**BRIEFING ON AUSTRALIA FOR THE
COMMITTEE ON THE RIGHTS OF THE CHILD,
SESSION 82 PRE-SESSIONAL WORKING GROUP – February 2019**

*From the Global Initiative to End All Corporal Punishment of Children, October 2018*

**This briefing describes the legality of corporal punishment of children in Australia. In light of the Committee’s General Comment No. 8 on “The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment”, its previous recommendations to Australia on the issue, the importance of eradicating this form of violence given by the UN Secretary General’s Study on Violence against Children, the recommendations made by the Committee Against Torture and during the UPR of Australia in 2011 and 2015, 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 will:**

* **in its List of Issues for Australia, raise the issue of corporal punishment of children, in particular asking what steps are being taken to prohibit all corporal punishment of children, in all settings including in the home, and to repeal all legal defences of “reasonable punishment”, throughout the territory; and,**
* **in its concluding observations on the fifth/sixth report of Australia, recommend that legislation is immediately enacted to explicitly prohibit corporal punishment of children in all settings including the home and to repeal all legal defences for its use, throughout the territory, as a matter of priority.**

**1 The report of Australia to the Committee on the Rights of the Child**

* 1. Australia’s fifth/sixth state party report declares that “corporal punishment is not accepted as a social norm in Australia” and reiterates that the Government does not “endorse” corporal punishment in schools, but concedes that it is not explicitly prohibited in all settings.[[1]](#footnote-2)
	2. Provisions confirming a right to use “reasonable” punishment are in force throughout Australia and contradict and weaken the message that corporal punishment is “not accepted” as they allow for some forms of “lighter” corporal punishment. Australia has an obligation to enact a clear and explicit prohibition of all corporal punishment, in all settings, in legislation. This will enable clearer messaging to parents, teachers, and others working with children that all forms of corporal punishment, however light, are unacceptable.

**2 The legality and practice of corporal punishment of children in Australia**

2.1 ***Summary:***Corporal punishment in Australia is lawful in homes throughout the territory and in alternative care, day care, schools and penal institutions in some states/territories. It is prohibited everywhere as a sentence for a crime.

2.2 ***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.

2.3 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 is under comprehensive review by the Australian Law Reform Commission. The review began in October 2017 and is expected to be completed by March 2019; it will address family violence and child abuse.[[2]](#footnote-3) The Discussion Paper entitled “Review of the Family Law System” released in October 2018 does not address corporal punishment or family discipline.[[3]](#footnote-4)

2.4 The aims of the National Framework for Protecting Australia’s Children 2009-2020[[4]](#footnote-5) 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 National Plan to Reduce Violence against Women and their Children 2010 – 2022[[5]](#footnote-6) also does 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 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”.[[6]](#footnote-7) 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”.[[7]](#footnote-8)

2.5 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.[[8]](#footnote-9) 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”.[[9]](#footnote-10) In March 2016, a ruling by the South Australian Supreme Court found in favour of “reasonable” corporal punishment of children by parents.[[10]](#footnote-11)

2.6 ***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).

2.7 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.

2.8 ***Day care settings (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) 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).

2.9 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 inNew 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.

2.10 ***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.[[11]](#footnote-12) 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”,[[12]](#footnote-13) but no progress has been made on enacting prohibiting legislation.

2.11 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 (s3 and s47) and the Children (Education and Care Services) National Law (NSW) No 104a 2010, 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, 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.

2.12 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.

2.13 ***Penal institutions (partially lawful):*** Corporal punishment is unlawful as a disciplinary measurein 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 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.

2.14 ***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 and during the UPR**

3.1 ***CRC:*** TheCommittee 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,[[13]](#footnote-14) on the second/third report in 2005[[14]](#footnote-15) and on the fourth report in 2012.[[15]](#footnote-16)

3.2 ***CAT:*** In 2008, theCommittee 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-17)

3.3 ***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.[[17]](#footnote-18) 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”.[[18]](#footnote-19) The Government accepted the second of these but rejected the first.[[19]](#footnote-20)

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

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1. [2018], CRC/AUS/5-6, Fifth/sixth report, page 14 [↑](#footnote-ref-2)
2. 9 November 2017, CCPR/C/AUS/CO/6, Concluding observations on sixth report, Advance unedited version, para. 21 [↑](#footnote-ref-3)
3. See Australian Law Reform Commission (October 2018), *Discussion Paper - Review of the Family Law System*, accessible at <https://www.alrc.gov.au/publications/review-family-law-system-discussion-paper> [↑](#footnote-ref-4)
4. Council of Australian Governments (2009), *Protecting Children is Everyone’s Business, National Framework for Protecting Australia’s Children 2009–2020* [↑](#footnote-ref-5)
5. 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) [↑](#footnote-ref-6)
6. Alasdair Roy, Children & Young People Commissioner, ACT Human Rights Commission, in correspondence with the Global Initiative, March 2015 [↑](#footnote-ref-7)
7. The Royal Australasian College of Physicians, Paediatric & Child Health Division (2013), *Position Statement on Physical Punishment of Children* [↑](#footnote-ref-8)
8. 9 May 2012, CRC/C/AUS/Q/4/Add.1, Reply to list of issues, para. 53 [↑](#footnote-ref-9)
9. 29 February 2016, A/HRC/31/14/Add.1, Report of the working group: Addendum, paras. 47 and 48 [↑](#footnote-ref-10)
10. *Police v Gray, [2016] SASC 39*, Judgment issued 21 March 2016 [↑](#footnote-ref-11)
11. 9 May 2012, CRC/C/AUS/Q/4/Add.1, Reply to list of issues, para. 66 [↑](#footnote-ref-12)
12. [2018], CRC/AUS/5-6, Fifth/sixth report, page 14 [↑](#footnote-ref-13)
13. 10 October 1997, CRC/C/15/Add.79, Concluding observations on initial report, paras. 15 and 26 [↑](#footnote-ref-14)
14. 20 October 2005, Concluding observations on second and third report, CRC/C/15/Add.268, paras. 5, 35 and 36 [↑](#footnote-ref-15)
15. 28 August 2012, CRC/C/AUS/CO/4, Concluding observations on fourth report, paras. 7, 8, 43, 44, 45, 46 and 47 [↑](#footnote-ref-16)
16. 22 May 2008, CAT/C/AUS/CO/1, Concluding observations on third report, para. 31 [↑](#footnote-ref-17)
17. 31 May 2011, A/HRC/17/10/Add.1, Report of the working group: Addendum [↑](#footnote-ref-18)
18. 13 January 2016, A/HRC/31/14, Report of the working group, paras. 136(165) and 136(193) [↑](#footnote-ref-19)
19. 29 February 2016, A/HRC/31/14/Add.1, Report of the working group: Addendum, paras. 47 and 48 [↑](#footnote-ref-20)