

**BRIEFING ON AUSTRALIA FOR THE COMMITTEE AGAINST TORTURE PRESESSIONAL WORKING GROUP, 59th session (Nov/Dec 2016)**

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**This briefing describes the legality of corporal punishment of children in Australia. In light of the obligation under international human rights law to prohibit all corporal punishment of children, the recommendations of the UN Secretary General’s Study on Violence against Children, the previous recommendations to prohibit corporal punishment made to Australia by the Committee Against Torture, the Committee on the Rights of the Child and during the UPR, and the new global commitment to ending all violence against children in the context of the 2030 Agenda for Sustainable Development, we hope the Committee Against Torture will:**

* **raise the issue of corporal punishment of children in its List of Issues Prior to Reporting for Australia, in particular asking what measures are being taken to ensure Australian law clearly prohibits all corporal punishment of children, including in the home, and**
* **recommend to Australia, following its examination of the state party’s report, that legislation is enacted as a matter of priority which clearly prohibits corporal punishment in the home and all other settings and explicitly repeals all legal defences for the use of corporal punishment in childrearing.**

**1 The legality of corporal punishment of children in Australia**

1.1 ***Summary:***Corporal punishment of children is lawful in the home in all states and territories in Australia; it is unlawful as a sentence for crime throughout the state party. With regard to other settings – alternative care settings, day care, schools and penal institutions – corporal punishment is prohibited in some but not all states and territories. The legality in each state and territory is summarised in the following table, with further details set out below.

| **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][[1]](#footnote-1) | YES | YES[[2]](#footnote-2) | YES |
| **New South Wales** | NO | YES | [YES][[3]](#footnote-3) | YES | YES | YES |
| **Northern Territory** | NO | NO | SOME[[4]](#footnote-4) | SOME[[5]](#footnote-5) | YES | YES |
| **Queensland** | NO | YES | [YES][[6]](#footnote-6) | NO[[7]](#footnote-7) | YES | YES |
| **South Australia** | NO[[8]](#footnote-8) | YES | [YES][[9]](#footnote-9) | YES | YES | YES |
| **Tasmania** | NO | NO | SOME[[10]](#footnote-10) | YES | YES | YES |
| **Victoria** | NO | NO | [YES][[11]](#footnote-11) | YES | YES | YES |
| **Western Australia** | NO | NO | [YES][[12]](#footnote-12) | SOME[[13]](#footnote-13) | NO | YES |

1.2 ***Home (lawful******):*** Corporal punishment in the home is lawful throughout Australia under the right of “reasonable chastisement” and similar provisions in state and territory laws – in **Australian Capital Territory** under common law, **Northern Territory** theCriminal Code Act (s27), **Queensland** theCriminal Code Act 1899 (s280), **South Australia** theCriminal Law Consolidation Act 1935 (s20), **Tasmania** theCriminal Code Act 1924 (s50), **Western Australia** the Criminal Code 1913 (s257) and **Victoria** under common law rule. In 2001, law reform in **New South Wales** limited the defence of “awful correction” in the Crimes Act (s61AA) but did not repeal it. In March 2016, a ruling by the South Australian Supreme Court found in favour of “reasonable” corporal punishment of children by parents.[[14]](#footnote-14)

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

1.4 In foster care, corporal punishment is prohibited in **New South Wales** (Children and Young Persons (Care and Protection) Regulation 2000, s35), **Queensland** (Child Protection Act 1999, s122), **South Australia** (by licensing requirements) and **Australian Capital Territory** (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 (Criminal Code Act, s27), in **Tasmania** and **Western Australia** under the authority to use force “by way of correction” (respective Criminal Code Acts, s50 and s257) and in **Victoria** under common law.

1.5 ***Day care (partially prohibited):***Corporal punishment is prohibited in child care centres in **Australian Capital Territory** (Children and Young People Act 200, s741), **New South Wales** (Children’s Services Regulation 2004, s65), **Queensland** (Child Protection Act 1999 , s122), **South Australia** (Children’s Services (Child Care Centres) Regulations 199, s39), **Victoria** Children’s Services Act 1996, s28) and **Western Australia** (Child Care Services (Child Care) Regulations 2006, s85; Child Care Services (Family Day Care) Regulations 2006, s69; Child Care Services (Outside School Hours Care) Regulations 2006, s66; 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 (Criminal Code Act, s27) and in **Tasmania** under the authority to use force “by way of correction” (Criminal Code Act, s50).

1.6 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.

1.7 ***Schools (partially prohibited):***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.[[15]](#footnote-15) However, the Framework is silent on the issue of corporal punishment.

1.8 Legally, corporal punishment in schools is regulated at state level. It is prohibited in government and independent schools in **Australian Capital Territory** (Education Act 2004, s7), **New South Wales** (Education Act 1990, s3 and s47; Children (Education and Care Services) National Law (NSW) No 104a 2010), **Tasmania** (Education Act 1994, s82A; Education and Care Services National Law (Application) Act 2011), and **Victoria** (Education and Training Reform Act 2006, s4.3; Education and Training Reform Regulations 2007, reg14; Education and Care Services National Law Act 2010). It is prohibited in government schools in **Western Australia** (School Education Regulations, s40; Education and Care Services National Law (WA) Act 2012), but the use of force “by way of correction” is lawful for schoolteachers under section 257 of the Criminal Code Act and provisions for caning of boys in the Country High School Hostels Authority Act Regulations 1962 have yet to be repealed.

1.9 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. In **Northern Territory** corporal punishment is prohibited in some but not all education settings in the Education and Care Services (National Uniform Legislation) Act 2011. In **South Australia**, provisions for corporal punishment were removed from the Education Regulations in 1991, but it was not prohibited: prohibition is now included in the Education and Early Childhood Services (Registration and Standards) Act 2011.

1.10 ***Penal institutions (partially prohibited):*** Corporal punishment is unlawful as a disciplinary measurein penal institutions in **New South Wales** (Children (Detention Centres) Regulations 2005, s50), **Northern Territory** (Youth Justice Act, s153), **Queensland** (Juvenile Justice Regulations 2003, s17), **South Australia** (Family and Community Services Regulations 1996, s7), **Tasmania** (Youth Justice Act 1997, s132) and **Victoria** (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**.

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

**2 Recommendations by human rights treaty bodies and during the UPR**

2.1 ***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”.[[16]](#footnote-16)

2.2 ***CRC:*** The Committee on the Rights of the Child has recommended that corporal punishment of children in Australia be prohibited in the home and other settings on three occasions – in its concluding observations on the initial report in 1997,[[17]](#footnote-17) on the second/third report in 2005[[18]](#footnote-18) and on the fourth report in 2012.[[19]](#footnote-19)

2.3 ***UPR:*** At the first cycle Universal Periodic Review of Australia in 2011, the Government rejected the recommendation to prohibit corporal punishment in the family in all states and territories.[[20]](#footnote-20) At the second cycle UPR in 2015, recommendations were made to “remove the reservation to the Convention on the Rights of the Child, and prohibit corporal punishment of children in the home and all other settings” and to “reinforce the measures to improve conditions of detention, especially for persons with disabilities and the young, as well as to eliminate corporal punishment”.[[21]](#footnote-21) The Government accepted the second of these but rejected the first.[[22]](#footnote-22)

*Briefing* *prepared by the Global Initiative to End All Corporal Punishment of Children*

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1. Prohibition in childminding unconfirmed [↑](#footnote-ref-1)
2. But no explicit prohibition [↑](#footnote-ref-2)
3. Prohibition in childminding unconfirmed [↑](#footnote-ref-3)
4. Prohibited in some education and care settings for under 13s [↑](#footnote-ref-4)
5. Prohibited in some education settings under NT Education and Care Services (National Uniform Legislation) Act 2011 [↑](#footnote-ref-5)
6. Prohibition in childminding unconfirmed [↑](#footnote-ref-6)
7. Prohibited in government schools as a matter of policy [↑](#footnote-ref-7)
8. 2016 South Australian Supreme Court ruling found in favour of “reasonable” corporal punishment by parents [↑](#footnote-ref-8)
9. Prohibition in childminding unconfirmed [↑](#footnote-ref-9)
10. Prohibited in some education and care settings for under 13s [↑](#footnote-ref-10)
11. Prohibition in childminding unconfirmed [↑](#footnote-ref-11)
12. Prohibition in childminding unconfirmed [↑](#footnote-ref-12)
13. Prohibited in government schools [↑](#footnote-ref-13)
14. *Police v Gray, [2016] SASC 39*, Judgment issued 21 March 2016 [↑](#footnote-ref-14)
15. 9 May 2012, CRC/C/AUS/Q/4/Add.1, Reply to list of issues, para. 66 [↑](#footnote-ref-15)
16. 22 May 2008, CAT/C/AUS/CO/1, Concluding observations on third report, para. 31 [↑](#footnote-ref-16)
17. 10 October 1997, CRC/C/15/Add.79, Concluding observations on initial report, paras. 15 and 26 [↑](#footnote-ref-17)
18. 20 October 2005, Concluding observations on second and third report, CRC/C/15/Add.268, paras. 5, 35 and 36 [↑](#footnote-ref-18)
19. 28 August 2012, CRC/C/AUS/CO/4, Concluding observations on fourth report, paras. 7, 8, 43, 44, 45, 46 and 47 [↑](#footnote-ref-19)
20. 31 May 2011, A/HRC/17/10/Add.1, Report of the working group: Addendum [↑](#footnote-ref-20)
21. 13 January 2016, A/HRC/31/14, Report of the working group, paras. 136(165) and 136(193) [↑](#footnote-ref-21)
22. 29 February 2016, A/HRC/31/14/Add.1, Report of the working group: Addendum, paras. 47 and 48 [↑](#footnote-ref-22)