (s132) and in Victoria under the Children, Youth and Families Act 2005 (s487). In Australian Capital Territory, corporal punishment is not among permitted disciplinary measures in the Children and Young People Act 2008 but is not explicitly prohibited. It is not prohibited in Western Australia.

2.12 **Sentence for crime (unlawful):** Corporal punishment is prohibited as a sentence for crime in all states and territories.

3 Recommendations by human rights treaty bodies

3.1 **CRC:** The Committee on the Rights of the Child has recommended that corporal punishment in Australia be prohibited in the home and other settings four times – in 1997,¹⁹ in 2005,²⁰ in 2012²¹ and in 2019.²²

3.2 **CAT:** In 2008, the Committee Against Torture recommended to Australia that it should “adopt and implement legislation banning corporal punishment at home and in public and private schools, detention centres, and all alternative care settings in all States and Territories”.²³

4 State/territory level summary of legality

State/territory	Prohibited in the home	Prohibited in alternative care settings	Prohibited in day care	Prohibited in schools	Prohibited in penal institutions	Prohibited as sentence for crime
Australian Capital Territory	NO	YES	[YES] ²⁴	YES	YES ²⁵	YES
New South Wales	NO	YES	[YES] ²⁶	YES	YES	YES
Northern Territory	NO	NO	SOME ²⁷	YES	YES	YES
Queensland	NO	YES	[YES] ²⁸	NO ²⁹	YES	YES
South Australia	NO ³⁰	YES	[YES] ³¹	YES	YES	YES
Tasmania	NO	NO	SOME ³²	YES	YES	YES
Victoria	NO	NO	[YES] ³³	YES	YES	YES
Western Australia	NO	NO	[YES] ³⁴	YES	NO	YES

¹⁹ 10 October 1997, CRC/C/15/Add.79, Concluding observations on initial report, paras. 15 and 26

²⁰ 20 October 2005, Concluding observations on second and third report, CRC/C/15/Add.268, paras. 5, 35 and 36

²¹ 28 August 2012, CRC/C/AUS/CO/4, Concluding observations on fourth report, paras. 7, 8, 43, 44, 45, 46 and 47

²² 30 September 2019, CRC/C/AUS/CO/5-6 Advance unedited version, Concluding observations on fifth/sixth report, para. 28

²³ 22 May 2008, CAT/C/AUS/CO/1, Concluding observations on third report, para. 31

²⁴ Prohibition in childminding unconfirmed

²⁵ But no explicit prohibition

²⁶ Prohibition in childminding unconfirmed

²⁷ Prohibited in some education and care settings for under 13s

²⁸ Prohibition in childminding unconfirmed

²⁹ Prohibited in government schools as a matter of policy

³⁰ 2016 South Australian Supreme Court ruling found in favour of “reasonable” corporal punishment by parents

³¹ Prohibition in childminding unconfirmed

³² Prohibited in some education and care settings for under 13s

³³ Prohibition in childminding unconfirmed

³⁴ Prohibition in childminding unconfirmed

Briefing prepared by the Global Initiative to End All Corporal Punishment of Children
www.endcorporalpunishment.org; info@encorporalpunishment.org

The Global Initiative to End All Corporal Punishment of Children has regularly briefed the Committee on the Rights of the Child on this issue since 2002, since 2004 has similarly briefed the Committee Against Torture, the Committee on the Elimination of Discrimination Against Women, the Committee on Economic, Social and Cultural Rights and the Human Rights Committee, and since 2011 the Committee on the Rights of Persons with Disabilities.