

A National Children's and Youth Law Centre

The National Children's and Youth Law Centre (“**the Centre**”) is a Community Legal Centre working for and with Australia's children and young people to promote and protect their rights and interests. It was established in 1993 with the support of the University of New South Wales, the University of Sydney, the Public Interest Advocacy Centre and the (then) Australian Youth Foundation.

The touchstone of the Centre's efforts is the UN Convention on the Rights of the Child (“**UNCROC**”), as its mandate is to promote understanding of and adherence to children's rights as fundamental human rights. Since its inception in 1993 the Centre has made over 160 public submissions on a range of issues affecting children and young people and has responded to more than 150,000 enquiries by or on behalf of children and young people throughout Australia.

B Summary of submission

The Centre submits that there is a serious need for consistency between state laws on domestic corporal punishment. The current inconsistency between state laws means that there is a need for a federal law banning domestic corporal punishment.. There would be much less of a need for a federal law if the domestic laws were more consistent and adequate. The inadequacy of state laws and the fact that domestic corporal punishment is lawful throughout Australia under the right of ‘reasonable chastisement’ or similar rights means that:

1. children are afforded less protection than is given to adults in relation to assault;
2. children are discriminated against on the grounds of their age;
3. Australia's obligations under the Convention on the Rights of the Child and other international human rights instruments are violated;
4. there is an inconsistency with international moves to ban corporal punishment;
5. a practice associated with adverse health and developmental outcomes is permitted;

6. there is an inconsistency with children's attitudes to corporal punishment; and
7. the line between discipline and abuse remains blurred.¹

The Centre urges the state governments to move immediately towards implementing measures (legislative and educational) to eliminate corporal punishment against children. This would ensure that children's rights are given the eminence they require, that Australia is acting in accordance with its international obligations and that children and adults are accorded their rights in an equal manner.

C Submission

1 Children are afforded less protection than is afforded to adults

Adults are granted an absolute right to bodily integrity. They have a right not to be assaulted by another person — any application of force to the body of another person is an assault. This principle is of central importance both to the common law and to international human rights law.²

In some of the states laws on domestic corporal punishment, there is a lawful correction defence which is an exception to this fundamental legal right. For example, section 61AA of the *Crimes Act 1900 (NSW)* provides such a defence. The exception is applicable in respect only of assaults directed towards a child. No such exception exists in respect of an assault directed toward an adult. This implies that children are not entitled to the inalienable 'human' right afforded to adults. It also means that children are afforded less protection from violence than adults.

This unequal level of protection seems extraordinary and completely unjustified given the special vulnerability of children — such vulnerability being consistently recognised in both domestic and international legal instruments. The UN Committee on the Rights of the Child stated, earlier this year, that “[t]he distinct nature of children, their initial dependent and development state, their unique

¹ **Australian Capital Territory** Child Welfare Ordinance, 1957, section 124; **Northern Territory** Criminal Code Act section 27; **Queensland** Criminal Code Act, 1899, section 280; **South Australia** Criminal Law Consolidation Act, 1935, section 39 and subsequent amendments; **Tasmania** Criminal Code Act, 1995, amended 2005, section 50; **Western Australia**, Criminal Code Act, 1913, section 257; **Victoria** under common law rule, **New South Wales** Crimes Act, 1900, section 61AA.

² See, for example, Article 5 of the *Universal Declaration of Human Rights* and Article 7 of the *International Covenant on Civil and Political Rights*.

human potential as well as their vulnerability, all demand the need for more, rather than less, legal and other protection from all forms of violence.”³

The Centre submits that it is absurd that, whilst adults are protected from physical attacks from others via laws against assault,⁴ in the case of children, lawful correction defences continue to ensure that the line between discipline and abuse remains blurred.

2 *Discrimination on the basis of age*

Treating children less favourably than adults, in respect to the right not to be assaulted, amounts to discrimination on the basis of age. Age discrimination is prohibited by human rights legislation and by international human rights instruments.⁵ Age discrimination would only be permissible if it was held to be of real benefit to children. This has not been proven to be the case in respect to corporal punishment.

3 *Australia's obligations under international obligations*

(a) *UN Convention on the Rights of the Child*

Australia ratified UNCROC in 1990.

Articles 3, 19 and 37 of UNCROC provide clear obligations on State Parties to protect children from abuses such as violence and other inhuman or degrading punishments.

- Article 3(1) provides that “*In all actions concerning children, whether undertaken ... legislative bodies, the best interests of the child shall be a primary consideration.*”
- Article 19 provides 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 ... while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.*”

³ Committee on the Rights of the Child, Forty-second session, Geneva, 15 May-2 June 2006, General Comment No 8 (2006) “*The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment*” at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.GC.8.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.GC.8.En?OpenDocument) – page 6.

⁴ For example, Part 3 of the *Crimes Act 1900* (NSW).

⁵ Article 2(1) of UNCROC provides that “States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s ... birth or other status.” See also the *Age Discrimination Act 1994* (Cth); *Anti-Discrimination Act 1977* (NSW).

- Article 37(1) provides that “*No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment ...*”.

The Committee on the Rights of the Child, which monitors compliance with UNCROC, has found that corporal punishment violates articles 2, 3, 19 and 37 of UNCROC. It has consistently interpreted art 19 as requiring states both to prohibit all forms of corporal punishment of children and to educate and inform the public on the subject.⁶

In 2006, the Committee released a general comment specifically on “*The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment*”.⁷ The Committee issued the general comment “*to highlight the obligation of all State parties to move quickly to prohibit and eliminate all corporal punishment ... and to outline the legislative and other awareness-raising and education measures that States must take*” (emphasis added, pg 3).

The Committee unequivocally states that corporal punishment is contrary to the inalienable and equal rights of children to respect for their human dignity and physical integrity (pg 6). In particular, the Committee notes the inconsistency of corporal punishment with articles 19 and 37 of UNCROC. The Committee emphasises that eliminating corporal punishment of children through legislative and awareness-raising measures “*is an immediate and unqualified obligation of State parties*” (emphasis added, pg 6).

The Committee defines “corporal” or “physical” punishment as “*any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light. Most involves hitting (“smacking”, “slapping”, “spanking”) children with the hand or an implement ...*” (pg 4). It is clear that corporal punishment which State parties are obliged to eliminate is that which is explicitly permitted pursuant to laws providing for lawful correction defences such as section 61AA of the *Crimes Act 1900 (NSW)*.

In the Committee’s 2005 Concluding Observations on Australia’s compliance with its UNCROC obligations,⁸ the Committee noted its “*concern that corporal punishment in the home is lawful throughout Australia under the label “reasonable chastisement” and other similar provisions in states’ legislation*”. It recommended that Australia take measures to prohibit corporal punishment at home and at school in all states and territories. It also recommended that

⁶ See Committee on the Rights of the Child, General Comment No 8 (2006)

⁷ See Committee on the Rights of the Child, General Comment No 8 (2006)

⁸ Concluding observations: Australia. 20/10/2005 - CRC/C/15/Add.268, a copy is at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.15.Add.268.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15.Add.268.En?OpenDocument)

Australia strengthen awareness-raising and education campaigns, with the involvement of children, so as to “*promote positive, non-violent forms of discipline and respect for children’s rights, while raising awareness about the negative consequences of corporal punishment*”.

Similar concerns and recommendations had already been expressed by the Committee in its 1997 Concluding Observations.⁹ It is disappointing that some states governments including New South Wales have not, in the eight years which has passed since then, taken measures to prohibit corporal punishment but have instead, by way of the provision of lawful correction defences, codified the permissibility of physical punishment in the home.

The centre applauds moves made toward reform in certain states, such as the consideration of legal reform in Tasmania, where in 2003 the Law Reform Institute recommended the abolition of the defence of reasonable correction from criminal and civil law, and the lobbying and proposals to repeal the defence of reasonable force in Queensland in 2005 and 2007. The centre is concerned however that no changes in the law of either of these states have as yet been made.¹⁰ The centre also supports the Federal Government’s anti-smacking campaign of 2007.¹¹ It urges the Government to turn this emphasis on awareness into a full prohibition of domestic corporal punishment.

Many states laws are currently in breach of Australia’s UNCROC obligations. To ensure compliance with UNCROC, the Centre urges the states governments to move immediately towards implementing measures (legislative and educational) to eliminate corporal punishment against children.

(b) *Other international law obligations*

Corporal punishment is specifically intended to cause pain. Pain is inflicted causing obvious hurt and a sense of humiliation in an attempt to intimidate and alter behaviour.

For these reasons (as stated), the Committee on the Rights of the Child, recognises that corporal punishment falls within the definition of “*inhuman or degrading treatment or punishment*” contrary to art 37 of UNCROC. The European Court of Human Rights has also recognised, in a series of judgments, that corporal punishment falls within the definition of “*inhuman or degrading*

⁹ Concluding observations of the Committee on the Rights of the Child: Australia, 10/10/97. CRC/C/15/Add.79, a copy is at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.15.Add.79.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15.Add.79.En?OpenDocument)

¹⁰ <http://www.endcorporalpunishment.org/pages/progress/reports/australia.html>

¹¹ *Every Child is Important*, Australian Childhood Foundation, 2007.

treatment or punishment” contrary to Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.¹²

Inhuman and degrading treatment is also prohibited by Article 5 of the *Universal Declaration of Human Rights* and Article 7 of the *International Covenant on Civil and Political Rights*. In 1982 and 1992, the Human Rights Committee expressed its view that the *International Covenant on Civil and Political Rights* extends to disciplining measures. It stated that children should be entitled to no lesser protection in this regard. If Australia does not change its law in this area, an individual complaint could be made under the individual complaints mechanism under the First Optional Protocol of the *International Covenant on Civil and Political Rights*.

The Centre again urges, in order to ensure compliance with Australia’s international treaty obligations, that the states governments move immediately towards legislatively banning the corporal punishment of children.

4 *International moves to ban corporal punishment*

The attitude to corporal punishment of European and other countries is much more in line with the provisions of UNCROC than in Australia. For example, in Europe all forms of physical punishment of children have been banned in Sweden (1979), Finland (1984)¹³, Norway (1987), Austria (1989)¹⁴, Cyprus (1994), Denmark (1997)¹⁵, Croatia (1998) and Latvia (1998) and Germany (2001). In May 1996, the Italian Supreme Court also held that parental use of corporal punishment is inconsistent with the established Italian Law which recognises that minors should be treated with the same dignity as adults. The Centre urges that the states governments follow the example set by these countries and move towards ensuring compliance with UNCROC.

5 *Physical punishment has a negative impact on children’s development and health*

There have been consistent findings that “smacking” is a risk factor for a range of health outcomes.¹⁶

From a developmental perspective, research on the impact of physical punishment reveals a consistent association between corporal punishment and aggression, antisocial behaviour, psychological maladjustment, impaired parent-child relationships, and

¹² See *Tyrer v UK* (178); *Campbell and Cosans v UK* (1982); *Costello-Roberts v UK* (1993); *A v UK* (1998). European Court judgments are available at <http://www.echr.coe.int/echr>

¹³ Child Custody and Right of Access Act 1983, <http://www.nospank.org/europe.htm>

¹⁴ Youth Welfare Act

¹⁵ Parental Custody and Care Act 1987 <http://www.nospank.org/europe.htm>

¹⁶ Jamie Hosking “Is smacking in New Zealand a public health problem?” NZ “Blossoming of our Children” Conference Paper. Available <http://www.nzfvc.org.nz/acan/papers-presentations/abstract201v.shtml>

physical injury. Indeed, 47 out of 49 studies on aggression and anti-social behaviour showed a consistent link between punishment and antisocial behaviour.¹⁷

Every child and adult has an internationally recognised right to enjoy the highest standard of physical and mental health.¹⁸ The physical punishment of a child prevents that child from enjoying the highest attainable standard of health available to him or her. Therefore, legislating for corporal punishment breaches Australia's obligation to recognise the right to health and to make provision for "*the healthy development of the child*" (art 12, ICESCR).

Given the impact of physical punishment on a person's health, allowing children (but not adults) to be physically punished also gives rise to a discriminatory approach to children's and adults right to health, contrary to article 2 of UNCROC.

6 Children's attitudes to corporal punishment

Research on children's perspectives on corporal punishment has indicated that it fuels anger and resentment, is felt as rejection and leads to avoidance of the punitive parent.¹⁹ In research done in the United Kingdom by Save the Children, children expressed their opinions that smacking hurts, is generally not effective and is considered wrong. Importantly, the children saw little difference between different levels of physical punishment inflicted by their parents.²⁰

However, corporal punishment is rarely evaluated from children's perspective and children's attitudes to corporal punishment are generally ignored, such that children remain without a voice in relation to an area of law which specifically affects them.

The Centre submits that ignoring the views of children on matters which affect them is inconsistent with article 3 of UNCROC which requires that "*[i]n all actions concerning children, whether undertaken ... legislative bodies, the best interests of the child shall be a primary consideration.*" In relation to individual decisions affecting a child, Australia recognises that a child's views must be considered in order to determine what is in that child's best interests: see ss 60CC(3) of the *Family Law Act 1975*.

¹⁷ Anne Smith (2006) "The State of Research on the Effects of Physical Punishment", 27 *Social Policy Journal of New Zealand* at <http://www.msd.govt.nz/publications/journal/27-march-2006/27-pages114-127.html>; Also see Anne Smith and Joan Durrant "Physical Punishment: The State of Research and the State of Law" NZ "Blossoming of our Children" Conference Paper. Available <http://www.nzfvc.org.nz/acan/speakers/smith.shtml>

¹⁸ Article 25 of the Universal Declaration of Human Rights; Article 12(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR); Article 24 of UNCROC

¹⁹ Above at 14.

²⁰ Kate Harper as quoted in BBC News 'Parents retain right to smack', http://news.bbc.co.uk/1/hi/english/uk/newsid_607000/607889.stm, p. 4.

The Centre submits that, at a policy level, children's best interests can also only be determined if proper consideration is given to their views on laws which are to (or do) affect them as a group.

8 Encouraging parenting without violence

Section 61AA of the *Crimes Act 1900 (NSW)* is premised on the permissibility of a parent harming their child so long as the application of force to occasion that harm is "reasonable" (ss61AA(1)), or the harm itself does not last for more than a short period (ss61(2)(b)). In the Centre's view, however, intentionally harming a child should never be permissible. Harm is harm regardless of the length of time that harm is physically endured (let alone, mentally endured) and regardless of the gravity of the force used to inflict that harm.

Parenting can be challenging and stressful. There are ways, however, for parents to manage these challenges without resorting to violence. The NAPCAN foundation provides materials which educate parents on alternatives to hitting children.²¹ Parents need to be encouraged, through awareness raising and educational programs, to respond to stressful situations and challenges without recourse to violence.²²

The defence of lawful correction suggests that physically hitting a child may be okay. It gives rise to a societal perception to this effect. Without a blanket ban on corporal punishment this perception is unlikely to change, and education programs that recommend other ways of child discipline are unlikely to be effective.

9 Conclusion

The Centre urges the state governments to reassess their position on corporal punishment in light of the discriminatory nature of its laws, the inconsistency of its laws with international obligations and the fact that by way of the inclusion of a lawful correction defence, some states governments are, in effect, permitting the intentional infliction of harm (physical and mental) on one of the most vulnerable groups in our society.

²¹ The NAPCAN website is <http://www.napcan.org.au>

²² This was specifically recommended by the UN Committee on the Rights of the child in its 1997 and 2005 concluding Observations.