

**A COMPARATIVE LEGAL STUDY OF CORPORAL
PUNISHMENT AND TRI-NATION LAW REFORM**

by

LAETITIA-ANN GREEFF

submitted in accordance with the requirements for the degree of

DOCTOR OF LAWS

at the

UNIVERSITY OF SOUTH AFRICA

SUPERVISOR: PROF DR AMANDA SPIES

(October 2021)

Declaration

Name: Laetitia-Ann Greeff

Student Number: 8677085

Degree: Doctor of Laws

The exact wording of the title of the thesis as appearing on the electronic copy submitted for examination:

A Comparative Legal Study of Corporal Punishment and Tri-Nation Law Reform

I declare that the above thesis is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

I further declare that I submitted the thesis to originality checking software and that it falls within the accepted requirements for originality.

I further declare that I have not previously submitted this work, or part of it, for examination at Unisa for another qualification or at any other higher education institution.

Signature:



Date: 25 October 2021

Turnitin Submission Receipt



Digital Receipt

This receipt acknowledges that Turnitin received your paper. Below you will find the receipt information regarding your submission.

The first page of your submissions is displayed below.

Submission author: **Laetitia-ann Greeff**
Assignment title: **Revision 2**
Submission title: **A COMPARATIVE LEGAL STUDY OF CORPORAL PUNISHMENT ...**
File name: **LLD_Thesis_22_Oct.pdf**
File size: **2.1M**
Page count: **324**
Word count: **105,377**
Character count: **567,914**
Submission date: **22-Oct-2021 08:00AM (UTC+0200)**
Submission ID: **1680832438**



Copyright 2022 Turnitin. All rights reserved.

Declaration by Editor

PROFESSOR NEVILLE BOTHA

B Iuris, LLB (Pret) LLD (Unisa)

Professor (Rtd), School of Law University of South Africa
Advocate of the High Court
Former South African Representative Permanent Court of Arbitration
Former Editor: *Annual Survey of South African Law*
South African Mercantile Law Journal
Comparative & International Law Journal for Southern Africa
South African Yearbook of International Law

Cell: 082 820 1414
Tel: 012 362 0376
e-mail: Neville.Botha7@gmail.com

5 October 2021

TO WHOM IT MAY CONCERN

I hereby confirm that the LLD thesis entitled:

A COMPARATIVE LEGAL STUDY OF CORPORAL PUNISHMENT AND TRI-NATION LAW REFORM

submitted by Laetitia-Ann Greeff has been fully edited in accordance with the requirements of the University.



Prof Neville Botha

Acknowledgements

The COVID-19 pandemic has made post-graduate, trans-national legal research during 2020 and 2021 very challenging - as if doctoral research is not challenging enough! With that in mind, I should like to acknowledge:

My supervisor, Professor Amanda Spies, Department of Public Law, Faculty of Law, Nelson Mandela University who guided me through the writing process over many Skype sessions and emails. Her unique perspective challenged me to aspire to more conceptual thinking and develop my hypothesis along those lines. I appreciate her generosity in the time she devoted to my supervision.

Professor Anne Louw, Faculty of Law, University of Pretoria, my initial supervisor for the research proposal module. I thank her for all her insights and positive feedback.

Doctor Meda Couzens, School of Law, Western Sydney University, for sharing her PhD thesis (still under embargo at the time) and knowledge of the United Nations *Convention on the Rights of the Child* with me, along with her kind words of wisdom and support.

Professor Patrick Ngulube, College of Graduate Studies, University of South Africa, for being a calming voice when it all just seemed a little too overwhelming.

Ms Yegisthree Naidu, Librarian, University of South Africa, for all her help with finding primary and secondary sources in the challenging COVID-19 environment.

Emeritus Professor Neville Botha for the language editing of this thesis. His attention to detail is a vast improvement upon my own efforts, and I am ever so grateful for his contribution.

And, on a more personal note:

To God the Father for giving me patience, courage, and determination to take on a task of this magnitude.

My family: Without your continued devotion, dedication, love, and prayers, this doctoral thesis would not have been possible. I want to acknowledge my husband, Niel Greeff, who has had to read chapter after chapter and provide constructive criticism, and my children, Daniel and Amelia, for being the most supportive children a parent could ask for. My parents, Lorcan Kennedy and Annekie Heydenreich, for your steadfast love and support that sustained me now in this endeavour but has always been part of my life. And my big brother, Tony Kennedy, for your moral support throughout this formidable process. I thank you all for believing in me. I dedicate this thesis to you.

Soli Deo Gloria

Summary

Since 1979 when Sweden became the first country to ban corporal punishment, there has been a steady increase in the number of countries prohibiting physical force as a disciplinary measure against children. To date, sixty-three countries have banned the use of corporal punishment in all settings (schools, foster care, child-care, penal institutions, and the home). South Africa and New Zealand have also joined the list of countries to prohibit the use of corporal punishment against children for purposes of correction. However, Australia has yet to join this list. In Australia, corporal punishment is permitted in the home and other specific settings. This thesis presents a comparative legal study of corporal punishment and law-reform strategies in South Africa, New Zealand, and Australia.

The focal points of this study are, first, to analyse the three principles that dominate the corporal punishment discourse: the best interests of the child; the right to equal protection under the law; and the right to freedom of religion. The second focal point is to determine what law-reform process would be viable in Australia, a federal state made up of eight states and territories, in the pursuit of excluding the defence of reasonable chastisement to a charge of common assault. The defence of reasonable chastisement is a common-law defence to a charge of common assault available to parents in Australia, and prior to 2019 and 2007 respectively, also available to parents in South Africa and New Zealand. South Africa banned corporal punishment in 2019 through public interest litigation and judicial condemnation, while New Zealand used its parliamentary processes to outlaw the use of physical force against children in 2007. This study analyses these two methods of law reform to establish which is the more viable for Australia given its federal constitutional dispensation.

The study makes several recommendations that Australia should implement to eradicate corporal punishment once the defence of reasonable chastisement has been prohibited.

Key terms

best interests of the child; childhood; children's rights; common assault; corporal punishment; physical force; discrimination; human rights; lawful correction; parents and persons *in loco parentis*; physical punishment; reasonable chastisement

Abbreviations

ACRWC	African Charter on the Rights and Welfare of the Child
ACT	Australian Capital Territory
ACT HR Act	Australian Capital Territory Human Rights Act 2004
ALR	Australian Law Reports
ALJR	Australian Law Journal Reports
BCLR	Butterworths Constitutional Law Reports
CALS	Centre for Applied Legal Studies (University of the Witwatersrand)
CC	Constitutional Court (South Africa)
CCA	Court of Criminal Appeal (Australia)
CCL	Centre for Child Law (University of Pretoria)
CLR	Commonwealth Law Reports (Australia)
COMB	Comberbach's King's Bench Reports (England and Wales)
Cth	Commonwealth of Australia
CRC	Committee on the Rights of the Child
ER	English Reports
FamCa	Family Court of Australia
F&F	Foster & Finlayson's Nisi Prius Reports (England and Wales)

FLA	Family Law Act 1975 (Cth)
FLR	Family Law Reports (England and Wales)
FMCAfam	Federal Magistrates Court of Australia - Family Law Division
Fordham Urb LJ	Fordham Urban Law Journal
GLR	Gazette Law Reports (New Zealand)
HCA	High Court of Australia
HRA	Human Rights Act 1993 (New Zealand)
Int'l J Child Rts	International Journal of Children's Rights
Int'l JL & Fam	International Journal of Law and the Family
Int'l JL Pol'y & Fam	International Journal of Law, Policy and the Family
J Crim L & Criminology	Journal of Criminal Law and Criminology
JL & Soc'y	Journal of Law and Society
LHR	Lawyers for Human Rights
LRC	Legal Resources Centre, Johannesburg
LQR	Law Quarterly Review
Melb U L Rev	Melbourne University Law Review
NmSC	Namibian Supreme Court
NSW	New South Wales
NT	Northern Territory
NYU L Rev	New York University Law Review

NZBORA	New Zealand Bill of Rights Act 1990
NZGazLawRp	New Zealand Gazette Law Reports
NZLR	New Zealand Law Reports
NZPoliceLawRP	New Zealand Police Law Reports
NZ L Rev	New Zealand Law Review
OPIC	Optional Protocol on the Rights of the Child on a Communications Procedure
PER	<i>Potchefstroomse Elektroniese Regsblad</i> Potchefstroom Electronic Law Journal
PIAC	Public Interest Advocacy Centre Ltd (Sydney)
Qld	Queensland
QLD HR Act	Queensland Human Rights Act
SA	South Australia
SA	South African Law Reports
SAJHR	South African Journal on Human Rights
SCC	Supreme Court of Canada
SCR	Canada Supreme Court Reports
Tas	Tasmania
Tas R	Tasmanian Reports
TASSC	Supreme Court of Tasmania
TPD	Transvaal Provincial Division
UKHL	United Kingdom House of Lords

UN	United Nations
U Pa L Rev	University of Pennsylvania Law Review
Vic	Victoria
VLR	Victorian Law Reports
VR	Victorian Reports
WA	Western Australia
WASC	Supreme Court of Western Australia
WAR	Western Australia Reports
ZACC	South African Constitutional Court
ZAGPJHC	South Africa: South Gauteng High Court, Johannesburg

Table of Contents

DECLARATION.....	II
TURNITIN SUBMISSION RECEIPT	III
DECLARATION BY EDITOR.....	IV
ACKNOWLEDGEMENTS.....	V
SUMMARY	VII
ABBREVIATIONS	IX
TABLE OF CONTENTS	XIII

CHAPTER 1

INTRODUCTION

1.1	Background.....	1
1.2	International Obligations	3
1.3	Research Question	5
1.4	Research Objectives.....	5
1.5	Point of Departure.....	6
1.6	The Scope and Framework of the Thesis.....	9
1.6.1	<i>CHAPTER 2: General Concepts and Strategies for Law Reform</i>	<i>9</i>
1.6.2	<i>CHAPTER 3: Australian Perspective</i>	<i>18</i>
1.6.3	<i>CHAPTER 4: South African Perspective</i>	<i>20</i>
1.6.4	<i>CHAPTER 5: New Zealand Perspective</i>	<i>22</i>

1.6.5	<i>CHAPTER 6: Conclusion and Recommendations</i>	22
1.7	Research Methodology	23
1.8	Gender-neutral language	24

CHAPTER 2

GENERAL CONCEPTS OF THE CORPORAL PUNISHMENT DEBATE AND STRATEGIES FOR CHANGE

2.1	Introduction	25
Part I	27
2.2	The Nebulous Concept of Childhood.....	27
2.3	A Rights-Based Approach as a Legal Framework to the Convention	29
2.4	The ‘So-Called’ Four Principles of a Rights-Based Approach.....	34
2.5	Best Interests of the Child Principle: Article 3(1) of the Convention.....	39
2.5.1	<i>The History of the Principle</i>	42
2.5.2	<i>Developing the Best Interests Principle</i>	50
2.5.3	<i>International Criticism of the Best Interests Principle</i>	55
2.6	The Child’s Right to Equal Protection of the Law: Article 2 of the Convention, the Right to Non-Discrimination.....	60
2.6.1	<i>Background</i>	60
2.6.2	<i>Western Philosophical Approaches to Equality</i>	61
2.6.3	<i>The African Philosophy of Equality in the Ubuntu Paradigm</i>	64

2.6.4	<i>Equality in Domestic and International Law</i>	66
2.7	The Right to Freedom of Religion: Article 14 of the Convention, the Right to Freedom of Thought, Conscience and Religion.....	72
2.7.1	<i>Background</i>	72
2.7.2	<i>Religion and International Law</i>	74
2.7.3	<i>The Anachronistic Public/Private Dichotomy</i>	75
2.7.4	<i>The Lived Experiences of Corporal Punishment</i>	78
2.7.5	<i>Limiting the Right to Freedom of Religion</i>	83
2.7.6	<i>The World Religions Oppose Corporal Punishment</i>	85
Part II	89
2.8	Litigation and the Legislature: Strategies for the Abolition of Corporal Punishment.....	89
2.8.1	<i>The Effectiveness of Litigation as a Strategy for Change</i>	90
2.8.2	<i>The Relevance and Impact of Direct Legislative Reform</i>	97
2.9	Conclusion	98

CHAPTER 3

CORPORAL PUNISHMENT IN AUSTRALIAN JURISDICTIONS

3.1	Introduction.....	103
3.2	Australia and Human Rights Legislation.....	108
3.3	States with Human Rights Legislation	112

3.4	The Commonwealth of Australia	119
3.5	Common law States	124
3.5.1	<i>New South Wales (NSW)</i>	127
3.5.2	<i>Victoria (Vic)</i>	133
3.5.3	<i>South Australia (SA)</i>	136
3.6	Code States	139
3.6.1	<i>Queensland (Qld)</i>	139
3.6.2	<i>Northern Territory (NT)</i>	142
3.6.3	<i>Tasmania (Tas)</i>	143
3.6.4	<i>Australian Capital Territory (ACT)</i>	146
3.6.5	<i>Western Australia (WA)</i>	147
3.7	Defining ‘reasonable’ chastisement.....	148
3.8	Pressure from the International Community	156
3.9	Conclusion	161

CHAPTER 4

THE FORMAL DEMISE OF CORPORAL PUNISHMENT IN SOUTH AFRICA

4.1	Introduction	170
4.2	Section 28(2) of the Constitution: Best Interests of the Child Principle .	174
4.2.1	<i>Best Interests of the Child Principle as a Right</i>	178

4.2.2	<i>Local Criticism of the Principle</i>	183
4.3	The Philosophy of Corporal Punishment in Pre- and Post-Apartheid South Africa	186
4.4	The Children’s Act 38 of 2005: A Red Flag to a Bull.....	201
4.5	Impactful Public Interest Litigation.....	207
4.6	Conclusion	209

CHAPTER 5

THE NEW ZEALAND EXPERIENCE - LAW REFORM, SOCIETY, AND CULTURE

5.1	Introduction	214
5.2	Colonialism, Common Law and Corporal Punishment	217
5.3	Milestones on the Long Road to Abolition	222
5.4	What Sparked the Change?	224
5.4.1	<i>The Abolition of Corporal Punishment Campaign Narrative</i>	227
5.5	The Legislative Process to Repeal Section 59	237
5.6	Has Law Reform brought Social and Cultural Change?	241
5.7	Judicial Approaches and Discretionary Powers.....	246
5.8	Conclusion	252

CHAPTER 6
CONCLUSION

6.1	Introduction	256
6.2	The Practical Application of the Theoretical Principles	259
6.2.1	<i>The Best Interests of the Child Principle</i>	259
6.2.2	<i>The Right to Equal Protection under the Law</i>	262
6.2.3	<i>The Right to Freedom of Religion</i>	263
6.3	Law Reform in Australian Jurisdictions.....	265
6.4	Lessons from South Africa and Aotearoa New Zealand	266
6.4.1	<i>Children’s rights in South Africa</i>	267
6.4.2	<i>Law Reform in New Zealand</i>	268
6.4.3	<i>Does the Prohibition of Corporal Punishment Work?</i>	269
6.5	Constitutional Implications for Australia.....	272
6.6	Recommendations	274
6.7	Concluding Remarks.....	276
BIBLIOGRAPHY		277
BOOKS AND CHAPTERS IN BOOKS		277
JOURNAL ARTICLES		281
THESES		290
REPORTS/STUDIES		291

LEGISLATION	291
BILLS	294
TABLE OF CASES.....	294
INTERNATIONAL INSTRUMENTS	299
INTERNET SOURCES	302
OTHER	306
TABLES	307

Chapter 1

Introduction

1.1 Background

For far too long children have been treated as less deserving of the protection of their human rights than adults.¹ Their unequal treatment is evident from how certain jurisdictions still permit the practice of corporal punishment² as a disciplinary measure for children by parents or persons *in loco parentis* (in the place of a parent). A case in point is the Commonwealth of Australia. State and territory jurisdictions permit the use of the defence of reasonable chastisement for purposes of correction against a charge of common assault. Children in Australia are being hit, slapped, spanked, smacked, given a hiding, given a trashing, and having their ears clipped – all acceptable conduct in the eyes of the law because of the defence of reasonable chastisement.

¹ Bernadette J Saunders, Pernilla Leviner and Bronwyn Naylor, 'Introduction: "To Prohibition of Corporal Punishment – And Beyond!" Issues and Insights from an Inaugural Workshop in Stockholm on the Corporal Punishment of Children' in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 1.

² The term 'corporal punishment' is synonymous with the terms 'physical punishment', 'physical force' and the words 'hitting', 'smacking' and 'spanking' and is used interchangeably in this thesis. Furthermore, this thesis follows the definition of the Committee on the Rights of the Child as set out in United Nations General Comment No 8 CRC/C/GC/8 para 11 as: '[A]ny 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 with an implement - a whip, stick, belt, shoe, wooden spoon, etc. But it can also involve, for example, kicking, shaking, or throwing children, scratching, pinching, biting, pulling hair or boxing ears, forcing children to stay in uncomfortable positions, burning, scalding, or forced ingestion (for example, washing children's mouths out with soap or forcing them to swallow hot spices). In the view of the Committee, corporal punishment is invariably degrading. In addition, there are other non-physical forms of punishment that are also cruel and degrading and thus incompatible with the Convention. These include, for example, punishment which belittles, humiliates, denigrates, scapegoats, threatens, scares or ridicules the child.'

Corporal punishment is 'linked to disempowerment, discrimination based on gender, disability and social class, which increases children's vulnerability'.³ Notions of control and power are carried over into contemporary attitudes to family violence.⁴ Corporal punishment of children by family members is particularly closely related to intimate partner violence (IPV) – childhood experience of physical discipline, especially for girls, is often the start of violent victimisation by authority figures and family members.⁵ Research has shown a link between the corporal punishment of children and involvement in IPV later in life, both as a victim and as a perpetrator.⁶

Dodd argues that corporal punishment is frequently linked to patriarchy and an authoritarian form of discipline based on fear, 'unquestioning obedience, compliance and subordination'.⁷ Certain societies use corporal punishment in traditional justice systems and customary and religious law such as Shariah or Islamic law.⁸ Moreover, many religious schools believe that corporal punishment is a necessary part of a child's learning.⁹ Corporal punishment occurs in almost all

³ Chris Dodd, 'Towards Universal Prohibition of Corporal Punishment of Children – Religious Progress, Challenges and Opportunities' in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 120.

⁴ Angelika Poulsen, 'The Role of Corporal Punishment of Children in the Perpetuation of Intimate Partner Violence in Australia' (2018) *Children Australia* 43(1) 1,1.

⁵ Chris Dodd, 'Towards Universal Prohibition of Corporal Punishment of Children – Religious Progress, Challenges and Opportunities' in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 116.

⁶ Angelika Poulsen, 'The Role of Corporal Punishment of Children in the Perpetuation of Intimate Partner Violence in Australia' (2018) *Children Australia* 43(1) 1,1.

⁷ Chris Dodd, 'Towards Universal Prohibition of Corporal Punishment of Children – Religious Progress, Challenges and Opportunities' in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 119.

⁸ Chris Dodd, 'Towards Universal Prohibition of Corporal Punishment of Children – Religious Progress, Challenges and Opportunities' in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 118.

⁹ Chris Dodd, 'Towards Universal Prohibition of Corporal Punishment of Children – Religious Progress, Challenges and Opportunities' in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards*

cultures, and the tension between modern laws, traditional customs, and authoritarian laws impede the necessary law reform to abolish all forms of physical punishment.¹⁰ However, even in a largely secular society such as Australia, corporal punishment can thrive when it becomes a habit more than anything else.

This study compares the law-reform processes followed in New Zealand and South Africa to prohibit corporal punishment of children in all settings. Furthermore, it proposes, from a constitutional and procedural point of view, which law reform process will be most suitable in Australia – a country still very much in favour of corporal punishment in the home.

1.2 International Obligations

During the second half of the twentieth century the international community recognised that the human rights of children were not adequately defined and protected in existing human rights instruments.¹¹ Therefore, when the United Nations declared that 1979 would be the International Year of the Child, the government of Poland used this opportunity to suggest a new convention outlining the rights of the child.¹² After a decade-long negotiation process, the international community codified the rights of the child in a document of international standing.¹³

Prohibition and Beyond (vol 4 Brill Nijhoff, 2019) 120; *Christian Education South Africa v Minister of Education* [2000] ZACC 11, 2000 (4) SA 757, 2000 (10) BCLR 1051 [4].

¹⁰ Chris Dodd, 'Towards Universal Prohibition of Corporal Punishment of Children – Religious Progress, Challenges and Opportunities' in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 122.

¹¹ Julia Sloth-Nielsen, 'Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law' (1995) 11 SAJHR 401, 402.

¹² Noam Peleg, *The Child's Right to Development* (Cambridge University Press, 2019) 55; Jaap E Doek, 'The Human Rights of Children: An Introduction' in Ursula Kilkelly and Ton Liefwaard (eds), *International Human Rights of Children* (Springer, 2019) 8.

¹³ Noam Peleg, *The Child's Right to Development* (Cambridge University Press, 2019) 55; Jaap E Doek, 'The Human Rights of Children: An Introduction' in Ursula Kilkelly and Ton Liefwaard (eds), *International Human Rights of Children* (Springer, 2019) 12.

In 1990, the Convention on the Rights of the Child (Convention) was adopted and is today a significant and legally binding instrument.¹⁴ It is the first international cooperative step in recognising children's rights. Even earlier, the first international instrument dedicated exclusively to the rights of the child was the 1924 Declaration of the Rights of the Child.¹⁵ Unfortunately, these 'rights' were mere guidelines and were not enforceable.¹⁶ They did, however, carry significant moral authority¹⁷ – they were regarded as 'moral entitlements'. That is why with the ratification of the Convention children today enjoy far greater protection of their rights than under previous international instruments.

The Convention is a popular legal instrument and all UN member states, save for the United States of America, have ratified it.¹⁸ The Preamble to the Convention provides:

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth'.

Article 19 of the Convention requires that signatories take the necessary measures (legislative, administrative, social, and education) to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment, or exploitation, including sexual abuse while in the care of parents

¹⁴ Julia Sloth-Nielsen, 'Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law' (1995) 11 SAJHR 401, 402.

¹⁵ Julia Sloth-Nielsen, 'Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law' (1995) 11 SAJHR 401, 402; Jaap E Doek, 'The Human Rights of Children: An Introduction' in Ursula Kilkelly and Ton Liefaard (eds), *International Human Rights of Children* (Springer, 2019) 5.

¹⁶ Julia Sloth-Nielsen, 'Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law' (1995) 11 SAJHR 401, 402.

¹⁷ Rajnaara C Akhtar and Conrad Nyamutata, *International Child Law* (4th edn Routledge London, 2020) 88.

¹⁸ Australia in 1990, New Zealand in 1993, and South Africa in 1995.

or persons *in loco parentis*.¹⁹ Furthermore, article 37(a) states that no child should be forced to endure torture or cruel, inhuman, or degrading treatment or punishment. Although Australia was one of the first countries to ratify the Convention, it has been slow to adopt the provisions of the Convention in its domestic law.²⁰ As a result, Australia is frequently criticised by the international community and the Committee on the Rights of the Child (CRC).²¹

1.3 Research Question

This thesis aims to address the question: 'Why should Australia, a signatory to the Convention, implement nationwide law reform to abolish all forms of corporal punishment, and what, if any, lessons can Australia learn from South Africa and New Zealand in this regard?'

1.4 Research Objectives

This comparative study aims to provide a clear and concise analysis of the history of corporal punishment and the adverse effects of physical punishment in Australia, New Zealand, and South Africa. The study further aims to explain why Australia should prohibit corporal punishment through law reform in the wake of the two comparator countries that have already done so. What form law reform will take depends on the constitutional framework and the viability of change through strategic litigation or a legislative process. After such an analysis, recommendations can be made to answer the question: 'How should Australia

¹⁹ Article 19(1).

²⁰ John Tobin, 'The Development of Children's Rights' in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 26.

²¹ See Chapter 3 para 3.8.

proceed with law reform to prohibit physical punishment in all forms and in all settings by parents and persons *in loco parentis*?’

1.5 Point of Departure

The impetus for this comparative analysis is the shared English common-law²² history of the defence of reasonable chastisement to a charge of common assault applicable in South Africa, New Zealand, and Australia. The defence of reasonable chastisement is a common-law defence raised against a charge of common assault. All three countries refer to *R v Hopley*²³ as the seminal case which introduced the defence of reasonable chastisement to the common law through judicial precedent.²⁴ A further commonality is that all three comparator countries have ratified the Convention – Australia in 1990, New Zealand in 1993, and South Africa in 1995.²⁵

The year 1995 proved to be a watershed year for South African jurisprudence. The turning point in children’s rights jurisprudence in South Africa came soon after the adoption of the interim Constitution²⁶ in *S v Williams and Others*²⁷ when the presiding magistrate referred the matter for a special review of the sentence of juvenile whipping in terms of section 304(4) of the Criminal Procedure Act.²⁸ The magistrate was concerned that the sentence of juvenile whipping in section 294 of

²² Common law is based on case law that has developed over time. The judiciary refers to previous extant case law to determine a rule or custom.

²³ (1860) F&F 202, 175 ER 1204.

²⁴ *R v Janke and Janke* 1913 TPD 385; *Police v G, DM* [2016] SASC 39 [39]. Ann Skelton, ‘S v Williams: A Springboard for Further Debate about Corporal Punishment’ (2015) *Acta Juridica* 336, 337.

²⁵ United Nations Human Rights Office of the High Commissioner, ‘Status of Ratification’ <<https://indicators.ohchr.org/>> accessed 29 September 2021.

²⁶ Act 200 of 1993.

²⁷ 1995 (3) SA 632 (CC).

²⁸ Act 51 of 1977.

the Act was inconsistent with the provisions of the interim Constitution.²⁹ The result was that the Constitutional Court declared juvenile whipping inconsistent with the interim Constitution and, therefore, unlawful. Children's rights received a further boost, this time from the legislator, with the adoption of the South African Schools Act³⁰ and the Bill of Rights in Chapter 2 of the Constitution,³¹ both introduced in 1996, and the Children's Act introduced in 2007³² subsequently supplemented by crucial judicial decisions.³³ In 2019, the Constitutional Court held in *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others (FORSA)*³⁴ that the common law as it stood was incompatible with the South African Constitution and the defence of reasonable and moderate chastisement was abolished.³⁵

South Africa is a good example of how strategic impact litigation can be a successful way of prohibiting corporal punishment and thereby achieving the desired law reform.³⁶ The use of constitutional decisions to outlaw corporal punishment and promote law reform through strategic public interest litigation (PIL)

²⁹ Act 200 of 1993.

³⁰ Act 84 of 1996.

³¹ Constitution of the Republic of South Africa, 1996.

³² Act 38 of 2005.

³³ See *Christian Education South Africa v Minister of Education* [2000] ZACC 11, 2000 (4) SA 757, 2000 (10) BCLR 1051; *YG v S* [2017] ZAGPJHC 290, 2018 (1) SACR 64 (GJ); and *Freedom of Religion South Africa v Minister of Justice and Constitutional Development* [2019] ZACC 34.

³⁴ [2019] ZACC 34.

³⁵ [2019] ZACC 34 [76].

³⁶ See *S v Williams* [1995] ZACC 6, 1995 (3) SA 632 (CC) where a magistrate referred the case of judicial whipping of juveniles to the Constitutional Court for special review. The Legal Resources Centre acted as *amicus curiae* for the accused. In *Christian Education South Africa v Minister of Education* [2000] ZACC 11, 2000 (4) SA 757, 2000 (10) BCLR 1051 a group of 196 Christian schools challenged the ban on corporal punishment in the school. In *S v M* [2007] ZACC 18, 2008 (3) SA 232 (CC) the court discussed the best interests of the child principle, and the Centre for Child Law at the University of Pretoria was admitted as *amicus curiae*. In the *FORSA* case the appellant, FORSA, approached the Constitutional Court to appeal the decision of the court a quo that declared corporal punishment in the home unconstitutional. In this case the court found there was sufficient public interest to allow FORSA *locus standi* to appeal the matter. Three *amici curiae* were also admitted in this case which included Global Initiative to End All Corporal Punishment of Children (first *amicus curiae*), Dullah Omar Institute for Constitutional Law, Governance and Human Rights (second *amicus curiae*) and Parent Centre (third *amicus curiae*).

is a viable alternative to direct legislative reform.³⁷ However, as this thesis will conclude, this should be followed up with legislation to implement the court's decision.

New Zealand achieved the prohibition of corporal punishment through a parliamentary process. On 9 June 2005, Ms Sue Bradford of the Green Party of Aotearoa introduced the *Crimes (Substituted Section 59) Amendment Bill* to the New Zealand Parliament.³⁸ Almost two years later the Bill was adopted by the House of Representatives of the New Zealand Parliament. The sole purpose of this Bill was to abolish parental force as a means of correction.³⁹

It will be interesting to see if Australia chooses legislative law reform to abolish corporal punishment, or whether change will be brought about by strategic litigation. There are advantages to achieving law reform through the Commonwealth Parliament in that it is achieved through debate and democratic process. Such a process also has the advantage of legislating on a national level bringing certainty to those affected by the new legislation such as parents and those *in loco parentis*.

With strategic litigation in Australia only available at state and territory level,⁴⁰ there is the risk that if only one or two state or territory jurisdictions move to ban corporal punishment, this could leave parents or persons *in loco parentis* in the remaining jurisdictions 'in the wilderness'. This is akin to what happened after South Africa's South Gauteng High Court handed down its decision in *YG v S*⁴¹ finding corporal punishment in the home unconstitutional – a decision applicable only in the

³⁷ Sonia Vohito, 'Using the Courts to End Corporal Punishment – The International Score Card' (2019) *De Jure* 597, 599, 600.

³⁸ New Zealand Parliament, 'Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill – First Reading' <https://www.parliament.nz/en/pb/hansard-debates/rhr/document/47HansD_20050727_00001406/crimes-abolition-of-force-as-a-justification-for-child> accessed 20 May 2020.

³⁹ See s 4 of the Crimes (Substituted Section 59) Amendment Act 2007.

⁴⁰ The reason for this is fully explained in Chapter 3.

⁴¹ *YG v S* [2017] ZAGPJHC 290, 2018 (1) SACR 64 (GJ).

Gauteng province.⁴² South Africa had to wait for the Constitutional Court for the prohibition of corporal punishment to apply nationwide.

1.6 The Scope and Framework of the Thesis

1.6.1 CHAPTER 2: General Concepts and Strategies for Law Reform

This chapter is divided into two parts:

Part I discusses the nebulous notion of childhood and what it is understood to mean in different cultures, and the principles of a rights-based approach to all matters involving children. The section further analyses three general concepts traditionally found in children's-rights jurisprudence – the principle of the best interests of the child; the child's right to equal protection under the law; and the right to freedom of religion.

Part II contains an in-depth discussion of the relevance of PIL in initiating social and cultural change, and the viability of direct legislative law reform – both strategies with Australia's constitutional arrangements in mind.

1.6.1.1 Best Interests of the Child

The 'best interests of the child' principle (best interests principle) is found in article 3(1) of the Convention. Recognition of the child's best interests underpins all the

⁴² See *FORSA v Minister of Justice and Constitutional Development* [2019] ZACC 34 where Moengoeng CJ stated at [4] that: '[Reasonable and moderate chastisement] remains a valid defence against a charge of common assault throughout South Africa, except for Gauteng.' and at [23]: 'Since the decision of one Division of the High Court of South Africa does not bind all other Divisions, the need for uniformity and finality demands the intervention of this Court.'

other provisions of the Convention.⁴³ In Australia, the best interests principle is most commonly applied in family law matters.⁴⁴ The application of the principle is set out in Part VII Division 1 Subdivision BA of the Family Law Act (FLA).⁴⁵

In *W v R*,⁴⁶ a case involving a mother who sought a parenting order to relocate from Australia to New Zealand with the couple's three children, the court held that the child's best interests may be paramount, but that they are not the *only* interests to consider. Carmody J stated that: 'The general quality of life and economic, cultural and psychological welfare of both parents, but particularly the residence parent, are relevant and important.'⁴⁷

In the South African context, section 28(2) of the Constitution states that '[a] child's best interests are of paramount importance in every matter concerning the child'.⁴⁸ This wording is similar to that in article 4 of the African Charter on the Rights and Welfare of the Child 1979 (ACRWC) which states: 'In all action concerning a child undertaken by any person or authority the best interest of the child shall be the primary consideration.' In addition, section 9 of the Children's Act states that: 'In all matters concerning the care, protection and well-being of a child the standard that the child's best interests are of paramount importance, must be applied.'⁴⁹

Many scholars, both local and international, have criticised the paramountcy principle in particular, and the entire concept of the best interests of the child in

⁴³ Michael Freeman, 'Article 3: The Best Interests of the Child' in André Alen and others (eds) *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, 2007) 1.

⁴⁴ Australian Law Reform Commission, '*The Best Interest Principle as the basis of decisions*' <<https://www.alrc.gov.au/publication/seen-and-heard-priority-for-children-in-the-legal-process-alrc-report-84/16-childrens-involvement-in-family-law-proceedings/the-best-interests-principle/#:~:text=16.11%20The%20Family%20Law%20Act,the%20child%20in%20those%20cases>> accessed 21 June 2020.

⁴⁵ Family Law Act 1975 (Cth).

⁴⁶ [2006] FamCa 25.

⁴⁷ *W v R* [2006] FamCa 25 at [5].

⁴⁸ Constitution of the Republic of South Africa, 1996.

⁴⁹ Act 38 of 2005.

general.⁵⁰ Sachs J's remarked in *S v M* that because of its wide reach, the principle appears to promise everything in general but delivers very little in particular.⁵¹ The most significant criticism is that the principle is vague and does not provide a clear definition of what the best interests of the child actually are.⁵²

1.6.1.2 *The Child's Right to Equal Protection under the Law*

The defence of reasonable chastisement is, at its core, a discriminatory concept. It protects the actions of parents or persons *in loco parentis* (adults) by allowing them to apply physical force to a child (a person younger than 18 years of age)⁵³ who is in their care without any legal consequences.

Under section 9(1) of the South African Constitution,⁵⁴ '[e]veryone is equal before the law and has the right to equal protection and benefit of the law.' Subsection 2 continues to provide that '[e]quality includes the full and equal enjoyment of all rights and freedoms'. Section 19(1) of the New Zealand Bill of Rights Act 1990 (NZBORA) states that: 'Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.'⁵⁵

Australia does not have a bill of rights to protect and guarantee individual rights in the same way South Africa has through its Bill of Rights entrenched in Chapter two

⁵⁰ Elsje Bonthuys, 'The Best Interest of Children in the South African Constitution' (2006) Int'l JL Pol'y & Fam 23.

⁵¹ [2007] ZACC 18, 2008 (3) SA 232 (CC), 2007 (12) BCLR 1312 (CC) [23]; Ann Skelton, 'Children's Rights' in Jason Brickhill (contr ed), *Public Interest Litigation in South Africa* (Juta, 2018) 258, 266.

⁵² Benyam Dawit Mezmur, "'Don't Try this at Home?': Reasonable or Moderate Chastisement, and the Rights of the Child in South Africa with *YG v S* in Perspective' (2018) 32(2) *Speculum Juris* 85–86 <<http://www.saflii.org/za/journals/SPECJU/2018/7.pdf>> accessed 25 June 2020.

⁵³ Article 1 of the CRC states: 'For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained.'

⁵⁴ Constitution of the Republic of South Africa, 1996.

⁵⁵ See s 21(1) for a list of prohibited grounds of discrimination.

of the Constitution⁵⁶ or the statutory Bill of Rights in New Zealand.⁵⁷ Because of its federal system of governance, human rights legislation is still very provincial in Australia, with only Queensland,⁵⁸ Victoria,⁵⁹ and the Australian Capital Territory (ACT)⁶⁰ having human rights legislation.

In the ACT, section 8(3) of the Human Rights Act (ACT-HR Act) states that: 'Everyone is equal before the law and is entitled to the equal protection of the law without discrimination.' Moreover, in terms of section 11(2) '[e]very child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind.' Similarly, section 8(3) of Victoria's Charter of Rights and Responsibilities (Victoria Charter) states: 'Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.'⁶¹ Section 15(3) of the Queensland Human Rights Act (Qld-HR Act) provides that: 'Every person is equal before the law and is entitled to the equal protection of the law without discrimination.'

This notwithstanding, the defence of reasonable chastisement is still available to parents and persons *in loco parentis* in all three of these jurisdictions despite their having a Bill of Rights. These provisions *could* open the door to strategic PIL if civil society organisations are so inclined. The viability and efficacy of instituting legal proceedings to facilitate a law change in these jurisdictions are considered in Chapter 3.

⁵⁶ Constitution of the Republic of South Africa, 1996.

⁵⁷ Bill of Rights Act 1990.

⁵⁸ Human Rights Act 2019 (Qld).

⁵⁹ Charter of Human Rights and Responsibilities Act 2006 (Vic).

⁶⁰ Human Rights Act 2004 (ACT).

⁶¹ Charter of Human Rights and Responsibilities Act 2006 (Vic).

1.6.1.3 *The Right to Freedom of Religion*

The right to freedom of religion lies at the heart of what many religious parents feel is their right to punish their children physically. Because of the reforms to the law regarding the defence of reasonable chastisement in South Africa and New Zealand, we have seen some conservative Christian parents promoting corporal punishment in the belief that the Bible instructs them to do so. The most common Christian texts used to justify physical punishment are passages taken from the book of Proverbs in the Old Testament.⁶² It is unclear whether there will be the same level of protest amongst conservative Christians in Australia should law reform be proposed at the parliamentary or judicial level as Australia is more secular than the two comparator countries.

This section also analyses the mistaken belief that religion mandates corporal punishment and that scripture is the source of the justification for children's physical punishment. Although many other religions practise corporal punishment, the focus here is on Christianity in that corporal punishment was adopted in the British common-law from Roman law.⁶³ Christian missionaries extended the practice to the colonies, where corporal punishment continued to be a means of punishment and control in the military,⁶⁴ penal institutions,⁶⁵ schools,⁶⁶ and in the home.⁶⁷

⁶² Proverbs 13:24, 22:15 and 23:13.

⁶³ Anne McGillivray, 'Childhood in the Shadow of *Parens Patriae*' in Hillel Goelman, Sheila K Marshall and Sally Ross (eds), *Multiple Lenses; Multiple Images: Perspectives on the Child Across Time, Space and Disciplines* (Toronto University Press, 2004a) 38, 40.

⁶⁴ David Killingray, 'The "Rod of Empire": The Debate over Corporal Punishment in the British African Colonial Forces, 1888 – 1946' (1994) 35(2) *Journal of African History* 201, 201.

⁶⁵ Mark Finnane and John McGuire, 'The Uses of Punishment and Exile: Aborigines in Colonial Australia' (2001) 3(2) *Punishment & Society* 279, 283; David Killingray, 'The "Rod of Empire": The Debate over Corporal Punishment in the British African Colonial Forces, 1888 – 1946' (1994) 35(2) *The Journal of African History* 201, 201.

⁶⁶ Elmon M Tafa, 'Corporal Punishment: The Brutal Face of Botswana's Authoritarian Schools' (2002) 54(1) *Educational Review* 17, 20 < <https://www.tandfonline.com/doi/abs/10.1080/00131910120110848>> accessed 7 October 2020.

⁶⁷ Judy Cashmore and Briony Horsfall, 'Child Maltreatment' in Lisa Young and others (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 105.

Certain conservative Christian organisations feel that legislation banning corporal punishment would violate their rights. This issue came to the fore in *Christian Education South Africa v Minister of Education (Christian Education)*⁶⁸ with the passage of the South African Schools Act in 1996. It is worth mentioning that *Christian Education* lost its appeal in this case.

Discipline need not be physical to be effective.⁶⁹ Gershoff and Grogan-Kaylor have shown that physical punishment is less effective than non-physical punishment.⁷⁰ Afifi et al found in a 2016 study that physical punishment is associated with an increased likelihood of attempted suicide, alcohol abuse, and drug use in adulthood.⁷¹ Furthermore, the study found a strong link between severe physical punishment and physical and emotional abuse.⁷² This study indicates that physical punishment in childhood is linked to an increased likelihood of mental health and behavioural problems in adulthood.⁷³

As far as Australia is concerned, the Constitution states in section 116:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion; and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.⁷⁴

⁶⁸ [2000] ZACC 11, 2000 (4) SA 757, 2000 (10) BCLR 1051 (CC).

⁶⁹ Emma C Lubaale, 'Reconceptualising "Discipline" to Inform an Approach to Corporal Punishment that Strikes a Balance Between Children's Rights and Parental Rights' (2019) 20(1) Child Abuse Research in South Africa 36, 37. *FORSA v Minister of Justice and Constitutional Development* [2019] ZACC 34 [69].

⁷⁰ Elizabeth T Gershoff and Andrew Grogan-Kaylor, 'Spanking and Child Outcomes: Old Controversies and New Meta-Analyses' (2016) 30(4) Journal of Family Psychology 453, 465.

⁷¹ Tracie O Afifi et al, 'Spanking and Adult Mental Health Impairment: The Case for the Designation of Spanking as an Adverse Childhood Experience' (2017) Child Abuse & Neglect 24, 28

⁷² Tracie O Afifi et al, 'Spanking and Adult Mental Health Impairment: The Case for the Designation of Spanking as an Adverse Childhood Experience' (2017) Child Abuse & Neglect 24, 29.

⁷³ Tracie O Afifi et al, 'Spanking and Adult Mental Health Impairment: The Case for the Designation of Spanking as an Adverse Childhood Experience' (2017) Child Abuse & Neglect 24, 30.

⁷⁴ Commonwealth of Australia Constitution Act 1900.

The Qld-HR Act provides in section 20 that '[e]very person has the right to freedom of thought, conscience, religion and belief'. Similar provisions are found in section 14 of the ACT-HR Act and section 14 of the Victoria Charter. The remaining states and territory have no human rights legislation which guarantees the right to freedom of religion to the same extent as under the Human Rights Acts.

The NZBORA⁷⁵ states in section 13: 'Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and hold opinions without interference.' Section 15 continues to provide: 'Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either public or private.'

1.6.1.4 *Public Interest Litigation or Direct Legislative Reform*

Chapter 2 also investigates how legal change can be effected. Through PIL, judicial condemnation of corporal punishment is a possible strategy to protect children from violence and advance their rights. Public interest litigation is an established strategy whereby legal action is commenced to achieve social policy changes or law reform.⁷⁶ Litigants generally (but not always) assert ultra vires governmental acts or seek binding or declaratory orders on social policy matters or orders clarifying legislative ambiguity.⁷⁷ In short, PIL facilitates holding officials to account and provides redress to those harmed by violations.⁷⁸ This form of litigation is a crucial strategy of particular value in protecting vulnerable, under-

⁷⁵ New Zealand Bill of Rights Act 1990.

⁷⁶ Andrea Durbach et al, 'Public Interest Litigation: Making the Case in Australia' (2013) 38(4) *Alternative Law Journal* 219, 219.

⁷⁷ Michael Kirby, 'Deconstructing the Law's Hostility to Public Interest Litigation' (2011) 127 *LQR* 537, 537–538.

⁷⁸ Andrea Durbach et al, 'Public Interest Litigation: Making the Case in Australia' (2013) 38(4) *Alternative Law Journal* 219, 219.

resourced groups who are not sufficiently powerful to influence social justice issues directly.⁷⁹ It constitutes an alternate strategy by which to direct legislative change through judicial processes.

South Africa had a strong children's rights movement even before the introduction of the Constitution and the Bill of Rights.⁸⁰ During the consultation process for drafting the Constitution,⁸¹ children's rights organisations made submissions to the Constitutional Assembly, which resulted in the broader reach of section 28 – the section addressing children's rights.⁸² However, the children's rights movement did not stop there. Several public interest cases involving children's rights followed the introduction of the Constitution with issues spanning adoption,⁸³ juvenile whipping,⁸⁴ socio-economic rights,⁸⁵ and basic education.⁸⁶

Public interest litigation has also had some success in foreign jurisdictions. In India, the Parents' Forum for Meaningful Education managed to persuade the court to direct the state to ban corporal punishment in schools.⁸⁷ In Fiji, a High Court condemned corporal punishment both in schools and as a judicial punishment. However, corporal punishment is still legal in the home and in day-

⁷⁹ Scott Cummings and Deborah L Rhode, 'Public Interest Litigation: Insights from Theory and Practice' (2009) XXXVI Fordham Urb LJ 604, 606.

⁸⁰ Ann Skelton, 'Children's Rights' in Jason Brickhill (ed), *Public Interest Litigation in South Africa* (Juta, 2018) 259.

⁸¹ Constitution of the Republic of South Africa, 1996.

⁸² Ann Skelton, 'Children's Rights' in Jason Brickhill (ed), *Public Interest Litigation in South Africa* (Juta, 2018) 259.

⁸³ *Frazer v Children's Court, Pretoria North* [1997] ZACC 1, 1997 (2) SA 261 (CC); *Fraser v Naude* [1998] ZACC 13, 1999 (1) SA (CC) - CALS and LHR were admitted as amici curiae; *Minister of Welfare and Population Development v Fitzpatrick* [2000] ZACC 6, 2000 (3) SA 422 - CALS were admitted as amicus curiae.

⁸⁴ *S v Williams* [1995] ZACC 6, 1995 (3) SA 632 (CC) where a magistrate referred the case of judicial whipping of juveniles to the Constitutional Court. The LRC acted as *amicus curiae* for the accused.

⁸⁵ *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19, 2001 (1) SA 46 (CC). The LRC was admitted as *amicus curiae*.

⁸⁶ *Governing Body of the Juma Masjid Primary School v Essay NO* [2011] ZACC 13, 2011 (8) BCLR 761 (CC). The CCL and SERI were admitted as *amici curiae*.

⁸⁷ Sonia Vohito, 'Using the Courts to End Corporal Punishment – The International Score Card' (2019) *De Jure* 597, 601.

care and alternative-care settings.⁸⁸ Italy brought a case in the Court of Cassation in which the accused was convicted of the crime of abuse. In this case, a father was charged with repeatedly administering corporal punishment to his ten-year-old daughter. The court held that corporal punishment was no longer a lawful means of correcting misbehaviour.⁸⁹ Unfortunately, this decision has not yet been incorporated into domestic law and legislation permitting corporal punishment still stands. This has left Italy in a very precarious and uncertain position.⁹⁰

In 2000, corporal punishment came before the Israeli Supreme Court⁹¹ in an appeal from the District Court and, just as the Court of Cassation, the Israeli court condemned the use of corporal punishment. However, unlike Italy, the Israeli court's decision was immediately enacted into legislation prohibiting corporal punishment in the home.⁹² Strategic PIL is not always successful, but it most certainly is an appropriate way to ensure prominence for issues of corporal punishment. Strategic PIL is a possible means of law reform in Australia in the absence of direct legislative intervention. The success of PIL is a critical step towards law reform and the protection of children from violence.⁹³ It also plays an indirect, but no less crucial, role in mobilising supporters and getting the message across that it is wrong to violate a child's right to physical integrity by using corporal punishment as a means of punishment.

⁸⁸ Sonia Vohito, 'Using the Courts to End Corporal Punishment – The International Score Card' (2019) *De Jure* 597, 604.

⁸⁹ Cambria, Cass, sez. VI, 18 Marzo 1996, *Foro It II* 1996, 407–414.

⁹⁰ Bronwyn Naylor, 'Comparative Legal Approaches to Corporal Punishment: Regulating for Behavioural Change' in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 96–97.

⁹¹ CA 4596/98 *Anonymous v The State of Israel* PD 54(1) 149 (2000).

⁹² Tamar Morag, 'The Ban on Parental Corporal Punishment in Israel – What Facilitated the Change?' in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 225; Sonia Vohito, 'Using the Courts to End Corporal Punishment – The International Score Card' (2019) *De Jure* 597, 604.

⁹³ Sonia Vohito, 'Using the Courts to End Corporal Punishment – The International Score Card' (2019) *De Jure* 597, 609.

A further strategy to facilitate social and cultural change is direct legislative law reform as happened with the abolition of corporal punishment in New Zealand. There are advantages to achieving law reform through parliament in that it is subject to public debate and democratic processes. Legislating to ban a controversial practice such as corporal punishment *can* give the new law a heightened level of authority and promote public acceptance.⁹⁴ Legislative reform also has the advantage of legislating on a national level which brings certainty to those affected by the new legislation, such as parents and legal guardians.

1.6.2 CHAPTER 3: Australian Perspective

This chapter summarises approximately thirty pieces of Australian legislation related to corporal punishment and its application in various settings.⁹⁵ It also discusses the background to corporal punishment, the abolition of physical punishment in specific settings, and the application of the common-law defence of reasonable chastisement as it applies in the various states and territories in Australia. The chapter further considers why Australia needs law reform and what drives the move to abolish the defence of reasonable chastisement. The most significant step to eliminate all forms of physical punishment of children was the adoption, signature, ratification of and accession to UN resolution 44/25 of 20 November 1989, which brought the Convention into force.⁹⁶

To date, sixty-three countries have prohibited all forms of physical punishment.⁹⁷ Australia has yet to add its name to the list. Physical punishment remains legal in

⁹⁴ Thomas B Stoddard, 'Bleeding Heart: Reflections on Using the Law to make Social Change' (1997) 72 NYU L Rev 967, 983-4.

⁹⁵ See Table 3.3.

⁹⁶ United Nations Human Rights, Office of the High Commissioner, <<https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>> accessed 15 September 2021.

⁹⁷ Global Initiative to End All Corporal Punishment of Children, Progress <<https://endcorporalpunishment.org/countdown/>> accessed 10 February 2021.

the home and other selected settings.⁹⁸ The move to law reform in Australia is positively glacial as regards pace. Many voices have called for change,⁹⁹ the most recent being the Tasmanian Commissioner for Children in a January 2021 media release in which she calls for a change to or abolition of section 50 of the Tasmanian Criminal Code Act 1924.¹⁰⁰ Section 50 states that it is lawful for a parent or legal guardian to use force towards a child for the purposes of correction.

Political challenges remain – such as a backlash from parents who see state intervention in their homes as a restriction on parental rights – which prevent the much-needed law reform from being introduced.¹⁰¹ Whether these challenges are real or perceived is yet to be determined. No state or territory has attempted to legislate against physical punishment in the home. New South Wales (NSW) is the only state to legislate to restrict the defence of reasonable chastisement with the introduction of section 61AA of the Crimes Act 1900 (NSW).

The Australian states and territories have only gone so far as to prohibit corporal punishment in schools in all states and territories, save for Queensland and Western Australia where ambiguity about prohibition exists regarding corporal punishment in private schools. The Queensland Minister for Education told the state parliament on 19 August 2019 that the Queensland government had no plans to make any changes to corporal punishment in schools.¹⁰² Similarly, NSW

⁹⁸ See Table 3.3.

⁹⁹ Michael Freeman and Bernadette J Saunders, 'Can We Conquer Child Abuse if We Don't Outlaw Physical Chastisement of Children?' (2014) 22 *Int'l J Child Rts* 681. Bronwyn Naylor and Bernadette Saunders, 'Whose rights? Children, Parents and Discipline' (2009) *Alternative Law Journal* 34(2) 81, 85.

¹⁰⁰ Leanne McLean, 'Talking Point – Physical Punishment' (*CCYP Media Release*, January 2021) <<https://www.childcomm.tas.gov.au/wp-content/uploads/CCYP-Talking-Point-Physical-Punishment-FINAL.pdf>> accessed 25 January 2021.

¹⁰¹ Bronwyn Naylor and Bernadette Saunders, 'Whose Rights? Children, Parents and Discipline' (2009) *Alternative Law Journal* 34(2) 81, 85.

¹⁰² Tony Moore, 'Former MP Smacks Queensland for Not Banning Cane from Private Schools' *Brisbane Times* (29 September 2019) <<https://www.brisbanetimes.com.au/national/queensland/former-mp-smacks-queensland-for-not-banning-cane-from-private-schools-20190927-p52vvgb.html>> accessed 2 October 2019.

also stated in a statutory review of section 61AA that there were no plans to review corporal punishment legislation.¹⁰³ Corporal punishment in the home is legal in all Australian states and territories.

Naylor and Saunders¹⁰⁴ offer five reasons to challenge the claim that parents have a fundamental right to punish their children physically:

- children have rights;
- children are entitled to equal protection;
- physical discipline can be harmful;
- physical force may ultimately prove ineffective as discipline; and
- other effective disciplinary options are available.

These are valid reasons for Australia to engage in introspection and for the Attorneys-General in all the states and territories to muster the courage to introduce some much-needed law reform to protect their most vulnerable citizens – the children.

1.6.3 CHAPTER 4: South African Perspective

This chapter traces the history of South African law reform from the English case of *R v Hopley*¹⁰⁵ and the South African case of *R v Janke and Janke*,¹⁰⁶ to the

¹⁰³ Statutory Review Section 61AA Crimes Act 1900 (NSW) Lawful Correction (Department of Justice and Attorney General) 2010 16
<<https://www.justice.nsw.gov.au/justicepolicy/Documents/Statutory%20Review.pdf>>
accessed 11 May 2020.

¹⁰⁴ Bronwyn Naylor and Bernadette Saunders, 'Whose rights? Children, Parents and Discipline' (2009) 34(2) *Alternative Law Journal* 81.

¹⁰⁵ (1860) F&F 202, 175 ER 1204.

¹⁰⁶ 1913 TPD 382.

recent decision handed down by the Constitutional Court in the *FORSA* case.¹⁰⁷ South Africa saw the ratification of the Convention as imposing an obligation to review domestic law and give effect to the child's rights and the best interests of the child principle.

As an indication of its commitment to children's rights, the South African legislature included section 28(2)¹⁰⁸ in the Bill of Rights, which mirrors the best interests of the child principle set out in the Convention, thereby constitutionalising children's rights. The principle is a benchmark against which all decisions regarding children are evaluated.¹⁰⁹ The first instance in which we can see the principle's impact is in the decision handed down in *S v Williams and Others*¹¹⁰ in 1995, which held judicial whipping of juveniles to be incompatible with the interim Constitution.¹¹¹

Of note is the fact that follow-up legislation to the *FORSA* case ought to have been incorporated in the Children's Act Amendment Bill (February 2020 version) to give the Constitutional Court's decision some legislative force. Unfortunately, when the Bill was tabled before Cabinet it contained nothing relating to corporal punishment.¹¹² This was indeed a missed opportunity at last to legislate against corporal punishment in the home in South Africa.

¹⁰⁷ [2019] ZACC 34.

¹⁰⁸ Section 28(2) states: 'A child's best interests are of paramount importance in every matter concerning the child.'

¹⁰⁹ Julia Sloth-Nielsen and Benyam D Mezmur, '2+2=5? – Exploring the Domestication of the CRC in South African Jurisprudence (2002 – 2006)' (2008) 16 Int'l J Child Rts 1, 2.

¹¹⁰ 1995 (3) SA 632 (CC). See Skelton, 'S v Williams: A Springboard for Further Debate about Corporal Punishment' (2015) Acta Juridica 336–359.

¹¹¹ Act 200 of 1993.

¹¹² Julia Sloth-Nielsen, 'Sideswipes and Backhanders: Abolition of the Reasonable Chastisement Defence in South Africa' (2020) Int'l Journal of Law, Policy and the Family 191, 203.

1.6.4 CHAPTER 5: New Zealand Perspective

This chapter shows the trajectory of the abolition of corporal punishment in New Zealand. The legislative process started on 9 June 2005, when Sue Bradford of the Green Party of Aotearoa introduced the Crimes (Substituted Section 59) Amendment Bill to the New Zealand Parliament.¹¹³ Almost two years later the Bill was adopted by the House of Representatives of the New Zealand Parliament. The sole purpose of this Bill was to abolish the use of parental force for purposes of correction.¹¹⁴

The road to reform in New Zealand spanned almost three decades, starting in 1978 with academic and human rights activists calling for law reform and change.¹¹⁵ What drove the change in New Zealand is categorised under three campaign headings – the good person/parent; the just society; and the natural parent/society.¹¹⁶ An analysis of these headings is also undertaken in this chapter.

1.6.5 CHAPTER 6: Conclusion and Recommendations

This chapter focuses on what lessons Australia can learn from South Africa and New Zealand through their journeys to abolish all forms of physical punishment in their respective jurisdictions. After comparing the current legal state of corporal punishment in all three comparator countries, this study concludes with several

¹¹³ New Zealand Parliament, 'Crimes (Abolition of Force as Justification for Child Discipline) Amendment Bill – First Reading' <https://www.parliament.nz/en/pb/hansard-debates/rhr/document/47HansD_20050727_00001406/crimes-abolition-of-force-as-a-justification-for-child> accessed 20 May 2020.

¹¹⁴ See s 4 of the Crimes (Substituted Section 59) Amendment Act 2007.

¹¹⁵ Ian Hassall, 'New Zealand's Landmark Law Change to Prohibit Corporal Punishment of Children' in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 173.

¹¹⁶ Ian Hassall, 'New Zealand's Landmark Law Change to Prohibit Corporal Punishment of Children' in Bernadette J Saunders, Pernilla Leviner and Bronwyn Naylor (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 173, 181–185.

recommendations for law reform in Australia and an acknowledgement that more education and support for parents and persons *in loco parentis* are needed if we are ever to rid these jurisdictions of the scourge of physical punishment of children.

The Tasmania Law Reform Institute made several recommendations in their 2003 report on corporal punishment.¹¹⁷ With some amendments, those recommendations should be adapted to apply to all Australian states and territories. The recommendations are first, that the defence of reasonable chastisement be abolished, followed by a list of appropriate legislative and support measures.

1.7 Research Methodology

This thesis is a doctrinal research study. Hutchinson describes the doctrinal research methodology as,

[T]he location and analysis of the primary documents in order to establish the nature and parameters of the law. The doctrinal method is a two-part process because it involves both finding the law and interpreting and analysing the documents or text.¹¹⁸

The doctrinal research methodology in the positivist tradition requires the identification and examination of primary sources of law as a first step. Traditionally, these are legislation and case law. Following the collation of primary sources, secondary sources consisting of peer-reviewed journal articles,

¹¹⁷ Tasmania Law Reform Institute, *Physical Punishment of Children* (Final Report No 4, 2003) 5.

¹¹⁸ Terry Hutchinson, *Researching and Writing in Law* (4th edn Thomson Reuters (Professional) Australia Limited, 2018) 51.

textbooks, commentaries, and international instruments such as the United Nations Convention on the Rights of the Child, are consulted.

This thesis is a multi-jurisdictional comparative study of South Africa, New Zealand and the eight state and territory jurisdictions that comprise the Commonwealth of Australia. The purpose of comparing these three countries is the exposition of the process used to realise the abolition of corporal punishment. In South Africa, the abolition of corporal punishment was achieved through judicial condemnation by the Constitutional Court. In New Zealand, the defence of reasonable chastisement was abolished by the legislature. Therefore, these two countries are examples of how law reform can possibly be achieved in Australia.

1.8 Gender-neutral language

This thesis aims to use gender-neutral or gender-inclusive language and, wherever a person of unspecified or unknown gender is being referred to, has avoided the use of gender specific pronouns. The phrase 'his or her' is replaced by the gender-neutral singular 'their', and the phrase 'he or she' is replaced by the gender-neutral singular 'they'.

Chapter 2

General Concepts of the Corporal Punishment Debate and Strategies for Change

2.1 Introduction

This chapter focuses on general concepts that have emerged from the corporal punishment debate, and strategies that may or may not be viable for the abolition of corporal punishment. The chapter is divided into two parts. Part I examines five concepts. The first is the nebulous nature of childhood, followed by the notion of a rights-based approach to matters involving children. Third, is the 'best interests of the child' which, under article 3(1) of the Convention, provides that the best interests of the child shall be a primary concern in all actions or decisions – both public and private – that affect the child. This section examines the principle as it appears in the Convention and other international instruments and analyses the criticism raised by certain international commentators that the principle is too vague and indeterminate.

Four is the child's right to equal protection under the law. This section explores the concept of equality from ancient Greece through to contemporary times. It further analyses the difference between formal and substantive equality and how this difference affects the lived experience of children who are discriminated against based on their age and by being subjected to corporal punishment.

The final concept is the right to freedom of religion. This section analyses the mistaken belief that religion mandates corporal punishment and that scripture is a source of justification for children's physical punishment. Although many people from various religions practise corporal punishment, the focus is on Christianity

since corporal punishment was adopted in the British common law from Roman law.¹ Christian missionaries extended the practice to the colonies, where corporal punishment continued to be a means of punishment and control in the military,² penal institutions,³ schools,⁴ and the home.⁵

Part II of this chapter examines two strategies that can bring about legal change to encourage the necessary social and cultural change required to outlaw the use of corporal punishment in Australia. The first strategy discussed is law reform through the judiciary, the relevance of PIL, and the assumption that litigation can bring about social and cultural change. Furthermore, this chapter explores what the chances are that even if PIL is successful, it will result in the necessary cultural reform so desperately needed to eradicate all forms of physical punishment of children. Will this strategy, in fact, result in social change? Is PIL a viable alternative to direct law reform through legislation? The second strategy is direct law reform through the legislature and the advantages of using this method to encourage social and cultural change.

¹ Anne McGillivray, 'Childhood in the Shadow of *Parens Patriae*' in Hillel Goelman, Sheila K Marshall and Sally Ross (eds), *Multiple Lenses; Multiple Images: Perspectives on the Child Across Time, Space and Disciplines* (Toronto University Press, 2004a) 38, 40.

² David Killingray, 'The "Rod of Empire": The Debate over Corporal Punishment in the British African Colonial Forces, 1888 – 1946' (1994) 35(2) *Journal of African History* 201, 201.

³ Mark Finnane and John McGuire, 'The Uses of Punishment and Exile: Aborigines in Colonial Australia' (2001) 3(2) *Punishment & Society* 279, 283; David Killingray, 'The "Rod of Empire": The Debate over Corporal Punishment in the British African Colonial Forces, 1888 – 1946', (1994) 35(2) *Journal of African History* 201, 201.

⁴ Elmon M Tafa, 'Corporal Punishment: The Brutal Face of Botswana's Authoritarian Schools' (2002) 54(1) *Educational Review* 17, 20 <<https://www.tandfonline.com/doi/abs/10.1080/00131910120110848>> accessed 7 October 2020.

⁵ Judy Cashmore and Briony Horsfall, 'Child Maltreatment' in Lisa Young and others (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 105.

Part I

2.2 The Nebulous Concept of Childhood

Whenever one embarks on an analytical discussion of childhood and children's rights, it bears remembering that the concept of childhood is not settled: it is fluid and depends on the individual child's personal development and social, political, and religious contexts.⁶ Conceptually, childhood is neither natural nor neutral.⁷ Childhood as a concept is a social construct that changes over time and between societies.⁸ It is argued that different societies and cultures have different interpretations of the notion of childhood and what it means to be a child.⁹ For example, as regards the Convention, article 1 defines children as all persons younger than eighteen years of age unless emancipated earlier under domestic law. This, Tobin asserts, is a classic example of the 'incomplete[ly] theorised'¹⁰ nature of the Convention.¹¹ However, and far more controversially, the Preamble to the Convention indicates that the child needs appropriate protection both before and after birth.¹² The notion that children should be protected before birth means that those who seek an abortion violate the child's right to life. It was, therefore, decided that the Convention should remain silent on this issue.¹³ Conceptually, states have agreed on what childhood is but cannot agree on its scope. In other

⁶ Noam Peleg, 'International Children's Rights Law: General Principles' in Ursula Kilkelly and Ton Liefaard (eds), *International Human Rights of Children* (Springer, 2019) 139.

⁷ Noam Peleg, *The Child's Right to Development* (Cambridge University Press, 2019) 3.

⁸ Noam Peleg, *The Child's Right to Development* (Cambridge University Press, 2019) 3.

⁹ Michael Freeman, 'Article 3: The Best Interests of the Child' in André Alen and others (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, 2007) 33.

¹⁰ A term applied by Cass Sunstein, 'Participants in legal controversies try to produce incompletely theorized agreements on particular outcomes. They agree on the result of a narrow or low-level explanation for it; they need not agree on fundamental principle.' Cass R Sunstein, 'Political Conflict and Legal Agreement' (1994) *The Tanner Lectures on Human Values*, Harvard University 143.

¹¹ John Tobin, 'Justifying Children's Rights' (2013) 21 *Int'l J Child Rts* 399, 400.

¹² Jaap E Doek, 'The Human Rights of Children: An Introduction' in Ursula Kilkelly and Ton Liefaard (eds), *International Human Rights of Children* (Springer, 2019) 10.

¹³ Noam Peleg, 'International Children's Rights Law: General Principles' in Ursula Kilkelly and Ton Liefaard (eds), *International Human Rights of Children* (Springer, 2019) 137.

words, at what point does childhood begin and end?¹⁴ Because of deep philosophical divisions during the drafting of the Convention, it was left up to the individual states to determine when childhood begins.¹⁵

Tobin believes that it is incorrect to refer to Western and non-Western conceptions of childhood (in other words, how childhood is perceived or regarded). Based on the 'interest' theory,¹⁶ one must acknowledge that there are various conceptions of childhood in Western and non-Western states.¹⁷ The divergent meaning of the childhood in Western and non-Western states is found in their approaches to the concept. In Western states there is the tendency to want to protect children from the harshness of the adult world, and 'childhood' is seen as a time for play and training for what awaits after their eighteenth birthdays. In non-Western states, the concept encapsulates familial and community responsibilities born of poverty which often include paid work to support the family.¹⁸

In African culture, childhood is not conceptualised in terms of age but in terms of support and subservience to the family. Childhood is a prolonged period of 'self-effacing obedience to traditional authority'.¹⁹ In customary law, children 'belong' to families as a group rather than to individual parents.²⁰ The point at which a child

¹⁴ John Tobin, 'Justifying Children's Rights' (2013) 21 Int'l J Child Rts 399, 400.

¹⁵ Noam Peleg, 'International Children's Rights Law: General Principles' in Ursula Kilkelly and Ton Liefwaard (eds), *International Human Rights of Children* (Springer, 2019) 137.

¹⁶ According to the interest theory, children have a number of interests. These interests are then treated as rights for which another person (most probably a parent or carer) has an obligation towards the child. Some of these obligations have sanctions attached to them, but not all. The right functions as a link between the obligation (of the parent or carer) and the interests of the child. Lars-Göran Sund and Marie Vackermo, 'The Interest Theory, Children's Rights and Social Authorities' (2015) 23 Int'l J Child Rts 752, 758. See also, John Tobin, 'Justifying Children's Rights' (2013) 21 Int'l J Child Rts 395, 397 who refers to the *substantive* dimension of interest theory which includes rights-holders and duty bearers.

¹⁷ John Tobin, 'Justifying Children's Rights' (2013) 21 Int'l J Child Rts 395, 420.

¹⁸ John Tobin, 'Justifying Children's Rights' (2013) 21 Int'l J Child Rts 395, 420.

¹⁹ Michael Freeman, 'Article 3: The Best Interests of the Child' in André Alen and others (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, 2007) 34.

²⁰ Marius Pieterse, 'In Loco Parentis: Third Party Parenting Rights in South Africa' (2000) 11 Stellenbosch L Rev 324, 331.

attains majority under indigenous law depends on the individual child's 'physical and intellectual maturity, initiation, marriage and the establishment of a separate household.'²¹ One could categorise 'childhood' as a fixed period²² in Western society, and a 'status' within an extended family or community in a non-Western society.

2.3 A Rights-Based Approach as a Legal Framework to the Convention

As a concept, children's rights are not simply a legal hypothesis but also a political and ethical blueprint for promoting the needs and interests of children. A children's rights-based approach (CRBA) is a complex set of ideas and principles that have their basis in international human rights standards, primarily the Convention. A CRBA provides the potential to act as a valuable tool for addressing children's needs.²³ It is imperative for the adoption of a CRBA that children are recognised and promoted as rights-holders.²⁴ On an international level, this is evident from the virtually universal ratification of the Convention.²⁵

Defining the substantive meaning of a CRBA has been described as an 'elusive' endeavour.²⁶ Although there is no single definition of a CRBA, Doel-Mackaway

²¹ Tshepo L Mosikatsana, 'Children's Rights and Family Autonomy in the South African Context: A Comment on Children's Rights Under the Final Constitution' (1998) 3 J Race & L 341, 347.

²² Sheila Varadan, 'The Principle of Evolving Capacities under the UN Convention on the Rights of the Child' (2019) 27 Int'l J Child Rts 306, 307.

²³ John Tobin, 'The Development of Children's Rights' in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 36.

²⁴ John Tobin, 'Justifying Children's Rights' (2013) 21 Int'l J Child Rts 395, 397.

²⁵ United Nations, Convention on the Rights of the Child < <https://www.unicef.org/child-rights-convention/convention-text#>> accessed 30 July 2020.

²⁶ John Tobin, 'The Development of Children's Rights' in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 26.

asserts that the goal of the approach is to promote human rights by enabling governments to apply human rights in their practice, policy, and legislation.²⁷ A further aim of the approach is to enable rights-holders to experience the rights set out in the legal framework of international law.²⁸

A bona fide commitment to the Convention requires the recognition that children have rights, understanding the substantive content of these rights, and a commitment to adopt practical measures to advance and protect them.²⁹ A case in point would be for Australian state and territory jurisdictions to remove the defence of reasonable chastisement thereby promoting the right of the child to not to be discriminated against (art 2), the right to be free from mental and physical violence (art 19(1)), and the right not to be subjected to torture or other cruel, inhuman, or degrading treatment or punishment (art 37(a)). In the absence of such a commitment, children's rights will struggle to find traction amongst all the other human rights that tend to favour adults over children such as the right not to be discriminated against on the basis of age.

The first way to advance and protect children's rights is to bring them into the 'mainstream' human rights discourse. When used in the context of children's rights, the term 'mainstream' emphasises the need to make children visible and homogenised instead of marginalised, isolated, or invisible within all discourse concerning matters that affect them.³⁰ Mainstreaming children's rights is not intended to override other rights. Instead, it recognises that children have special

²⁷ Holly Doel-Mackaway, "Just Ask Us. Come and See Us" The Participation of Aboriginal Children and Young People in Law and Policy Development' (PhD thesis, Macquarie University, 2016) 45.

²⁸ Holly Doel-Mackaway, "Just Ask Us. Come and See Us" The Participation of Aboriginal Children and Young People in Law and Policy Development' (PhD thesis, Macquarie University, 2016) 45.

²⁹ John Tobin, 'The Development of Children's Rights' in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 37.

³⁰ John Tobin, 'The Development of Children's Rights', in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 38.

needs because they are children, and as such deserve special attention for fear that they become invisible and marginalised.³¹

Three guiding principles have been identified as underscoring a general human rights-based approach to dealing with children.³² They are, first, *interdependence and indivisibility*, which asserts that the realisation of a specific right cannot be separated from the fulfilment of the other rights to which children are entitled.³³ For example, in the context of violence against children, there is limited value in prosecuting the offenders if the victims do not have access to the necessary support services to assist in their recovery.³⁴ The notion of the indivisibility of rights provides the necessary recognition of interdependence and also eliminates any claim that there is a 'hierarchy of rights'.³⁵ Second, the indivisibility of rights affirms the equal status of all human rights and the need to adopt a comprehensive approach encapsulating the whole being of the child that guarantees the fulfilment of all their rights.³⁶

Second, the principle of *accountability* 'demands that children are recognised as subjects with entitlements that states must secure on their behalf. This obligation is generic to all human rights and is generally considered to consist of three

³¹ John Tobin, 'The Development of Children's Rights' in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 38.

³² John Tobin, 'The Development of Children's Rights' in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 42.

³³ John Tobin, 'The Development of Children's Rights' in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 42.

³⁴ John Tobin, 'The Development of Children's Rights' in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 42.

³⁵ John Tobin, 'The Development of Children's Rights' in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 43.

³⁶ John Tobin, 'The Development of Children's Rights', in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 43.

distinct duties: an obligation to respect, an obligation to protect and an obligation to fulfil.³⁷

Third, the concept of *universality* is based on the premise that ‘all human beings are born free and equal in dignity and rights’, which translates into a requirement that all children be accorded the rights that are universally applicable.³⁸ Furthermore, this principle emphasises the need to secure every individual child’s rights, not simply the rights of children as a category. The challenge, therefore, is to recognise the need to identify and respond to the individual needs of every child rather than becoming preoccupied with generalist approaches that simply set targets or indicators for the treatment of children.³⁹

As regards practical steps, the first stage of a CRBA must be to pinpoint and examine children’s needs by reference to their rights.⁴⁰ This examination must be conducted in conjunction with identifying the various elements – eg, social, cultural, economic, geographic, political, environmental, and personal – that undermine the realisation of these rights.⁴¹ This will, for example, entail identifying children who are vulnerable and whose parents or carers are prone to violence and where a smack might turn into a violent assault. In this regard, the use of

³⁷ John Tobin, ‘The Development of Children’s Rights’ in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 43.

³⁸ John Tobin, ‘The Development of Children’s Rights’, in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 44.

³⁹ John Tobin, ‘The Development of Children’s Rights’, in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 45.

⁴⁰ See in this regard Sachs J’s remarks in the South African Constitutional Court case of *S v M* [2007] ZACC 18, 2008 (3) SA 232 (CC), 2007 (12) BCLR 1312 (CC) [48] where he stated: ‘Though the High Court was not unsympathetic to the plight of M and her children, and noted that imprisonment would be hard both for her and her children, it should have gone further and itself made the enquiries and weighed the information gained.’

⁴¹ John Tobin, ‘The Development of Children’s Rights’ in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 50.

'tendency' evidence ought to be admissible.⁴² This data should then be used to develop the capabilities of duty-bearers to fulfil children's rights and limit any elements, be they structural, social, or institutional, that would hinder the full realisation of these rights.⁴³

Therefore, a CRBA demands a new strategy to confront existing civil order and powerful connections.⁴⁴ It is about challenging the marginalisation, paternalism, and patronising or condescending attitudes which have typified how children are treated.⁴⁵ This is evident in the adoption of corporal punishment provisions in domestic law and equating the practice with guidance and correction when it should be seen as an infringement of the child's physical integrity. Society must recognise that children have dignity, entitlements, capacity, and evolving autonomy whilst also accepting social responsibility and burden-sharing in the realisation of their entitlements to live free from mental and physical violence. Finally, authorities ought to create appropriate, unfettered, and continuous processes to ensure the realisation of children's rights which governments have accepted by ratifying the Convention.⁴⁶

⁴² See *R v Drake* NZCA [1902] NZGazLawRp 141, (1902) 22 NLR 478, (1902) 5 GLR 145, 146.

⁴³ John Tobin, 'The Development of Children's Rights' in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 50.

⁴⁴ John Tobin, 'The Development of Children's Rights' in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 53.

⁴⁵ John Tobin, 'The Development of Children's Rights' in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 53.

⁴⁶ John Tobin, 'The Development of Children's Rights' in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 53.

2.4 The ‘So-Called’ Four Principles of a Rights-Based Approach

The CRC has identified four articles in the Convention as general principles that inform a CRBA.⁴⁷ These general principles are found in article 2 (non-discrimination), article 3(1) (best interests of the child), article 6 (the right to life, survival, and development), and article 12 (the participation clause). These four articles are briefly discussed below.

Article 2: Non-discrimination⁴⁸

This provision not only covers the child but also protects its parents or legal guardians against discrimination of any kind. The article requires states specifically to identify children and groups of children whose rights demand special measures for them to be recognised and realised. This may require legislative and

⁴⁷ General Comment No 5 CRC/GC/2003/5 para 12. See Noam Peleg, ‘International Children’s Rights Law: General Principles’ in Ursula Kilkelly and Ton Liefwaard (eds), *International Human Rights of Children* (Springer, 2019) 139–150. See also Julia Sloth-Nielsen and Benyam D Mezmur, ‘2+2=5? – Exploring the Domestication of the CRC in South African Jurisprudence (2002 – 2006)’ (2008) 16 *Int’l J Child Rts* 1,5 for a discussion of the four general principles of the Convention in the South African context. Cf Karl Hanson and Laura Lundy, ‘Does Exactly What It Says on the Tin? A Critical Analysis and Alternative Conceptualisation of the So-called “General Principles” of the Convention on the Rights of the Child’ in Michael Freeman (ed), *Children’s Rights: New Issues, New Themes, New Perspectives* (Brill Nijhoff, 2018) 23, 29, 32–33 doi: <https://doi-org.oasis.unisa.ac.za/10.1163/9789004358829_004> accessed 8 July 2021 where the authors describe the general principles as a ‘thin conceptualisation’ with a very limited understanding amongst CRC members of the meaning of the concept of ‘general principles’. Furthermore, Hanson and Lundy opine there is a lack of clarity and consistency by the CRC in the use of the general principles in monitoring and advising state parties. They propose a reformulation of the general principles concept to include article 5 but the removal of article 6 and changing the name to ‘cross-cutting standards’.

⁴⁸ Article 2 of the Convention states: ‘(1) 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 or her or his parent’s or legal guardian’s race, colour, sex, language religion, political or other opinion, national ethnic or social origin, property disability, birth or other status. (2) States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members.’

administrative changes in resource allocation and education to drive social and cultural change in attitudes to discriminatory practices.⁴⁹ Furthermore, it must be emphasised that the non-discrimination principle of equal access to rights, does not necessarily imply identical treatment. Non-discrimination is not only a passive obligation, prohibiting all forms of discrimination (*de jure*), but also requires appropriate pro-active measures to ensure adequate and equal opportunities for all (*de facto*).⁵⁰ The non-discrimination issue is discussed further in paragraph 2.6 under the heading 'The Child's Right to Equal Protection under the Law'.

Article 3(1): Best Interests of the Child Principle

Article 3(1) contains the best interests of the child principle, a general standard in the Convention which underpins the rights set out in the rest of the treaty. Article 3(1) states:⁵¹

- (1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

The best interests of the child principle is explored in detail in paragraph 2.5 below.

Article 6: Rights to Life, Survival, and Development⁶²

⁴⁹ UN Doc CRC/GC/2003/5 para 12.

⁵⁰ UN Doc CRC/C/GC/14 para 41.

⁵¹ Michael Freeman, 'Article 3: The Best Interests of the Child' in André Alen and others (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, 2007) 25.

This provision requires state parties to the Convention to provide adequate care for mothers and babies to reduce child and infant mortality and create conditions that promote the wellbeing of all children in the critical phases of childhood. The rights to life, survival, and development incorporate several provisions of the Convention.⁵³ Peleg believes that article 6 should be read disjunctively to mean three distinct rights – to life, to survival, and to development.⁵⁴ The CRC expects states to interpret ‘development’ in its broadest sense to include, among other things, life expectancy, child mortality, immunisation, malnutrition, and preventable diseases.⁵⁵ Furthermore, ‘development’ should embrace the child’s physical, mental, spiritual, moral, psychological, and social development.⁵⁶

Article 12: Participation⁵⁷

Article 12 provides for the child to be given the opportunity to be heard in all matters (judicial or administrative) that affect them,⁵⁸ having regard to the age and maturity of the child to express their views constructively. These views can be expressed either directly or through a representative or appropriate body in accordance with the law. Article 12 is commonly referred to as the *child*

⁵² Article 6 of the CRC states: ‘(1) States Parties recognize that every child has the inherent right to life. (2) States Parties shall ensure to the maximum extent possible the survival and development of the child.’

⁵³ Julia Sloth-Nielsen and Benyam D Mezmur, ‘2+2=5? – Exploring the Domestication of the CRC in South African Jurisprudence (2002 – 2006)’ (2008) 16 Int’l J Child Rts 1, 10.

⁵⁴ Noam Peleg, *The Child’s Right to Development* (Cambridge University Press, 2019) 14.

⁵⁵ Julia Sloth-Nielsen and Benyam D Mezmur, ‘2+2=5? – Exploring the Domestication of the CRC in South African Jurisprudence (2002 – 2006)’ (2008) 16 Int’l J Child Rts 1, 10.

⁵⁶ UN Doc CRC/GC/2003/5 para 12.

⁵⁷ Article 12 of the CRC states: ‘(1) States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. (2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.’

⁵⁸ UN Doc CRC/C/GC/14 para 45.

participation provision. Tobin asserts that although article 12 emphasises the principle of participation, it should not be read in isolation from the other provisions of the Convention which form a ‘package’ of participation rights, such as article 13 (freedom of expression), article 14 (freedom of thought, conscience, and religion), and article 15 (freedom of association).⁵⁹

Lundy, Tobin and Parkes assert that the right to respect for the views of the child has emerged as one of the most influential provisions of the Convention in both domestic and international law.⁶⁰ (In passing, article 12 has even been described as ‘the soul of the Convention’.⁶¹) Peleg opines that article 12 is a departure from the paternalistic view of children as ‘human becomings’ to a more empowered and inclusive status as human beings.⁶² Along with article 3 of the Convention, it is the provision that has been most frequently taken up in domestic law and national constitutions.⁶³ From a practical point of view, it is unclear how children’s views on corporal punishment provisions in domestic law and their application will be given due weight. It is not sufficient to survey children *ex post facto* about what effect corporal punishment has had on them. A more prospective approach is needed where due weight is given to children’s views *before* new legislation is passed. It is suggested that adults and children work together to create an ‘inclusive

⁵⁹ John Tobin, ‘The Development of Children’s Rights’ in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 49.

⁶⁰ Laura Lundy, John Tobin and Aisling Parkes, ‘Article 12: The Right to Respect for the Views of the Child’ in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 398.

⁶¹ Julia Sloth-Nielsen, 8th edn of the Summer School on International Children’s Rights, Leiden University, 28 June 2021–2 July 2021 which was attended by the author of this thesis.

⁶² Noam Peleg, ‘International Children’s Rights Law: General Principles’ in Ursula Kilkelly and Ton Liefwaard (eds), *International Human Rights of Children* (Springer, 2019) 148.

⁶³ Laura Lundy, John Tobin and Aisling Parkes, ‘Article 12: The Right to Respect for the Views of the Child’ in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 398.

communication system and processes that allow children's views to be heard'.⁶⁴ The method in which children express their opinions is not limited to verbal communication, and can be through drawings, dance, murmurs, or any other format that the child feels comfortable using.⁶⁵

Tobin opined that the articles of the Convention should not be read in isolation.⁶⁶ It, therefore, seems incumbent upon state parties to apply the entire value system or general principles of the Convention when corporal punishment provisions are considered and law reform is proposed. In other words, the best interests of the child should (shall) be a primary consideration whenever governments consider any legislation or regulation that contains corporal punishment provisions. Therefore, it is in the child's best interests that they should not be discriminated against by regulations or legislation that allows for corporal punishment as these clauses generally discriminate against children based on their age.

As will be seen from the discussions below, social scientists have established that being subjected to corporal punishment can have adverse effects on the child's development.⁶⁷ Moreover, corporal punishment is inherently violent and infringes on the child's right to life, survival, and development. It is for this reason that the UN Human Rights Committee has described the right to life, survival, and development in General Comment No 6 as 'the supreme right from which no derogation is permitted'.⁶⁸

⁶⁴ Laura Lundy, John Tobin and Aisling Parkes, 'Article 12: The Right to Respect for the Views of the Child' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 433.

⁶⁵ Noam Peleg, 'International Children's Rights Law: General Principles' in Ursula Kilkelly and Ton Liefwaard (eds), *International Human Rights of Children* (Springer, 2019) 150.

⁶⁶ John Tobin, 'The Development of Children's Rights' in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 46.

⁶⁷ See paras 5.4.1.1 and 6.4.3.

⁶⁸ UN Human Rights Committee, 'General Comment No 6: Article 6 (Right to Life)', 30 April 1982 <<https://www.refworld.org/docid/45388400a.html>> accessed 19 June 2021.

2.5 Best Interests of the Child Principle: Article 3(1) of the Convention⁶⁹

Contemporary approaches to applying the best interests of the child principle generally entail taking all surrounding circumstances relating to the child into account and, depending on those circumstances, the child's best interests are determined.⁷⁰ The application of the principle calls for the development of a *rights-based approach* and this necessitates the engagement of 'the holistic physical, psychological, moral and spiritual integrity of the child to promote her human dignity'.⁷¹

As noted above, article 3(1) of the Convention contains the best interests of the child principle which states that in all aspects concerning a child, the best interests of the child shall be a primary consideration.⁷² The best interest principle has, at its core, the goal of achieving a CRBA whereby all children have the full protection of all the rights in the Convention.⁷³ The Convention gives the child the right to have their best interests considered and evaluated as a primary concern in all actions or decisions that affect the child both publicly and privately.⁷⁴ When determining what is in the best interests of the child, the Committee on the Rights of the Child (CRC)⁷⁵ in General Comment⁷⁶ No 14 lists individual elements (concrete rights) that need to be taken into consideration:

⁶⁹ See also para 2.4.

⁷⁰ *S v M* [2007] ZACC 18, 2008 (3) SA 232 (CC), 2007 (12) BCLR 1312 (CC) [24].

⁷¹ UN Doc CRC/C/GC/14 para 4.

⁷² UN Convention on the Rights of the Child 1989.

⁷³ UN Doc CRC/C/GC/14 para 5.

⁷⁴ UN Doc CRC/C/GC/14 para 1.

⁷⁵ The Committee on the Rights of the Child is a body of eighteen independent child law experts who monitor the implementation of the Convention on the Rights of the Child by state parties. The Committee also monitors implementation of three Optional Protocols to the Convention, on involvement of children in armed conflict, on sale of children, child prostitution and child pornography, and the communications procedure for rights violations under the CRC and/or Optional Protocols <<https://www.ohchr.org/en/hrbodies/crc/pages/crcindex.aspx>> accessed 29 July 2020.

- a) **The child's views**⁷⁷ – Article 12 of the Convention creates the child's right to be heard and participate in all decisions affecting him or her in accordance with the age and maturity of the child.
- b) **The child's identity**⁷⁸ – Factors that determine the child's identity like sex, sexual orientation, national origin, religion and beliefs, cultural identity, and personality must be considered when determining what is in the child's best interests.
- c) **Preservation of the family environment and maintaining relations**⁷⁹ – The Committee recognises that the family is the fundamental unit of society and the natural environment for children's growth and wellbeing. Preservation of the family environment includes maintaining the child's ties to both parents and siblings, extended family, and the community – eg, grandparents, aunts, uncles, and friends.
- d) **Care, protection, and safety of the child**⁸⁰ - The state is responsible for the child's well-being and ensures the child's care, protection, and safety when assessing their best interests. The state is responsible for the child's wellbeing in relation to their basic material, physical, educational and emotional needs and needs for affection and safety.

⁷⁶ General Comments are authoritative statements on the meaning, interpretation and implementation of the provisions of the Convention. See Karl Hanson and Laura Lundy, 'Does Exactly What it Says on the Tin? A Critical Analysis and Alternative Conceptualisation of the So-called "General Principles" of the Convention on the Rights of the Child' in Michael Freeman (ed), *Children's Rights: New Issues, New Themes, New Perspectives* (Brill Nijhoff, 2018) 27 doi: <https://doi-org.oasis.unisa.ac.za/10.1163/9789004358829_004> accessed 8 July 2021. See also Sheila Varadan, 'The Principle of Evolving Capacities under the UN Convention on the Rights of the Child' (2019) 27 Int'l J Child Rts 306, 308.

⁷⁷ UN Doc CRC/C/GC/14 paras 53–54.

⁷⁸ UN Doc CRC/C/GC/14 paras 55–57.

⁷⁹ UN Doc CRC/C/GC/14 paras 58–70.

⁸⁰ UN Doc CRC/C/GC/14 paras 71–74

- e) **Situation and vulnerability**⁸¹ – When determining the child's best interests, factors such as disability, race, refugee status, and abuse should be considered in the child's situation of vulnerability. Other human rights related to these situations and those covered in other international instruments should also be considered.
- f) **The child's right to health**⁸² – The child's right to health is central in assessing their best interests. The child has a right to be provided with adequate treatment for a health condition. Depending on the child's age and maturity, they should be provided with appropriate information concerning their health condition. The child should be allowed to consent to treatment in an informed manner, where possible.
- g) **The child's right to education**⁸³ – All decisions concerning education must be made in the best interests of the child, having regard to the fact that it is in the best interests of the child to have access to early childhood, non-formal and formal education, free of charge.

The CRC emphasised that the fundamental best interests assessment is a universal evaluation of all the appropriate elements of the child's best interests, the relevance of each element contingent on the others.⁸⁴ Not all elements apply to every circumstance and may be applicable in different situations and different ways.⁸⁵ The composition of each element will invariably differ from child to child and case to case depending on the category of decision and the substantive position, as will the significance of each element in the general assessment.⁸⁶ However, Cantwell is critical of these 'rights' which he believes are 'no more than a review of rights implications of various options'. He argues that when there is a

⁸¹ UN Doc CRC/C/GC/14 paras 75–76.

⁸² UN Doc CRC/C/GC/14 paras 77–78.

⁸³ UN Doc CRC/C/GC/14 para 79.

⁸⁴ UN Doc CRC/C/GC/14 para 80.

⁸⁵ UN Doc CRC/C/GC/14 para 80.

⁸⁶ UN Doc CRC/C/GC/14 para 80.

legitimate reason for applying the best interest principle, then surely it can be assumed that there is a duty to guarantee that this right (among others), will be in the best interests of all human beings.⁸⁷

2.5.1 The History of the Principle

Historically, children have never been the holders of any individual freedoms or rights.⁸⁸ Under Roman law, the doctrine of *patria potestas* (paternal power) entitled a father as *paterfamilias* (father of the family) all proprietary, magisterial, and arbitrary power over his children.⁸⁹ Roman law contained various provisions concerning the child, even the father's power over the life and death of the child, *ius Vitae ac Necis*.⁹⁰ Incidental *potestas* included the rights of custody or ownership of the child's body, name, sale, trade, labour, education, emancipation, religion, and the magisterial power of corporal punishment.⁹¹ *Potestas* governed all household members as the *pater's dominium* and included wives, children, slaves, and chattels. Children were treated no better than domesticated animals. The Roman father's power was unparalleled.⁹² As such, Roman law played a crucial

⁸⁷ Nigel Cantwell, 'Are "Best Interests" a Pillar or a Problem for Implementing the Human Rights of Children?' in Ton Liefaard and Julia Sloth-Nielsen (eds), *The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead* (Brill | Nijhoff, 2017) 65–6.

⁸⁸ John Tobin, 'The Development of Children's Rights' in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 26.

⁸⁹ Anne McGillivray, 'Children's Rights, Paternal Power and Fiduciary Duty: From Roman Law to the Supreme Court of Canada' (2011) *Int'l J Child Rts* 21, 25.

⁹⁰ Jaap E Doek, 'The Human Rights of Children: An Introduction' in Ursula Kilkelly and Ton Liefaard (eds), *International Human Rights of Children* (Springer, 2019) 4.

⁹¹ Anne McGillivray, 'Children's Rights, Paternal Power and Fiduciary Duty: From Roman Law to the Supreme Court of Canada' (2011) *Int'l J Child Rts* 21, 25.

⁹² Anne McGillivray, 'Children's Rights, Paternal Power and Fiduciary Duty: From Roman Law to the Supreme Court of Canada' (2011) *Int'l J Child Rts* 21, 25.

role in developing European laws, cementing the child's position as property of their parents subject to their absolute power.⁹³

By the time Justinian codified Roman law, the power had been reduced to the father's right to punish his child and to use reasonable force when doing so.⁹⁴ In the final days of the Roman Empire, *potestas* was restricted by a series of Novels.⁹⁵ In the last of these Novels, issued in 365, the paternal power of chastisement was limited to minor children.⁹⁶ Furthermore, these Novels prohibited severe physical punishment and are the origin of the 'defence of correction by force'.⁹⁷

The English common law inherited aspects of the *patria potestas*, such as custody, control, and corporal punishment through the Roman-based Canon law of the ecclesiastical courts which had jurisdiction over family matters.⁹⁸ Against this backdrop stood the *parens patriae* doctrine, the fiduciary authority of the state which was seen as an equitable jurisdiction to take care of those who could not care for themselves. This doctrine was extended to notions of legal incapacity, which included childhood.⁹⁹

⁹³ Jaap E Doek, 'The Human Rights of Children: An Introduction' in Ursula Kilkelly and Ton Liefwaard (eds), *International Human Rights of Children* (Springer, 2019) 4.

⁹⁴ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 22.

⁹⁵ Anne McGillivray, 'Children's Rights, Paternal Power and Fiduciary Duty: From Roman Law to the Supreme Court of Canada' (2011) *Int'l J Child Rts* 21, 25.

⁹⁶ Anne McGillivray, 'Children's Rights, Paternal Power and Fiduciary Duty: From Roman Law to the Supreme Court of Canada' (2011) *Int'l J Child Rts* 21, 25.

⁹⁷ Anne McGillivray, 'Children's Rights, Paternal Power and Fiduciary Duty: From Roman Law to the Supreme Court of Canada' (2011) *Int'l J Child Rts* 21, 25.

⁹⁸ Anne McGillivray, 'Childhood in the Shadow of *Parens Patriae*' in Hillel Goelman, Sheila K Marshall and Sally Ross (eds), *Multiple Lenses; Multiple Images: Perspectives on the Child Across Time, Space and Disciplines* (Toronto University Press, 2004a) 38, 40.

⁹⁹ Anne McGillivray, 'Children's Rights, Paternal Power and Fiduciary Duty: From Roman Law to the Supreme Court of Canada' (2011) *Int'l J Child Rts* 21, 26.

After the Norman Conquest in 1066, English monarchs adopted the title of *pater patriae* (the title used by the Roman emperors) as ‘father of the state’.¹⁰⁰ The care of orphaned children and the mentally disabled fell under the king’s jurisdiction. The king’s jurisdiction also extended to charities, infants, idiots, and lunatics.¹⁰¹ Under English law a father was guardian of his children *jure naturae*, and Chancery could not interfere with this absolute right.¹⁰² However, criminal prosecution was becoming a more frequent response to violence against children.¹⁰³ Statutory reform in 1873 saw the absolute paternal power abolished and replaced with maternal custody of children under sixteen years of age.¹⁰⁴

Reform continued with the 1866 Guardian and Infants Act which gave Chancery authority to issue custody orders using their discretionary powers of what was in the interests of the child, a forerunner to the best interests of the child principle.¹⁰⁵

Over the course of the twentieth century, the notion of children’s rights began to emerge. The focus appeared to move from children as the property of their parents, to children as individual rights holders.¹⁰⁶ On an international level, children’s rights started to gain momentum. For example, in 1919 the recognition of the exploitation of children for labour led the International Labour Organisation to adopt various requirements to protect working children by implementing

¹⁰⁰ Anne McGillivray, ‘Childhood in the Shadow of *Parrens Patriae*’ in Hillel Goelman, Sheila K Marshall and Sally Ross (eds), *Multiple Lenses; Multiple Images: Perspectives on the Child Across Time, Space and Disciplines* (Toronto University Press, 2004a) 38, 40.

¹⁰¹ Anne McGillivray, ‘Children’s Rights, Paternal Power and Fiduciary Duty: From Roman Law to the Supreme Court of Canada’ (2011) *Int’l J Child Rts* 21, 26.

¹⁰² Anne McGillivray, ‘Children’s Rights, Paternal Power and Fiduciary Duty: From Roman Law to the Supreme Court of Canada’ (2011) *Int’l J Child Rts* 21, 26.

¹⁰³ See *R v Hopley* [1860] 2 F&F 202, 175 ER 1024.

¹⁰⁴ Anne McGillivray, ‘Children’s Rights, Paternal Power and Fiduciary Duty: From Roman Law to the Supreme Court of Canada’ (2011) *Int’l J Child Rts* 21, 28.

¹⁰⁵ Anne McGillivray, ‘Children’s Rights, Paternal Power and Fiduciary Duty: From Roman Law to the Supreme Court of Canada’ (2011) *Int’l J Child Rts* 21, 28.

¹⁰⁶ John Tobin, ‘The Development of Children’s Rights’ in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 27.

minimum age standards. This created an awareness of the link between children's needs and children's rights.¹⁰⁷

In 1924 the League of Nations, driven by the atrocities of World War I, adopted the first international instrument dedicated solely to the rights of the child, the Geneva Declaration of the Rights of the Child.¹⁰⁸ Unfortunately, these 'rights' were mere non-binding guidelines.¹⁰⁹ They were regarded as 'moral entitlements.'¹¹⁰ Even so, this represented the formal establishment of the international children's rights movement.¹¹¹

The aftermath of World War II led to an expanded, but still non-binding, Declaration of the Rights of the Child in 1959. The Declaration 'promised children the rights and freedoms due to all mankind ...'¹¹² The best interests of the child principle also appeared in the Convention on the Elimination of All Forms of

¹⁰⁷ Julia Sloth-Nielsen, 'Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law' (1995) 11 SAJHR 401, 401; John Tobin, 'The Development of Children's Rights', in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 26.

¹⁰⁸ Anne McGillivray, 'Children's Rights, Paternal Power and Fiduciary Duty: From Roman Law to the Supreme Court of Canada' (2011) Int'l J Child Rts 21, 23; Jaap E Doek, 'The Human Rights of Children: An Introduction' in Ursula Kilkelly and Ton Liefaard (eds), *International Human Rights of Children* (Springer, 2019) 4–5.

¹⁰⁹ The Geneva Declaration of the Rights of the Child 1924 stated: '1. The child must be given the means requisite for its normal development, both materially and spiritually. 2. The child that is hungry must be fed, the child that is sick must be nursed, the child that is backward must be helped, the delinquent child must be reclaimed, and the orphan and the waif must be sheltered and succoured. 3. The child must be the first to receive relief in times of distress. 4. The child must be put in a position to earn a livelihood, and must be protected against every form of exploitation. 5. The child must be brought up in the consciousness that its talents must be devoted to the service of its fellow men.'

¹¹⁰ Julia Sloth-Nielsen, 'Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law' (1995) 11 SAJHR 401, 402.

¹¹¹ John Tobin, 'The Development of Children's Rights' in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 27. See also Jaap E Doek, 'The Human Rights of Children: An Introduction' in Ursula Kilkelly and Ton Liefaard (eds), *International Human Rights of Children* (Springer, 2019) 5.

¹¹² Anne McGillivray, 'Children's Rights, Paternal Power and Fiduciary Duty: From Roman Law to the Supreme Court of Canada' (2011) Int'l J Child Rts 21, 23; Jaap E Doek, 'The Human Rights of Children: An Introduction' in Ursula Kilkelly and Ton Liefaard (eds), *International Human Rights of Children* (Springer, 2019) 5.

Discrimination against Women,¹¹³ and in 1948 in the Universal Declaration on Human Rights was expanded to include children's rights. Furthermore, in 1966 the International Covenant on Civil and Political Rights (ICCPR)¹¹⁴ and the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹¹⁵ extended to include children's rights.¹¹⁶ However, the latter two conventions contained only a minimal number of provisions devoted solely to children's rights.¹¹⁷

Towards the end of the twentieth century, a bold, new document on children's rights saw the light of day. The Convention on the Rights of the Child was adopted and opened for signature, ratification, and accession by General Assembly resolution 44/25 of 20 November 1989 and, in accordance with its article 49, entered into force on 2 September 1990.¹¹⁸ The Convention followed and was developed as a result of the 1979 International year of the Child.¹¹⁹ It is the most widely ratified human rights treaty in the world, and to date 195 state parties have ratified the Convention, including Australia (1990), New Zealand (1993), and South

¹¹³ UN Doc CRC/C/GC/14 para 2.

¹¹⁴ Article 24 of the ICCPR states: '1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State. 2. Every child shall be registered immediately after birth and shall have a name. 3. Every child has the right to acquire a nationality.'

¹¹⁵ Article 13(1) of the ICESCR recognises that everyone has the right to education. Art 13(2)(a) states that primary education shall be compulsory and free; art 13(2)(b) states that secondary education shall be made generally available and accessible to all; and art 13(2)(c) states that higher education shall also be made generally available and accessible to all.

¹¹⁶ John Tobin, 'The Development of Children's Rights' in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 27.

¹¹⁷ John Tobin, 'The Development of Children's Rights', in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 27.

¹¹⁸ 'Child' is defined in art 1 as every human being below the age of eighteen unless legally emancipated.

¹¹⁹ Julia Sloth-Nielsen, 'Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law' (1995) 11 SAJHR 401, 401.

Africa (1995).¹²⁰ The United States remains the only member state not to have ratified the Convention despite their signalling their intention to ratify by signing the Convention on 16 February 1995.¹²¹

With the ratification of the Convention and the inclusion of the best interests of the child principle in article 3, children today enjoy far greater protection than under previous international instruments and standards. Children are now seen as individual rights holders¹²² as is clear from the vast number of rights cases in current child law jurisprudence.¹²³ Children are now afforded the same human rights as adults, and in some cases, even special protection beyond those afforded adults.¹²⁴

Historically, the best interests of the child principle has always been part of family law in general and custody matters in particular.¹²⁵ When applied in custody

¹²⁰ United Nations Office of the High Commissioner for Human Rights, 'UN Treaty Body Database' <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=9&Lang=EN> accessed 30 September 2021.

¹²¹ John Tobin, 'The Development of Children's Rights' in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 26; United Nations Office of the High Commissioner for Human Rights, 'UN Treaty Body Database' <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=9&Lang=EN> accessed 30 September 2021.

¹²² Ton Liefaard and Julia Sloth-Nielsen, '25 Years CRC: Reflecting on Successes, Failures and the Future' in Ton Liefaard and Julia Sloth-Nielsen (eds), *The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead* (Brill | Nijhoff, 2017) 1,1.

¹²³ Ann Skelton, 'Children's Rights' in Jason Brickhill (ed), *Public Interest Litigation in South Africa* (Juta, 2018).

¹²⁴ Cantwell uses the example of the internationally recognised 'right of everyone to the enjoyment of the highest attainable standard of physical and mental health' found in art 12(1) of the CESCR. This right is available to everyone, yet the Committee on the Rights of the Child, in General Comment No 8 United Nations Document CRC/C/GC/8, emphasised that the child's right to health ought to be regarded as pivotal when determining the best interests of the child. This approach then creates the perception that children's rights can be advanced on the same basis as human rights for adults, for whom the special provisions of best interests are not available. Nigel Cantwell, 'Are "Best Interests" a Pillar or a Problem for Implementing the Human Rights of Children?' in Ton Liefaard and Julia Sloth-Nielsen (eds), *The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead* (Brill | Nijhoff, 2017) 61, 65.

¹²⁵ Michael Freeman, 'Article 3: The Best Interests of the Child' in André Alen and others (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, 2007) 3.

matters, Mnookin argues that the principle involves determining which outcome will be the 'best' or 'least detrimental' for a particular child.¹²⁶ He states that there may not be consensus on what is best for a child but that there is certainly agreement on what is bad for a child, for example, physical abuse.¹²⁷ Mnookin suggests three rules as a limited substitute for the best interests of the child principle when dealing with care arrangements for children. First, no child should be placed in a situation in which there is an immediate and substantial threat to its physical health. Second, the parent who has a stronger bond (Mnookin uses the term 'psychological bond') with the child (from the child's point of view) should be preferred over a 'stranger' with whom the child does not necessarily have a psychological bond. And third, subject to the first two rules, placement with biological parents should be favoured.¹²⁸

Before the introduction of the principle in divorce and custody matters, the absolute paternal preference rule dominated British legislation until late in the nineteenth century.¹²⁹ This rule was based on the father's dominant right in all family matters. The rule determined that even if the father was abusive, custody could never be awarded to the mother.¹³⁰ This right of the father was, in general, perceived to be 'a natural right founded on the inherent superiority of men over women'.¹³¹

¹²⁶ Robert H Mnookin, 'Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39 *Law and Contemporary Problems* 226, 229.

¹²⁷ Robert H Mnookin, 'Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39 *Law and Contemporary Problems* 226, 261. See also, Benyam Dawit Mezmur, "'Don't Try this at Home?': Reasonable or Moderate Chastisement, and the Rights of the Child in South Africa with *YG v S* in Perspective' (2018) 32(2) *Speculum Juris* 88 <<http://www.saflii.org/za/journals/SPECJU/2018/7.pdf>> accessed 29 July 2020.

¹²⁸ Robert H Mnookin, 'Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39 *Law and Contemporary Problems* 226, 282.

¹²⁹ Anne McGillivray, 'Children's Rights, Paternal Power and Fiduciary Duty: From Roman Law to the Supreme Court of Canada' (2011) *Int'l J Child Rts* 21, 28.

¹³⁰ *R v Greenhill* [1836] 4 Ad & E 624, 111 ER 922.

¹³¹ Jon Elster, 'Solomonic Judgements: Against the Best Interests of the Child' (1987) 54(1) *University of Chicago Law Review* 1, 8.

However, this changed when in 1970 the case of *J v C*¹³² came before the English courts. A Spanish couple, M and F, relocated to England where they had a son, B.¹³³ Less than ideal circumstances forced M and F to allow B to live with foster parents.¹³⁴ However, when circumstances improved for M and F, they asked for B to be returned but the foster parents refused. Consequently, M and F applied to the court for an order granting them care and control over B.¹³⁵ The foster parents applied for a custody order to have B remain with them. The court held that the child's welfare trumps that of both the mother and the father, and in so doing, put mothers on an equal footing with fathers.¹³⁶

This rule did not, however, take hold in American law.¹³⁷ Instead, American law recognised a fault-based presumption in terms of which custody of children of divorced parents was generally awarded to the parent who was 'innocent' in the divorce.¹³⁸ In the twentieth century, the maternal-preference rule slowly emerged as the dominant doctrine in most Western democracies.¹³⁹ As Mnookin points out, the judiciary applied the 'no-fault rule' because it thought children were best cared for by the 'innocent' party.¹⁴⁰ As the parties had to show fault on the part of a spouse, and given the social convention that it was usually wives who filed for divorce, the courts awarded custody to the mother more often than to the father.¹⁴¹ This rule was frequently accompanied by the proviso that it only be applied to the

¹³² [1970] AC 668.

¹³³ [1970] AC 668 [1].

¹³⁴ [1970] AC 668 [1].

¹³⁵ [1970] AC 668 [2].

¹³⁶ [1970] AC 668 [8].

¹³⁷ Robert H Mnookin, 'Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39 *Law and Contemporary Problems* 226, 234.

¹³⁸ Robert H Mnookin, 'Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39 *Law and Contemporary Problems* 226, 234.

¹³⁹ Jon Elster, 'Solomonic Judgements: Against the Best Interests of the Child' (1987) 54(1) *University of Chicago Law Review* 1, 8.

¹⁴⁰ Robert H Mnookin, 'Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39 *Law and Contemporary Problems* 226, 234.

¹⁴¹ Robert H Mnookin, 'Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39 *Law and Contemporary Problems* 226, 235.

custody of very young children.¹⁴² As with the two rules discussed above, the maternal presumption rule was justified on the basis of the best interests of the child.¹⁴³

From the 1970s, the maternal presumption rule was replaced by the principle that custody ought to be decided on what is in the best interests of the child.¹⁴⁴ Each case would, therefore, be judged on its merits. Determining what is in the best interests of the child in each case is, in Mnookin's words, '[A] question no less ultimate than the purposes and values of life itself.'¹⁴⁵

2.5.2 Developing the Best Interests Principle

In an attempt to define the principle, Eekelaar developed concepts of what the basic interests of a child entail, for example, 'physical, emotional and intellectual care, developmental interests to enter adulthood as far as possible without disadvantage, autonomy interests, especially the freedom to choose a lifestyle of their own'.¹⁴⁶ He continues:

It would be logically possible to have framed the Convention on the Rights of the Child as a list of duties owed by adults to children. But that would have revealed a negative, suspicious, view of human nature; it would have seen people as servile, responding best to restraint and control.¹⁴⁷

¹⁴² Robert H Mnookin, 'Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39 Law and Contemporary Problems 226, 235.

¹⁴³ Jon Elster, 'Solomonic Judgements: Against the Best Interests of the Child' (1987) 54(1) University of Chicago Law Review 1,8.

¹⁴⁴ Jon Elster, 'Solomonic Judgements: Against the Best Interests of the Child' (1987) 54(1) University of Chicago Law Review 1, 10.

¹⁴⁵ Robert H Mnookin, 'Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39 Law and Contemporary Problems 226, 260.

¹⁴⁶ John Eekelaar, 'The Importance of Thinking that Children have Rights' (1992) 6 Int'l JL & Fam 221, 231.

¹⁴⁷ John Eekelaar, 'The Importance of Thinking that Children have Rights' (1992) 6 Int'l JL & Fam 221, 234.

It has also been said that a child's best interests are of paramount importance in every aspect concerning the child.¹⁴⁸ Article 4 of the ACRWC states: 'In all action concerning a child undertaken by any person or authority the best interest of the child shall be the primary consideration.' Furthermore, it has also been stated that: 'In all matters concerning the care, protection and well-being of a child the standard that the child's best interests is of paramount importance, must be applied.'¹⁴⁹ However, it has also been said that the child's best interests may be paramount, but are not necessarily intended to replace all other considerations.¹⁵⁰

The first draft of the Convention, submitted by Poland in 1978, contained the principle in full as set out in Principle 2 of the UN Declaration of the Rights of the Child 1959. Principle 2 states:

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.

However, this reflects the restricted perspective of the 1959 Declaration of 'best interests' as the concern of law-makers and primary caregivers only.¹⁵¹ This draft was subsequently deemed unsatisfactory as a foundation for establishing a treaty, and an alternative draft was submitted.¹⁵² Eekelaar and Tobin point out that from

¹⁴⁸ Section 28(2) of the Constitution of the Republic of South Africa 1996.

¹⁴⁹ Section 9 of the South African Children's Act 38 of 2005.

¹⁵⁰ John Tobin, 'The Development of Children's Rights' in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 47. In *W v R* [2006] FamCa 25 Carmody J stated at [5]: 'The general quality of life and economic, cultural and psychological welfare of both parents, but particularly the residence parent, are relevant and important.'

¹⁵¹ Nigel Cantwell, 'Are "Best Interests" a Pillar or a Problem for Implementing the Human Rights of Children?' in Ton Liefwaard and Julia Sloth-Nielsen (eds), *The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead* (Brill | Nijhoff, 2017) 61, 63.

¹⁵² Nigel Cantwell, 'Are "Best Interests" a Pillar or a Problem for Implementing the Human Rights of Children?' in Ton Liefwaard and Julia Sloth-Nielsen (eds), *The United Nations*

the *travaux préparatoires* it is clear that several delegations were concerned about the burden this standard would impose.¹⁵³ It was therefore suggested that the version which merely required the best interests of the child to be a *primary* consideration be adopted.¹⁵⁴ This subsequent draft read as follows:

In all official actions concerning children, whether undertaken by public or private social welfare institutions, court of law, or administrative authorities, the best interests of the child shall be a primary consideration.¹⁵⁵

This text, discussed in 1981, was ultimately adopted with reservations.¹⁵⁶ The text was not discussed until 1988, when it was proposed to replace the word ‘the’ with ‘a’ in qualifying the words ‘primary consideration’.¹⁵⁷ This proposal was ultimately rejected. Freeman explains that the use of ‘a’ primary consideration instead of ‘the’ primary consideration indicates that the child’s best interests are of first importance, among other considerations.¹⁵⁸ However, they do not trump all other considerations or enjoy ‘absolute priority’.¹⁵⁹ One additional amendment was

Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead (Brill | Nijhoff, 2017) 61, 63. See also Michael Freeman, ‘Article 3: The Best Interests of the Child’ in André Alen and others (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, 2007) 25.

¹⁵³ John Eekelaar and John Tobin, ‘Article 3: The Best Interests of the Child’ in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 95.

¹⁵⁴ John Eekelaar and John Tobin, ‘Article 3: The Best Interests of the Child’ in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 95.

¹⁵⁵ Michael Freeman, ‘Article 3: The Best Interests of the Child’ in André Alen and others (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, 2007) 26.

¹⁵⁶ Michael Freeman, ‘The Best Interests of the Child in André Alen and others (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, 2007) 26.

¹⁵⁷ Julia Sloth-Nielsen, ‘Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law’ (1995) 11 S Afr J on Hum Rts 401, 408.

¹⁵⁸ Michael Freeman, ‘Article 3: The Best Interests of the Child’ in André Alen and others (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, 2007) 61.

¹⁵⁹ Michael Freeman, ‘Article 3: The Best Interests of the Child’ in André Alen and others (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, 2007) 61.

accepted for the final version of what ultimately became article 3(1) of the Convention. Article 3(1) is part of the first five articles of the Convention which set out the framework of the whole Convention. They assume an overarching importance.¹⁶⁰ The best interests of the child principle has been ‘elevated to an international law standard’ by its incorporation in the Convention.¹⁶¹

According to the CRC, the best interests of the child principle is a three-fold concept.¹⁶² (1) It is a substantive right of the child that requires that their best interests be assessed and taken into account as a primary consideration when various interests are weighed up against one another in deciding the issue at hand and the guarantee that this right will be applied whenever a decision is to be made about the child, a group of children, or children in general,¹⁶³ (2) It is a fundamental, interpretative legal principle that ‘[i]f a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child’s best interests should be chosen’.¹⁶⁴ (3) It is a rule of procedure; whenever a decision is to be made that will affect a specific child, the decision-making process must include an evaluation of the possible impact of the decision on the child.¹⁶⁵

As stated previously, in General Comment No 14 the CRC identified the best interest principle as one of the four general principles or pillars of the Convention.¹⁶⁶ Cantwell is critical of this ‘unilateral’ decision by the CRC to elevate the best interests of the child principle to the special status as one of the four

¹⁶⁰ Michael Freeman, ‘Article 3: The Best Interests of the Child’ in André Alen and others (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, 2007) 27.

¹⁶¹ Julia Sloth-Nielsen and Benyam D Mezmur, ‘2+2=5? Exploring the Domestication of the CRC in South African Jurisprudence (2002-2006)’ (2008) 16 *Int’l J Child Rts* 1, 21.

¹⁶² UN Doc CRC/C/GC/14 para 6.

¹⁶³ UN Doc CRC/C/GC/14 para 6(a).

¹⁶⁴ UN Doc CRC/C/GC/14 para 6(b).

¹⁶⁵ UN Doc CRC/C/GC/14 para 6(c).

¹⁶⁶ UN Doc CRC/C/GC/14 para 1

general principles of the Convention.¹⁶⁷ He argues that it took more than twenty years for the CRC to produce an Interpretive General Comment simply because the 'best interests' principle had some challenging conceptual and operational hurdles to overcome.¹⁶⁸ Nevertheless, by reading article 3(1) uncritically, it managed to ground the best interests of the child principle in a 'sacrosanct stance' as a fundamental value of the Convention, comprising a right, a principle, and a rule of procedure.¹⁶⁹

The CRC emphasised that the Convention asserts in article 18 that the best interests of the child will be a parent's basic concern. Furthermore, the interpretation of the best interests principle must be consistent with the Convention as a whole, including the obligation to protect children from all forms of violence as required by article 19(1).¹⁷⁰ Article 19(1) of the Convention states that state parties should take the necessary steps to protect children from all forms of physical or mental violence while in the care of their parents or persons *in loco parentis*. Article 19(2) provides for the establishment of social programmes to support the child and those tasked with the child's care. Parents and carers who find child-rearing a challenging prospect and who are prone to physical violence, should be provided with avenues by which to avoid violence including identification, reporting, referral, investigation, treatment, and follow-up of instances of the ill-

¹⁶⁷ Nigel Cantwell, 'Are "Best Interests" a Pillar or a Problem for Implementing the Human Rights of Children?' in Ton Liefaard and Julia Sloth-Nielsen (eds), *The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead* (Brill | Nijhoff, 2017) 64.

¹⁶⁸ Nigel Cantwell, 'Are "Best Interests" a Pillar or a Problem for Implementing the Human Rights of Children?' in Ton Liefaard and Julia Sloth-Nielsen (eds), *The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead* (Brill | Nijhoff, 2017) 64.

¹⁶⁹ Nigel Cantwell, 'Are "Best Interests" a Pillar or a Problem for Implementing the Human Rights of Children?' in Ton Liefaard and Julia Sloth-Nielsen (eds), *The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead* (Brill | Nijhoff, 2017) 64. See also Elsje Bonthuys, 'The Best Interest of Children in the South African Constitution' (2006) *International Journal of Law, Policy and the Fam* 23, 26.

¹⁷⁰ John Tobin, 'The Development of Children's Rights' in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 46.

treatment of children and, where necessary, for judicial involvement. While it is acknowledged that providing these measures will require significant resources, the lack of resources does not justify a failure to protect children.¹⁷¹ The CRC affirmed in General Comment No 13 (2011) that prevention strategies such as education, social services, and other measures to prevent all forms of violence are of paramount importance.¹⁷²

Parents cannot justify the use of corporal punishment which undermines the child's human dignity and the right to physical integrity. There is no room for legalised violence against children, and all forms of corporal punishment are cruel and degrading forms of violence. Furthermore, it is up to state parties to take all appropriate legislative, administrative, social, and educational measures to eliminate all forms of violence against children.¹⁷³

2.5.3 International Criticism of the Best Interests Principle

Various commentators have criticised the best interests of the child principle over the last four decades.¹⁷⁴ Mnookin points out that the principle is indeterminate,¹⁷⁵

¹⁷¹ John Tobin and Judy Cashmore, 'Article 19: The Right to Protection Against All Forms of Violence' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 692.

¹⁷² UN Doc CRC/C/GC/13 para 3(g).

¹⁷³ Julia Sloth-Nielsen, 'Sideswipes and Backhanders: Abolition of the Reasonable Chastisement Defence in South Africa' (2020) *Int'l Journal of Law, Policy and the Family* 191, 199 referencing UN Doc CRC/C/GC/8 para 18.

¹⁷⁴ See Helen Reece, 'The Paramountcy Principle: Consensus or Construct?' (1996) 49 *Current Legal Problems* 267; Robert H Mnookin, 'Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39 *Law and Contemporary Problems* 226; Jon Elster, 'Solomonic Judgements: Against the Best Interests of the Child' (1987) 54(1) *University of Chicago Law Review* 1; Elsje Bonthuys, 'The Best Interest of Children in the South African Constitution' (2006) *International Journal of Law, Policy and the Fam* 23; Nigel Cantwell, 'Are "Best Interests" a Pillar or a Problem for Implementing the Human Rights of Children?' in Ton Liefaard and Julia Sloth-Nielsen (eds), *The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead* (Brill | Nijhoff, 2017) 61.

¹⁷⁵ See also Helen Reece, 'The Paramountcy Principle: Consensus or Construct?' (1996) 49 *Current Legal Problems* 267, 273. She points to some 'radical variants' of this argument

which he argues allows a court to evaluate parental attitudes based on the judicial officers' personal values (discretion), noting that this is risky when class differences complicate matters.¹⁷⁶ He continues that because foster children frequently come from impoverished families and contemporary juvenile court standards allow judges to base their decisions on their personal values, this creates a definite possibility of class bias.¹⁷⁷ Furthermore, an examination of extant case law has shown that the personal attitudes of judicial officers towards child-rearing can influence their decisions and may affect the result of court proceedings.¹⁷⁸ However, Tobin counters the indeterminacy argument by pointing out that it is constructed on reading the articles of the Convention in isolation.¹⁷⁹ Moreover, the best interests of the child principle is a fluid and flexible concept that remains both informed and constrained by the articles of the Convention.¹⁸⁰

The indeterminacy of the principle is one of the leading reasons why some legal scholars criticise it so heavily. In England, the criterion for applying the principle

which 'suggest that judges' decisions may be informed by their middle- and upper-class backgrounds, by their patriarchal values or simply by their personal prejudices' (footnotes omitted).

¹⁷⁶ Robert H Mnookin, 'Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39 *Law and Contemporary Problems* 226, 269.

¹⁷⁷ Robert H Mnookin, 'Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39 *Law and Contemporary Problems* 226, 269.

¹⁷⁸ Robert H Mnookin, 'Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39 *Law and Contemporary Problems* 226. At 269 he mentions the following case law to illustrate judicial bias. The extramarital affair of the mother was used as a justification to remove the child from her care in *In re Booth* 253 Minn 395, 91 NW2d 921 (1958); the sexual orientation of a lesbian mother in *In re Tammy F* Civil No 32643 (Cal Ct App 1973); or where the mother had several children out of wedlock in *In re Three Minors* 50 Wash 2d 653, 314 P 2d 423 (1957). Judges have not taken kindly to unconventional beliefs about religion and sex in *In re Watson* 95 NYS2d 798 (Dom Rel Ct 1950) and where children were removed from a home where the cleanliness was of concern although the parents argued that no children were harmed in *In re Deborah Gibson* Civil No 40391 (Cal Ct App filed June 29, 1973).

¹⁷⁹ John Tobin, 'The Development of Children's Rights' in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 46.

¹⁸⁰ John Tobin, 'The Development of Children's Rights' in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 46.

was that the child's welfare should be the 'first and paramount' consideration.¹⁸¹ This formulation of the principle left some scope for other criteria to be added.¹⁸² Other criteria might include decisions about the care and education of the child, including religious education, consultation of the non-custodial parent regarding the child's education, and the duty to provide child support.¹⁸³ However, this was not always the case in the US, where the continuity of the parental relationship was seen as all-important.¹⁸⁴ This was seen as almost creating a presumption that the status quo should be maintained and that courts should 'award the child to the parent with whom the child was living at the time of the dispute'.¹⁸⁵

Elster argues that the best interest principle ought not to be the sole, primary, or first and paramount consideration in custody matters. He points out that the following conditions need to be satisfied for a determinate answer to the question of what would be in the child's best interests: (a) all the options must be known; (b) all possible outcomes of each option must be known; (c) the probabilities of each outcome occurring must be known; and (d) the value attached to each

¹⁸¹ Jon Elster, 'Solomonic Judgements: Against the Best Interests of the Child' (1987) 54(1) University of Chicago Law Review 1,10.

¹⁸² Jon Elster, 'Solomonic Judgements: Against the Best Interests of the Child' (1987) 54(1) University of Chicago Law Review 1,10.

¹⁸³ Robert H Mnookin, 'Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39 Law and Contemporary Problems 226, 233.

¹⁸⁴ Jon Elster, 'Solomonic Judgements: Against the Best Interests of the Child' (1987) 54(1) University of Chicago Law Review 1,11.

¹⁸⁵ Jon Elster, 'Solomonic Judgements: Against the Best Interests of the Child' (1987) 54(1) University of Chicago Law Review 1,11.

outcome must be known.¹⁸⁶ Secondly, Elster believes that the principle could lead to an unjust decision.¹⁸⁷

Elster argues that the child is seen as the 'innocent' party in disputed custody issues, and the parents' interests can, therefore, be trumped by the child's best interests.¹⁸⁸ He points out that the principle of the child's best interests might be unjust towards the parents. Parental interests could, in principle, also be relevant in child access matters.¹⁸⁹ It does not necessarily follow that those disputes should be settled to benefit the family (parents and children). However, children do require special protection.¹⁹⁰ Elster argues that a child's best interests should never trump those of other parties, for example, parents and siblings.¹⁹¹

It is further argued that public interest could override the best interest of the child principle.¹⁹² Elster gives two examples. First, where the father follows a lifestyle which is frowned upon in the community. The child living with the father will be stigmatised. Therefore, whilst living with the mother would be in the public interest, it would not necessarily be in the child's best interests. Second, where one parent has vastly more resources than the other. In custody decisions the

¹⁸⁶ To this criticism, Mezmur states that despite the absence of a general definition, if a certain measure goes against any of the other three general principles or pillars (non-discrimination, right to life, survival and development and the child participation provision) of the Convention, it seems unlikely that it would pass the best interests of the child test. Benyam Dawit Mezmur, "'Don't Try this at Home?': Reasonable or Moderate Chastisement, and the Rights of the Child in South Africa with YG v S in Perspective' (2018) 32(2) *Speculum Juris* 86 <<http://www.saflii.org/za/journals/SPECJU/2018/7.pdf>> accessed 29 July 2020.

¹⁸⁷ Jon Elster, 'Solomonic Judgements: Against the Best Interests of the Child' (1987) 54(1) *University of Chicago Law Review* 1, 16.

¹⁸⁸ Jon Elster, 'Solomonic Judgements: Against the Best Interests of the Child' (1987) 54(1) *University of Chicago Law Review* 1, 5.

¹⁸⁹ Jon Elster, 'Solomonic Judgements: Against the Best Interests of the Child' (1987) 54(1) *University of Chicago Law Review* 1, 5.

¹⁹⁰ Jon Elster, 'Solomonic Judgements: Against the Best Interests of the Child' (1987) 54(1) *University of Chicago Law Review* 1, 5.

¹⁹¹ Jon Elster, 'Solomonic Judgements: Against the Best Interests of the Child' (1987) 54(1) *University of Chicago Law Review* 1, 5.

¹⁹² Jon Elster, 'Solomonic Judgements: Against the Best Interests of the Child' (1987) 54(1) *University of Chicago Law Review* 1, 26.

courts will likely place the child with the affluent parent even though it might not be in the child's best interests but is certainly in the public interest to do so.¹⁹³ However, courts must take care not to create the impression that child custody is a commodity easily traded to the highest bidder.¹⁹⁴

Reece argues that the paramountcy principle should be abandoned and replaced by a framework that recognises that the child is but one part in a process in which the interests of all players count.¹⁹⁵ Reece's issue with the principle is that children's welfare trumps all other considerations; that children's interests are the only ones to be considered.¹⁹⁶ Furthermore, she argues that it is a fallacy to equate priority with protection. Generally, children need more protection than adults, but it does not necessarily follow that they should be prioritised over adults.¹⁹⁷ Cantwell echoes this argument and opines: 'Yet in the great majority of instances, children's rights can be promoted and defended on the same basis as the human rights of adults, for whom "best interests" are simply not regarded as pertinent.'¹⁹⁸

Different societies and different historical periods have different approaches to the principle. For example, even though the global approach to corporal punishment has shifted to the abolition of the practice, there are still differences in how

¹⁹³ Jon Elster, 'Solomonic Judgements: Against the Best Interests of the Child' (1987) 54(1) *University of Chicago Law Review* 1, 27.

¹⁹⁴ Jon Elster, 'Solomonic Judgements: Against the Best Interests of the Child' (1987) 54(1) *University of Chicago Law Review* 1, 28.

¹⁹⁵ Helen Reece, 'The Paramountcy Principle: Consensus or Construct?' (1996) 49 *Current Legal Problems* 267, 303.

¹⁹⁶ Helen Reece, 'The Paramountcy Principle: Consensus or Construct?' (1996) 49 *Current Legal Problems* 267, 267.

¹⁹⁷ Helen Reece, 'The Paramountcy Principle: Consensus or Construct?' (1996) 49 *Current Legal Problems* 267, 277.

¹⁹⁸ Nigel Cantwell, 'Are "Best Interests" a Pillar or a Problem for Implementing the Human Rights of Children?' in Ton Liefaard and Julia Sloth-Nielsen (eds), *The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead* (Brill | Nijhoff, 2017) 61, 65.

corporal punishment is viewed by different cultures today.¹⁹⁹ When applying the best interest principle, it is also essential to be sensitive to different cultural and social traditions. The principle can mean different things to different people, and Western attitudes should not replace traditional indigenous practices. Freeman opines that it is important that when decisions on the principle are made, they are underpinned by objective arguments without bias and prejudice.²⁰⁰

2.6 The Child's Right to Equal Protection of the Law: Article 2 of the Convention, the Right to Non-Discrimination

2.6.1 Background

One of the limitations of the Convention is that it contains no express provision for equal protection under the law.²⁰¹ In international law, fundamental principles for protecting human rights can be found in principles of non-discrimination, equality before the law and equal protection under the law.²⁰² As fundamental principles, these all form the basis of equality for all human beings – adults and children alike. A case in point is article 2 of the Convention which provides for non-discrimination against children.²⁰³ Therefore, it is ironic that corporal punishment, which is inherently discriminatory in that it can only be applied to children below an arbitrary

¹⁹⁹ Michael Freeman, 'Article 3: The Best Interests of the Child' in André Alen and others (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, 2007) 27.

²⁰⁰ Michael Freeman, 'Article 3: The Best Interests of the Child' in André Alen and others (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, 2007) 28.

²⁰¹ Benyam Dawit Mezmur, "'Don't Try this at Home?': Reasonable or Moderate Chastisement, and the Rights of the Child in South Africa with YG v S in Perspective' (2018) 32(2) *Speculum Juris* 88 <<http://www.saflii.org/za/journals/SPECJU/2018/7.pdf>> accessed 29 July 2020.

²⁰² Benyam D Mezmur, "'Don't Try this at Home?': Reasonable or Moderate Chastisement, and the Rights of the Child in South Africa with YG v S in Perspective' (2018) 32(2) *Speculum Juris* 85–88 <<http://www.saflii.org/za/journals/SPECJU/2018/7.pdf>> accessed 25 June 2020.

²⁰³ See para 2.4 with regard to art 2 of the Convention.

age of eighteen years, is permitted by countries like Australia that is a signatory to the Convention.²⁰⁴

Should any person older than eighteen years be subjected to corporal punishment, it would constitute the offence of assault for which there are criminal sanctions. It is therefore clear that children are treated differently (ie not equal to) from adults in the eyes of the law. Australia, in contravention of article 2 of the Convention, discriminates against children on the basis of their age. Children in Australia, therefore, lack substantive equality when it comes to corporal punishment.

2.6.2 Western Philosophical Approaches to Equality

To gain a clear understanding of the notion of equality, a brief examination of Western philosophies on the subject is needed. With a clear understanding of what equality means, it is easier to distinguish discriminatory treatment or non-equal treatment of children such as those who are subjected to corporal punishment.

The first philosophical accounts of equality this section seeks to discuss are those from ancient Greece. Plato was advancing the notion of equality when he argued that even if women are physically weaker, this should not prevent them from being educated like men to perform the same socio-political functions, including those that have reached the top plane of leadership responsibility.²⁰⁵ Plato believed that it is the soul that is virtuous or cruel, regardless of the gender of the body.²⁰⁶ The focus for Plato was on society's common good. Aristotle believed that what is lawful, and fair is conducive to either the common good or the good of the rulers,

²⁰⁴ See Chapter 3.

²⁰⁵ Wayne P Pomerleau, 'Western Theories of Justice' (2013) <<https://www.iep.utm.edu/justwest/>> accessed 28 June 2020.

²⁰⁶ Wayne P Pomerleau, 'Western Theories of Justice' (2013) <<https://www.iep.utm.edu/justwest/>> accessed 28 June 2020.

or both. Only citizens who generally obey such laws can be regarded as 'just'.²⁰⁷ Even the poet Homer viewed the concept of a 'just person' as crucial.²⁰⁸ From this notion of a 'just person' emerged the idea of 'justice as a virtue'.²⁰⁹

In Medieval Christianity, Aurelius Augustine distinguished between the law of the state and the divine law of God.²¹⁰ He believed that 'an unjust law is no law at all' and that a law of the state which is inconsistent with God's eternal law cannot be morally binding and may, therefore, be disobeyed.²¹¹ Augustine held the opposite view to that of Aristotle that the 'just' should be rulers for the common good rather than the powerful who rule for their own self-interest.²¹² On the concepts of 'equity' and 'justice', Aristotle declared that the perpetrator of a crime must understand and intend their action or not understand but still intend to perform the action. In the former case, the perpetrator makes a deliberate choice. Aristotle suggested that 'equity must be applied to forgivable actions' and that we should distinguish between criminal activities and errors of judgement or misfortune.²¹³

Asking why, morally speaking, we should act for the sake of agreeableness and utility, Immanuel Kant argues for a single fundamental principle – the 'categorical imperative' – which tells us what we ought to do. We should, (1) try to do only that which can be a universal law; (2) always try to act in a way that shows respect to all persons and never treat anyone as merely a necessary means to an end; and (3) according to the 'principle of autonomy', that we, as rational autonomous

²⁰⁷ Wayne P Pomerleau, 'Western Theories of Justice' (2013) <<https://www.iep.utm.edu/justwest/>> accessed 28 June 2020.
²⁰⁸ Wayne P Pomerleau, 'Western Theories of Justice' (2013) <<https://www.iep.utm.edu/justwest/>> accessed 28 June 2020.
²⁰⁹ Wayne P Pomerleau, 'Western Theories of Justice' (2013) <<https://www.iep.utm.edu/justwest/>> accessed 28 June 2020.
²¹⁰ Wayne P Pomerleau, 'Western Theories of Justice' (2013) <<https://www.iep.utm.edu/justwest/>> accessed 28 June 2020.
²¹¹ Wayne P Pomerleau, 'Western Theories of Justice' (2013) <<https://www.iep.utm.edu/justwest/>> accessed 28 June 2020.
²¹² Wayne P Pomerleau, 'Western Theories of Justice' (2013) <<https://www.iep.utm.edu/justwest/>> accessed 28 June 2020.
²¹³ Aristotle, *Rhetoric* (W Rhys Roberts tr, Dover Publications Inc 2004) 50.

persons, should try to act in such a way that we could be reasonably legislating for a (hypothetical) moral society for all persons.²¹⁴

The contemporary American philosopher John Rawls revived the 'social contract' theory with the publication of his 1958 paper 'Justice and Fairness'²¹⁵ in which he assumes that every person is free and equal. Rawls introduced us to the 'original position' or 'natural condition' free from self-interest and bias occasioned by a 'veil of ignorance'.²¹⁶ He believed that under these circumstances we would assign basic duties and rights to all and distribute social benefits to everyone. Justice is seen as requiring fundamental freedoms and rights for all citizens.²¹⁷

The obligation not to discriminate is not passive. The right extends to prohibiting all forms of discrimination (*de jure*), but also requires appropriate proactive measures to ensure adequate and equal opportunities for all (*de facto*).²¹⁸ Furthermore, it is argued that the right to equality should move beyond the Aristotelian principle of treating likes alike.²¹⁹ It has been said that: 'Substantive equality, as defined in politics or law, requires a concern with recognition, redistribution and redress, and an eradication of actual, "real-life" inequalities.'²²⁰ Substantive equality does not require identical treatment of children.²²¹ Sometimes state parties have to address issues of inequality with affirmative action to

²¹⁴ Wayne P Pomerleau, 'Western Theories of Justice' (2013) <<https://www.iep.utm.edu/justwest/>> accessed 28 June 2020.

²¹⁵ Wayne P Pomerleau, 'Western Theories of Justice' (2013) <<https://www.iep.utm.edu/justwest/>> accessed 28 June 2020.

²¹⁶ Wayne P Pomerleau, 'Western Theories of Justice' (2013) <<https://www.iep.utm.edu/justwest/>> accessed 28 June 2020.

²¹⁷ Wayne P Pomerleau, 'Western Theories of Justice' (2013) <<https://www.iep.utm.edu/justwest/>> accessed 28 June 2020.

²¹⁸ UN Doc CRC/C/GC/14 para 41.

²¹⁹ Sandra Fredman 'Substantive Equality Revisited' (2016) 14(3) International Journal of Constitutional Law 712, 713 and 716.

²²⁰ Catherine Albertyn, 'Contested Substantive Equality in the South African Constitution: Beyond Social Inclusion Towards Systemic Justice' (2018) 34(3) SAJHR 441, 442.

²²¹ John Tobin, 'The Development of Children's Rights' in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 46.

eliminate conditions conducive to unequal outcomes.²²² This may require positive steps to address situations of substantive inequality.²²³

Certain commentators argue that 'where there is a need to treat children differently, even if it means discriminating against others, it may squarely fit within the concept of fair discrimination and be valid'.²²⁴ In other words, fair discrimination may be valid since substantive equality does not require identical treatment of children.²²⁵ Fredman argues that substantive equality should not be treated as a single principle.²²⁶ Rather, it should be seen as a four-dimensional approach that proposes: addressing disadvantages, including stigma, stereotyping, prejudice, and violence; enhancing voice and participation; making allowances for differences; and working towards fundamental change.²²⁷ The aim is to provide an analytical legal framework that would enlighten one to the multi-dimensional characteristics of inequality and help determine whether certain actions or institutions advance or hinder the right to equality.²²⁸

2.6.3 The African Philosophy of Equality in the Ubuntu Paradigm

In a South African context, an historical concept of togetherness, a traditional value system that created freedom and equality in society and is termed ubuntu,

²²² John Tobin, 'The Development of Children's Rights', in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds) *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 46.

²²³ UN Doc CRC/C/GC/14 para 41.

²²⁴ Julia Sloth-Nielsen and Benyam D Mezmur, '2+2=5? Exploring the Domestication of the CRC in South African Jurisprudence (2002-2006)' (2008) 16 *Int'l J Child Rts* 1,10.

²²⁵ John Tobin, 'The Development of Children's Rights' in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 46.

²²⁶ Sandra Fredman 'Substantive Equality Revisited' (2016) 14(3) *International Journal of Constitutional Law* 712, 713.

²²⁷ Sandra Fredman 'Substantive Equality Revisited' (2016) 14(3) *International Journal of Constitutional Law* 712, 713.

²²⁸ Sandra Fredman 'Substantive Equality Revisited' (2016) 14(3) *International Journal of Constitutional Law* 712, 713.

applies.²²⁹ Ubuntu is a Zulu/Xhosa/Ndebele/Sesotho/Shona word that refers to the person's moral attributes. The concept has varyingly been defined as humaneness, linked to the idea of humanism, and used as a conflict-resolution philosophy.²³⁰ In *S v Makwanyane and Another*,²³¹ Mokgoro J explained the concept as follows in her judgment in the Constitutional Court:

Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation.

The concept of ubuntu is the antithesis of corporal punishment in that under ubuntu one is overtaken by a sense of care, protection, togetherness, inclusion, and respect for children. Insofar as Africans are concerned, the ubuntu philosophy is averse to conflict and aggression – much like the Māori of New Zealand where, before European settlement, children had a peaceful and tranquil existence and were unaccustomed to physical discipline.²³² Corporal punishment is based on the premise of fear, pain, hurt, violence, and punishment of children.²³³ This is not how children are treated under the ubuntu philosophy. Children are individual rights holders who, in terms of article 2 of the Convention, are entitled to be treated as equal to their parents and other adults. Treating children differently and subjecting them to corporal punishment based solely on their age, is an unacceptable

²²⁹ Fainos Mangena, 'Hunhu/Ubuntu in the Traditional Thought of Southern Africa' (2016) <<https://iep.utm.edu/hunhu/>> accessed 7 August 2020.

²³⁰ Fainos Mangena, 'Hunhu/Ubuntu in the Traditional Thought of Southern Africa' (2016) <<https://iep.utm.edu/hunhu/>> accessed 7 August 2020.

²³¹ 1995 (6) BCLR 665 (CC) 672, 1995 3 SA 391 (CC) [308].

²³² See Chapter 5.

²³³ *FORSA v Minister of Justice and Constitutional Development* [2019] ZACC 34 at [39]. See also, *Christian Education SA v Minister of Education of the Government of the RSA* 1999 (9) BCLR 951 (SE) [966I] where Liebenberg J held that: 'Its result must also be a cringing fear, a terror of expectation before the whipping and acute distress and it is no less an affront to the dignity of all concerned.'

discriminatory practice in the eyes of the Convention, other human rights treaties, and the ubuntu philosophy.

Undoubtedly, it is because of this concept of ubuntu that South Africa has moved forward with human rights law reform over the past twenty-five years. Ahmed argues that ubuntu has played a part in 'reconciling and mending society after the apartheid era where people were separated on grounds of race and colour'.²³⁴ The Constitution does not expressly mention the principle of ubuntu. However, section 211(3) mandates the courts to apply customary law when applicable, subject to the provisions of the Constitution.²³⁵ One could even say that ubuntu promotes and values the concept of a 'just society'. Together with section 9(1) of the Constitution, which states that everyone is equal before the law and has the right to equal protection and benefit of the law, the values that underpin the ubuntu philosophy are sure to increase the protection of the human rights of all children in a free and democratic society.

2.6.4 Equality in Domestic and International Law

In New Zealand, section 19(1) of NZBORA²³⁶ states that: 'Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.'²³⁷ However, it bears noting though that the Human Rights Act makes it unlawful to discriminate on the basis of age, this applies only to those sixteen years of age or older.²³⁸ It is therefore ironic that a law which aims to limit

²³⁴ Raheel Ahmed, 'The Explicit and Implicit Influence of Reasonableness on the Elements of Delictual Liability' (LLD thesis, University of South Africa, 2018) 17.

²³⁵ Constitution of the Republic of South Africa, 1996.

²³⁶ New Zealand Bill of Rights Act 1990.

²³⁷ See s 21(1) for a list of prohibited grounds of discrimination.

²³⁸ Section 21(1)(i).

discrimination, itself discriminates against the youngest and most vulnerable in society on the basis of their age.²³⁹

In Australia the Age Discrimination Act 2004 (Cth) aims

... to eliminate discrimination, as far as possible, against persons on the ground of age in the areas of work, education, access to premises, the provision of goods, services and facilities, accommodation, the disposal of land, the administration of Commonwealth laws and programs and requests for information;²⁴⁰

However, the scope of the Act does not include the elimination of discrimination against children for purposes of corporal punishment.²⁴¹ It appears that the Age Discrimination Act 2004 (Cth) is directed only at 'changing negative stereotypes about older people'.²⁴²

In Australian society, the defence of reasonable chastisement is a prime example of the perpetuation of discriminatory practices aimed at children and their unequal treatment based on their age. It is a lawful defence to a charge of common assault. It is, at its core, a discriminatory concept because it applies only to a specific category of people, so classified purely because of their age. It protects the actions of parents or persons *in loco parentis* (adults) by allowing them to apply physical force to a child (a person younger than eighteen years)²⁴³ who is in their care without any legal consequences.²⁴⁴ If such a classification is based on

²³⁹ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 62.

²⁴⁰ Section 3(a).

²⁴¹ See Chapter 3.

²⁴² Section 3(e)(ii).

²⁴³ Article 1 of the Convention states: 'For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained.'

²⁴⁴ Consider the following hypothetical scenario. A father of a 17- year-old boy slaps him on the back for a minor infraction of talking back to the father. The boy retaliates and hits his father with a closed fist in the chest. As the law currently stands in Australia, the father escapes a charge of common assault with the defence of reasonable chastisement, but the boy does not and is charged with common assault. The boy cannot use self-defence as an

reasonable grounds and is appropriate to the goal it is intended to achieve, then the classification may well fall within the legal definition of equal treatment.²⁴⁵

However, if the classification does not comply with the requirement above, then the classification is in contravention of the non-discrimination clause in article 2 of the Convention. Corporal punishment has as goal to discipline and control children. Discipline and control can be achieved through non-violent means which nullifies the need for the classification in that it fails the 'reasonable basis' requirement and is, therefore, in contravention of article 2 of the Convention.

Under section 9(1) of the South African Constitution, '[e]veryone is equal before the law and has the right to equal protection and benefit of the law'. Furthermore, section 9(3) states that the state may not unfairly discriminate, directly or indirectly, against anyone based on, among other things, their age. It further requires that national legislation be passed to prevent unfair discrimination. As one commentator has put it: 'As far as corporal punishment and equal protection are concerned, the argument that is advanced is that the inclusion of reasonable chastisement as a defence leaves children with less protections than adults under the criminal law of assault.'²⁴⁶

It has also been observed that the mere fact that corporal punishment has been normalised in so many of our societies, is a clear indication of how children are

excuse since the physical force applied by the father is legal, and therefore, no self-defence applies. It is clear that the law discriminates against children. Had the boy been eighteen years of age or older, the roles would be reversed, and the father would be charged with common assault, and the boy would, no doubt, succeed in his claim of self-defence.

²⁴⁵ Julia Sloth-Nielsen and Benyam D Mezmur, '2+2=5? Exploring the Domestication of the CRC in South African Jurisprudence (2002-2006)' (2008) 16 Int'l J Child Rts 1,10.

²⁴⁶ Benyam Dawit Mezmur, "Don't Try this at Home?": Reasonable or Moderate Chastisement, and the Rights of the Child in South Africa with YG v S in Perspective' (2018) 32(2) Speculum Juris 75, 88 <<http://www.saflii.org/za/journals/SPECJU/2018/7.pdf>> accessed 12 July 2020.

held in low esteem; they are not seen or recognised as people who have rights.²⁴⁷

Furthermore, the Preamble to the Convention states:

Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular the spirit of peace, dignity, tolerance, freedom, *equality* and solidarity (emphasis added).

Article 3 of the ACRWC contains a non-discrimination provision.²⁴⁸ Similarly, the ICCPR, is one of the most respected human rights treaties,²⁴⁹ provides in article 7 that 'no one shall be subject to cruel, inhuman or degrading treatment or punishment'. Article 26 of the ICCPR, which has been ratified by Australia,²⁵⁰ South Africa,²⁵¹ and New Zealand,²⁵² states that all persons are equal before the law.²⁵³ It is reasonable to assume that Australia, because of its support for

²⁴⁷ Chris Dodd, 'Towards Universal Prohibition of Corporal Punishment of Children – Religious Progress, Challenges and Opportunities' in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 115.

²⁴⁸ Article 3 of the ACRWC states: 'Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.'

²⁴⁹ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 61.

²⁵⁰ On 13 August 1980. OHCHR, 'UN Treaty Body Database' <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=9&Lang=EN> accessed 14 July 2020.

²⁵¹ On 10 December 1998. OHCHR, 'UN Treaty Body Database' <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=9&Lang=EN> accessed 14 July 2020.

²⁵² On 28 August 1978. OHCHR, 'UN Treaty Body Database' <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=9&Lang=EN> accessed 14 July 2020.

²⁵³ Article 26 of the ICCPR states: 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

lawfulness of corporal punishment in the home, is in breach of these articles of the ICCPR in addition to articles 19(1),²⁵⁴ 28(2),²⁵⁵ and 37(a)²⁵⁶ of the Convention.

Furthermore, corporal punishment is not compatible with the non-discrimination clause in article 2(1) of the Convention. As the Committee pointed out in General Comment No 8 (2006):

The first purpose of law reform to prohibit corporal punishment of children within the family is prevention: to prevent violence against children by changing attitudes and practice, underlining children's rights to *equal protection* and providing an unambiguous foundation for child protection and for the promotion of positive, non-violent and participatory forms of child-rearing. (emphasis added)²⁵⁷

Corporal punishment is a form of discrimination and can also present as a form of gender-based violence in the home and in educational institutions where it is considered an educational tool applied most often to boys. Girls, on the other hand, tend to suffer significant psychological abuse in an attempt to force them to conform to traditional gender stereotypes.²⁵⁸ Labelling boys physically stronger than girls and arguments that physical abuse helps them grow into 'strong men' underlie these differential expressions of gender-based violence.²⁵⁹ Moreover,

²⁵⁴ Article 19(1) of the Convention states: '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, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.'

²⁵⁵ Article 28(2) of the Convention states: 'States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.'

²⁵⁶ Article 37(a) of the Convention states that: 'States Parties shall ensure that: (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without the possibility of release shall be imposed for offences committed by persons below eighteen years of age;'

²⁵⁷ UN Doc CRC/C/GC/8 para 38.

²⁵⁸ Save the Children, 'Children and Gender-Based Violence: An Overview of Existing Conceptual Frameworks' (2007) Save the Children Sweden, Discussion Paper, Addis Ababa <<https://resourcecentre.savethechildren.net/sites/default/files/documents/1530.pdf>> accessed 19 June 2021.

²⁵⁹ See also Chapter 5 para 5.4.1.1.

discriminatory ideas of children being inferior to adults, or that parents are entitled to use violence to educate their children, are also manifested in the use of physical punishment as an educational tool.²⁶⁰

There is no doubt that in the Australian context there is adequate legislation to promote formal equality for all.²⁶¹ However, this does not always translate into substantive equality as we have seen in the discussion above on gender-based violence and the justification of corporal punishment of boys, in particular. Where the common-law defence of reasonable chastisement still applies, children are not afforded the same protection against assault and violence as adults. They are, therefore, not treated equally before the law.

Children are being discriminated against by the law because of their age. There is a moral obligation to abolish the defence of reasonable chastisement and to comply with the provisions set out the Convention. However, as children in Australia are still subjected to corporal punishment under the guise of reasonable chastisement, substantive equality under the law remains as elusive as ever for children below the age of eighteen.

²⁶⁰ Save the Children, 'Children and Gender-Based Violence: An Overview of Existing Conceptual Frameworks' (2007) Save the Children Sweden, Discussion Paper, Addis Ababa <https://resourcecentre.savethechildren.net/sites/default/files/documents/1530.pdf> accessed 19 June 2021.

²⁶¹ The Queensland Human Rights Act 2019 (QLD), the Victoria Charter of Human Rights and Responsibilities Act 2006 (VIC), and the Australian Capital Territory Human Rights Act 2004 (ACT).

2.7 The Right to Freedom of Religion: Article 14 of the Convention, the Right to Freedom of Thought, Conscience and Religion²⁶²

2.7.1 Background

For centuries the Christian Church promoted the image of a wrathful God ready to punish anyone who violates God's laws.²⁶³ Fundamentalist preachers are known to put the fear of God into their congregations in sermons filled with fire and brimstone in which sinners are condemned to eternal damnation in the fire pit of Hell with extraordinary zeal.

It is, therefore, hardly surprising that fundamentalist Christians regard physical punishment as a way of redeeming 'sinful children' from their 'wicked ways'. However, physical punishment does not only belong to the fundamentalist Christians among us. It is argued that many parents who use physical punishment as a disciplinary tool, do so purely from habit and not from any deep religious conviction.²⁶⁴ The use of physical punishment is so entrenched in Western thinking that it becomes impossible to establish the religious rationale and its influence on society.²⁶⁵ Corporal punishment, therefore, is not limited to the religious fundamentalists, but includes everyday average families. However, this

²⁶² Article 14 of the CRC states: '(1) States Parties shall respect the right of the child to freedom of thought, conscience and religion. (2) States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child. (3) Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or moral, or the fundamental rights and freedoms of others.'

²⁶³ John Shelby Spong, *The Sins of Scripture: Exposing the Bible's Texts of Hate to Reveal the God of Love* (Kindle edn, 2005) 160–161.

²⁶⁴ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 93.

²⁶⁵ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 93.

does not take away from the fact that many conservative Christians cling to the belief that corporal punishment is divinely ordained in the Scriptures.²⁶⁶

English common-law inherited aspects of the *patria potestas*, such as custody, control, and corporal punishment from the Roman-based canon law of the ecclesiastical courts which enjoyed jurisdiction over family matters.²⁶⁷ Corporal punishment was part of the common law and an accepted practice in England's judicial and social order in the nineteenth century.²⁶⁸ Christian missionaries carried the practice to the colonies,²⁶⁹ where corporal punishment survived as the means of punishment and control in the public and private spheres of the military,²⁷⁰ penal institutions,²⁷¹ schools,²⁷² and the home.²⁷³

²⁶⁶ John Shelby Spong, *The Sins of Scripture: Exposing the Bible's Texts of Hate to Reveal the God of Love* (Kindle edn, 2005) 169.

²⁶⁷ Anne McGillivray, 'Children's Rights, Paternal Power and Fiduciary Duty: From Roman Law to the Supreme Court of Canada' (2011) *Int'l J Child Rts* 21, 26.

²⁶⁸ David Killingray, 'The "Rod of Empire": The Debate over Corporal Punishment in the British African Colonial Forces, 1888–1946', (1994) 35(2) *Journal of African History* 201, 203.

²⁶⁹ Beth Wood et al, *Unreasonable Force: Aotearoa New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children Aotearoa New Zealand, 2008) 91.

²⁷⁰ David Killingray, 'The "Rod of Empire": The Debate over Corporal Punishment in the British African Colonial Forces, 1888–1946' (1994) 35(2) *Journal of African History* 201, 201.

²⁷¹ Mark Finnane and John McGuire, 'The Uses of Punishment and Exile: Aborigines in Colonial Australia' (2001) 3(2) *Punishment & Society* 279, 283. David Killingray, 'The "Rod of Empire": The Debate over Corporal Punishment in the British African Colonial Forces, 1888–1946' (1994) 35(2) *Journal of African History* 201, 201.

²⁷² Elmon M Tafa, 'Corporal Punishment: The Brutal Face of Botswana's Authoritarian Schools' (2002) 54(1) *Educational Review* 17, 20 <<https://www.tandfonline.com/doi/abs/10.1080/00131910120110848>> accessed 7 October 2020.

²⁷³ Judy Cashmore and Briony Horsfall, 'Child Maltreatment' in Lisa Young and others (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 105.

2.7.2 Religion and International Law

It has been said that '[t]he right to freedom of religion and belief is an essential feature of societies'.²⁷⁴ It is recognised by international instruments such as the UDHR, specifically in article 18, which states:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.²⁷⁵

This right holds a special status in international, regional, and domestic law and is one of the few non-derogable rights of the ICCPR²⁷⁶ which states in article 27:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Article 14(1) of the Convention provides that: 'States Parties shall respect the right of the child to freedom of thought, conscience and religion.' Similarly, article 9(1) of the ACRWC states that '[e]very child shall have the right to freedom of thought, conscience and religion'. The right to freedom of thought, conscience, and religion is a crucial element of self-determination and autonomy.²⁷⁷ Article 14(2) of the Convention requires state parties to respect parents' rights and duties to provide

²⁷⁴ Benyam Dawit Mezmur, "'Don't Try this at Home?': Reasonable or Moderate Chastisement, and the Rights of the Child in South Africa with *YG v S* in Perspective' (2018) 32(2) *Speculum Juris* 90 <<http://www.saflii.org/za/journals/SPECJU/2018/7.pdf>> accessed 29 July 2020.

²⁷⁵ United Nations, Universal Declaration of Human Rights < <https://www.un.org/en/universal-declaration-human-rights/>> accessed 15 October 2020.

²⁷⁶ Sylvie Langlaude Doné and John Tobin, 'Article 14: The Right to Freedom of Thought, Conscience, and Religion' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 476.

²⁷⁷ Sylvie Langlaude Doné and John Tobin, 'Article 14: The Right to Freedom of Thought, Conscience, and Religion' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 476.

direction when their child exercises their right to freedom of religion, thought, and conscience in accordance with their child's evolving capacities.²⁷⁸ The Convention recognises that as children grow and develop, their capacities evolve and their parents must adjust their directions to empower their children to take more and more control over their lives.²⁷⁹

When interpreting article 14, care must be taken to approach this provision in a child-centred manner. Furthermore, article 14 should be interpreted to create a presumption that children have the right to embrace or change their religion in accordance with their evolving capacities.²⁸⁰ The question is: 'Are parental directions lawful when exercising the child's article 14 rights, especially for established religious customs like corporal punishment?' In this regard, the CRC has adopted a 'zero-tolerance approach' to corporal punishment.²⁸¹

2.7.3 The Anachronistic Public/Private Dichotomy

One of the reasons why parents are so reluctant to abolish the defence of reasonable chastisement is the perceived interference of the state in the private sphere of the family unit.²⁸² Religion is part of that private sphere where intrusion by the state is not suffered lightly. For a clear understanding of the public/private divide, it is essential to understand who or what falls within the public sphere, and who or what within in the private sphere.

²⁷⁸ Sylvie Langlaude Doné and John Tobin, 'Article 14: The Right to Freedom of Thought, Conscience, and Religion' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 477.

²⁷⁹ Sheila Varadan, 'The Principle of Evolving Capacities under the UN Convention on the Rights of the Child' (2019) 27 *Int'l J Child Rts* 306, 307.

²⁸⁰ Sylvie Langlaude Doné and John Tobin, 'Article 14: The Right to Freedom of Thought, Conscience, and Religion' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 478.

²⁸¹ UN Doc CRC/C/GC/8 para 29.

²⁸² Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 103

The classic liberal theory believes the division between public and private is the reason for the continued survival of state regulation.²⁸³ Therefore, the sphere characterised as 'public' is the appropriate area for regulation, whereas the 'private' sphere falls beyond the purview of the state. However, this designation is not as clear when it comes to matrimonial matters and the welfare of children – these are conventional private matters, yet they are notable breeding grounds for state intervention.²⁸⁴

Furthermore, it should be acknowledged that the state determines what is public and what is private.²⁸⁵ Moreover, the silent approval of the public enables the retention of patriarchal power in the private sphere in the form of the family.²⁸⁶ As one scholar points out: 'For most of us, what we want to do and be left alone to do seems like private action – thus beating up one's son... [is] considered private by the person who engages in the activity.'²⁸⁷ Therefore, it is conceivable that people will label their use of power as 'private', yet if any power is used against them, it is invariably characterised as 'public' and seen as 'oppressive, unjustified and unconstitutional'.²⁸⁸ Discussing rights and the right to break the law, Dworkin made the following comment:

A man must honour his duties to his God and to his conscience, and if these conflict with his duty to the State, then he is entitled, in the end, to do what he judges to be right. If he decides that he must break the law, however, then he must submit to the judgement and punishment that the State imposes, in

²⁸³ Margaret Thornton, 'The Public/Private Dichotomy: Gendered and Discriminatory' (1991) 18 JL & Soc'y 448, 449.

²⁸⁴ Margaret Thornton, 'The Public/Private Dichotomy: Gendered and Discriminatory' (1991) 18 JL & Soc'y 448, 449.

²⁸⁵ Margaret Thornton, 'The Public/Private Dichotomy: Gendered and Discriminatory' (1991) 18 JL & Soc'y 448, 449.

²⁸⁶ Margaret Thornton, 'The Public/Private Dichotomy: Gendered and Discriminatory' (1991) 18 JL & Soc'y 448, 459.

²⁸⁷ Frances Olsen, 'Constitutional Law: Feminist Critiques of the Public/Private Distinction' (1993) 10 Const Comments 319, 324.

²⁸⁸ Frances Olsen, 'Constitutional Law: Feminist Critiques of the Public/Private Distinction' (1993) 10 Const Comments 319, 320.

recognition of the fact that his duty to his fellow citizens was overwhelmed but not extinguished by his religious or moral obligation.²⁸⁹

Furthermore, as soon as the possibility of a rule change (such as the abolition of corporal punishment) is mentioned, religious adherents protest the perceived state interference in their private lives. The law indeed prefers the status quo. And for so long as religious parents are reluctant to change their behaviour, patriarchy will rule in the private sphere. One of the main reasons for labelling power 'private' is the perceived 'degree of legitimacy and immunity from attack' that the power-holder gains.²⁹⁰

The separation of state and church situates the church in the private sphere and follows the justification arguments that religious adherence to faith-based practices belongs in the private sphere. However, it does not follow that the state should stand back when the most vulnerable in society need protection. On the contrary, under international law the state is compelled to protect children from peril, both in public and in private settings.²⁹¹

This then brings us back to the argument as to why parents are so reluctant to have the reasonable chastisement defence abolished. Opponents of the abolition of corporal punishment frequently argue that parents should decide how they raise and discipline their children, and that a mild smack is harmless.²⁹² Furthermore, they decry the unwarranted state intervention in family life and risk criminalising good parents without the necessary evidence that links corporal punishment to child abuse.²⁹³ However, Hassall points out that parents have no inherent right to

²⁸⁹ Ronald Dworkin, *Taking Rights Seriously* (Bloomsbury, 1997) 226.

²⁹⁰ Frances Olsen, 'Constitutional Law: Feminist Critiques of the Public/Private Distinction' (1993) 10 Const Comments 319, 319.

²⁹¹ Art 19(1) of the CRC.

²⁹² Beth Wood et al, *Unreasonable Force: New Zealand's journey towards banning the physical punishment of children* (Save the Children New Zealand, 2008) 103.

²⁹³ Beth Wood et al, *Unreasonable Force: New Zealand's journey towards banning the physical punishment of children* (Save the Children New Zealand, 2008) 103.

‘smack’ their children.²⁹⁴ Parents may resent what is perceived as the state interfering in what they regard is their right to punish their children physically, but in reality the state has an obligation to intervene to protect its citizens, including children, from harm.²⁹⁵

However, it should be noted that state intervention in the private sphere is not necessarily a bad thing. For example, when the proprietary model of the *patria potestas* was challenged in the late nineteenth and early twentieth centuries after evidence of the ill-treatment of children was uncovered, it was the state that intervened with the ‘welfare model’ linked to the best interests principle.²⁹⁶ This model was beneficial for children as the focus moved away from the adults’ proprietary rights to consider children’s interests.²⁹⁷

2.7.4 The Lived Experiences of Corporal Punishment

More children than ever were being beaten over a longer age span in the sixteenth and seventeenth centuries.²⁹⁸ As McGillivray states: ‘Severe beating was a daily occurrence in grammar schools and colleges and was intended to reinforce filial, state, and religious obedience.’²⁹⁹

²⁹⁴ Ian Hassall, ‘New Zealand’s Landmark Law Change to Prohibit Corporal Punishment of Children’ in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 184.

²⁹⁵ Ian Hassall, ‘New Zealand’s Landmark Law Change to Prohibit Corporal Punishment of Children’ in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 184.

²⁹⁶ John Tobin, ‘Justifying Children’s Rights’ (2013) 21 Int’l J Child Rts 395, 410.

²⁹⁷ John Tobin, ‘Justifying Children’s Rights’ (2013) 21 Int’l J Child Rts 395, 410.

²⁹⁸ Anne McGillivray, ‘Childhood in the Shadow of Parens Patriae’ in Hillel Goelman, Shiela K Marshall and Sally Ross, *Multiple Lenses, Multiple Images: Perspectives on the Child Across Time, Space, and Disciplines* (University of Toronto Press, 2004) 43.

²⁹⁹ Anne McGillivray, ‘Childhood in the Shadow of Parens Patriae’ in Hillel Goelman, Shiela K Marshall and Sally Ross, *Multiple Lenses, Multiple Images: Perspectives on the Child Across Time, Space, and Disciplines* (University of Toronto Press, 2004) 43.

Spong remarks that: 'In boarding schools of the nineteenth and early twentieth centuries [this] disciplinary activity sometimes had about it a ritualistic quality and even came to be thought of as a kind of "liturgical observance".'³⁰⁰ Writing in *The Guardian* in 2006, Giles Fraser, an Anglican priest in England, recounted his experiences in primary school thirty years earlier. Remembering the lonely wait outside the headmaster's office, the cane, the slipper, the table tennis paddle, he recounts that for Giles, the boy, it was a very long time ago, 'but in time measured out by the psyche it was yesterday.'³⁰¹ He continued: 'I remember my underpants filled with blood. I remember seething with frustration when they beat my brother.'³⁰² Such is the psychological impact of corporal punishment on children that it remains with them for decades. Fraser concludes with the statement: 'What Jesus said about those who would harm children comes inevitably to mind: "It would be better for them if a millstone was hanged about their neck, and that they were drowned in the depth of the sea"'³⁰³

Fundamentalist Christians of the twentieth and twenty first centuries argue that it is their responsibility to raise their children according to biblical principles, including administering, 'Loving, proper corrective discipline...'³⁰⁴ However, more progressive Christians argue that there is no evidence that the Bible instructs followers to use corporal punishment.³⁰⁵ Spong highlights verses from the Bible that command subservience and obedience: In 1 Corinthians 11:2-16, we have the

³⁰⁰ John Shelby Spong, *The Sins of Scripture: Exposing the Bible's Texts of Hate to Reveal the God of Love* (Kindle Edition, 2005) 152.

³⁰¹ Giles Fraser, 'Suffer little children' *The Guardian* (8 June 2006) <<https://www.theguardian.com/commentisfree/2006/jun/08/comment.usa1#comments>> accessed 1 August 2020.

³⁰² Giles Fraser, 'Suffer little children' *The Guardian* (8 June 2006) <<https://www.theguardian.com/commentisfree/2006/jun/08/comment.usa1#comments>> accessed 1 August 2020.

³⁰³ Giles Fraser, 'Suffer little children' *The Guardian* (8 June 2006) <<https://www.theguardian.com/commentisfree/2006/jun/08/comment.usa1#comments>> accessed 1 August 2020.

³⁰⁴ Beth Wood et al, *Unreasonable Force: New Zealand's journey towards banning the physical punishment of children* (Save the Children New Zealand, 2008) 103.

³⁰⁵ Beth Wood et al, *Unreasonable Force: New Zealand's journey towards banning the physical punishment of children* (Save the Children New Zealand, 2008) 95.

ancient Hebrew myth that women are inferior to men and that they should keep their heads covered; in Colossians 3:20, children are told to obey their parents; and in Colossians 3:22 slaves are instructed to obey their masters. He states:

[S]urely that is not the eternal 'Word of God' speaking. These are the reflections of a somewhat discredited cultural sexism, an immoral oppression of human life and an obsolete guide to good parenting being revealed here. When the holy God is identified with such bankrupt ideas, surely God is not well served.³⁰⁶

For many Christians, the Bible should be read with an understanding of the cultural context in which it was written. Many of the customs practised in ancient times are no longer relevant, and some would even be regarded as unlawful – eg, the custom of owning slaves. This fact is recognised by progressive Christians but not necessarily by their conservative counterparts who hold on to a literal interpretation of the Bible and believe that the Bible is inerrant and has the answers to all human concerns.³⁰⁷

It is argued that if followers of a religion use scripture and its teachings to justify violence against children, they are betraying the core values of their religion since followers of all major religions testify to their deity being kind, caring, nurturing, and compassionate.³⁰⁸ Furthermore, most religious leaders of the world religions preach justice, equality, compassion, respect, peace, and non-violence as essential to their faith.³⁰⁹

³⁰⁶ John Shelby Spong, *The Sins of Scripture: Exposing the Bible's Text of Hate to Reveal the God of Love* (Kindle edn, 2005) 22.

³⁰⁷ Christopher G Ellison and Darren E Sherkat, 'Conservative Protestantism and Support for Corporal Punishment' (1993) 58(1) *American Sociological Review* 131, 131, 134.

³⁰⁸ Chris Dodd, 'Towards Universal Prohibition of Corporal Punishment of Children – Religious Progress, Challenges and Opportunities' in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 117.

³⁰⁹ Chris Dodd, 'Towards Universal Prohibition of Corporal Punishment of Children – Religious Progress, Challenges and Opportunities' in Bernadette J Saunders and others (eds),

The right to freedom of religion lies at the heart of what many religious parents feel is their right to punish their children physically. Dodd points out that holy books and sacred texts hold great significance and influence over their daily lives for many faith-based communities.³¹⁰ However, the literal readings of scripture used to justify violence against children cannot be ascribed to any particular religion or tradition.³¹¹ As mentioned earlier, many religions permit (or have in the past permitted) corporal punishment, even regarding it as 'divinely ordained'.³¹²

Dodd points out that even in largely secular societies, religious teachings on physical punishment continue to play a significant role, with the scripture passages from the book of Proverbs³¹³ perpetuating the practice of corporal punishment for misbehaviour.³¹⁴ For Christians the world over, the influence of the words from Proverbs is undeniable, but in a secular society the impact is barely recognised. For example, the Anglican Bishops of New Zealand stated that 'it is inappropriate to take such texts out of their ancient cultural context, and out of the broader context of Scripture, so as to justify modes of behaviour in a modern situation very

Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond (vol 4 Brill Nijhoff, 2019) 117.

³¹⁰ Chris Dodd, 'Towards Universal Prohibition of Corporal Punishment of Children – Religious Progress, Challenges and Opportunities' in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 118.

³¹¹ Churches' Network for Non-violence, 'Faith-based support for prohibition and elimination of corporal punishment of children – a global overview' < <http://churchesfornon-violence.org/wp/wp-content/uploads/2012/02/Global-faith-support-summary-2015.pdf>> accessed 31 July 2020.

³¹² John Shelby Spong, *The Sins of Scripture: Exposing the Bible's Texts of Hate to Reveal the God of Love* (Kindle edn, 2005) 169.

³¹³ Proverbs 13:24 'He who spares the rod hates his son, but he who loves him is careful to discipline him.'; 19:18 'Discipline your son, for in that there is hope; do not be a willing party to his death.'; 22:15 'Folly is bound up in the heart of a child, but the rod of discipline will drive it far from him.' and 23:13 'Do not withhold discipline from a child; if you punish him with the rod, he will not die [14] Punish him with the rod and save his soul from death.' *New International Version*

³¹⁴ Chris Dodd, 'Towards Universal Prohibition of Corporal Punishment of Children – Religious Progress, Challenges and Opportunities' in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 118.

different from that for which they were given'.³¹⁵ Nevertheless, the pervasive use of the words from Proverbs as justification for inflicting physical punishment belies the reality.³¹⁶ Spong opines:

Although the book of Proverbs has had influence in Christian history, its impact has generally not been recognised by most people. Yet the words from his book suggesting that physical discipline of children is appropriate have played a major role in the history of child-rearing and I would argue, in child abuse ... If one is the victim of corporal punishment these words suggest a sense of 'deserving' and thereby play into a self-negativity that arises from a particular definition of humanity. If one is a perpetrator of corporal punishment, these words seem to feed a human need to control, to exercise authority or even to demonstrate forced submission is a virtue.³¹⁷

It has been pointed out that the key to changing minds and attitudes to violence against children is to elevate the status of children and place them at the centre of our communities, listening to their points of view and responding with compassion to their concerns.³¹⁸ Perhaps this is what article 12(1) of the Convention aims to achieve with the following words:

States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

Adults should have a more child-centred approach, ensuring that children have the same rights and protections as adults.

³¹⁵ Beth Wood et al, *Unreasonable Force: New Zealand's journey towards banning the physical punishment of children* (Save the Children New Zealand, 2008) 97.

³¹⁶ John Shelby Spong, *The Sins of Scripture: Exposing the Bible's Texts of Hate to Reveal the God of Love* (Kindle edn, 2005) 146.

³¹⁷ John Shelby Spong, *The Sins of Scripture: Exposing the Bible's Texts of Hate to Reveal the God of Love* (Kindle edn, 2005) 146.

³¹⁸ Chris Dodd, 'Towards Universal Prohibition of Corporal Punishment of Children – Religious Progress, Challenges and Opportunities' in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 129.

2.7.5 Limiting the Right to Freedom of Religion

As noted above, many religious groups bemoan state interference in their religious practices and traditions. However, the right to freedom of religion is not a right free from state intervention. It involves a delicate balancing act between what the state can allow under the right to freedom of religion and what it considers a contravention of a law or the infringement of a right. Sachs J attempted to address this issue in *Christian Education* where he observed that:

The underlying problem in an open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not.³¹⁹

Mezmur points out that when analysing the link between parents' right to religion and corporal punishment, some pertinent questions arise. For instance, 'Does the religious text provide in clear and sufficient terms for the belief on the value of corporal punishment? Is the practice a uniform, agreed constitutive element and requirement of the religion in question?' In addition, a distinction should be made between acts required by religion and actions inspired by religion.³²⁰ In other words, do parents administer corporal punishment because a constitutive element *required* it of the belief system, or is the administering of corporal punishment *inspired* by the belief system?³²¹

³¹⁹ [2000] ZACC 11, 2000 (4) SA 757, 2000 (10) BCLR 1051 at [35].

³²⁰ Benyam D Mezmur, "'Don't Try this at Home?': Reasonable or Moderate Chastisement, and the Rights of the Child in South Africa with *YG v S* in Perspective' (2018) 32(2) *Speculum Juris* 91 <<http://www.saflii.org/za/journals/SPECJU/2018/7.pdf>> accessed 29 July 2020.

³²¹ John Eekelaar, 'Corporal Punishment, parents' religion and children's rights', (2003) 119 (Jul) *Law Quarterly Review* 370, 371.

Suppose corporal punishment is a constitutive element of the church in question. In that case, it is appropriate that the right to freedom of religion should be weighed up against the best interests of the child principle (as far as it relates to physical punishment) and all other applicable human rights to determine if it is constitutionally valid or if the right should be limited and, if so, to what extent.³²² Freedom of religion is not an absolute right. As the CRC pointed out in General Comment No 8: 'Freedom to practise one's religion or belief may be *legitimately limited* in order to protect the fundamental rights and freedoms of others'³²³(emphasis added). The South African Constitutional Court decision in *Christian Education*³²⁴ illustrates the limitation of the right to freedom of religion.³²⁵

A democratic society can only exist if all parties accept that certain rules and norms are binding. Therefore, faith-based groups cannot profess an automatic right to immunity from the laws of the land because of their beliefs.³²⁶ In the South African Constitutional Court case of *MEC for Education: KwaZulu-Natal v Pillay*, Langa J emphasised that even the 'most vital part of religious practice can be limited for the greater good'.³²⁷ No belief is absolute, but those closest to the essence of the person's belief system need greater justification before they may be limited.³²⁸ As corporal punishment is not a constitutive element of any recognised religion, little justification is needed to limit the right to freedom of religion when it violates any other human right, such as articles 19(1) and 37(a) of the Convention.

³²² *Christian Education South Africa v Minister of Education* [2000] ZACC 11, 2000 (4) SA 757, 2000 (10) BCLR 1051 at [31].

³²³ UN Doc CRC/C/GC/8 para 29.

³²⁴ [2000] ZACC 11, 2000 (4) SA 757, 2000 (10) BCLR 1051.

³²⁵ This case is discussed in detail in Chapter 4.

³²⁶ *Christian Education South Africa v Minister of Education* [2000] ZACC 11, 2000 (4) SA 757, 2000 (10) BCLR 1051 at [35].

³²⁷ [2007] ZACC 21, 2008 (1) SA 474 (CC), 2008 BCLR 99 (CC) at [95].

³²⁸ *MEC for Education: KwaZulu-Natal v Pillay* [2007] ZACC21, 2008 (1) SA 474 (CC), 2008 BCLR 99 (CC) at [95].

2.7.6 The World Religions Oppose Corporal Punishment

It is worth noting that many religious organisations are proponents of a total ban on corporal punishment. Prohibiting corporal punishment means changing the at times profoundly entrenched culture of accepting corporal punishment as a disciplinary method found in many faith-based communities.³²⁹ This means they also must challenge those who use their sacred text to justify inflicting harsh and unacceptable punishment on the most vulnerable in their communities. Growing numbers of religious communities support a ban on corporal punishment.³³⁰ In this regard, religious communities from across the world have committed to and support the prohibition of corporal punishment.³³¹

In May 2006, Religions for Peace in partnership with UNICEF convened a global consultation of religious leaders and experts from thirty countries in Toledo, Spain.³³² Participants were asked to find solutions and strategies to protect children from violence.³³³ The Kyoto Declaration – A Multi-Religious Commitment

³²⁹ Chris Dodd, 'Towards Universal Prohibition of Corporal Punishment of Children – Religious Progress, Challenges and Opportunities' in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 122.

³³⁰ Chris Dodd, 'Towards Universal Prohibition of Corporal Punishment of Children – Religious Progress, Challenges and Opportunities' in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 125.

³³¹ For example, the Baha'i Faith, Islam, Buddhism, Jainism, Judaism, Sikhism, and Hinduism all oppose corporal punishment. Churches' Network for Non-violence, Faith-based support for prohibition and elimination of corporal punishment of children – a global overview < <http://churchesfornon-violence.org/wp/wp-content/uploads/2012/02/Global-faith-support-summary-2015.pdf>> accessed 31 July 2020.

³³² Chris Dodd, 'Towards Universal Prohibition of Corporal Punishment of Children – Religious Progress, Challenges and Opportunities' in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 125.

³³³ Chris Dodd, 'Towards Universal Prohibition of Corporal Punishment of Children – Religious Progress, Challenges and Opportunities' in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 125.

to Confront Violence against Children – was developed in response.³³⁴ The Declaration includes religious leaders' acknowledgement of the seriousness of past failures to protect children from harm:

We must acknowledge that our religious communities have not fully upheld their obligations to protect our children from violence. Through omission, denial and silence, we have at times tolerated, perpetuated and ignored the reality of violence against children in homes, families, institutions and communities, and not actively confronted the suffering that this violence causes. Even as we have not fully lived up to our responsibilities in this regard, we believe that religious communities must be part of the solution to eradicating violence against children, and we commit ourselves to take leadership in our religious communities and the broader society.

Article 6 of the Declaration states:

We call upon our governments to adopt legislation to prohibit all forms of violence against children, including corporal punishment, and to ensure the full rights of children, consistent with the Convention on the Rights of the Child and other international and regional agreements. We urge them to establish appropriate mechanisms to ensure the effective implementation of these laws and to ensure that religious communities participate fully in these mechanisms. Our religious communities are ready to serve as monitors of implementation, making use of national and international bodies to maintain accountability.³³⁵

On another occasion, representatives from churches across Africa came together in Maputo in December 2007 for the 9th General Assembly of the All-Africa Conference of Churches.³³⁶ At this gathering, representatives committed to

³³⁴ Churches' Network for Non-violence, A Multi-religious commitment to end violence against children – Kyoto Declaration < <http://endcorporalpunishment.org/wp-content/uploads/thematic/Kyoto-Declaration-Guide-2016.pdf>> accessed 31 July 2020.

³³⁵ Churches' Network for Non-violence, Faith-based support for prohibition and elimination of corporal punishment of children – a global overview < <http://churchesfornon-violence.org/wp/wp-content/uploads/2012/02/Global-faith-support-summary-2015.pdf>> accessed 31 July 2020.

³³⁶ Sonke Gender Justice, 'Does Sparing the Rod Really Spoil the Child? A fact sheet to address religious justifications of corporal punishment' < <file:///C:/Users/juris/Downloads/MenCare-Factsheet-5.pdf>> accessed 5 October 2020.

ensuring that their respective countries pass legislation outlawing all forms of corporal and humiliating punishment of children.³³⁷

In 2002, church leaders in Auckland, New Zealand, from various denominations issued a media statement calling on the government to repeal the section in the Criminal Law that permitted corporal punishment.³³⁸ In August 2007, the South African Council of Churches affirmed that there could be no justification for corporal punishment.³³⁹ In 2013, the South African Catholic Bishops' Conference issued the following statement: 'There is nothing in the Catechism of the Catholic Church, which supports the right of parents to use corporal punishment.'

In Norway, church leaders approved the proposal from the Norwegian Children's Ombudsman to remove the word 'chastisement' from the Christian Bible and replaced it with a more appropriate word.³⁴⁰ The Norwegian Bishops said:

We urge those working in the Church to devote greater attention to violence against children – in their sermons, education and guidance. Men and women working in the Church must point out how such violence represents an infringement of human worth and conflicts with Christian ethics.³⁴¹

In June 2021 the General Assembly of the Presbyterian Church in Canada formally opposed the use of corporal punishment of children, by endorsing the

³³⁷ Sonke Gender Justice, 'Does Sparing the Rod Really Spoil the Child? A fact sheet to address religious justifications of corporal punishment' <file:///C:/Users/juris/Downloads/MenCare-Factsheet-5.pdf> accessed 5 October 2020.

³³⁸ Beth Wood et al, *Unreasonable Force: New Zealand's journey towards banning the physical punishment of children* (Save the Children New Zealand, 2008) 94.

³³⁹ The Uniting Church in Australia, 'Bible rethink on corporal punishment gathers pace around the world', < <https://journeyonline.com.au/queensland-synod-news/bible-rethink-on-corporal-punishment-gathers-pace-around-the-world/>> accessed 5 October 2020.

³⁴⁰ The Uniting Church in Australia, 'Bible rethink on corporal punishment gathers pace around the world', < <https://journeyonline.com.au/queensland-synod-news/bible-rethink-on-corporal-punishment-gathers-pace-around-the-world/>> accessed 5 October 2020.

³⁴¹ The Uniting Church in Australia, 'Bible rethink on corporal punishment gathers pace around the world', < <https://journeyonline.com.au/queensland-synod-news/bible-rethink-on-corporal-punishment-gathers-pace-around-the-world/>> accessed 5 October 2020.

Joint Statement on Physical Punishment of Children and Youth.³⁴² The purposes of the Joint Statement on Physical Punishment of Children and Youth are, inter alia, to create a common understanding of the ways in which physical punishment can affect children's development and to encourage parents and caregivers to choose non-violent methods in their approach to discipline.³⁴³ The Church, furthermore, agreed to lobby the Canadian Government to repeal that section of the Canadian Criminal Code which permits schoolteachers, parents, and legal guardians to use force by way of correction on children under their care.³⁴⁴

In conclusion, there is no evidence that the Church mandates corporal punishment;³⁴⁵ it is a voluntary use of physical force to punish children based on a peculiar interpretation of selected passages from the Bible.³⁴⁶ Does this mean that the right to freedom of religion cannot be claimed if there has been no infringement of the religion? If corporal punishment is declared unlawful and not a constitutive requirement of a religion, then there has been no violation of the right, and no claim of infringement can be forthcoming. It is crucial to make this distinction because if no right has been infringed, there should be no issue for religious groups when corporal punishment is abolished.

³⁴² End Violence Against Children, 'Presbyterian Church in Canada Formally Opposes Corporal Punishment of Children' (8 July 2021) < <https://www.end-violence.org/articles/presbyterian-church-canada-formally-opposes-corporal-punishment-children>> accessed 19 September 2021.

³⁴³ CHEO Physical Punishment, 'Joint Statement on Physical Punishment of Children and Youth' <<https://www.cheo.on.ca/en/about-us/physical-punishment.aspx>> accessed 21 September 2021.

³⁴⁴ Sec 43 of the Canadian Criminal Code, RSC 1985, c C-46.

³⁴⁵ Sonke Gender Justice, 'Does Sparing the Rod Really Spoil the Child? A fact sheet to address religious justifications of corporal punishment', < <file:///C:/Users/juris/Downloads/MenCare-Factsheet-5.pdf>> accessed 5 October 2020.

³⁴⁶ Sonke Gender Justice, 'Does Sparing the Rod Really Spoil the Child? A fact sheet to address religious justifications of corporal punishment', < <file:///C:/Users/juris/Downloads/MenCare-Factsheet-5.pdf>> accessed 5 October 2020.

Part II

2.8 Litigation and the Legislature: Strategies for the Abolition of Corporal Punishment

The question is often asked whether a change in the content of a law can have a positive impact on society. Can a change in law effect a change in social and cultural behaviour? In other words, will judicial condemnation of corporal punishment through PIL be an effective strategy to protect children from violence and advance children's rights? What is the relevance of PIL, and can it bring about social and cultural change, specifically as regards corporal punishment?³⁴⁷ Will this strategy result in real, substantive social change?

An example of the relevance and impact of PIL can be seen in *Government of the Republic of South Africa v Grootboom (Grootboom)*.³⁴⁸ This case is perhaps the most significant in South Africa concerning socio-economic rights and is an example of how a public interest campaign led to a very significant change in the law. Mrs Irene Grootboom was part of an impoverished community that lived in informal housing/shacks on private land in a suburb of Cape Town. The owner of the land instituted legal proceedings to have the Grootboom community evicted. An eviction order was granted in the court a quo. However, the Constitutional Court found the eviction in breach of s 26 of the Constitution which states that everyone has the right to adequate housing. The *Grootboom* decision had a prodigious impact on the government's attitude to socio-economic rights and socio-economic cases. Accordingly, the government became more sensitive to the issues and included these socio-economic factors (like providing temporary shelters) in their budgeting process. Furthermore, the result prompted the

³⁴⁷ Bronwyn Naylor, 'Comparative Legal Approaches to Corporal Punishment: Regulating for Behavioural Change' in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 92.

³⁴⁸ [2000] ZACC 19, 2001 (1) SA 46 (CC).

authorities to make the necessary changes to legislation to assist people who find themselves homeless for any reason beyond their control. PIL thus played a significant role in advancing the rights of the homeless, much in the same way that *FORSA* (albeit contrary to their aim) advanced the rights of children when the Constitutional Court prohibited the use of corporal punishment in the home.

This first part of the section attempts to answer these questions.

The second part examines the strategy of direct law reform by the legislature and its effectiveness in bringing about social and cultural change. Can parents be legislated into better behaviour?³⁴⁹ Again, the question is asked: 'Will this strategy result in real and substantive social change?'

2.8.1 The Effectiveness of Litigation as a Strategy for Change

Public interest litigation is an established strategy in which legal action is instituted in order to achieve social policy change or law reform.³⁵⁰ Furthermore, PIL is an effective strategy by which to address social inequalities or human rights violations by governments or government agencies and corporations. Litigants generally (but not always) assert ultra vires governmental acts or seek binding or declaratory orders on social policy matters, or orders to clarify legislative ambiguity.³⁵¹ In short, PIL facilitates holding officials to account and provides redress through the legal system.³⁵² The impact of a successful PIL campaign is the immediate formal

³⁴⁹ Bronwyn Naylor, 'Comparative Legal Approaches to Corporal Punishment: Regulating for Behavioural Change' in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 92.

³⁵⁰ Andrea Durbach et al, 'Public interest litigation: making the case in Australia' (2013) 38(4) *Alternative Law Journal* 219, 219.

³⁵¹ Michael Kirby, 'Deconstructing the Law's Hostility to Public Interest Litigation' (2011) 127 *LQR* 537, 537-538.

³⁵² Andrea Durbach et al, 'Public interest litigation: making the case in Australia' (2013) 38(4) *Alternative Law Journal* 219, 219.

realignment of social inequalities or compliance with human rights. Some interest groups also see a change in the law as the first step in series of steps towards a more holistic approach that would include raising awareness and encouraging a change in behaviour, attitudes, and expectations.³⁵³ Public interest litigation is a crucial and valuable strategy for protecting vulnerable, under-resourced groups that are not sufficiently powerful to influence social justice issues directly.³⁵⁴

Some scholars argue that rights are generally most effective when they are linked to social movements. Furthermore, social mobilisation is one of the key strategies required for a successful PIL campaign.³⁵⁵ Marcus and Budlender point out that even where there are legal victories that lead to legislative change, that does not always lead to social change because it does not take place in conjunction with advocacy and mobilisation strategies.³⁵⁶ Some form of social action is necessary to identify issues, mobilise support, exert political pressure, engage in litigation, and monitor and enforce legislation and court orders.³⁵⁷

Marcus and Budlender identify seven factors that need to be present for a PIL campaign to achieve maximum social change. These factors or principles are: (i) the proper organisation of clients; (ii) an overall long-term strategy; (iii) coordination and information sharing; (iv) timing; (v) research; (vi) characterisation; and (vii) follow up.³⁵⁸ However, some scholars criticise this argument and argue in turn that these seven principles 'lack the explanatory power on their own' to

³⁵³ Andrea Durbach et al, 'Public interest litigation: making the case in Australia' (2013) 38(4) *Alternative Law Journal* 219, 219.

³⁵⁴ Scott Cummings and Deborah L Rhode, 'Public Interest Litigation: Insights from Theory and Practice' (2009) XXXVI *Fordham Urb LJ* 604, 606.

³⁵⁵ Steven Budlender, Gilbert Marcus and Nick Ferreira, *Public Interest Litigation and social change in South Africa: Strategies, tactics and lessons* (The Atlantic Philanthropies, 2014) 101.

³⁵⁶ Gilbert Marcus and Steven Budlender, *A strategic evaluation of public interest litigation in South Africa* (Atlantic Philanthropies, 2008) 150 - 51.

³⁵⁷ Gilbert Marcus and Steven Budlender, *A strategic evaluation of public interest litigation in South Africa* (Atlantic Philanthropies, 2008) 150 - 51.

³⁵⁸ Gilbert Marcus and Steven Budlender, *A strategic evaluation of public interest litigation in South Africa* (Atlantic Philanthropies, 2008) 6.

interpret and predict the success or otherwise of PIL correctly.³⁵⁹ Moreover, as all PIL has to deal with a lack of resources, it is argued that caution should be exercised when using these seven principles to decide whether or not to proceed with a PIL campaign.³⁶⁰

Lack of resources such as money, expertise, political and social connections, status, and legal representation creates many challenges for the mobilisation of groups. Moreover, lack of resources also creates an unequal ability to mobilise.³⁶¹ This is evident in the disparity between children, who lack the resources to form powerful and persuasive lobby groups, and their parents, who elect to emphasise their parental rights and ignore the impact of physical punishment on their children.³⁶² The premise of this argument is that the law prefers the status quo. Law tends to favour the powerful over the vulnerable, disempowered, and disenfranchised, so perpetuating inequality in mobilisation.³⁶³

Fortunately, the lack of resources that children face is addressed by NGOs and civil society organisations like the Centre for Child Law at the University of Pretoria, the Centre for Applied Legal Studies (CALs) at the University of the Witwatersrand, Lawyers for Human Rights in Johannesburg, the Human Rights Law Centre in Melbourne, and the Public Interest Advocacy Centre (PIAC) in Sydney. In addition, children's views should and are increasingly given their due

³⁵⁹ Jackie Dugard and Malcolm Langford, 'Art or Science? Synthesising Lessons from Public Interest Litigation and the Dangers of Legal Determinism' (2011) 27(1) SAJHR 39, 54 <<https://doi.org/10.1080/19962126.2011.11865004>>.

³⁶⁰ Jackie Dugard and Malcolm Langford, 'Art or Science? Synthesising Lessons from Public Interest Litigation and the Dangers of Legal Determinism' (2011) 27(1) SAJHR 39, 54 <<https://doi.org/10.1080/19962126.2011.11865004>>.

³⁶¹ Michael McCann, 'Litigation and Legal Mobilization' in Gregory A Caldeira and others (eds), *The Oxford Handbook of Law and Politics* (Oxford University Press, 2009) 4.

³⁶² Tasmania Law Reform Institute, *Physical Punishment of Children* (Final Report No 4, 2003) 38 <https://www.utas.edu.au/__data/assets/pdf_file/0004/1009804/PhysicalPunishment-of-Children-Issues-Paper-No-3.pdf> accessed 18 November 2020.

³⁶³ Michael McCann, 'Litigation and Legal Mobilization' in Gregory A Caldeira and others (eds) *The Oxford Handbook of Law and Politics* (Oxford University Press, 2009) 4.

weight, in the main as a result of increased awareness of children's rights and the provisions of the Convention, specifically article 12.

It is argued that at times PIL has an adverse effect on change, such as backlash reactions and the rise of reactionary social movements.³⁶⁴ This argument is supported by the increase in counter-mobilisation movements like Justice Alliance of South Africa (JASA) which came to the fore in 2013 in *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another*.³⁶⁵ The applicant in this matter applied to the Constitutional Court to have sections 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 declared invalid and unconstitutional to the extent that they criminalised sex between consenting children. The JASA³⁶⁶ (the first *amicus curiae*) submitted that allowing sexual penetration between children is not in the best interests of the child because children are unable to give informed consent.³⁶⁷ Scholars have noted the backlash or resistance to progressive law reform by groups such as JASA,³⁶⁸ Freedom of Religion South Africa (FORSA), and Family First New Zealand, a lobby group that opposes the prohibition of corporal punishment in the home.

Rosenberg argues that because of the 'alleged success of social reform litigation' in the US, it is tempting to suggest that 'it *always* makes sense for groups to litigate'. However, a knowledge of legal history suggests that 'courts can *never* be

³⁶⁴ Andrea Durbach et al, 'Public interest litigation: making the case in Australia' (2013) 38(4) *Alternative Law Journal* 219, 220.

³⁶⁵ [2013] ZACC 35, 2014 (2) SA 168 (CC).

³⁶⁶ JASA is a conservative Christian organisation that aims to uphold and develop Judeo-Christian values, the Constitution of South Africa, and the laws of the land by way of litigation.

³⁶⁷ *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* [2013] ZACC 35, 2014 (2) SA 168 (CC) at [8].

³⁶⁸ Steven Budlender, Gilbert Marcus and Nick Ferreira, *Public Interest Litigation and Social Change in South Africa: Strategies, Tactics and Lessons* (The Atlantic Philanthropies, 2014) 13 – 20.

effective producers of significant social reform'³⁶⁹ as they are dependent on other political institutions and lack enforcement power.³⁷⁰ Furthermore, his view is that major PIL campaigns consistently fail to produce the required social reform and change.

The second reason, Rosenberg argues, is found in the autonomy of the courts. For strategic litigation to really make an impact, the judiciary must be truly independent of political influence.³⁷¹ Judicial officers are bound by legal rules alone and should not be constrained by political affiliation to succeed in PIL.³⁷² In the USA this issue is more pronounced because of the tendency to make judicial appointments along party lines.³⁷³ Judges are chosen by politicians with whom they are politically and philosophically aligned.³⁷⁴ When there is a change in the make-up of the bench, it can have profound repercussions for public interest issues.³⁷⁵

Some critics oppose the notion that the courts should be asked to make new laws or strike down undesirable legislation. The contemporary philosopher Dworkin

³⁶⁹ Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (2nd edn University of Chicago Press, 2008) 24.

³⁷⁰ Scott Cummings and Deborah L Rhode, 'Public Interest Litigation: Insights from Theory and Practice' (2009) XXXVI Fordham Urb LJ 604, 606.

³⁷¹ Scott Cummings and Deborah L Rhode, 'Public Interest Litigation: Insights from Theory and Practice' (2009) XXXVI Fordham Urb LJ 604, 606.

³⁷² Scott Cummings and Deborah L Rhode, 'Public Interest Litigation: Insights from Theory and Practice' (2009) XXXVI Fordham Urb LJ 604, 606.

³⁷³ Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (2nd edn University of Chicago Press, 2008) 28.

³⁷⁴ Lloyd Green, 'Supreme Ambition Review: Trump, Kavanaugh and the Right's big coup' *The Guardian* (Australia, 1 December 2019) <<https://www.theguardian.com/law/2019/nov/30/supreme-ambition-review-ruth-marcus-trump-kavanaugh-gorsuch>> accessed 26 July 2020.

³⁷⁵ See, eg, the difference in approach by the Constitutional Court in South Africa in *S v M* [2007] ZACC 18, 2008 (3) SA 232 (CC), 2007 (12) BCLR 1312 (CC) and four years later in *S v S* [2011] ZACC 7, 2011 (2) SACR 88 (CC) at [64]–[66]. In the earlier case the court applied a wide interpretation of 'primary caregivers' but this approach was subsequently narrowed by the majority decision in the latter case to 'single primary caregivers'. This was as a result of the bench having lost four judicial officers at the same time, all of whom had concurred in the majority decision in *S v M*.

argues that 'adjudication must be subordinate to legislation'.³⁷⁶ He puts forward that judicial officers, unlike politicians, have not been elected to office and therefore are not accountable to the people. The politicians are elected to govern the electorate, and only these elected officials should make new or repeal existing laws.³⁷⁷ Furthermore, if a judge makes a new law and applies it retrospectively, the losing party will be punished because he acted unlawfully *ex post facto*. Therefore, 'adjudication should be as unoriginal as possible'.³⁷⁸

Further to this argument is the counter-majoritarian dilemma. In jurisdictions that have a supreme constitution like South Africa, the executive, the legislature, and judiciary are bound by the Constitution of the Republic of South Africa.³⁷⁹ The Constitution is the supreme law of the land. As members of the judiciary are not elected to parliament, unlike members of the executive and the legislature, it creates a dilemma when unelected officials turn their hand to law-making. The public prefers their parliamentarians to make the laws of the land as they are elected to make laws that will benefit their constituents who in a democracy, would be the majority.³⁸⁰ If the judiciary embarks on law-making contrary to the will of the majority, there is no way for the electorate to hold them to account. Hence, a counter-majoritarian dilemma arises.³⁸¹

However, the power of PIL should not be underestimated. Threatening or instituting legal action can often have the desired effect of discouraging discriminatory behaviour or effecting an informal out-of-court settlement.³⁸² This can be part of a multi-strategy approach. McCann argues that the notion of legal

³⁷⁶ Ronald Dworkin, *Taking Rights Seriously* (Bloomsbury, 1997) 109.

³⁷⁷ Ronald Dworkin, *Taking Rights Seriously* (Bloomsbury, 1997) 109.

³⁷⁸ Ronald Dworkin, *Taking Rights Seriously* (Bloomsbury, 1997) 109.

³⁷⁹ Constitution of the Republic of South Africa, 1996.

³⁸⁰ Kate Dent and Irma J Kroeze, 'Minority Rights in the South-African Context: An Exploration of the Counter-Majoritarian Dilemma' (2015) 26 Stellenbosch L Rev 518, 518.

³⁸¹ Kate Dent and Irma J Kroeze, 'Minority Rights in the South-African Context: An Exploration of the Counter-Majoritarian Dilemma' (2015) 26 Stellenbosch L Rev 518, 518.

³⁸² Michael McCann, 'Litigation and Legal Mobilization' in Gregory A Caldeira and others (eds), *The Oxford Handbook of Law and Politics* (Oxford University Press, 2009) 3.

mobilisation tends to identify litigation as just one dimension or phase in a broader, more complex, multi-strategy approach to perceived harms among various parties.³⁸³ Central to this argument is that only a small number of disputes end up with institutional involvement.³⁸⁴ A substantial number of people who threaten to or in fact institute legal action have little prospect or intention of ever going to court.³⁸⁵ Matters are often settled out-of-court so avoiding costly court and counsel fees associated with public interest litigation.³⁸⁶ Legal mobilisation, therefore, only occasionally involves lawyers, judges, attorneys, and jurors.³⁸⁷ However, settling disputes out-of-court has the potential to leave litigants without a legal precedent on which to rely³⁸⁸ and this, in turn, may not result in the necessary social and cultural change that the original litigation intended to achieve.

The importance of PIL often lies in the indirect impact it has beyond a specific judgment, such as generating public support, reinforcing mobilisation efforts, creating media awareness, and increasing political tactics.³⁸⁹ This includes mobilising community and social movement groups other than from the legal fraternity, which can serve to politicise issues and thereby create a far more lasting and profound impact than a court judgment.³⁹⁰ Vohito argues that even if high-level

³⁸³ Michael McCann, 'Litigation and Legal Mobilization' in Gregory A Caldeira and others (eds), *The Oxford Handbook of Law and Politics* (Oxford University Press, 2009) 3.

³⁸⁴ Michael McCann, 'Litigation and Legal Mobilization' in Gregory A Caldeira and others (eds), *The Oxford Handbook of Law and Politics* (Oxford University Press, 2009) 3.

³⁸⁵ Michael McCann, 'Litigation and Legal Mobilization' in Gregory A Caldeira and others (eds), *The Oxford Handbook of Law and Politics* (Oxford University Press, 2009) 3.

³⁸⁶ Public Interest Advocacy Centre Ltd, Media Release 'Test case settlement great news for autistic children' (10 July 2020) <<https://piac.asn.au/2020/07/10/test-case-settlement-great-news-for-autistic-children/?fbclid=IwAR36fgcRurQY91xuPWZJC0JUP0vR3O2AhCvg7LzCSQcRIPEgm0ia7SICQXk>> accessed 26 July 2020.

³⁸⁷ Michael McCann, 'Litigation and Legal Mobilization' in Gregory A Caldeira and others (eds), *The Oxford Handbook of Law and Politics* (Oxford University Press, 2009) 3.

³⁸⁸ Michael McCann, 'Litigation and Legal Mobilization' in Gregory A Caldeira and others (eds), *The Oxford Handbook of Law and Politics* (Oxford University Press, 2009) 4.

³⁸⁹ Michael W McCann, 'Legal Mobilization and Social Reform Movements: Notes on Theory and its Application' in Michael W McCann (ed) *Law and Social Movements* (Ashgate 2006) 230.

³⁹⁰ Jackie Dugard and Malcolm Langford, 'Art or Science? Synthesising Lessons from Public Interest Litigation and the Dangers of Legal Determinism' (2011) 27(1) SAJHR 39, 55 <<https://doi.org/10.1080/19962126.2011.11865004>>.

decisions are not implemented in domestic law, they may still provide some pressure at national and international levels, and improve children's rights to a certain extent.³⁹¹ Furthermore, civil society groups can challenge the lawfulness of corporal punishment.³⁹²

This study examines the relevance and impact of PIL in addressing the use of the common-law defence of reasonable chastisement against a charge of common assault by parents or persons *in loco parentis*. The focus of this study is on the South African context reflected in Chapter 4, where the Constitutional Court declared the defence of reasonable and moderate chastisement unconstitutional and therefore invalid, thereby prohibiting the use of corporal punishment in the home.

2.8.2 The Relevance and Impact of Direct Legislative Reform

There are those scholars who argue that legislative change is preferable to judicial reform.³⁹³ Stoddard argues that with legislative reform there is a 'validity' or 'legitimacy' to the reform because the issue has been out in public and debated in parliament, and therefore, public acceptance is easier to achieve.³⁹⁴ It is a public

³⁹¹ Sonia Vohito, 'Using the courts to end corporal punishment – The international score card' (2019) *De Jure* 597, 607.

³⁹² Sonia Vohito, 'Using the courts to end corporal punishment – The international score card' (2019) *De Jure* 597, 607.

³⁹³ Thomas B Stoddard, 'Bleeding Heart: Reflections on Using the Law to make Social Change' (1997) 72 *NYU L Rev* 967, 984.

³⁹⁴ Stoddard uses the example of the Civil Rights Act of 1964, which encountered minimal opposition to its passing because it 'carried an aura of legitimacy and fostered public acceptance', as opposed to the decision in *Brown v Board of Education* 347 US 483 (1954) ten years earlier where there was widespread withdrawal of students from public schools because White parents opposed the integration in school of students of different races; Thomas B Stoddard, 'Bleeding Heart: Reflections on Using the Law to make Social Change' (1997) 72 *NYU L Rev* 967, 983-4.

exercise that is more likely to bring about a ‘rule change’ as well as a ‘culture change’.³⁹⁵

Sunstein argues that laws should either reflect the current social norms (corporal punishment is a private matter) or changing social norms (that non-violent parenting is the preferred method of raising children).³⁹⁶ Sunstein makes a further argument that laws can change social norms by requiring a behavioural change through statutory mandate without the threat of criminal penalty.³⁹⁷ The benefit of having direct legislative law reform is the publicity surrounding the issue which political debate creates. Political debate also encourages public debate and that creates awareness of the issue before parliament. When there is awareness of an issue, the public is more likely to change or alter their habits in line with the legislated provisions.

New Zealand is renowned for its direct approach in repealing the provision in its Criminal Law which permitted the defence of reasonable chastisement, through their parliament. Chapter 5 is devoted to the process of law reform followed by the New Zealand legislature.

2.9 Conclusion

Corporal punishment is not in the best interests of the child. Neither is the abolition of the defence of reasonable chastisement an infringement on the right of freedom of religion of parents and persons *in loco parentis* since no religion has

³⁹⁵ Thomas B Stoddard, ‘Bleeding Heart: Reflections on Using the Law to make Social Change’ (1997) 72 NYU L Rev 967, 984.

³⁹⁶ Bronwyn Naylor, ‘Comparative Legal Approaches to Corporal Punishment: Regulating for Behavioural Change’ in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 92 referencing Cass R Sunstein, ‘On the Expressive Function of Law’ (1996) 144 U Pa L Rev 2021, 2032.

³⁹⁷ Cass R Sunstein, ‘On the Expressive Function of Law’ (1996) 144 U Pa L Rev 2021, 2032.

corporal punishment as a constitutive element. Corporal punishment is an abhorrent practice which violates the provisions of the Convention – specifically articles 2 (non-discrimination), 3 (best interests of the child), 6 (the right to life, survival and development), 12 (participation), 19 (the right to be protected from all forms of violence, both mental and physical), and 37(a) (the right not to be subjected to torture or other cruel, inhuman and degrading treatment or punishment).

The best interests of the child principle has as its goal to achieve a child rights-based approach whereby all children enjoy the full protection of all the rights in the Convention. The Convention gives the child the right to have their best interests considered and evaluated as a primary concern in all actions or decisions that affect him or her, both in public and private. Even though some see the principle as vague and indeterminate, it has also been argued that this is an advantage in that it broadens the application of the principle and makes it more flexible. It can, therefore, easily be applied in a discretionary manner on a case-by-case basis. It has also been shown that the principle strengthens other human rights and that it has been applied in a multitude of human rights cases. Furthermore, it has been said that the best interests principle in article 3 should not be read in isolation.³⁹⁸

One of the limitations of the Convention is that it contains no express provision mandating equal protection under the law.³⁹⁹ Reasonable chastisement allows discrimination against a group of people who have not reached the arbitrarily set age of eighteen years. Moreover, childhood means different things in different cultures. It has also been pointed out that many jurisdictions have good intentions

³⁹⁸ John Tobin, 'The Development of Children's Rights', in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 46.

³⁹⁹ Benyam Dawit Mezmur, "'Don't Try this at Home?': Reasonable or Moderate Chastisement, and the Rights of the Child in South Africa with *YG v S* in Perspective' (2018) 32(2) *Speculum Juris* 88 <<http://www.saflii.org/za/journals/SPECJU/2018/7.pdf>> accessed 29 July 2020.

in enacting equality laws but fail to implement the equality provisions leaving children without substantive equality.

For many religious followers, their right to freedom of religion is protected in various international instruments. However, with the right comes the responsibility to practise their religion with respect for others' human rights and physical integrity.⁴⁰⁰ Furthermore, adults should not and must not rely on religious belief to impose cruel and degrading forms of punishment on their children. Moreover, parents and persons *in loco parentis* must understand that their right to freedom of religion may be legitimately limited to protect fundamental rights and freedoms.⁴⁰¹ Fundamentalist or Conservative Christians argue that it is their responsibility to raise their children according to biblical principles, including administering '[l]oving, proper corrective discipline...'⁴⁰² However, progressive Christians counter this argument by pointing out that there is no evidence that the Bible instructs followers to use corporal punishment.⁴⁰³

This thesis does not call for a ban on religion. On the contrary, religion is what gives many people faith, hope, and purpose. It does, however, call for a ban on the practice of using religion as a justification for administering corporal punishment to discipline children by parents and persons *in loco parentis*.

When the prohibition of corporal punishment is considered from a legal perspective, a strategy for change can be either PIL or direct legislative law reform. It has been said that although litigation is a necessary strategy for social

⁴⁰⁰ Chris Dodd, 'Towards Universal Prohibition of Corporal Punishment of Children – Religious Progress, Challenges and Opportunities' in Bernadette J Saunders and others (eds) *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 122.

⁴⁰¹ UN Doc CRC/C/GC/8 para 29.

⁴⁰² Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 103.

⁴⁰³ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 95.

change, it is never sufficient.⁴⁰⁴ Successful PIL cannot work in isolation from other mobilisation efforts. For PIL campaigns to succeed financial backing is crucial. Unfortunately, there is insufficient public funding, and more needs to be done to encourage philanthropists to invest in social justice issues. Financial constraints are felt in multiple jurisdictions. As Budlender, Marcus and Ferreira point out, ‘advances in the last few years are presently threatened and may be undermined by the fact that there has been a substantial decrease in funding for public interest work’.⁴⁰⁵

A third important issue is a more contemplative approach to the consequences of litigation better to understand the power of social justice.⁴⁰⁶ As one commentator has said, there is a concern that ‘over-reliance on courts diverts effort from potentially more productive political strategies and disempowers the groups that lawyers are seeking to assist’.⁴⁰⁷ The question then is: ‘What is the value of public interest litigation?’⁴⁰⁸ Public interest litigation is essential in asserting rights, declaring conduct *ultra vires*, holding officials to account, scrutinising corporations’ behaviour, enforcing civic duties and responsibilities, and providing redress to those whose rights have been violated.⁴⁰⁹

On the other hand, corporal punishment can be eliminated by direct law reform through democratic parliamentary processes. This strategy has the benefit of public debate and will, therefore, as one commentator has said, carry a certain

⁴⁰⁴ Scott L Cummings and Deborah L Rhode, ‘Public Interest Litigation: Insights from Theory and Practice’ (2009) 36 *Fordham Urb LJ* 603,604.

⁴⁰⁵ Steven Budlender, Gilbert Marcus and Nick Ferreira, *Public Interest Litigation and Social Change in South Africa: Strategies, Tactics and Lessons* (The Atlantic Philanthropies, 2014) 10.

⁴⁰⁶ Scott L Cummings and Deborah L Rhode, ‘Public Interest Litigation: Insights from Theory and Practice’ (2009) 36 *Fordham Urb LJ* 603,605.

⁴⁰⁷ Scott L Cummings and Deborah L Rhode, ‘Public Interest Litigation: Insights from Theory and Practice’ (2009) 36 *Fordham Urb LJ* 603,604.

⁴⁰⁸ Jackie Dugard and Malcolm Langford, ‘Art of Science? Synthesising Lessons from Public Interest Litigation and the Dangers of Legal Determinism’ (2011) 27(1) *SAJHR* 39, 39 <<https://doi.org/10.1080/19962126.2011.11865004>>.

⁴⁰⁹ Andrea Durbach et al, ‘Public Interest Litigation: Making the Case in Australia’ (2013) 38(4) *Alternative Law Journal* 219.

level of legitimacy and validity that is sure to bring about a more comprehensive social and cultural change.⁴¹⁰

Whatever form law reform takes in Australia, it will be an acknowledgement that children have agency and are individual human beings and rights holders⁴¹¹ and that their rights are just as deserving of promotion and protection as those of any adult. It will also signal to parents that corporal punishment is no longer an acceptable form of discipline, and that parents and persons *in loco parentis* should embrace a more non-violent, child-friendly approach to disciplining the children in their care. Parents need to move away from a 'punishment' mindset and embrace an enlightened approach to discipline. It is hoped that law reform to eliminate corporal punishment in all settings and across the globe happens sooner rather than later. Although, for the purpose of this thesis, the focus, to prohibit the use of corporal punishment in all settings, will be on law reform in Australia.

⁴¹⁰ Thomas B Stoddard, 'Bleeding Heart: Reflections on Using the Law to make Social Change' (1997) 72 NYU L Rev 967, 984.

⁴¹¹ Noam Peleg, *The Child's Right to Development* (Cambridge University Press, 2019) 9.

Chapter 3

Corporal Punishment in Australian Jurisdictions

3.1 Introduction

Children (aged under 12) and young people (aged 12 – 25) are among the most regulated groups of people in Australia.¹ This is evidenced by the large body of legislation and regulations mentioned in this chapter relating to the notion of corporal punishment in specific settings.² From birth, infants are weighed, measured, and vaccinated. From age five, they are sent to school until at least the age of sixteen. Legislation exists to prevent children from smoking³ or drinking alcohol.⁴ In addition to these measures, each jurisdiction within Australia has a Children’s Commissioner or Advocate who is dedicated to observe, advance, and protect children’s rights. Furthermore, since 2013 Australia also has a National Children’s Commissioner.⁵ Despite all these protective measures, children and young people (under 18 years of age) can be subjected to physical assault under the guise of reasonable chastisement which would be classified as common assault if perpetrated against an adult.⁶

¹ Judith Bessant and Rob Watts, ‘Children and the Law: An Historical Overview’ in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 3.

² See Table 3.3 below – approximately thirty pieces of legislation relating to corporal punishment regulate the lives of children under eighteen years of age.

³ In NSW, for example, s 22 of the Public Health (Tobacco) Act 2008 regulates the sale of tobacco products to minors.

⁴ In Tasmania, for example, s 26 of the Police Offences Act 1935 regulates the sale and supply of alcohol to minors.

⁵ United Nations General Assembly: Human Rights Council ‘National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21* Australia’ A/HRC/WG.6/37/AUS/1 (28 December 2020) para 88 <<https://undocs.org/A/HRC/WG.6/37/AUS/1>> accessed 2 October 2021.

⁶ Judith Bessant and Rob Watts, ‘Children and the Law: An Historical Overview’ in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 3.

There remains strong cultural resistance to the abolition of the defence of reasonable chastisement.⁷ As Saunders points out: ‘In Australia, surveys have indicated that sixty nine per cent (69%) of adults across Australia believe “it is sometimes necessary to smack a naughty child”’.⁸ However, that percentage is lower than the substantial support for physical punishment of seventy five per cent (75%) in 2002.⁹ Some argue that this high percentage indicates that corporal punishment is morally acceptable in Australian society.¹⁰ The counter-argument is that merely because people have grown up with corporal punishment and have given little thought to its morality, does not mean that the impact on the human rights of children should not be questioned. Parents often use physical punishment as a last resort and as often lose control, clearly indicating that corporal punishment is not used because it is morally acceptable.¹¹

Australia is one of the few Western democracies that still allows corporal punishment in contravention of articles 19 and 37(a) of the Convention.¹² In addition to that label, Australia is also the only liberal democracy without a national bill of rights¹³ to protect and guarantee individual rights in the same way South

⁷ Judy Cashmore and Briony Horsfall, ‘Child Maltreatment’ in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 105.

⁸ Bernadette J Saunders, ‘Ending the Physical Punishment of Children by Parents in the English-speaking World: The Impact of Language, Tradition and Law’ (2013) 21 *International Journal of Children’s Rights* 278, 291.

⁹ Joe Tucci, Janise Mitchell and Chris Goddard, ‘Crossing the Line - Making the Case for Changing Australian Laws About the Physical Punishment of Children’ (Australian Childhood Foundation and National Research Centre for the Prevention of Child Abuse, Monash University, 2006) 15.

¹⁰ Tasmania Law Reform Institute, *Physical Punishment of Children* (Final Report No 4, 2003) 26.

¹¹ Tasmania Law Reform Institute, *Physical Punishment of Children* (Final Report No 4, 2003) 26.

¹² Judy Cashmore and Briony Horsfall, ‘Child Maltreatment’ in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 105.

¹³ Human Rights Commission, ‘Ten Common Questions About a Human Rights Act for Australia’
<https://humanrights.gov.au/sites/default/files/content/letstalkaboutrights/downloads/HRA_questions.pdf> accessed 5 July 2020.

Africa has enshrined its Bill of Rights in Chapter two of its Constitution¹⁴ or the statutory Bill of Rights in New Zealand.¹⁵ As far as children's rights are concerned, the most significant, in fact the only, step Australia has taken to date to eliminate all forms of physical punishment of children has been the ratification of the United Nations Convention on 17 December 1990.¹⁶ Ironically, Australia played a major role in the drafting and passage of the Convention and was one of the first countries to ratify the Convention.¹⁷ When Australia ratified the Convention every child in Australia became entitled to the protections it confers.¹⁸ However, in Australia, incorporating aspects of the Convention into domestic legislation has at best been piecemeal,¹⁹ and at worst been blatantly ignored by the government.²⁰ Australia has a complex and uneasy relationship with international law. This uneasy relationship is evidenced by the unincorporated status of the Convention. Ratification of the Convention requires the signatory state to ensure that its laws, to the extent that they impinge on the lives of children, are aligned with the rights set out in the Convention.²¹

Under articles 26 and 27 of the Vienna Convention on the Law of Treaties 1969, treaties must be implemented as soon as they have been ratified and existing domestic law is no justification for not doing so. The government has

¹⁴ Constitution of the Republic of South Africa, 1996.

¹⁵ New Zealand Bill of Rights Act 1990.

¹⁶ United Nations, Office of the High Commissioner, 'Status of Ratification' <<https://indicators.ohchr.org/>> accessed 18 September 2020.

¹⁷ Faith Gordon and Noam Peleg, "'The Australian Government is not listening": how our country is failing to protect its children' *The Conversation* (8 October 2019) <<https://theconversation.com/the-australian-government-is-not-listening-how-our-country-is-failing-to-protect-its-children-124779>> accessed 26 April 2021.

¹⁸ John Tobin, 'The Development of Children's Rights', in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 31.

¹⁹ John Tobin, 'The Development of Children's Rights', in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 34.

²⁰ John Tobin, 'The Development of Children's Rights', in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 26.

²¹ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 52.

acknowledged that it has an obligation to comply with the Convention under the Human Rights and Equal Opportunities Act 1986 (Cth).²² This failure to implement the Convention means that Australian children lack many basic protections and human rights that other groups have long taken for granted.²³

Ironically, there are approximately thirty pieces of legislation regulating corporal punishment across all Australian jurisdictions.²⁴ Therefore, it hardly seems unreasonable to expect the provisions of the Convention to be implemented in domestic law. Australia is generally eager to legislate, yet it appears that legislating to protect the most vulnerable citizens from all forms of violence is not a priority for the Australian government.

The Third Optional Protocol on the Rights of the Child on a communications procedure (OPIC) was adopted and opened for signature, ratification and accession by General Assembly resolution on 19 December 2011 and entered into force on 14 April 2014.²⁵ This Optional Protocol established a communication procedure which allows children to lodge complaints directly with the CRC for alleged rights violations under the Convention or Optional Protocols.²⁶ Regrettably, Australia is yet to ratify the OPIC, which means Australian children cannot use the

²² Judith Bessant and Rob Watts, 'Children and the Law: An Historical Overview' in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 4.

²³ Judith Bessant and Rob Watts, 'Children and the Law: An Historical Overview' in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 4.

²⁴ See Table 3.3 below.

²⁵ United Nations Human Rights: Office of the High Commissioner, 'Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure' <<https://www.ohchr.org/en/professionalinterest/pages/opicrc.aspx>> accessed 2 October 2021.

²⁶ John Tobin, 'The Development of Children's Rights', in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 32.

complaints procedure to lodge a complaint when they experience rights violations.²⁷

Some argue that the drafters of the Australian Constitution had a perception that international law was not law, 'but a discretionary set of norms that states could neglect at will'.²⁸ The most significant reference to international law in the Australian Constitution is the external affairs power found in section 51(xxix), giving the Commonwealth parliament power to pass laws implementing any obligation under an international treaty or convention.²⁹ Given that the Constitution does not mention international law in its interpretation provisions, the issue of international law has been left to the High Court to decide, and a definitive position is yet to emerge.³⁰

This chapter considers certain constitutional aspects of law reform and how they will impact the abolition of corporal punishment at the federal and state levels. It further addresses the question of 'what rights children have under Australian law regarding corporal punishment?' This question will be answered by examining the nature of criminal law legislation in Australia on both federal and state levels, and the legal status of corporal punishment and the defence or reasonable chastisement (lawful correction) in the different states and territories.

²⁷ John Tobin, 'The Development of Children's Rights' in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 32.

²⁸ Devika Hovell and George Williams, 'A Tale of Two Systems: The Use of International Law in Constitutional Interpretation in Australia and South Africa' (2005) 29 *Melb U L Rev* 95, 107.

²⁹ Devika Hovell and George Williams, 'A Tale of Two Systems: The Use of International Law in Constitutional Interpretation in Australia and South Africa' (2005) 29 *Melb U L Rev* 95, 107.

³⁰ Devika Hovell and George Williams, 'A Tale of Two Systems: The Use of International Law in Constitutional Interpretation in Australia and South Africa' (2005) 29 *Melb U L Rev* 95, 107.

3.2 Australia and Human Rights Legislation

Corporal punishment is morally repugnant as it denies children the right to physical integrity on the same level guaranteed adults. It violates children and discriminates against them based on their age. Sections 14 and 15 of the Age Discrimination Act 2004 (Cth) prohibits direct and indirect discrimination based on a person's age. However, the Age Discrimination Act only prohibits discrimination in employment, education, access to premises, provision of goods, services and facilities, accommodation, disposal of land, administration of Commonwealth laws and programmes, and requests for information. The Age Discrimination Act 2004 (Cth) makes no mention of corporal punishment.

Corporal punishment breaches international human rights treaties and obligations. For this reason, the common law must be developed to remove the contentious and essentially subjective defence of reasonable chastisement. Furthermore, legislation must be amended or repealed to ensure that corporal punishment is no longer permitted in any Australian jurisdiction. Legislation that protects the human rights of all people, especially children, will go a long way in establishing a rights-based approach to all matters involving children.

As noted earlier, Australia is the only Western democracy that does not have a bill of rights to protect the fundamental rights of its citizens.³¹ Certain scholars believe that consolidating individual human rights in a legal document is a way of holding governments accountable.³² In 2016 Australia responded to the Universal Periodic Review of the United Nations Human Rights Council by stating that it does not propose to alter its federal model of parliamentary supremacy by introducing a judicially enforceable Human Rights Act.³³ However, there have recently been two

³¹ George Williams, 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope' (2006) 30 Melb U L Rev 880, 883.

³² George Williams, 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope' (2006) 30 Melb U L Rev 880, 883.

³³ UN Doc A/HRC/31/14/Addendum 1 para 14.

unsuccessful attempts to introduce a Bill of Rights Act in the Australian parliament.³⁴ Independent federal MP, Andrew Wilke, introduced a private member's bill – the Australian Bill of Rights Bill 2017 – in the House of Representatives on 14 August 2017. This bill was defeated in the House.³⁵ On 16 September 2019, Wilke introduced another private member's bill in the House of Representatives – the Australian Bill of Rights Bill 2019. Again, this bill was defeated in the House.³⁶

It was reported in the media that the former Attorney-General of the Northern Territory, John Elferink, felt that Australia already had adequate protection for human rights through individual laws.³⁷ However, Australia has only four separate pieces of legislation to protect against age discrimination,³⁸ sex discrimination,³⁹ disability discrimination,⁴⁰ and race discrimination.⁴¹ A fifth Act, the Human Rights (Sexual Conduct) Act 1994, adopted the international obligations in article 17⁴² of

³⁴ In addition to two previous attempts, the Human Rights Bill 1973 (Cth) was introduced by the then Attorney-General Lionel Murphy and encountered strong opposition and eventually lapsed when parliament was prorogued in early 1974; and the Australian Human Rights Bill 1985 (Cth). The 1985 bill was passed by the House of Representatives but failed in the Senate. See also George Williams, 'The Federal Parliament and the Protection of Human Rights' 9 <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp9899/99rp20> accessed 18 September 2020.

³⁵ Parliament of Australia, 'Parliamentary Business' <https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansardr/c81b363c-b13c-4875-9e05-d8d7236d649b/&sid=0086> accessed 5 July 2020.

³⁶ Parliament of Australia, 'Parliamentary Business' <https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansardr/6cd30e15-83c4-4db4-bebc-e1033048fb66/&sid=0063> accessed 5 July 2020.

³⁷ Lachlan Keller, 'Australia doesn't have a bill of rights and we need one' *Hatch @Macleay College* (Sydney and Melbourne, 25 November 2019) <<https://hatch.macleay.net/australia-doesnt-have-a-bill-of-rights-and-we-need-one/>> accessed 19 September 2020.

³⁸ Age Discrimination Act 2004 (Cth).

³⁹ Sex Discrimination Act 1984 (Cth).

⁴⁰ Disability Discrimination Act 1992 (Cth).

⁴¹ Racial Discrimination Act 1975 (Cth).

⁴² Article 17 of the ICCPR states: '1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.'

the International Covenant on Civil and Political Rights (ICCPR).⁴³ Therefore, it would appear that the doctrine of responsible government is still firmly entrenched in the Australian parliament.⁴⁴ The view has been expressed that there is no need for a formal document such as a Bill of Rights as the legislature is perfectly capable of making laws to protect the rights of the citizenry.⁴⁵ The Australian government stated:

Australia's strong democratic institutions, the Constitution, the common law and current legislation, including anti-discrimination legislation at the Commonwealth, State and Territory levels, protect and promote human rights in Australia. For these reasons, the Australian Government is not convinced of the need for a Bill of Rights in Australia.⁴⁶

This approach by the Australian government has been described by one commentator as 'a domestic political climate of growing hostility to the international human rights system'.⁴⁷

Why then does Australia not have a Bill of Rights? The answer lies in Australia's constitutional history. Australia is a young country but, constitutionally speaking, it is one of the oldest in the world. The Australian Constitution is virtually unchanged from its first enactment in 1901, while the states' Constitutions date from as far

⁴³ Parliament of Australia, 'Parliamentary Business' <https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansardr/c81b363c-b13c-4875-9e05-d8d7236d649b/&sid=0086> accessed 5 July 2020.

⁴⁴ George Williams, 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope' (2006) 30 *Melb U L Rev* 880, 881.

⁴⁵ George Williams, 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope' (2006) 30 *Melb U L Rev* 880, 881.

⁴⁶ Commonwealth of Australia (2007) Common Core Document forming part of the reports of States Parties – Australia – incorporating the Fifth Report under the International Covenant on Civil and Political Rights and the Fourth Report under the International Covenant on Economic, Social and Cultural Rights June 2006 para 83 <<https://webarchive.nla.gov.au/awa/20071003045148/http://pandora.nla.gov.au/pan/77128/20071003-1424/www.ag.gov.au/www/agd/agd.nsf/Page/Core.pdf>> accessed 27 May 2021.

⁴⁷ Diane Otto, 'From "Reluctance" to "Exceptionalism": The Australian Approach to Domestic Implementation of Human Rights' (2001) 26 *Alternative LJ* 219, 219.

back as the 1850s.⁴⁸ When these constitutions were conceived, individual human rights were not protected through a single legal document in the United Kingdom on whose legal system Australia's was largely based.⁴⁹ For the Australian drafters of the Constitution it made sense to trust that the then British traditions of responsible government and the common law would adequately protect fundamental human rights.⁵⁰

What is the constitutional implication of the defence of reasonable chastisement to a charge of common assault? It means that, for now, Australians must be content with the fact that there is no prospect of a statutory bill of rights being adopted by the federal government any time soon. Therefore, the defence of reasonable chastisement to a charge of common assault remains relevant. For so long as the view is held that fundamental human rights are adequately protected in Australia by individual pieces of legislation, there will be no bill of rights.

However, in recent years the doctrine of responsible government has been challenged, and questions are being asked about whether the conventions attached to the doctrine, such as ministerial accountability, are still relevant.⁵¹

Williams opines that:

What is necessary is change that engenders a culture of rights protection, including a tolerance and respect for rights, built upon the fundamental values held by the Australian people. Accordingly, any scheme that is designed to better protect civil liberties by way of constitutional or statutory change must be judged according to its scope, not only to change the text of the law but also to bring about a culture of rights protection in Australia.⁵²

⁴⁸ George Williams, 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope' (2006) 30 Melb U L Rev 880, 883.

⁴⁹ George Williams, 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope' (2006) 30 Melb U L Rev 880, 883.

⁵⁰ George Williams, 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope' (2006) 30 Melb U L Rev 880, 883.

⁵¹ George Williams, 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope' (2006) 30 Melb U L Rev 880, 881.

⁵² George Williams, 'The Federal Parliament and the Protection of Human Rights' (Parliament of Australia, 11 May 1999) 17 <<https://www.aph.gov.au/>

And

An incremental approach to protecting rights by statutory means before constitutional means and of protecting certain rights before others is a pragmatic and potentially achievable means of bolstering rights protection in Australia. Importantly, it is also a process that would allow the oversight of the Federal Parliament at every step in continuing to build a culture of rights protection. This would maximise the chances of achieving a workable balance between, enabling the judiciary to foster the rights of Australians and not vesting misplaced faith in the courts, to solve Australia's pressing social, moral and political concerns.⁵³

It remains to be seen whether the government will have a change of heart and eventually adopt a consolidated federal Bill of Rights that will protect the human rights of all Australians. Parliamentarians like Wilke will just have to persevere.

3.3 States with Human Rights Legislation

Although Australia does not have a federally enacted Bill of Rights Act, Victoria, the ACT, and Queensland have all adopted legislation to protect the human rights of their residents. The Victoria Charter, the ACT-HR Act, and the Qld-HR Act are all based on the 'dialogue' model of human rights, which aims to promote discussion of human rights between the executive, parliament, and the courts.⁵⁴ This model protects parliamentary sovereignty and makes no provision for the

About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp9899/99rp20> accessed 18 September 2020.

⁵³ George Williams, 'The Federal Parliament and the Protection of Human Rights', (Parliament of Australia, 11 May 1999) 24 <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp9899/99rp20> accessed 18 September 2020.

⁵⁴ Bruce Chen, 'The *Human Rights Act 2019* (Qld): Some Perspectives from Victoria' (2020) 45(1) *Alternative Law Journal* 4, 4. See also George Williams, 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope' (2006) 30 *Melb U L Rev* 880, 901.

striking down of incompatible legislation.⁵⁵ The implication is that a person whose rights have been violated cannot commence legal proceedings to have a section(s) of an Act struck down on the basis of its incompatibility with a provision(s) in the Charter or Human Rights Act.

The Victoria Charter provides several protections for children against physical violence (s 10), discrimination (s 17), and freedom of religion (s 14). Section 10 of the Charter states that a person should not be tortured or treated or punished in a cruel, degrading, or inhuman way. Subsection 14(1) states that:

Everyone has the right to freedom of thought, conscience and religion. This right includes-

- (a) the freedom to have or to adopt a religion or belief of his or her choice; and
- (b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community and whether in public or private.

Furthermore, subsection 17(2) states: 'Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.'

Williams points out that the Victoria Charter 'was designed to not lead to a significant increase in litigation.'⁵⁶ Therefore, human rights legislation takes the form of ordinary Acts of Parliament similar to the New Zealand Bill of Rights Act of

⁵⁵ Louis Schetzer, 'Queensland's *Human Rights Act*. Perhaps not such a great step forward?' (2020) 45(1) *Alternative Law Journal* 12, 12.

⁵⁶ George Williams, 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope' (2006) 30 *Melb U L Rev* 880, 894.

1990.⁵⁷ These Acts are not constitutionally enshrined like the South African Bill of Rights which appears in Chapter 2 of the South African Constitution.⁵⁸

The Victoria Charter includes a limitations clause in subsection 7(2) which states:

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including –

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

This clause draws heavily upon the drafting of section 36⁵⁹ of the South African Bill of Rights.⁶⁰

The ACT adopted the Human Rights Act of 2004 (ACT-HR Act), which entered into force on 2 March 2017. Section 40B of the ACT-HR Act imposes direct obligations on ACT public authorities to take relevant human rights into account in

⁵⁷ George Williams, 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope' (2006) 30 *Melb U L Rev* 880, 893.

⁵⁸ Constitution of the Republic of South Africa, 1996.

⁵⁹ Section 36 of the South African Constitution states:
'Limitation of Rights

- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including —
 - (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.

- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'

⁶⁰ Bruce Chen, 'The *Human Rights Act 2019* (Qld): Some Perspectives from Victoria' (2020) 45(1) *Alternative Law Journal* 4, 5. See also George Williams, 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope' (2006) 30 *Melb U L Rev* 880, 898.

their decision making. In October 2017, the ACT Human Rights Commission made the following submission to the Standing Committee on Justice and Community Safety:

Having a clear legislative prohibition against the use of violence against children, including within the family, could be consistent with Australia's obligations under the United Nations Convention on the Rights of the Child, and the right to protection in s 11 of the HR Act. A clear prohibition of violence against children makes it more difficult for parents to justify serious physical violence as discipline, and reduces the risk of discipline escalating into unintended levels of physical abuse.⁶¹

Children and young people are entitled to all human rights guaranteed under the ACT-HR Act. Section 10 is in line with article 37(a) of the Convention which provides: 'No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.'⁶² The ACT-HR Act also provides explicitly in section 11(2) that 'every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind'.⁶³

In February 2019, Queensland became the third jurisdiction in Australia to enact rights legislation. The Queensland Human Rights Act 2019 is similar to that of Victoria and the ACT with one exception – the Qld-HR Act provides an accessible complaints mechanism for alleged breaches by a public body.⁶⁴

⁶¹ John Hinchey, 'Submissions to the Standing Committee on Justice and Community Safety, Inquiry into Domestic and Family Violence – Policy approaches and responses' (6 October 2017, ACT Human Rights Commission) 7 <<https://hrc.act.gov.au/wp-content/uploads/2015/04/HRC-Submission-DFV-Inquiry-October-2017-1.pdf>> accessed 13 May 2020.

⁶² United Nations Convention on the Rights of the Child 1989.

⁶³ Helen Watchers and Jodie Griffiths-Cook, 'Australia's progress in implementing the United Nations Convention on the Rights of the Child' (1 June 2018, ACT Human Rights Commission) <https://humanrights.gov.au/sites/default/files/2020-02/97._dr_helen_watchers_oam_jodie-griffiths_cook_human_rights_commission_act_.pdf> accessed 17 August 2020.

⁶⁴ Louis Schetzer, 'Queensland's *Human Rights Act*: Perhaps Not Such a Great Step Forward?' (2020) 45(1) *Alternative Law Journal* 12,12.

The Qld-HR Act provides, in the main, for the protection of civil and political rights enshrined in the ICCPR.⁶⁵ These include equality before the law (s 15), protection from torture and cruel, inhuman, or degrading treatment (s 17), freedom of thought, conscience, religion and belief (s 20), and the protection of families and children (s 26). Section 13 provides for the limitation of human rights in the Act, and section 48 is the interpretation clause.

Resembling the ACT-HR Act and the Victoria Charter, the Qld-HR Act is based on the dialogue model, which does not focus on enforcement by the courts but rather on preserving parliamentary sovereignty.⁶⁶ Under these rights Acts it is unlawful for a public entity to act or take a decision that is not compatible with human rights; or to take a decision not to give proper consideration to a relevant human right.⁶⁷ While these actions create a ground for unlawfulness, the Act makes no provision for a stand-alone cause of action. Litigants may therefore not complain directly to the court but must do so during a hearing based on some other law. The Acts, therefore, create a 'piggy-back' clause. 'In practical terms, this means that where individuals have an independent cause of action against a public entity (eg, the right to seek judicial review of a decision by a public entity), a claim of unlawfulness under the Bill can be added to that existing claim.'⁶⁸ The piggy-back provision is a theoretical concept aimed at limiting litigation. Consequently, there are no practical examples in case law.

⁶⁵ Louis Schetzer, 'Queensland's *Human Rights Act*: Perhaps Not Such a Great Step Forward?' (2020) 45(1) *Alternative Law Journal* 12,12.

⁶⁶ Louis Schetzer, 'Queensland's *Human Rights Act*: Perhaps Not Such a Great Step Forward?' (2020) 45(1) *Alternative Law Journal* 12,12.

⁶⁷ Louis Schetzer, 'Queensland's *Human Rights Act*: Perhaps Not Such a Great Step Forward?' (2020) 45(1) *Alternative Law Journal* 12,13.

⁶⁸ Queensland Government, 'Human Rights Bill 2018: Explanatory Notes' 7 <<https://www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-2018-076>> accessed 22 October 2020.

The Victoria Charter was criticised by the Law Institute of Victoria, which stated that the piggy-back clause would cause significant resources to be expended.⁶⁹ The Victoria Bar Council criticised the piggy-back clause as a barrier to accessible, just and timely remedies for infringements of fundamental human rights.⁷⁰ Both organisations argued for a stand-alone cause of action.⁷¹ This argument is supported by the author of this thesis in that a stand-alone cause of action is less onerous than the piggy-back requirement and will lead to better outcomes for children in cases of human rights violations. Fortunately, the ACT-HR Act provides for a stand-alone cause of action in the ACT Supreme Court under section 40C(2), and allows a person to start proceedings against a public authority in respect of any human rights violation or to rely on their rights in any other legal proceedings.⁷²

Unfortunately, the prospect of abolishing corporal punishment in these states, from a human rights point of view, is disappointing. Because of the piggy-back model that preserves parliamentary sovereignty, questionable law, such as section 280 of the Criminal Code 1899 (Qld), cannot be struck down by the Supreme Court for incompatibility with sections 15 (equality before the law), 17 (protection from torture and cruel, inhuman, or degrading treatment), and 26 (protection of families and children) of the Qld-HR Act.

However, all three acts have an interpretative provision such as section 48 of the Qld-HR Act, section 32 of the of the Victoria Charter and section 30 of the ACT-HR Act, which states that: “All statutory provisions must, to the extent possible that is

⁶⁹ Law Institute of Victoria, Submission No 54 to 2015 Review of the Charter of Human Rights 19 < <https://www.liv.asn.au/getattachment/f069f70d-366b-4b3a-933f-ab9064aed587/2015-Review-of-the-Charter-of-Human-Rights-and-Res.aspx>> accessed 27 August 2020.

⁷⁰ Louis Schetzer, ‘Queensland’s *Human Rights Act*: Perhaps Not Such a Great Step Forward?’ (2020) 45(1) *Alternative Law Journal* 12,13.

⁷¹ Louis Schetzer, ‘Queensland’s *Human Rights Act*: Perhaps Not Such a Great Step Forward?’ (2020) 45(1) *Alternative Law Journal* 12,13.

⁷² Louis Schetzer, ‘Queensland’s *Human Rights Act*: Perhaps Not Such a Great Step Forward?’ (2020) 45(1) *Alternative Law Journal* 12,13.

consistent with their purpose, be interpreted in a way that is compatible with human rights". There is some variation in the wording in the provisions of the other two states, but essentially, these provisions operate in much the same way. Section 36 of the Victoria Charter confers on the Victorian Superior Courts the power to declare that legislation is inconsistent with human rights.⁷³ Similarly, litigants can apply for a declaration of incompatibility in terms of section 53 of the Qld HR-Act. However, the effect of this declaration is negligible. Section 54 states that the declaration does not in any way affect the validity of the provision for which the declaration was made and also does not create in any person a legal right to a civil cause of action. Furthermore, Chen⁷⁴ opines that since the commencement of operation of the Victoria Charter, there has only been one declaration made and then subsequently set aside on appeal and that was the matter of *Momcilovic v The Queen*.⁷⁵ Even though Victoria, the ACT, and Queensland have promulgated rights legislation, the defence of reasonable chastisement remains available to parents or persons *in loco parentis* charged with common assault.

The three states were lauded for introducing rights legislation to protect the human rights of their residents. However, on closer inspection these rights Acts fall short when it comes to the complaints process and access to effective remedies for human rights violations.⁷⁶ Article 2(3) of the ICCPR provides that access to effective dispute resolution mechanisms is an essential component of an effective regime that endeavours to protect the human rights of its people.⁷⁷

⁷³ Bruce Chen, 'The *Human Rights Act 2019* (Qld): Some Perspectives from Victoria' (2020) 45(1) *Alternative Law Journal* 4, 6.

⁷⁴ Bruce Chen, 'The Quiet Demise of Declarations of Inconsistency under the Victorian Charter' (2021) 44 *Melb U L Rev* 928, 929.

⁷⁵ (2011) 245 *CLR* 1.

⁷⁶ Bruce Chen, 'The *Human Rights Act 2019* (Qld): Some Perspectives from Victoria' (2020) 45(1) *Alternative Law Journal* 4,10. See also Louis Schetzer, 'Queensland's *Human Rights Act*: Perhaps Not Such a Great Step Forward?' (2020) 45(1) *Alternative Law Journal* 12,16.

⁷⁷ Louis Schetzer, 'Queensland's *Human Rights Act*: Perhaps Not Such a Great Step Forward?' (2020) 45(1) *Alternative Law Journal* 12,12.

The absence of a stand-alone cause of action is a retrogressive step for children's rights in Victoria and Queensland. Moreover, as corporal punishment violates the right to equal protection under the law and the right to protection from torture and cruel, inhuman, or degrading treatment, it appears that children are doomed to be discriminated against without any recourse or remedy. It emerges, therefore, that the rights espoused by these Charters ring particularly hollow for children and do not bode well for a children's rights approach in Australia.

3.4 The Commonwealth of Australia

As there appears to be little recourse through extant human rights legislation, the current criminal law framework which provides for the defence of reasonable chastisement must be explored. Because Australia is a federation of states, the only strategy which remains for most states to achieve full prohibition of corporal punishment, is to repeal criminal legislation that permits the defence of reasonable chastisement. Criminal laws aim to adjudicate and punish perceived breaches of laws which embody critical community norms and values. Because of the severity of the punishment for guilty findings, which can include a custodial sentence, the standard of proof is very high. For a criminal charge to be upheld all the elements of the offence must be proved beyond a reasonable doubt.⁷⁸

Where a parent punishes a child to an extent that causes physical harm, the parent may be liable to be charged with assault under state criminal laws. Any physical intervention may amount to a criminal assault.⁷⁹ Although the law

⁷⁸ Renata Alexander, Bronwyn Naylor and Bernadette J Saunders, *Lawful Correction or Child Abuse: Clarifying the Boundaries, Sanctions and Decision-making Surrounding the Physical Discipline of Children* (Report to the Legal Services Board Victoria, Melbourne 2011) 10.

⁷⁹ Renata Alexander, Bronwyn Naylor and Bernadette J Saunders, *Lawful Correction or Child Abuse: Clarifying the Boundaries, Sanctions and Decision-making Surrounding the*

recognises various defences to a charge of assault,⁸⁰ the only general defence considered in this thesis is the defence of reasonable chastisement available to parents or persons *in loco parentis*.⁸¹

The Commonwealth of Australia has no single set of criminal laws.⁸² The criminal laws of each state or territory and of the Commonwealth operate in parallel.⁸³ The Australian federal government has no specific power under the Australian Constitution to make national criminal laws.⁸⁴ Under the Australian federal system, the Commonwealth can only make laws in relation to those powers conferred under sections 51 and 52 of the Commonwealth of Australia Constitution Act (the Australia Constitution).⁸⁵ Therefore, any criminal law made by the Commonwealth must be justified under a specific power in the Constitution, for example, powers related to external affairs or trade and commerce.⁸⁶ Under each state's Constitution, the state parliament can pass laws on a broader range of subjects than the Commonwealth parliament.⁸⁷ For this reason, an important area such as criminal law is regulated primarily by state laws rather than by Commonwealth laws.⁸⁸

Physical Discipline of Children (Report to the Legal Services Board Victoria, Melbourne 2011) 10.

⁸⁰ Other defences include, but are not limited to, self-defence, accident, and duress.

⁸¹ Renata Alexander, Bronwyn Naylor and Bernadette J Saunders, *Lawful Correction or Child Abuse: Clarifying the Boundaries, Sanctions and Decision-making Surrounding the Physical Discipline of Children* (Report to the Legal Services Board Victoria, Melbourne 2011) 10.

⁸² Penny Crofts, *Criminal Law Elements* (6th edn LexisNexis Butterworths, 2018) 1.

⁸³ Penny Crofts, *Criminal Law Elements* (6th edn LexisNexis Butterworths, 2018) 1.

⁸⁴ Penny Crofts, *Criminal Law Elements* (6th edn LexisNexis Butterworths, 2018) 1.

⁸⁵ Section 51: Legislative powers of the Parliament

The Parliament shall, subject to this Constitution, have power to make laws for the (xxix) external affairs.

⁸⁶ Penny Crofts, *Criminal Law Elements* (6th edn LexisNexis Butterworths, 2018) 1.

⁸⁷ *Overview of The Constitution as in force on 1 July 1999* (Office of Legislative Drafting, Attorney-General's Department, 1999) 6.

⁸⁸ *Overview of The Constitution as in force on 1 July 1999* (Office of Legislative Drafting, Attorney-General's Department, 1999) 6.

The Commonwealth has the power to intervene to bring about state-based reform in criminal law under the external affairs power, as is clear from the 1994 case of *Toonen v Australia* in which a state law was found to be in breach of the ICCPR.⁸⁹ Tasmanian criminal law had criminalised a range of sexual activities between adult men and hetero- and homosexual anal sex. Nicholas Toonen, a gay man, complained to the United Nations Human Rights Committee, which found the Commonwealth in breach of its international obligations under the ICCPR.⁹⁰ As a result, the Commonwealth government passed the Human Rights (Sexual Conduct) Act 1994 (Cth), overriding the Tasmanian Criminal Code,⁹¹ and specifically sections 122 and 123, which prohibited both 'unnatural' intercourse and indecent practices between males.⁹²

To codify general principles of criminal responsibility to be applied when interpreting criminal law, the Criminal Code Act 1995 (Cth) was enacted.⁹³ This Act substantially adopted the recommendations⁹⁴ of the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General.⁹⁵ The hope was that this legislation would be adopted in all states and territories in Australia and so establish a national Criminal Code. However, the general feeling is that it is unlikely that the states will implement the Model Criminal Code.⁹⁶ Moreover, as the Commonwealth has limited power to make criminal law, this responsibility has fallen, in the main, on the state legislatures. Fortunately, parts of the Code have

⁸⁹ [1994] PrivLawPRpr 33; (1994) 1(3) Privacy Law & Policy Reporter 50.

⁹⁰ UN Doc CCPR/C/50/D/488/1992, April 4, 1994.

⁹¹ Penny Crofts, *Criminal Law Elements* (6th edn LexisNexis Butterworths, 2018) 1.

⁹² University of Minnesota, Human Rights Library, 'Toonen v Australia' <<http://hrlibrary.umn.edu/undocs/html/vws488.htm>> accessed 22 October 2020.

⁹³ Penny Crofts, *Criminal Law Elements* (6th edn LexisNexis Butterworths, 2018) 2.

⁹⁴ NSW Government, Standing Committee of Attorneys-General, Report Model Criminal Code, Chapter 5, 'Non-Fatal Offences Against the Person' <https://webarchive.nla.gov.au/awa/20100519122115/http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/pages/scag_chapter5> accessed 14 May 2021.

⁹⁵ Australian Government, Attorney-General's Department, 'Model Criminal Law Officers Committee Reports' <<https://www.ag.gov.au/crime/publications/model-criminal-law-officers-committee-reports>> accessed 22 October 2020.

⁹⁶ Penny Crofts, *Criminal Law Elements* (6th edn LexisNexis Butterworths, 2018) 2.

been adopted in the ACT Crimes Act 1900 (ACT) and the Northern Territory in Part IIAA of its Criminal Code 1983 (NT).⁹⁷ As time passes, the Criminal Code may play a more significant role than a mere interpretation tool.⁹⁸ Certain Australian scholars have expressed the hope that the Commonwealth Criminal Code may at some point in the future play a foundational role in establishing a uniform Australian Criminal Law.⁹⁹

The implication of not having a uniform criminal law in Australia is that each Australian jurisdiction must legislate independently to ban corporal punishment. Alternatively, the federal government will have to legislate with overriding force under section 109 of the Constitution,¹⁰⁰ based on the external affairs power in section 51(xxix), to implement international human rights conventions which call for the abolition of corporal punishment.¹⁰¹ Any state or territory law inconsistent with the Commonwealth legislation will be deemed invalid to the extent of the inconsistency.

Australian states and territories consist of common-law and code states.¹⁰² The common-law states in Australia are New South Wales (NSW), Victoria (Vic), and South Australia (SA). In the common-law states, the common law is used by way of legal precedent based on case law developed by English courts and integrated with Australian law on the establishment of the colonies.¹⁰³ In the code states, legislation has been enacted to replace the common law, thereby codifying the

⁹⁷ Penny Crofts and others, *Waller & Williams Criminal Law: Text and Cases* (13th edn LexisNexis Butterworths, 2016) 31.

⁹⁸ Penny Crofts and others, *Waller & Williams Criminal Law: Text and Cases* (13th edn LexisNexis Butterworths, 2016) 30.

⁹⁹ Penny Crofts and others, *Waller & Williams Criminal Law: Text and Cases* (13th edn LexisNexis Butterworths, 2016) 31.

¹⁰⁰ Section 109 states: Inconsistency of Laws – When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

¹⁰¹ Jo Lennan and George Williams, 'The Death Penalty in Australian Law' (2012) 34 *Sydney Law Review* 659.

¹⁰² See Table 3.1 below for the categories of the states and territories.

¹⁰³ Penny Crofts, *Criminal Law Elements* (6th edn LexisNexis Butterworths, 2018) 2.

common law in a legal document.¹⁰⁴ In addition, as discussed above, three states have managed to introduce and pass human rights legislation: Victoria with the Charter of Human Rights and Responsibilities Act 2006 (Vic); the Australian Capital Territory (ACT) with the Human Rights Act 2004; and Queensland with the Human Rights Act 2019 (Qld).

¹⁰⁴ Penny Crofts, *Criminal Law Elements* (6th edn LexisNexis Butterworths, 2018) 3.

Table 3.1: Categories of Australian Jurisdictions

States	Common Law State	Code State/ Territory	Human Rights Legislation
New South Wales	YES		
Victoria	YES		YES
South Australia	YES		
Queensland		YES	YES
Tasmania		YES	
Australian Capital Territory		YES	YES
Northern Territory		YES	
Western Australia		YES	

3.5 Common law States

The common-law states in Australia are not pure common-law states. However, they are referred to as such because they still use the common law as a source and many of their legislated criminal laws reflect the common law. Furthermore, many criminal defences have their origins in the common law and fundamental

elements of criminal law are drawn from the common law.¹⁰⁵ In each of the common-law states, serious offences have been combined in a single statute.¹⁰⁶

The origins of the defence of reasonable chastisement can be traced back to the eighteenth century when Blackstone wrote in *The Commentaries on the Laws of England* that: '[A parent] may lawfully correct his child, being under age, in a reasonable manner, for this is for the benefit of his education.'¹⁰⁷

Australian criminal law inherited the defence of reasonable chastisement to a charge of common assault from English common law.¹⁰⁸ The leading authority on the defence is the 1860 case of *R v Hopley*.¹⁰⁹ In this case, the defendant, a schoolmaster, was entrusted with the care of a 13-year-old boy. The schoolmaster experienced the boy as 'obstinate' and wrote his father asking how he suggested the schoolmaster should discipline the child. The father indicated that he did not wish to interfere with the schoolmaster's plan.

On the night of 21 April between 22:00 and 00:30, the defendant was heard beating the boy for some two hours with a thick stick and skipping rope.¹¹⁰ After midnight he was heard dragging or pushing the boy to his bedroom where the schoolmaster again beat him until approximately 00:30. Early the following day, at about 7:00, the boy was found dead. An examination of the boy's body showed extensive bruising and evidence of profuse bleeding caused by excessive and

¹⁰⁵ Penny Crofts, *Criminal Law Elements* (6th edn LexisNexis Butterworths, 2018) 3.

¹⁰⁶ In NSW serious crimes are contained in the Crimes Act 1900 (NSW), in Victoria in the Crimes Act 1958 (Vic), and in South Australia in the Criminal Law Consolidation Act 1935 (SA).

¹⁰⁷ William Blackstone, *The Commentaries on the Laws of England* vol 1 (Philadelphia: JB Lippincott Co, 1893) 284 <http://files.libertyfund.org/files/2140/Blackstone_1387-01_EBk_v6.0.pdf> accessed 29 March 2021.

¹⁰⁸ Renata Alexander, Bronwyn Naylor and Bernadette J Saunders, *Lawful Correction or Child Abuse: Clarifying the Boundaries, Sanctions and Decision-making Surrounding the Physical Discipline of Children* (Report to the Legal Services Board Victoria, Melbourne 2011) 11.

¹⁰⁹ [1860] 2 F&F 202, 175 ER 1024.

¹¹⁰ [1860] 2 F&F 202 [203], 175 ER 1024, 1025.

protracted beatings. The cause of death was entered as exhaustion as a result of the beatings.¹¹¹

The court found the defendant guilty of beating the boy, but as the father had authorised the discipline, it remained to be determined whether the beatings were excessive as no parent may authorise excessive punishment.¹¹² Cockburn J made the following remarks on this issue:

[A] parent or a schoolmaster...may for the purpose of correcting what is evil in the child inflict moderate and reasonable corporal punishment, always, however with this condition, that it is moderate and reasonable. If it be administered for the gratification of passion or of rage, or if it be immoderate and excessive in its nature or degree, or if it be protracted beyond the child's powers of endurance, or with an instrument unfitted for the purpose and calculated to produce danger to the life or limb; in all such cases the punishment is excessive, the violence is unlawful, and if evil consequences to life or limb ensue, then the person inflicting it is answerable to the law, and if death ensues it will be manslaughter.

The court accepted that the defendant viewed the boy as obstinate, but this did not excuse the severe beatings he administered. However, the personal views of the schoolmaster were irrelevant to the case. The fact that the chastisement was not moderate and reasonable, and that the excessive beatings by the defendant caused the boy's death, compelled the court to find him guilty on a charge of manslaughter.¹¹³

Edward Hyde East defined the common-law offence of assault in 1803 in *A Treatise of the Pleas of the Crown*:

An assault is any attempt or offer with force and violence to do a corporal hurt to another, whether from malice or wantonness, as by striking him, or even by holding up one's fists at him in a threatening or insulting manner, or with such other circumstances as denote at the time an intention, coupled with a present

¹¹¹ [1860] 2 F&F 202 [204], 175 ER 1024, 1025.

¹¹² [1860] 2 F&F 202 [207], 175 ER 1024, 1026.

¹¹³ [1860] 2 F&F 202 [207], 175 ER 1024, 1026.

ability of using actual violence against the person; as by pointing a weapon at him within the reach of it. Where the injury is actually inflicted, it amounts to a battery (which includes an assault) at this, however small it may be; as by spitting in a man's face, or any way touching him in anger without any lawful occasion. But if the occasion were merely accidental or undesigned, or if it were lawful, and the party used no more force than was reasonably necessary to accomplish the purpose, as to defend himself against a prior assault, or to arrest the other, or make him desist from some wrongful act or endeavour, or the like; it is no assault or battery in the law and the party may justify the force;¹¹⁴

3.5.1 New South Wales (NSW)

In NSW, *R v Hopley* is the English common-law authority on the defence of reasonable chastisement – known in NSW as *lawful correction* – to a charge of common assault. The penalty for common assault is set out in section 61 of the Crimes Act 1900 which states: ‘Whosoever assaults any person, although not occasioning actual bodily harm, shall be liable to imprisonment for two years.’ At common law, the defence of reasonable chastisement is available to all parents or legal guardians who are facing charges of common assault. In 2002, section 61AA was inserted in the Crimes Act 1900 (NSW) to codify the common law and limit the application of the defence of lawful correction. Subsections 61AA(1)(a) and (b) and subsection (2) introduced certain limitations on the application of the common-law defence of lawful correction.

61AA DEFENCE OF LAWFUL CORRECTION

- (1) In criminal proceedings brought against a person arising out of the application of physical force to a child, it is a defence that the force was applied for the purpose of the punishment of the child, but only if--
 - (a) the physical force was applied by the parent of the child or by a person acting for a parent of the child, and
 - (b) the application of that physical force was reasonable having regard to the age, health, maturity or other characteristics of

¹¹⁴ Vol 1, 406.

the child, the nature of the alleged misbehaviour or other circumstances.

- (2) The application of physical force, unless that force could reasonably be considered trivial or negligible in all the circumstances, is not reasonable if the force is applied--
- (a) to any part of the head or neck of the child, or
 - (b) to any other part of the body of the child in such a way as to be likely to cause harm to the child that lasts for more than a short period.

This section limits the application of the defence of lawful correction to

- a child;
- for purposes of punishment; and
- administered by a parent or legal guardian.

During debate on the suitability of the legislation, the Attorney-General remarked that the provision seeks 'to ensure that children are protected from unreasonable punishment, without limiting the ability of parents to discipline their children in the appropriate manner...'¹¹⁵ The government's view was that 'children should not be immune from ordinary parental discipline when the situation requires it.'¹¹⁶ Furthermore, the view was expressed that 'sensible parents' should have a valid defence, but that child abusers should not.¹¹⁷ The implication, it seems, is that 'sensible parents' will not exceed reasonable limits to violence as a means of disciplining their children. The Act defines a child as a person under the age of eighteen years.¹¹⁸ The Act was adopted with support of both government and

¹¹⁵ NSW, *Parliamentary Debates*, Legislative Assembly, 21 June 2001, Bob Debus – Attorney General, 15025 file:///C:/Users/juris/Downloads/HANSARD-1323879322-61516.pdf accessed 11 May 2020.

¹¹⁶ NSW, *Parliamentary Debates*, Legislative Assembly, 28 November 2001, Bob Debus – Attorney General, 19112 file:///C:/Users/juris/Downloads/HANSARD-1323879322-61544.pdf accessed 11 May 2020.

¹¹⁷ NSW, *Parliamentary Debates*, Legislative Assembly, 21 June 2001, Bob Debus – Attorney General, 15026 file:///C:/Users/juris/Downloads/HANSARD-1323879322-61516.pdf accessed 11 May 2020.

¹¹⁸ Section 61AA(6).

opposition, as well as some child protection experts and the medical and legal professions.¹¹⁹

Subsection 1(b) further limits the application of the defence based on the other personal attributes (in addition to age, health and maturity) of the child to whom the physical force was applied. The NSW Attorney-General opined during the parliamentary debates that: '[d]etermining what is reasonable in all the circumstances requires consideration of various factors, such as the nature of the child's misbehaviour, the type of force used and the child's age and maturity.'¹²⁰ Section 2(a) prohibits force from being applied to any part of the child's head or neck, and 2(b) to any part of the body where the physical harm could last for more than a short period.¹²¹

Corporal punishment is lawful in the home if administered by parents or persons *in loco parentis*. However, corporal punishment is prohibited in residential and foster care, child-care, and state and independent schools. Corporal punishment is also not permitted as a disciplinary measure in penal institutions.¹²²

Section 61AA(8) required the Attorney-General to review section 61AA after a set time. This review was concluded in 2010. The Attorney-General recommended that the status quo be maintained under the current NSW laws.¹²³ However, two

¹¹⁹ Tasmania Law Reform Institute, *Physical Punishment of Children* (Final Report No 4, 2003) 16.

¹²⁰ NSW, *Parliamentary Debates*, Legislative Assembly, 21 June 2001, Bob Debus – Attorney-General, 15025 <file:///C:/Users/juris/Downloads/HANSARD-1323879322-61516.pdf> accessed 11 May 2020.

¹²¹ See s 3.7 below for a discussion on what is considered reasonable/unreasonable.

¹²² Global Initiative to End All Corporal Punishment of Children, 'Corporal Punishment of Children in Australia' (July 2020) <<http://www.endcorporalpunishment.org/wp-content/uploads/country-reports/Australia.docx>> accessed 23 November 2020.

¹²³ Statutory Review Section 61AA Crimes Act 1900 (NSW) Lawful Correction (Department of Justice and Attorney General, 25 February 2010) 16 <<https://www.justice.nsw.gov.au/justicepolicy/Documents/Statutory%20Review.pdf>> accessed 18 September 2020.

submissions were made opposing the retention of section 61AA.¹²⁴ The Human Rights and Equal Opportunity Commission (HREOC) (now the Australian Human Rights Commission) and the National Children’s and Youth Law Centre (now Youth Law Australia), expressed concern over the provisions of this section.¹²⁵ They argued that the provisions in section 61AA fail to meet the requirements set out in article 19 of the Convention and, therefore, place Australia in breach of its international obligations.¹²⁶ The HREOC believed that article 19 does not leave room for any legalised violence and that the reference to ‘appropriate’ discipline should be interpreted to include only non-violent disciplinary methods and exclude all physical and mental harm.¹²⁷

Furthermore, the National Children’s and Youth Law Centre expressed its concern that this section discriminates against children on the basis of their age in that it affords adults greater protection than children under eighteen.¹²⁸ Moreover, they argued that corporal punishment leads to adverse outcomes and that this section

¹²⁴ Statutory Review Section 61AA Crimes Act 1900 (NSW) Lawful Correction (Department of Justice and Attorney General, 25 February 2010) 13 <<https://www.justice.nsw.gov.au/justicepolicy/Documents/Statutory%20Review.pdf>> accessed 18 September 2020.

¹²⁵ Statutory Review Section 61AA Crimes Act 1900 (NSW) Lawful Correction (Department of Justice and Attorney General, 25 February 2010) 14 <<https://www.justice.nsw.gov.au/justicepolicy/Documents/Statutory%20Review.pdf>> accessed 18 September 2020.

¹²⁶ Statutory Review Section 61AA Crimes Act 1900 (NSW) Lawful Correction (Department of Justice and Attorney General, 25 February 2010) 14 <<https://www.justice.nsw.gov.au/justicepolicy/Documents/Statutory%20Review.pdf>> accessed 18 September 2020.

¹²⁷ Statutory Review Section 61AA Crimes Act 1900 (NSW) Lawful Correction (Department of Justice and Attorney General, 25 February 2010) 14 <<https://www.justice.nsw.gov.au/justicepolicy/Documents/Statutory%20Review.pdf>> accessed 18 September 2020.

¹²⁸ Statutory Review Section 61AA Crimes Act 1900 (NSW) Lawful Correction (Department of Justice and Attorney General, 25 February 2010) 14 <<https://www.justice.nsw.gov.au/justicepolicy/Documents/Statutory%20Review.pdf>> accessed 18 September 2020.

perpetuates this practice. They argued further that the section is open to varying interpretations, which blurs the lines between discipline and abuse.¹²⁹

In 2006, the CRC issued General Comment No 8 on the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment.¹³⁰ The Committee defined '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'.¹³¹ This included hitting (smacking, spanking, slapping, kicking, scratching, pinching, shaking, or throwing the child, pulling hair, boxing ears, and biting) with the hand or with a stick, belt, shoe, wooden spoon, or whip. The view was that corporal punishment is intrinsically degrading and, therefore, incompatible with the Convention. Moreover, other non-physical behaviour that belittles, threatens, scares, ridicules, denigrates, or humiliates the child has also been found to be incompatible with the Convention.¹³²

The CRC stated in paragraph 26 of the General Comment, that when it raised the issue of prohibiting corporal punishment during the examination of state reports, certain states suggested that some level of 'reasonable' or 'moderate' corporal punishment can be justified as being in the best interests of the child.¹³³ The CRC was particularly critical of the type of legislation in section 61AA, which effectively legitimises the assault of children under the guise of legislative reform.¹³⁴ The CRC stated that:

¹²⁹ Statutory Review Section 61AA Crimes Act 1900 (NSW) Lawful Correction (Department of Justice and Attorney General, 25 February 2010) 15 <<https://www.justice.nsw.gov.au/justicepolicy/Documents/Statutory%20Review.pdf>> accessed 18 September 2020.

¹³⁰ UN Doc CRC/C/GC/8.

¹³¹ UN Doc CRC/C/GC/8 para 11.

¹³² UN Doc CRC/C/GC/8 para 11.

¹³³ See, eg, s 61AA of the Crimes Act 1900 (NSW) which regards corporal punishment below the head and neck as reasonable.

¹³⁴ Bernadette J Saunders, 'Ending the Physical Punishment of Children by Parents in the English-speaking World: The Impact of Language, Tradition and Law' (2013) 21 *International Journal of Children's Rights* 278, 294.

In its examination of reports, the Committee has noted that in many States there are explicit legal provisions in criminal and/or civil (family) codes that provide parents and other carers with a defence or justification for using some degree of violence in 'disciplining' children. For example, the defence of 'lawful', 'reasonable' or 'moderate' chastisement or correction has formed part of English common law for centuries, as has a 'right of correction' in French law...The Committee emphasizes that the Convention requires the removal of any provisions (in statute or common – case law) that allow some degree of violence against children ... in their homes/families or in any other setting.¹³⁵

It is unfortunate that the NSW government elected to retain the defence of lawful correction in the criminal law statute given that General Comment No 8 preceded the review by four years. Under international law, Australia is obliged to address the concerns of the CRC in good faith.¹³⁶ In practice, however, the recommendations of the CRC cannot be enforced by any coercive mechanism.¹³⁷ Unfortunately, as can be seen from the discussion above, Australia can and does ignore these recommendations with impunity.

One of the features of the defence of lawful correction that came out in this review, is the limited evidence that the defence is in fact being used. Some argue that the absence of litigated matters is an indication that the defence is meeting its policy objectives.¹³⁸ However, this may also be because these cases are heard in the lower courts where cases are unreported.¹³⁹

¹³⁵ UN Doc CRC/C/GC/8 para 31.

¹³⁶ John Tobin, 'The Development of Children's Rights', in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 32.

¹³⁷ John Tobin, 'The Development of Children's Rights', in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 32.

¹³⁸ Statutory Review Section 61AA Crimes Act 1900 (NSW) Lawful Correction (Department of Justice and Attorney General, 25 February 2010) 15 <<https://www.justice.nsw.gov.au/justicepolicy/Documents/Statutory%20Review.pdf>> accessed 18 September 2020.

¹³⁹ Tasmania Law Reform Institute, *Physical Punishment of Children* (Final Report No 4, 2003) 7.

* For a summary of the legal status of corporal punishment legislation in all settings, see Tables 3.2 and 3.3 below.

3.5.2 Victoria (Vic)

Victoria is the second of the three common-law states in Australia. In Victoria, common assault is a common-law offence¹⁴⁰ for which the penalty can be found in section 31(1)(a) of the Crimes Act 1958 (Vic). The section states: 'A person who assaults or threatens to assault another person with the intent to commit an indictable offence, is guilty of an indictable offence. (Penalty: Level 6 imprisonment (5 years maximum)).' A person can be charged under the Summary Offences Act 1996 or under the common law in Victoria. The common law is generally applied to less serious charges of assault.¹⁴¹

In Australia, the leading authority on the defence of reasonable chastisement to a charge of common assault is the 1955 Victoria case of *R v Terry* where Sholl J stated:

A parent has a lawful right to inflict reasonable and moderate corporal punishment on his or her child for the purpose of correcting the child in wrong behaviour, but there are exceedingly strict limits to that right. In the first place, the punishment must be moderate and reasonable. In the second place, it must have a proper relation to the age, physique and mentality of the child, and in the third place, it must be carried out with a reasonable means or instrument... So also a person duly authorized by a parent may act in his or her place...¹⁴²

Corporal punishment of children in the home is lawful and will generally not be classed as an assault. However, there are strict limits on the rights of parents (or

¹⁴⁰ *R v Patton* (1998) 1 VR 7, 15.

¹⁴¹ Penny Crofts, *Criminal Law Elements* (6th edn LexisNexis Butterworths, 2018) 110.

¹⁴² [1955] VLR 114.

persons *in loco parentis*) to inflict corporal punishment in Victoria. The punishment must:

- i) be moderate and reasonable;
- ii) have a proper relation to the age, physique and mentality of the child;
and
- iii) be carried out with reasonable means or instrument.¹⁴³

Corporal punishment is lawful in residential care and foster care under the common law. However, corporal punishment is prohibited in child-care centres.¹⁴⁴ Furthermore, corporal punishment is prohibited in state and independent schools as well as penal institutions. Express prohibition can be found in section 166 of the Children (Education and Care Services) National Law Act 2010.

It has been argued that the messaging regarding corporal punishment in Victoria is inconsistent because of the different approaches taken by civil, welfare, family, and criminal courts, by government agencies, and in various jurisdictions, confusing parents, professionals, and the general public with regard to corporal punishment.¹⁴⁵ For instance, in matters arising from the FLA, the Federal Magistrates Court or Family Court's decision may lean towards granting access to one parent in preference to the other, or imposing conditions on time spent with the child.¹⁴⁶ However, in criminal matters where a parent is charged with assault,

¹⁴³ *R v Terry* [1955] VLR 114.

¹⁴⁴ See Table 3.3 below.

¹⁴⁵ Renata Alexander, Bronwyn Naylor and Bernadette J Saunders, *Lawful Correction or Child Abuse: Clarifying the Boundaries, Sanctions and Decision-making Surrounding the Physical Discipline of Children* (Report to the Legal Services Board Victoria, Melbourne 2011) 3.

¹⁴⁶ Renata Alexander, Bronwyn Naylor and Bernadette J Saunders, *Lawful Correction or Child Abuse: Clarifying the Boundaries, Sanctions and Decision-making Surrounding the Physical Discipline of Children* (Report to the Legal Services Board Victoria, Melbourne 2011) 9.

the defence of reasonable chastisement can be raised and the parent should be acquitted.¹⁴⁷

Some commentators have noted that community standards change over time regarding what constitutes a justifiable act of physical discipline.¹⁴⁸ Case law in the jurisdiction has provided the community with the primary criteria – such as the child's age, type of implement used, and the seriousness of the injuries. These are the primary indicators of what is to be considered 'reasonable' physical discipline.¹⁴⁹

Furthermore, in family law matters it is observed that courts may not consider the risk or appearance of physical discipline as child abuse if it does not pose an 'unacceptable risk' of harm. If such a risk does exist, the courts are more likely to limit the time the child may spend with that party.¹⁵⁰ Instances where the administration of corporal punishment have been an issue in the Family Court are matters relating to visitation rights and access to children,¹⁵¹ where one parent alleges unreasonable physical chastisement by the other,¹⁵² where there is alcohol

¹⁴⁷ Renata Alexander, Bronwyn Naylor and Bernadette J Saunders, *Lawful Correction or Child Abuse: Clarifying the Boundaries, Sanctions and Decision-making Surrounding the Physical Discipline of Children* (Report to the Legal Services Board Victoria, Melbourne 2011) 9

¹⁴⁸ Renata Alexander, Bronwyn Naylor and Bernadette J Saunders, *Lawful Correction or Child Abuse: Clarifying the Boundaries, Sanctions and Decision-making Surrounding the Physical Discipline of Children* (Report to the Legal Services Board Victoria, Melbourne 2011) 13.

¹⁴⁹ Renata Alexander, Bronwyn Naylor and Bernadette J Saunders, *Lawful Correction or Child Abuse: Clarifying the Boundaries, Sanctions and Decision-making Surrounding the Physical Discipline of Children* (Report to the Legal Services Board Victoria, Melbourne 2011) 13.

¹⁵⁰ Renata Alexander, Bronwyn Naylor and Bernadette J Saunders, *Lawful Correction or Child Abuse: Clarifying the Boundaries, Sanctions and Decision-making Surrounding the Physical Discipline of Children* (Report to the Legal Services Board Victoria, Melbourne 2011) 16.

¹⁵¹ *KML v RAE* [2006] FMCAfam; *Collins and Ricardo* [2012] FamCA 11.

¹⁵² *Johnson v DOCS* [1999] NSWSC 1156; *B and P* [2002] FMCAfam 220.

abuse and violence in the home,¹⁵³ and where the courts are required to issue orders prohibiting physical chastisement.¹⁵⁴

* For a summary of the legal status of corporal punishment legislation in all settings, see Tables 3.2 and 3.3 below.

3.5.3 South Australia (SA)

Together with NSW and Victoria, SA is the third common-law state. The common-law defence of reasonable chastisement has been codified in subsection 20(2) of the Criminal Law Consolidation Act 1935. The relevant provisions of section 20 state that persons are guilty of assault if they intentionally apply direct or indirect force to another person without consent, knowing that the victim might reasonably object to the conduct. However, subsections 20(2)(a) and (b) state:

- (a) conduct that lies within limits of what would be generally accepted in the community as normal incidents of social interaction or community life cannot amount to an assault; and
- (b) conduct that is justified or excused by law cannot amount to an assault.

Corporal punishment is, therefore, lawful in the home in SA.

In recent years SA has seen a few cases coming before the Supreme Court. The court's decisions and their relevance to corporal punishment and the defence of reasonable chastisement, are discussed below.

¹⁵³ *T-P v T* [2001] FMCAfam 120.

¹⁵⁴ *P v P* [2004] FMCAfam 122. In *B and B* [2000] FMCAfam 31 the father struck his son and was reported to police and the Department of Community Services in NSW. However, the matter ended up in the Federal Magistrates Court as a children's case and the Department took no further action.

In 2008 the Supreme Court found on appeal in *Lumb v Police*,¹⁵⁵ that a child-care worker who dropped a four-year-old child from about eighteen inches (approximately 45 cm) was guilty of assault but imposed a fine of only \$250 with no conviction recorded. The appellant claimed to have been acting *in loco parentis* and that she was legally permitted to claim the defence of reasonable chastisement.¹⁵⁶ The magistrate disagreed (and the Supreme Court concurred) and found that a child-care worker does not act *in loco parentis* and that the relationship between the parent and the child-care worker is contractual. Therefore, the defence of reasonable chastisement to a charge of assault is not available to a child-care worker.¹⁵⁷

In 2014, the Supreme Court held, again on appeal, in *W, DL v Police*¹⁵⁸ that a father, W, was guilty of assault under section 20(2)(b) of the Act. W had grabbed his son by the ear, pinned him to the wall, and backhanded his shoulder to get him to clean his room. The boy, D, a 13-year-old, was at the time being difficult and refused to clean the room and called his father some abhorrent names. The magistrate found on the evidence that the prosecution had established beyond reasonable doubt that W's actions were not, in all the circumstances, acts of lawful correction.¹⁵⁹ However, the Supreme Court found that his conduct was at the lowest end of the scale for this type of conduct.¹⁶⁰ The appeal was dismissed.

In 2016, in *Police v G, DM (Police v Gray)*,¹⁶¹ the Supreme Court dealt with a criminal matter involving the appellant, G, who was found to have assaulted M, his 12-year-old son. G had smacked the boy three times on his thigh. M said that his leg had hurt a little for a day, it was not bruised, and the redness lasted for two

¹⁵⁵ [2008] SASC 198.

¹⁵⁶ [2008] SASC 198 [43] and [44].

¹⁵⁷ [2008] SASC 198 [43] and [44].

¹⁵⁸ [2014] SASC 102.

¹⁵⁹ [2014] SASC 102 [48].

¹⁶⁰ [2014] SASC 102 [48].

¹⁶¹ [2016] SASC 39.

days. G appealed against the magistrate's finding.¹⁶² Referring to the decision handed down in *R v Hopley*, the court at [42] and [43] drew a clear distinction between an act done *bona fide* and correction administered 'for the gratification of passion or rage'.¹⁶³ Quoting from a very old New Zealand case, *R v Drake* decided in 1902, the court said:

The point is one on which a jury might very well hesitate as to the extent to which it would interfere with the judgement of a parent. They might be inclined to allow for an honest error of judgement in the case of a parent whom they believe to have really been doing what seemed to be best for the child.¹⁶⁴

The court held that '...it was established on the evidence that the actions of appellant were *bona fide* for the purpose of parental correction and that his conduct was not unreasonable'.¹⁶⁵

As the law stands, it is lawful for a parent or persons *in loco parentis* to smack, hit, slap, or spank a child in the state of South Australia provided the action is moderate and reasonable under the circumstances, and is aimed at correcting misbehaviour. However, corporal punishment is prohibited in child-care centres.¹⁶⁶ Express prohibition of corporal punishment can be found in section 32(1) of the Education and Early Childhood Services Act 2019 (SA). Corporal punishment as a form of discipline is also prohibited in penal institutions, residential care, and private and independent schools.

* For a summary of the legal status of corporal punishment legislation in all settings, see Tables 3.2 and 3.3 below.

¹⁶² [2016] SASC 39 [33].

¹⁶³ (1860) 2 F&F 202; 175 ER 1024.

¹⁶⁴ NZCA [1902] NZGasLawRp 141, (1902) 22 NZLR 478, (1902) 5 GLR 145 [44].

¹⁶⁵ *Police v G, DM (Police v Gray)* [2016] SASC 39 [118].

¹⁶⁶ See Tables 3.2 and 3.3 below.

3.6 Code States

The code states have replaced the common law with criminal codes.¹⁶⁷ An offence must be contained in a Code (legislation) for a criminal offence to be established and/or for a legal defence to apply in the code states.¹⁶⁸ The Codes also have the ability to alter a common-law principle.¹⁶⁹ The code states are the Australian Capital Territory (ACT), the Northern Territory (NT), Queensland (Qld), Tasmania (Tas), and Western Australia (WA). All the criminal offences for these states and territories are collected in their respective Codes.¹⁷⁰ The criminal codes have not completely replaced the common law in the code states. For historical and practical reasons, the Codes reflect aspects of the common law inherited from England and further codify the law.¹⁷¹

3.6.1 Queensland (Qld)

Section 280 of the Queensland Criminal Code Act 1899 provides:

It is lawful for a parent or a person in the place of a parent, or for a schoolteacher or a master, to use, by way of correction, discipline, management or control, towards a child or pupil, under the person's care such force as is reasonable under the circumstances.

Corporal punishment is therefore permitted in the home if administered by a parent or a person *in loco parentis*. In 1992, the Queensland government took a decision to phase out corporal punishment, and in 1995 corporal punishment was abolished

¹⁶⁷ Penny Crofts, *Criminal Law Elements* (6th edn LexisNexis Butterworths, 2018) 3.

¹⁶⁸ Penny Crofts, *Criminal Law Elements* (6th edn LexisNexis Butterworths, 2018) 3.

¹⁶⁹ Such as the concept of *mens rea* – See Penny Crofts, *Criminal Law Elements* (6th edn LexisNexis Butterworths, 2018) 3.

¹⁷⁰ Penny Crofts, *Criminal Law Elements* (6th edn LexisNexis Butterworths, 2018) 3.

¹⁷¹ Penny Crofts, *Criminal Law Elements* (6th edn LexisNexis Butterworths, 2018) 3.

in state schools.¹⁷² While corporal punishment in state schools is not expressly prohibited, it is prohibited at a policy level.¹⁷³ Queensland, together with WA, are now the only states where corporal punishment is not explicitly prohibited in private (independent) schools.¹⁷⁴ The Executive Director of Independent Schools Queensland, which oversees non-state schools, stated that removing corporal punishment from non-state schools was an issue for the Queensland government.¹⁷⁵ However, the Queensland government, in turn, stated that its Department of Education does not have the authority to determine the non-state education sector's policy.¹⁷⁶ Education Minister Grace Grace told parliament in 2019 that the Queensland government had no plans to change the legislation regarding corporal punishment (presumably as regards state schools only).¹⁷⁷

¹⁷² Queensland Government, 'Corporal Punishment' (15 April 2019) <<https://education.qld.gov.au/about-us/history/history-topics>> accessed 18 September 2020.

¹⁷³ Queensland Government, 'Corporal Punishment' (15 April 2019) <<https://education.qld.gov.au/about/history/Pages/corporalPunishment.aspx>> accessed 18 September 2020. An extensive search of the government website could not produce the policy document that contains the decision to abolish corporal punishment in state schools. See also Queensland Government, 'Corporal Punishment' (15 April 2019) <<https://education.qld.gov.au/about-us/history/history-topics>> accessed 18 September 2020.

¹⁷⁴ In 1989 Queensland repealed the provision in the Education (General Provisions) Act 2006 (Qld) that allowed for corporal punishment in state schools.

¹⁷⁵ Tony Moore, 'Former MP 'Smack Queensland for Not Banning Cane from Private Schools'', *Brisbane Times* (29 September 2019) <<https://www.brisbanetimes.com.au/national/queensland/former-mp-smacks-queensland-for-not-banning-cane-from-private-schools-20190927-p52vvgb.html>> accessed 2 October 2020.

¹⁷⁶ Alice Matthews, 'In 2017, corporal punishment is still legal in Qld non-government schools' *Australian Broadcasting Corporation: Triple J Hack* (28 February 2017) <<https://www.abc.net.au/triplej/programs/hack/corporal-punishment-qld/8310160>> accessed 23 October 2020.

¹⁷⁷ Tony Moore, 'Former MP Smack Queensland for Not Banning Cane from Private Schools', *Brisbane Times* (29 September 2019) <<https://www.brisbanetimes.com.au/national/queensland/former-mp-smacks-queensland-for-not-banning-cane-from-private-schools-20190927-p52vvgb.html>> accessed 2 October 2020.

Independent schools are self-managed, setting them apart from government schools owned and managed by the states and territories.¹⁷⁸

The different approaches to government and non-government schools concerning corporal punishment are disappointing and create a measure of ambiguity and uncertainty which parents and carers can do without. Where the Education Act has undergone some changes to remove corporal punishment, the Criminal Code has not and still (in principle) permits the use of corporal punishment. This creates ambiguity and uncertainty. Therefore, the consequences of the use or not of corporal punishment depend on whether the child is enrolled in a public (government) or independent (non-government) school.¹⁷⁹

The Global Initiative to End All Corporal Punishment noted in its Country Report that corporal punishment is 'reportedly prohibited in government schools at policy level, although we have been unable to identify this policy'.¹⁸⁰ Corporal punishment is prohibited as a disciplinary measure in penal institutions and residential care.¹⁸¹

* For a summary of the legal status of corporal punishment legislation in all settings, see Tables 3.2 and 3.3 below.

¹⁷⁸ Independent Schools Australia, 'Autonomy and Accountability' <<https://isa.edu.au/about-independent-schools/about-independent-schools/autonomy-and-accountability/>> accessed 22 October 2020.

¹⁷⁹ Australian Institute of Family Studies <<https://aifs.gov.au/cfca/publications/corporal-punishment-key-issues>> accessed 22 October 2020.

¹⁸⁰ 'Corporal Punishment of Children in Australia' (March 2020, Global Initiative to End all Corporal Punishment of Children) 4 <<https://endcorporalpunishment.org/reports-on-every-state-and-territory/australia/>> accessed 11 May 2020.

¹⁸¹ See Table 3.3 below.

3.6.2 Northern Territory (NT)

Under the NT Criminal Code Act 1983, corporal punishment is lawful in the home, and in residential care, foster care, and child-care facilities. Section 27(p) of the Northern Territory Criminal Code Act 1983 (NT) states that:

27 CIRCUMSTANCES IN WHICH FORCE NOT BEING SUCH FORCE AS IS LIKELY TO CAUSE DEATH OR SERIOUS HARM IS JUSTIFIED

In the circumstances following, the application of force is justified provided it is not unnecessary force and it is not intended and is not such as is likely to cause death or serious harm: (p) in the case of a parent or guardian or a child, a person in the place of a parent or guardian, to discipline, manage or control such child;

Section 11 permits parents and guardians to delegate the power to use corporal punishment to others. Section 11 states:

Section 11: A person who may justifiably apply force to a child for the purposes of discipline, management or control may delegate that power either expressly or by implication to another person who has the custody or control of the child either temporarily or permanently and, where that other person is a schoolteacher of the child, it shall be presumed that the power has been delegated unless it is expressly withheld.

However, this does not include other persons who have regular contact with children, for example, teachers or support staff in schools. Section 162 of the Education Act 2015 prohibits the use of corporal punishment by any member of staff. Furthermore, it prohibits the delegation of this power for the purpose of discipline, management, or control.¹⁸² Sports coaches, drama coaches, and foster carers who have regular contact with children are not considered persons *in loco parentis* and 'therefore, cannot lawfully engage in corporal punishment of a child,

¹⁸² Section 162(3).

unless they have the custody or control of the child and the power has been delegated to them by the parent or guardian'.¹⁸³

* For a summary of the legal status of corporal punishment legislation in all settings, see Tables 3.2 and 3.3 below.

3.6.3 Tasmania (Tas)

In Tasmania, physical punishment of children has been prohibited in schools since 1999 when legislative amendments removed the reference to teachers from section 50 of the Criminal Code and inserted a prohibition clause in the former section 82A of the Education Act 1994 (now s 248(2) of the Education Act 2016).¹⁸⁴ Corporal punishment is also permitted in juvenile detention centres. Policy and licencing guidelines prohibit the use of corporal punishment in foster care and childcare. However, it is lawful in the home 'by way of correction' under section 50 of the Criminal Code.¹⁸⁵ This section reads:

It is lawful for a parent, or person in the place of a parent to use, by way of correction, any force towards a child in his or her care that is reasonable in the circumstances.

As in other states, there are not many cases in which the defence of reasonable chastisement has been used. This is because, primarily, these cases are heard in the lower courts where cases are unreported.¹⁸⁶ A secondary reason is that,

¹⁸³ Northern Territory Law Handbook, (4 September 2018) <<http://ntlawhandbook.org/foswiki/NTLawHbk/WebHome>> accessed 25 April 2020.

¹⁸⁴ Tasmania Law Reform Institute, *Physical Punishment of Children* (Final Report No 4, 2003) 9.

¹⁸⁵ Criminal Code Act 1924 (Tas).

¹⁸⁶ Tasmania Law Reform Institute, *Physical Punishment of Children* (Final Report No 4, 2003) 7.

overwhelmingly, parents are not charged with assaulting their children.¹⁸⁷ The delineation between what constitutes acceptable parenting and excessive use of physical punishment is highly contested and has come to the fore in the two cases of *Bresnehan v R*¹⁸⁸ and *P v Tasmania (No 2)*.¹⁸⁹ In the *Bresnehan*-case, Crawford J stated that he agreed with the trial judge when he said:

To smack a child whenever he is disobedient may not be ill-treatment but to do so three times a day for a year no matter what his behaviour, may well be so. To chastise a child for misdemeanours he has committed may be reasonable correction but to do so whenever one of his siblings misbehaves as well, may be unlawful.¹⁹⁰

The defendant had been accused of ill-treatment and allegedly using a cattle prod and whip to punish three of his children physically and force them to smoke and eat cigars over a period of five years.¹⁹¹ Some of these incidents occurred only once while others repeatedly. The trial judge found the defendant guilty and sentenced him to twelve months' imprisonment.¹⁹² The defendant appealed, and the Supreme Court reduced his sentence to time already served, which amounted to approximately ten weeks. In amending the defendant's sentence, Crawford J noted that he was a first offender and that had acted 'with a genuine belief that his methods were for the ultimate good of the child'.¹⁹³ The Tasmanian Law Reform Institute declared their utter dismay at this verdict, stating their view as follows:

Denunciation of physical punishment can be much stronger if the law prohibits it entirely and this would leave little room for mitigatory weight to be given to a genuine belief that it was for the good of the child. In other words, it is the existence of the defence of reasonable chastisement and its lack of clarity that leaves open the possibility of giving more than negligible mitigatory force to an

¹⁸⁷ Tasmania Law Reform Institute, *Physical Punishment of Children* (Final Report No 4, 2003) 7.

¹⁸⁸ [1992] TASSC 55, 1992 1 Tas R 234.

¹⁸⁹ [2006] TASSC 35.

¹⁹⁰ [1992] TASSC 55, 1992 1 Tas R 234 10.

¹⁹¹ [1992] TASSC 55, 1992 1 Tas R 234 10 [10].

¹⁹² [1992] TASSC 55, 1992 1 Tas R 234 10 [1] and [13].

¹⁹³ [1992] TASSC 55, 1992 1 Tas R 234 [13].

unreasonable but genuine belief in the appropriateness of punishment. The consequence is that the law fails to set effective and appropriate standards of reasonable punishment.¹⁹⁴

In the *Tasmania (No 2)* case, the appellant, the father of six daughters, was found guilty of one count of assault and three counts of ill-treatment of a child between 1968 and 2002 in contravention of section 178 of the Criminal Code Act 1924 (Tas). Subsection 178(1) of the Act provides:

- (1) Any person over the age of 14 years who, having the custody, care, or control of a child under the age of 14 years, wilfully ill-treats, neglects, abandons, or exposes such children, or causes such child to be ill-treated, neglected, abandoned, or exposed in a manner likely to cause such child unnecessary suffering or injury to health, is guilty of a crime. (Since repealed)

The appellant was sentenced to four years' imprisonment. Alexander, Naylor and Saunders highlighted the shortcomings in the court's approach to dealing with the mistreatment of children:

[T]he Supreme Court referred to the idea of the 'norms of a reasonable parent', and the social and historic elements of the notion when confirming a four-year prison term for a man convicted of many years of violence to his daughters. The Court imposed a benchmark of 'appropriate upbringing'. They distinguished behaviour which warranted criminal sanction, and other behaviour which would be merely 'inappropriate upbringing' that was not 'criminal'.¹⁹⁵

The inability of the courts to recognise excessive force and the inadequacy of the sentences handed down in these two cases, add to the confusion and inconsistent

¹⁹⁴ Tasmania Law Reform Institute, *Physical Punishment of Children*, October 2003 13 <https://www.utas.edu.au/__data/assets/pdf_file/0005/283784/PhysPunFinalReport.pdf> accessed 13 May 2020.

¹⁹⁵ Renata Alexander, Bronwyn Naylor and Bernadette J Saunders, *Lawful Correction or Child Abuse: Clarifying the Boundaries, Sanctions and Decision-making Surrounding the Physical Discipline of Children* (Report to the Legal Services Board Victoria, Melbourne 2011) 13.

messaging surrounding corporal punishment and its consequences.¹⁹⁶ Instead of putting the children's interests first, the courts' focus on parental rights underscores the need for law reform. The defence of reasonable chastisement should be abolished as it has placed Australia out of sync with its international obligations as contained in the Convention and consequently sends the wrong message to the community. It creates the impression that minor instances of violence against children are acceptable as they are 'for the ultimate good of the children'.¹⁹⁷ If violence against adults is against the law, then there is no reason why violence against the most vulnerable in our society should be legal.

* For a summary of the legal status of corporal punishment legislation in all settings, see Tables 3.2 and 3.3 below.

3.6.4 Australian Capital Territory (ACT)

The offence of Common Assault is set out in section 26 of the Crimes Act (1900) as follows: 'A person who assaults another person is guilty of an offence punishable, on conviction, by imprisonment for 2 years.'

The defence of 'parental chastisement' was inherited from the English common law, which means that corporal punishment is lawful in the home in the ACT if administered by a parent or a person *in loco parentis*. However, corporal punishment is prohibited in day-care, residential care, and foster care settings. Corporal punishment is prohibited in public and independent schools under the Education Act 2004. In the ACT, corporal punishment in penal institutions is not among the permitted disciplinary measures in the Children and Young People Act 2008. However, it is not explicitly prohibited.

¹⁹⁶ *P v Tasmania (No 2)* [2006] TASSC 35 [49].

¹⁹⁷ *Bresnehan v R* [1992] TASSC 55, 1992 1 Tas R 234 [66].

* For a summary of the legal status of corporal punishment legislation in all settings, see Tables 3.2 and 3.3 below.

3.6.5 Western Australia (WA)

Corporal punishment in the home is lawful in WA under section 257 of the Criminal Code. The Criminal Code provides:

It is lawful for a parent or a person in the place of a parent, or for a schoolmaster, to use, by way of correction, towards a child or pupil under his care, such force as is reasonable under the circumstances.¹⁹⁸

Corporal punishment is lawful in residential care centres and foster care settings under section 257 of the Criminal Code Act.¹⁹⁹ However, corporal punishment in state schools is prohibited under regulation 40 of the School Education Regulations 2000 and the Education and Care Services National Law (WA) Act 2012. Regulation 40(2) provides that: 'A student at a government school is not to be disciplined by way of corporal punishment.' This was extended to private and independent schools in 2015 under section 131A of the School Education Regulations and Chapter 12 of the Guide to the Registrations Standards and Other Requirements for Non-Government Schools 2016. However, WA has not passed legislation to explicitly prohibit corporal punishment in private and independent schools.

¹⁹⁸ Criminal Code Act 1913 (WA).

¹⁹⁹ Global Partnership to End Violence Against Children, 'Corporal Punishment of Children in Australia' (July 2020) <<http://www.endcorporalpunishment.org/wp-content/uploads/country-reports/Australia.docx>> accessed 23 November 2020.

As noted above, the Criminal Code allows teachers to use corporal punishment ‘by way of correction’.²⁰⁰ The Criminal Code Act and the School Education Regulations are in direct opposition to one another. This ambiguity is untenable, and the WA government ought to legislate to abolish corporal punishment in all settings. Explicit prohibition of corporal punishment can be found in section 16 of the Schedule of the Education and Care Services National Law (WA) Act 2012. This statute applies to some but not all education and care service for children under 13 years of age.²⁰¹ Corporal punishment is lawful as a disciplinary measure in penal institutions,²⁰² but is prohibited in child-care and family day-care.²⁰³

It is suggested that section 257 of the Criminal Code Act be repealed which will facilitate the abolition of the defence of reasonable chastisement in WA and bring some legal certainty for parents. The prohibition of corporal punishment will advance children's rights under article 19(1) of the Convention not only in this state but potentially across the whole nation.

3.7 Defining ‘reasonable’ chastisement

As can be seen from the discussion above, reasonable chastisement (lawful correction) is a general defence to a charge of common assault under both the common law and state Codes. There is no clear definition of what is meant by

²⁰⁰ Global Partnership to End Violence Against Children, ‘Corporal Punishment of Children in Australia’ (July 2020) <<https://endcorporalpunishment.org/reports-on-every-state-and-territory/australia/>> accessed 11 August 2020.

²⁰¹ Global Partnership to End Violence Against Children, ‘Corporal Punishment of Children in Australia’ (July 2020) 4 <<http://www.endcorporalpunishment.org/wp-content/uploads/country-reports/Australia.docx>> accessed 23 November 2020.

²⁰² Global Partnership to End Violence Against Children, ‘Corporal Punishment of Children in Australia’ (July 2020) 4 <<http://www.endcorporalpunishment.org/wp-content/uploads/country-reports/Australia.docx>> accessed 23 November 2020.

²⁰³ Global Partnership to End Violence Against Children, ‘Corporal Punishment of Children in Australia’ (July 2020) 3 <<http://www.endcorporalpunishment.org/wp-content/uploads/country-reports/Australia.docx>> accessed 23 November 2020.

'reasonable' chastisement. For this reason, it is necessary to explore and understand the formal requirements for the defence of reasonable chastisement and, therefore, this section focuses on what the defence is understood to mean.

At common law, reference is made to the oft-quoted dictum in *R v Hopley*²⁰⁴ where Cockburn J made the following remarks:

[A] parent or a schoolmaster...may for the purpose of correcting what is evil in the child inflict moderate and reasonable corporal punishment, always, however with this condition, that it is moderate and reasonable. If it be administered for the gratification of passion or of rage, or if it be immoderate and excessive in its nature or degree, or if it be protracted beyond the child's powers of endurance, or with an instrument unfitted for the purpose and calculated to produce danger to the life or limb; in all such cases the punishment is excessive, the violence is unlawful, and if evil consequences to life or limb ensue, then the person inflicting it is answerable to the law, and if death ensues it will be manslaughter.

An analysis of this paragraph reveals that physical punishment should not be administered 'for the gratification of passion and rage'. This implies that it should be administered as calmly as possible, not in anger or at the height of emotion. If corporal punishment is administered in anger, it will be regarded as unreasonable.²⁰⁵ Furthermore, the punishment should fit the crime. Punishment, both as regards the number of strokes administered and the degree of the force used, should be commensurate to the severity of the misbehaviour. If the two are not evenly balanced the punishment will be deemed unreasonable. If the punishment lasts longer than the child can endure, the punishment is unreasonable; or if it is inflicted using an implement not suited to the task it will also be unreasonable.²⁰⁶

²⁰⁴ [1860] 2 F&F 202 [206], 175 ER 1024, 1026.

²⁰⁵ *W, DL v Police* [2014] SASC 102 [41] and [42].

²⁰⁶ *R v Hopley* [1860] 2 F&F 202 [206] 175 ER 1024, 1026.

What stands out is the subjectivity of the approach to the 'reasonable' infliction of corporal punishment. When corporal punishment is to be administered calmly, it begs the question, why not then have a calm and reasonable discussion with the child and explain the misdeed and its consequences? Why the need then to resort to physical punishment? Corporal punishment is by its very nature administered with some level of emotion since it is primarily administered when a parent is angry or upset. The second issue that stands out is the arbitrariness of the punishment. The parent decides the level of force, the number of strokes, and for how long the punishment will continue. This may vary from day to day, depending on the mood of the parent doling out the punishment – there is no consistency.

This arbitrariness makes the punishment unreasonable from the outset. There is no fool-proof, objective way to measure what is 'reasonable' and what is not.

NSW attempted to legislate what is considered 'reasonable' corporal punishment under the guise of the defence of 'lawful correction'. In NSW, section 61AA of the Crimes Act 1900 limits the application of the defence of reasonable chastisement. It provides:

- (1) In criminal proceedings brought against a person arising out of the application of physical force to a child, it is a defence that the force was applied for the purpose of the punishment of the child, but only if—
 - (a) the physical force was applied by the parent of the child or by a person acting for a parent of the child, and
 - (b) the application of that physical force was reasonable having regard to the age, health, maturity or other characteristics of the child, the nature of the alleged misbehaviour or other circumstances.

Analysing section 61AA(1)(a) limits the defence to a parent of the child or a person acting for the parent. As corporal punishment is outlawed in NSW schools, the presumption is that the defence will be limited to parents, step-parents, and family members such as aunts, uncles and grandparents.

Furthermore, section (1)(b) states that personal attributes such as the child's age, the child's health, and the level of maturity of the child should be considered together with any other attributes. It is not clear whether this section implies that very young children and much older children should not be physically punished. Why else would the age of a child matter? If this is the case, this section should clearly state that the defence of reasonable chastisement should be limited to, for example, children between the ages of 2 and 13 years.²⁰⁷

This ties in with the requirement that the level of maturity of the child should be taken into account. Would it be unreasonable to inflict physical punishment on a child who could formulate an argument clearly and coherently, as opposed to one who is not sufficiently mature to understand what they did wrong? Even with these legislative measures to 'try' to limit the defence of lawful correction to 'reasonable' force, it is still a discretionary measure. It will depend on the mood of the parent, the implement (or not) used, the gender of the parent, the age of the child, the gender of the child, the level of mischief for which the child is being punished, and many other variables that give rise to uncertainty. Where there is uncertainty there can be no 'reasonableness'. No law permitting corporal punishment can guarantee 'reasonableness'. For this reason, non-violent, positive parenting is, from a child-rights point of view, the preferred form of discipline.

In *R v Terry*²⁰⁸ the court held that a child who is incapable of understanding should not be punished. Indeed, if a child is mature enough to understand what they did wrong, then it stands to reason that one could discuss the perceived transgressions and consequences with them, which will eliminate the need for physical punishment regardless of the child's age. As stated before, the level of arbitrariness when administering physical punishment leads to inconsistencies,

²⁰⁷ See *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)* [2004] 1 SCR 76 [45]–[46] where the court held that children older than two and not yet thirteen may be subjected to corporal punishment.

²⁰⁸ [1955] VLR 114.

creating uncertainty for the child. The punishment can differ from day to day and from parent to parent. These inconsistencies make corporal punishment 'unreasonable' because there is no objective measure on which the parent or the child can rely.

Subsection (2), further states under what circumstances the infliction of corporal punishment would be regarded as unreasonable: to any part of the child's head or neck or any other part of the body in a way that the punishment (blows or strikes) are likely to cause harm that lasts for more than a short period of time. It is unclear how long a short period of time is. The Act is silent on this. Subsection (3) states that instances where force is considered unreasonable are not limited to those mentioned in subsection (2).

Similar requirements were set in *R v Terry*²⁰⁹ where the court stated that the punishment must:

- (i) be moderate and reasonable;
- (ii) bear a proper relation to the age, physique, and mentality of the child; and
- (iii) be carried out using reasonable means or instrument.

Furthermore, the timing between the misbehaviour and the punishment and the repetition of the punishment is also relevant.²¹⁰

Actions and implements that have been held to be unreasonable are²¹¹:

- a hard blow with a closed fist;²¹²
- aiming a gun at a child to scare the child;²¹³

²⁰⁹ [1955] VLR 114.

²¹⁰ *R v Bresnehan* [1992] TASSC 55, 1992 1 Tas R 234 10.

²¹¹ Tasmania Law Reform Institute, *Physical Punishment of Children* (Final Report No 4, 2003) 8.

²¹² *R v Terry* [1955] VLR 114.

²¹³ *R v Hamilton* [1891] 12 LR (NSW) Sup Ct.

- tying a child to a tree, gagging the child, and driving away;²¹⁴
- throwing a book at a child;
- hitting a child with a cricket stump; and
- hitting a four-year-old with a wooden spoon, leaving bruising visible four days after the incident.²¹⁵

WA, Qld and Tas use the term ‘reasonable’ in their Criminal Codes in the sections relating to the defence of reasonable chastisement. The term ‘reasonable’ is not defined in the Criminal Code. What is deemed reasonable is a question of fact and will have to be determined by the court on a case-by-case basis having regard to community standards.²¹⁶ It has been argued that in making their decision, judicial officers can be guided by their own experiences or knowledge of community standards as well as by precedent.²¹⁷ Sloth-Nielsen points out that the common-law defence had a measure of ‘arbitrariness’ as to what would be considered reasonable in that it would be ‘context and child-victim dependent’.²¹⁸

It has also has been argued that the term is imprecise and does not provide clear guidance as to what is or is not unlawful.²¹⁹ Angela Sdrinis, a Tasmanian lawyer and proponent of the ban on corporal punishment, has opined in the media that: ‘Once you start talking about degree, that is when it becomes subjective and that is when it has the potential to seriously damage children on a long-term basis.’²²⁰ Furthermore, it has been argued that it is a vague term that means different things

²¹⁴ *R v Bedelph* [1981] 4 A Crim R 192.

²¹⁵ *Higgs v Booth* WA (unreported) Supreme Court, A315/316/86, 29 August 1986.

²¹⁶ Renata Alexander, Bronwyn Naylor and Bernadette J Saunders, *Lawful Correction or Child Abuse: Clarifying the Boundaries, Sanctions and Decision-making Surrounding the Physical Discipline of Children* (Report to the Legal Services Board Victoria, Melbourne 2011) 12.

²¹⁷ Tasmania Law Reform Institute, *Physical Punishment of Children* (Final Report No 4, 2003) 7.

²¹⁸ Julia Sloth-Nielsen, ‘Sideswipes and Backhanders: Abolition of the Reasonable Chastisement Defence in South Africa’ (2020) *Int’l Journal of Law, Policy and the Family* 191, 195.

²¹⁹ Tasmania Law Reform Institute, *Physical Punishment of Children* (Final Report No 4, 2003) 7.

²²⁰ Mone Bovill, ‘Tasmania’s Commissioner for Children backs renewed call to overhaul state’s child discipline laws’ (*ABC News*, 12 January 2021) <<https://www.abc.net.au/news/2021-01-12/bid-to-ditch-child-punishment-laws-tasmania/13051680>> accessed 13 January 2021.

to different people depending on the circumstances.²²¹ Some may argue that a light tap on the buttocks is reasonable, while others might regard smacking with a wooden spoon or beating with a leather strap or broom handle acceptable.²²²

Because the law offers no clear guidance on acceptable physical punishment, it may be easier for punishment that begins with reasonable force to escalate into unreasonable physical punishment in the heat of the moment.²²³ It has been commented that: 'As long as the law permits physical punishment of children subject to the proviso of unreasonableness, the law will be obliged to give such genuine beliefs mitigatory weight.'²²⁴ Children need an objective law that does not rely on a subjective assessment of what is or is not reasonable to protect them from all forms of violence, much like section 12(1)(c) of the South African Constitution, which states that everyone has the right to be free from all forms of violence from either public or private sources.²²⁵

Traditionally, the law of torts is concerned with the actions or omissions of the 'reasonable person'. The reasonable person is defined as 'the personification of ideas about justice and fairness in the allocation of risks of harm. In other words, the "mythical" reasonable person embodies a legal standard to which real people are to be held.'²²⁶ In the law of delict and the law of torts, the defence of *discipline* to a claim of *interference with the person (trespass to the person)* is commonly used for children and passengers on aircraft and ships.²²⁷ In disciplining a child, *R*

²²¹ Tasmania Law Reform Institute, *Physical Punishment of Children* (Final Report No 4, 2003) 11.

²²² Tasmania Law Reform Institute, *Physical Punishment of Children* (Final Report No 4, 2003) 11.

²²³ Tasmania Law Reform Institute, *Physical Punishment of Children* (Final Report No 4, 2003) 12.

²²⁴ Tasmania Law Reform Institute, *Physical Punishment of Children* (Final Report No 4, 2003) 13.

²²⁵ Constitution of the Republic of South Africa, 1996.

²²⁶ Francis A Trindale, Peter Cane and Mark Lunney, *The Law of Torts in Australia* (4th edn Oxford University Press, South Melbourne, 2007) 429.

²²⁷ Francis A Trindale, Peter Cane and Mark Lunney, *The Law of Torts in Australia* (4th edn Oxford University Press, 2007) 101.

*v Terry*²²⁸ sets clear boundaries for what is considered reasonable punishment. If the punishment is reasonable and moderate, the parents or persons *in loco parentis* will be able to rely on the defence of discipline.²²⁹ The captain of an aircraft or vessel may use reasonable force to arrest and confine a passenger or crew member if necessary to preserve order or the passengers and crew's safety on board the aircraft or ship (objective test).²³⁰ The captain must also believe that the arrest and confinement are necessary (subjective test). The influence of reasonableness on the defence of discipline is clear, specifically concerning the requirement of using reasonable force.²³¹ The reasonableness of the discipline meted out depends on the circumstances of the case.²³²

Unlike the law of torts, in criminal law the focus is not on what the reasonable parent or reasonable captain would or would not do, but on the form, location on the body, and severity of the punishment. Whether or not the punishment was reasonable must be determined having regard to all external factors, such as the age, physique, health, and maturity of the child.²³³

Instances where civil actions for the tort of trespass to the person have been brought are rare, but there is a very old English case, *Ann Ash v Lady Ash*,²³⁴ where a child successfully brought an action for assault, battery, and false imprisonment against her mother.

²²⁸ [1955] VLR 114.

²²⁹ Francis A Trindale, Peter Cane and Mark Lunney, *The Law of Torts in Australia* (4th edn Oxford University Press, 2007) 100.

²³⁰ Francis A Trindale, Peter Cane and Mark Lunney, *The Law of Torts in Australia* (4th edn, Oxford University Press 2007) 101.

²³¹ Raheel Ahmed, 'The Explicit and Implicit Influence of Reasonableness on the Elements of Delictual Liability' (LLD Thesis, University of South Africa, 2018) 255.

²³² Francis A Trindale, Peter Cane and Mark Lunney, *The Law of Torts in Australia* (4th edn, Oxford University Press, 2007) 100.

²³³ Tasmania Law Reform Institute, *Physical Punishment of Children* (Final Report No 4, 2003) 7–8.

²³⁴ (1696) COMB 357.

3.8 Pressure from the International Community

There have been numerous calls for a change in Australia's laws that allow for corporal punishment.²³⁵ One of the voices is that of the United Nations in its 2011 and 2015 Universal Periodic Review (UPR).²³⁶ The UPR process is a unique process that involves a review of all UN member states' human rights records. The Human Rights Council, a subsidiary body of the UN General Assembly, examined Australia in the first cycle of the UPR in 2011.²³⁷ The following recommendation was made:

Introduce a full prohibition of corporal punishment within the family in all states and territories (Russian Federation)²³⁸

The Australian government rejected this recommendation in the following terms:

While Australia has programs in place to protect children against family violence, and laws against assault, it remains lawful for parents in all States and Territories to use reasonable corporal punishment to discipline their children.²³⁹

In their Concluding Observations in 2012 on its fourth periodic report, the CRC voiced its regret that corporal punishment in various settings remains lawful in Australia under the label of 'reasonable chastisement'.²⁴⁰ In 2015, Estonia and the

²³⁵ Global Partnership to End Violence Against Children, Progress <<https://endcorporalpunishment.org/countdown/>> accessed 24 June 2020.

²³⁶ United Nations Human Rights Council, 'Basic Facts about the UPR', <<https://www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx>> accessed 24 June 2020.

²³⁷ United Nations Human Rights Council, 'Basic Facts about the UPR', <<https://www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx>> accessed 24 June 2020.

²³⁸ United Nations Human Rights Council, Universal Periodic Review – Australia <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/122/90/PDF/G1112290.pdf?OpenElement>> accessed 12 May 2020.

²³⁹ UN Doc A/HRC/17/10/Addendum 1.

²⁴⁰ UN Doc CRC/C/AUS/CO/4 28 August 2012 para 43.

Holy See made specific recommendations during the second cycle of examinations.²⁴¹ They stated:

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 (Estonia);

and

Reinforce the measures to improve conditions of detention, especially for persons with disabilities and the young, as well as to eliminate corporal punishment (Holy See).

The Australian government rejected the recommendation to prohibit corporal punishment in the home.²⁴² This is, as previously stated, probably because of the doctrine of responsible government that is still firmly entrenched in the Australian parliament.²⁴³

In the Concluding Observations on the combined fifth and sixth periodic reports, the CRC urged Australia to expressly prohibit corporal punishment in all settings, develop education campaigns to promote positive forms of discipline, and highlight the adverse effects of corporal punishment.²⁴⁴

In Australia, the best interests principle is entrenched in the Australian FLA.²⁴⁵ The FLA regulates matters relating to marriage and divorce, including parental responsibility for children and financial matters arising out of the breakdown of *de facto* relationships. The FLA provides for the best interests principle to be applied

²⁴¹ United Nations Human Rights Council, Universal Periodic Review – Australia <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/004/89/PDF/G1600489.pdf?OpenElement>> accessed 12 May 2020.

²⁴² UN Doc A/HRC/31/14/Add 1 paras 47 and 48.

²⁴³ George Williams, 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope' (2006) 30 *Melb U L Rev* 880, 881.

²⁴⁴ UN Doc CRC/C/AUS/CO/5-6* para 28.

²⁴⁵ See Pt VII Div 1 Subdiv BA of the Family Law Act 1975 (Cth).

in child protection and the exercise of the welfare power,²⁴⁶ making orders concerning parenting,²⁴⁷ location,²⁴⁸ and recovery.²⁴⁹ Section 60CC sets out the factors to be considered in determining a child's best interests. These include the views and wishes expressed by the child, the child's relationship with their parents and others, and the child's maturity, sex, lifestyle, and background, together with any other facts and circumstances that may be considered relevant.²⁵⁰

The best interests of the child principle was used in the context of sentencing juveniles,²⁵¹ and in 1995 in an immigration matter in *Minister of State for Immigration and Ethnic Affairs v Teoh*.²⁵² This case has been described as: '[T]he only case in which all High Court judges engaged with the Convention and a positive outcome for children was unequivocally connected to the Convention.'²⁵³ Mr Teoh, a Malaysian citizen, applied for and was granted a temporary entry permit into Australia in 1988.²⁵⁴ He subsequently married an Australian and went on to have three children with her. Teoh applied for a permanent entry permit in 1990. While the application was still pending, Teoh was convicted of importing drugs into Australia and sentenced to six years' imprisonment.²⁵⁵ Following his term of imprisonment, Teoh was informed in 1991 that his application for permanent residence had been refused, inter alia, on the basis of his criminal

²⁴⁶ Section 67ZC.

²⁴⁷ Section 60CA.

²⁴⁸ Section 67L.

²⁴⁹ Section 67V.

²⁵⁰ Brenda McGivern, 'Medical Treatment' in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds) *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 499.

²⁵¹ *Director of Public Prosecutions v Ty* (No 3) (2007) 18 VR 241, [2007] VSC 489.

²⁵² [1995] HCA 20, (1995) 128 ALR 353, (1995) 69 ALJR 423, (1995) EOC 92-696 (EXTRACT), (1995) 183 CLR 273.

²⁵³ Meda Couzens, 'The Application of the United Nations Convention on the Rights of the Child by National Courts (PhD thesis, Leiden Law School, 2019) 116.

²⁵⁴ [1995] HCA 20, (1995) 128 ALR 353, (1995) 69 ALJR 423, (1995) EOC 92-696 (EXTRACT), (1995) 183 CLR 273 [8] (McHugh J).

²⁵⁵ [1995] HCA 20, (1995) 128 ALR 353, (1995) 69 ALJR 423, (1995) EOC 92-696 (EXTRACT), (1995) 183 CLR 273 [10] (McHugh J).

record.²⁵⁶ Teoh claimed that were he to be deported, his wife and children would suffer hardship as he would not be able to provide for them. He subsequently applied to the Immigration Review Panel for a review of the decision. The Panel recommended that Teoh not be granted residency and the Minister decided that Teoh should be deported.

Teoh applied to the Federal Court under the Administrative Decisions (Judicial Review) Act 1977 (Cth) for a review. At first instance, his application was dismissed, and he then appealed to the Full Court of the Federal Court.²⁵⁷ It became clear that the break-up of the family was a major concern, particularly the effect that it would have on the children. It was also noted that the Convention, specifically article 3(1), requires that the child's best interests be a primary consideration in all matters affecting children. The Full Court set aside the decision to deport Teoh and ordered that the matter be referred to the Minister for reconsideration.²⁵⁸ The Minister appealed to the High Court where the majority of the High Court of Australia (Mason CJ, Deane, Toohey and Gaudron JJ; McHugh J dissenting) found in favour of Teoh and stated that the government's ratification of the Convention created a *legitimate expectation* that the Commonwealth delegate would make the best interests of children a primary consideration. The appeal of the Minister was dismissed with costs. Underpinning the court's decision to dismiss the appeal in Teoh, is the special status of ratified treaties which give rise to a legitimate expectation:

[R]atification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a convention is a positive statement

²⁵⁶ [1995] HCA 20, (1995) 128 ALR 353, (1995) 69 ALJR 423, (1995) EOC 92-696 (EXTRACT), (1995) 183 CLR 273 [11] (McHugh J).

²⁵⁷ [1995] HCA 20, (1995) 128 ALR 353, (1995) 69 ALJR 423, (1995) EOC 92-696 (EXTRACT), (1995) 183 CLR 273 [10] (Mason CJ and Deane J).

²⁵⁸ [1995] HCA 20, (1995) 128 ALR 353, (1995) 69 ALJR 423, (1995) EOC 92-696 (EXTRACT), (1995) 183 CLR 273 [15] (Mason CJ and Deane J).

by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention and treat the best interests of the child as 'a primary consideration'.²⁵⁹

However, incorporation of the provisions of the Convention into domestic law has been a piecemeal affair²⁶⁰ and, it is argued, using the Convention in legal proceedings in Australia has still not been fully explored.²⁶¹ Twomey has opined that the *Teoh*-case 'is indicative of the uneasy relationship between globalisation and national sovereignty and the competing pressures these place on the development of law within Australia'.²⁶²

To date, sixty-three countries have passed laws to prohibit all forms of physical punishment against children in accordance with the Convention,²⁶³ and still Australia has not yet legislated to prohibit physical punishment in the home and certain other settings in selected states. Law reform in Australia is moving at a glacial pace and many challenges remain – eg, a backlash from parents who see state intervention into their homes as a restriction on parental rights – which

²⁵⁹ [1995] HCA 20, (1995) 128 ALR 353, (1995) 69 ALJR 423, (1995) EOC 92-696 (EXTRACT), (1995) 183 CLR 273 [34] (Mason CJ and Deane J).

²⁶⁰ John Tobin, 'The Development of Children's Rights', in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 26.

²⁶¹ John Tobin, 'The Development of Children's Rights', in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 34. See Meda Couzens, 'The Application of the United Nations Convention on the Rights of the Child by National Courts (PhD thesis, Leiden Law School, 2019) 80 for a comprehensive study of the application of the Convention in Australian courts.

²⁶² Ann Twomey, 'Minister for Immigration and Ethnic Affairs v Teoh' (1995) 23 Fed L Rev 348, 361.

²⁶³ Global Partnership to End Violence Against Children, Progress <<https://endcorporalpunishment.org/countdown/>> accessed 22 October 2021.

prevent the much-needed law reform from being introduced.²⁶⁴ However, this resentment is unfounded as states are obliged to intervene when protecting their residents – including children – from harm.²⁶⁵ Furthermore, parents are misguided if they believe that there is an inherent right to punish children physically in the home.²⁶⁶

3.9 Conclusion

The lives of Australian children are regulated by a significant body of legislation. Corporal punishment is regulated at the state level by approximately thirty separate acts and regulations across all jurisdictions. Nevertheless, there is a distinct lack of legislation to protect the human rights of Australian children. They do not have equal protection under the law in the same way that adults do. Because of their age, it is lawful to assault children provided the action is 'reasonable' and performed to correct misbehaviour. No amount of violence should be 'reasonable'.

Australian scholars observe that decision makers are tasked with reflecting community standards in their decision making. This requires the substantial use of discretion, which has led to the emergence of inconsistency.²⁶⁷ Furthermore, it is

²⁶⁴ Bronwyn Naylor and Bernadette Saunders, 'Whose rights? Children, Parents and Discipline' (2009) 34(2) *Alternative Law Journal* 81, 85.

²⁶⁵ Ian Hassall, 'New Zealand's Landmark Law Change to Prohibit Corporal Punishment of Children' in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments Towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 184.

²⁶⁶ Ian Hassall, 'New Zealand's Landmark Law Change to Prohibit Corporal Punishment of Children' in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments Towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 184.

²⁶⁷ Renata Alexander, Bronwyn Naylor and Bernadette J Saunders, *Lawful Correction or Child Abuse: Clarifying the Boundaries, Sanctions and Decision-making Surrounding the Physical Discipline of Children* (Report to the Legal Services Board Victoria, Melbourne 2011) 21.

argued that it is unclear what the message is that the law conveys to the community concerning the rights and responsibilities of parents and persons *in loco parentis* when administering corporal punishment. At the same time, it is unclear what the law is communicating to individual parents regarding acceptable physical force.²⁶⁸ However, none of these issues is as detrimental as what the law says to the child and the value of his or her human rights when faced with physical violence.

There is no consistency in the law and parents must be aware of the various laws in each state for fear of being prosecuted for an offence that may be legal in another jurisdiction. Law reform is the only way to eliminate inconsistencies. A ban on corporal punishment will bring Australia's laws in line with articles 19 and 37(a) of the Convention and give certainty to parents and persons *in loco parentis*. Furthermore, children will know that they have rights, that they are valued, and that they do not have to live in fear of violence if they misbehave.

State and territory legislation relating to physical punishment is inconsistent and creates uncertainty for parents and persons *in loco parentis*. What might be lawful in one state can be a criminal offence in another. Although Victoria, the Australian Capital Territory, and Queensland have passed rights legislation, corporal punishment remains lawful in these states. This contradiction is immoral; the public need and deserve legislative certainty.

²⁶⁸ Renata Alexander, Bronwyn Naylor and Bernadette J Saunders, *Lawful Correction or Child Abuse: Clarifying the Boundaries, Sanctions and Decision-making Surrounding the Physical Discipline of Children* (Report to the Legal Services Board Victoria, Melbourne 2011) 21.

***Table 3.2: Summary of Legal Status of Corporal Punishment in all settings**

State	PIL possible	Prohibited in the Home	Prohibited in Residential Care	Prohibited in Foster Care	Child Care	Prohibited in Independent Schools	Prohibited in State Schools	Prohibited in Penal Institutions	Prohibited as a sentence for a crime
NSW	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Qld	No	No	Yes	Yes	Yes	Not explicitly prohibited	Policy only	Yes	Yes
NT	Yes	No	No	No	No	Yes	Yes	Yes	Yes
Vic	No	No	No	No	Yes	Yes	Yes	Yes	Yes
Tas	Yes	No	No	Yes	Yes	Yes	Yes	Yes	Yes
ACT	No	No	Yes	Yes	Yes	Yes	Yes	Not explicitly prohibited	Yes
WA	Yes	No	No	No	Yes	Not explicitly prohibited	Yes	Not explicitly prohibited	Yes
SA	Yes	No	Yes	Licencing requirement	Yes	Yes	Yes	Yes	Yes

***Table 3.3: Applicable Legislation/Regulation relating to corporal punishment in specific settings**

State	Setting	Legislation/Regulation
NSW - Common law State	Home	Permitted under common law (<i>R v Hopley</i>), but the application of the defence of <i>reasonable chastisement</i> is limited by section 61AA of the Crimes Act 1900 (NSW)
	Child Care and Family Day Care	Prohibited under section 166 of the Children (Education and Care Services) National Law (NSW)
	State and Independent Schools	Prohibited under subsections 35(2A) and 47(1h) of the Education Act 1990 (NSW)
	Penal Institutions	Prohibited under section 22 of the Children (Detention Centres) Act 1987 (NSW)
Qld – Code State	Home	Permitted under section 280 of the Criminal Code Act 1899 (Qld)
	Public schools Private schools	Prohibited at a policy level – policy yet to be obtained Ambiguity since there is no explicit prohibition

	Foster care, Residential care	<p>Prohibited under subsection 122(2) of the Child Protection Act 1999 (QLD)</p> <p>Prohibited under section 166 of the Education and Care Services National Law (QLD)</p> <p>Prohibited under regulation 16(4) of the Youth and Justice Regulation 2016 (QLD)</p>
	Penal Institutions	Prohibited under Regulation 16(4)(a) of the Youth and Justice Regulation 2015 (Qld)
NT – Code State	Home, Residential Care, Foster Care and Child Care	Permitted under subsection 27(p) of the Criminal Code Act 1983 (NT)
	School	Prohibited under section 162(2) of the Education Act 2015 (NT)
	Detention Centres (Penal Institutions)	Prohibited under section 153(2)(d)(i) of the Youth Justice Act 2005 (NT)
Vic – Common law State	Home	Permitted under common law - <i>R v Hopley</i> and <i>R v Terry</i>
	Residential Care and	

	Foster Care	Permitted under common law
	Child Care	Prohibited under section 106 of the Children's Services Act 1996 (Vic)
	State and Independent Schools	Prohibited under subsection 4.3.1(6)(a) and subsection 2.4.60(1)(f) of the Education and Training Reform Act 2006 (Vic); and Regulation 24 schedule 5 note 7 and schedule 6 note 2 of the Training Reform Regulation 2017; and Schedules 166(1)(a), (2)(a), (3)(a) and (4)(a) of the Education and Care Services National Law Act 2010 (Vic)
	Penal Institutions	Prohibited in under section 487(c) of the Children, Youth and Families Act 2005 (Vic)
Tas – Code State	Home	Permitted under section 50 of the Criminal Code Act 1924 (Tas)
	Foster Care and Child-care	Prohibited by policy and licensing guidelines
	State and Independent Schools	Prohibited under subsection 248(2) of the Education Act 2016 (Tas)

	Penal Institutions	Permitted
ACT – Code State	Home	Permitted under common law - <i>R v Hopley</i>
	Day Care, Residential Care and Foster Care	Prohibited under section 741 of the Children and Young People Act 2008 (ACT)
	State and Independent Schools	Prohibited under subsection 7(4) of the Education Act 2004 (ACT)
	Penal Institutions	Not explicitly prohibited in the Children and Young People Act 2008 (ACT), but also not among permitted disciplinary measures
WA – Code State	Home, Residential Care and Foster Care	Permitted under section 257 of the Criminal Code Act 1913 (WA)
	Child Care	Prohibited under subsection 85(2) of the Child Care Services (Child Care) Regulations 2006 (WA)

	Family Day Care	Prohibited under subsection 166(4)(a) of the Education and Care Services National Law (WA) Act 2012
	State Schools	Prohibited under regulation 40 of the School Education Regulations 2000 (WA)
	Private Schools	Ambiguity since there is no explicit prohibition
	Penal Institutions	Not explicitly prohibited
SA – Common law State	Home	Permitted under common law (<i>R v Hopley</i>). The defence of <i>reasonable chastisement</i> is found in subsection 20(2) of the Criminal Law Consolidation Act 1935
	Child Care	Prohibited under section 32(1) of the Education and Children’s Services Act 2019 (SA)
	Residential Care	Prohibited under section 13(a) of the Family and Community Services Regulations 2009 (SA)
	Penal Institutions	Prohibited under section 29 of the Youth Justice Administration Act 2016 (SA)

	State and Independent Schools	Prohibited under section 83 of the Education and Children's Services Act 2019 (SA)
--	-------------------------------	---

- Corporal Punishment is **prohibited** as a sentence for a crime in all States and Territories.

Chapter 4

The Formal Demise of Corporal Punishment in South Africa

The benefits of a jurisdiction with the most progressive and comprehensive Bill of Rights and the expertise and experience gained by children's rights advocates, legal scholars, and practitioners through a significant number of public interest cases before the Constitutional Court, set South Africa as the benchmark comparator for this study.

4.1 Introduction

On 16 June 1995, the nineteenth anniversary of the 1976 Soweto uprising,¹ South Africa ratified the Convention.² Together with the inclusion of children's rights in the Constitution,³ this signalled that South Africa was ready to cast off the mantle of oppression.⁴ It has even been posited that since the Convention, the ACRWC, and other international instruments have been incorporated into domestic law, South Africa has moved from a dualist to a monist state as far as children's rights

¹ Twenty thousand schoolchildren marched in protest against the government's decision that Afrikaans should be one of the languages of instruction and the use of corporal punishment in schools. See Simangele Gladys Mayisela, 'Corporal Punishment: Cultural-Historical and Socio-Cultural Practices of Teachers in a South African Primary School' (PhD thesis University of Cape Town, 2017) 26.

² Tshepo L Mosikatsana, 'Children's Rights and Family Autonomy in the South African Context: A Comment on Children's Rights Under the Final Constitution' (1998) 3 J Race & L 341, 344.

³ Section 28 of the Constitution of the Republic of South Africa 1996.

⁴ Tshepo L Mosikatsana, 'Children's Rights and Family Autonomy in the South African Context: A Comment on Children's Rights Under the Final Constitution' (1998) 3 J Race & L 341, 344.

are concerned.⁵ The focus shifted to a progressive policy path that established a formidable children's rights framework and produced a plethora of litigation and law reform over the next twenty years.⁶

As happened in the Soweto uprising referred to above, many thousands of children took part in the apartheid struggle.⁷ Black children in particular, were the primary victims of human rights abuses under the previous dispensation.⁸ Therefore, in a country once so bereft of rights for many, it is extraordinary that children's rights have been embraced through constitutionalisation and are now so highly regarded that they occupy the 'highest point in the legal system'.⁹ Moreover, to ensure that the provisions in the Bill of Rights in Chapter Two of the Constitution are legally applied and enforced throughout its nine provinces, South Africa has a dedicated Constitutional Court, further cementing its status as a pioneer in the promotion of human rights in general, and children's rights in particular.¹⁰

This chapter analyses the formal demise of corporal punishment and the common-law defence of reasonable and moderate chastisement in South Africa. It follows the law reform progression from the 1913 case of *R v Janke and Janke*¹¹ which limited corporal punishment to reasonable and moderate chastisement, to the 2019 decision handed down by the Constitutional Court in *FORSA v Minister of Justice and Constitutional Development and Others*,¹² which banned the defence

⁵ Julia Sloth-Nielsen and Helen Kruise, 'A Maturing Manifesto: The Constitutionalisation of Children's Rights in South African Jurisprudence 2007 – 2012' (2013) 21 Intl J Child Rts 646, 671.

⁶ Julia Sloth-Nielsen, 'Children's Rights Jurisprudence in South Africa – A 20 Year Retrospective' (2019) 52 De Jure, 501, 501.

⁷ Ann Skelton, 'Children's Rights' in Jason Brickhill (ed), *Public Interest Litigation in South Africa* (Juta, 2018) 259.

⁸ Tshepo L Mosikatsana, 'Children's Rights and Family Autonomy in the South African Context: A Comment on Children's Rights Under the Final Constitution' (1998) 3 J Race & L 341, 343.

⁹ Julia Sloth-Nielsen, 'Children's Rights Jurisprudence in South Africa – A 20 Year Retrospective' (2019) 52 De Jure, 501, 520.

¹⁰ Sections 166(a) and 167 of the Constitution of the Republic of South Africa 1996.

¹¹ 1913 TPD 382.

¹² [2019] ZACC 34.

of reasonable and moderate chastisement in the home – the last vestige of physical punishment still legally permitted in South Africa at the time.

Table 4.1: Timeline for the Formal Demise of Corporal Punishment in Public and Private Settings

1913	• <i>R v Janke and Janke</i>
1995	• <i>S v Williams</i>
1996	• South African Schools Act 84 of 1996
1997	• Abolition of Corporal Punishment Act 33 of 1997
2000	• <i>Christian Education South Africa v Minister of Education</i>
2017	• <i>YG v S</i>
2019	• <i>FORSA v Minister of Justice and Constitutional Development and Others</i>

However, although corporal punishment is formally dead in the legislature and the courts, the substantive practice of administering corporal punishment is still very much alive, even in schools (public sphere) where it is prohibited under the threat of incarceration on the offence of assault.¹³

¹³ Section 10(2) of the Schools Act 84 of 1996. In early 2021 the Centre for Child Law commenced legal action to challenge the punishment of two teachers, who pleaded guilty of administering corporal punishment. The Centre for Child Law claimed that the punishment handed down from the South African Council for Educators is not sufficient. One teacher had hit a child over the head with a pvc pipe and the other had hit a child on her cheek and head causing a lasting bleed from the ears. The teachers were fined R15 000 of which R5 000 was suspended, their names were removed from the roll of educators,

Mayisela points out in her research that in the 2011 General Household Survey, ninety two per cent (92%) of the child respondents indicated that they had been subjected to corporal punishment at school.¹⁴ Fortunately, this number had dropped to five point seven per cent (5.7%) nationally by 2018,¹⁵ but again rose in 2019 to six point eight per cent (6.8%) of respondents.¹⁶ In 2009 at a teacher's conference that purported to allow principals to discuss their needs with the President and the Ministers of Education, Eastern Cape teachers indicated that they wanted a return to corporal punishment in schools.¹⁷ This begs the question: 'Is the law a constructive tool for social and cultural change?'¹⁸

The practice of administering corporal punishment in the home (private sphere) is another hurdle for South African parents and those *in loco parentis* to clear. In the *FORSA* case¹⁹ the Constitutional Court found in a unanimous judgment that the defence of *reasonable and moderate chastisement* was at odds with sections 10 and 12(1)(c) of the Constitution and consequently no longer an effective defence against a charge of common assault. However, there is no criminal penalty for parents who fail to abide by the court's decision. The South African Human Rights Commission (SAHRC) adopted a strong stance against corporal punishment in the

suspended for ten years. This meant they could still teach provided that they were not found guilty of any other misconduct. Section 27, 'Section 27 takes SACE sanctions on cases of corporal punishment on review' (Media Statement, 13 January 2021) <<https://section27.org.za/2021/01/media-statement-section27-takes-sace-sanctions-on-cases-of-corporal-punishment-on-review/>> accessed 16 February 2021.

¹⁴ Simangele Gladys Mayisela, 'Corporal Punishment: Cultural-Historical and Socio-Cultural Practices of Teachers in a South African Primary School' (PhD thesis University of Cape Town, 2017) 18.

¹⁵ Statistics South Africa, 'General Household Survey 2018' 18 <<http://www.statssa.gov.za/publications/P0318/P03182018.pdf>> accessed 16 February 2021.

¹⁶ Statistics South Africa, 'General Household Survey 2019' 18 <<http://www.statssa.gov.za/publications/P0318/P03182019.pdf>> accessed 16 February 2021.

¹⁷ Simangele Gladys Mayisela, 'Corporal Punishment: Cultural-Historical and Socio-Cultural Practices of Teachers in a South African Primary School' (PhD thesis University of Cape Town, 2017) 20.

¹⁸ Thomas B Stoddard, 'Bleeding Heart: Reflections on Using the Law to make Social Change' (1997) 72 NYU L Rev 967, 970.

¹⁹ *FORSA v Minister of Justice and Constitutional Development* [2019] ZACC 34.

home and stated that the state's failure to pass legislation to protect children from physical punishment by their parents, contravenes international law and the Bill of Rights.²⁰

4.2 Section 28(2) of the Constitution: Best Interests of the Child Principle²¹

The best interests of the child is not a new concept. The principle was considered by South African courts as far back as the late nineteenth century.²² It has been an established principle of South African law since the 1940s when it was mainly relevant in family law and child custody matters.²³ As noted in Chapter 2, the best interests of the child is an international-law principle found in article 3 of the Convention and article 4 of the ACRWC. One has only to read the commentary referred to in this thesis to realise that the literature on this principle is extensive.

In a significant move to elevate the status of children in South Africa, the best interests of the child principle is enshrined in section 28(2) of the Constitution.²⁴ Section 28(2) reads: 'A child's best interests are of paramount importance in every matter concerning the child.'²⁵ Furthermore, section 9 of the Children's Act states that: 'In all matters concerning the care, protection and well-being of a child the standard that the child's best interests are of paramount importance, must be

²⁰ Jacqueline Heaton, 'Parental Responsibilities and Rights' in Trynie Boezaart (ed), *Child Law in South Africa* (2nd edn Juta & Co Ltd, 2017) 79.

²¹ See Chapter 2 para 2.5 for a general discussion on the best interests of the child principle.

²² Lize Mills, 'Failing Children: The Courts' Disregard of the Best Interests of the Child in *Le Roux v Dey*' (2014) SALJ 847, 847.

²³ Ann Skelton, 'South Africa' in Ton Liefaard and Jaap E Doek (eds), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Springer, 2015) 18.

²⁴ Constitution of the Republic of South Africa, 1996.

²⁵ See Ann Skelton, 'Too Much of a Good Thing: Best Interests of the Child in South African Jurisprudence' (2019) 52 *De Jure* 557, 558 for background on the history of the principle in South African jurisprudence.

applied.²⁶ Section 7 of the Act requires the ‘best interests of the child’ standard to be applied when certain relevant factors are considered. The section lists fourteen factors that must be considered when the principle is applied.²⁷

Of the three comparator countries, South Africa has embraced the principle most fully. In South African jurisprudence the principle has shown its versatility as a substantive right, a rule of procedure, and a fundamental principle of legal interpretation.²⁸ The principle has received a phenomenal amount of attention in the courts,²⁹ in legislation,³⁰ and in commentaries³¹ over the last twenty-five years. To understand and appreciate the Constitutional Court’s approach in the *FORSA*³² matter which ultimately found the defence of reasonable chastisement

²⁶ Act 38 of 2005.

²⁷ The fourteen factors are:

- a) the nature of the relationship between the child and parents/caregivers;
- b) the attitude of the parents towards the child;
- c) the capacity of the parents to provide for the needs of the child;
- d) the likely effect on the child of any change in circumstances;
- e) the practical difficulty and expense of the child having contact with the parents;
- f) the need of the child to remain with his/her parents and extended family;
- g) the child’s age, gender, background and other relevant characteristics;
- h) the child’s physical and emotional security and his/her intellectual, emotional, social and cultural development;
- i) any disability the child might have;
- j) any chronic illness from which the child might suffer;
- k) the need for the child to be brought up with a stable family;
- l) the need to protect the child from any physical or psychological harm;
- m) any family violence involving the child or family;
- n) which action or decision would avoid or minimise further legal proceedings in relation to the child.

²⁸ UN Doc CRC/C/GC/14 para 6.

²⁹ Ann Skelton, ‘South Africa’, in Ton Liefaard and Jaap E Doek (eds), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Springer, 2015) 18.

³⁰ Section 28(2) of the Constitution of the Republic of South Africa 1996; s 7 of the Children’s Act 38 of 2005.

³¹ Ann Skelton, ‘Children’s Rights’ in Jason Brickhill (ed), *Public Interest Litigation in South Africa* (Juta, 2018) 264; Julia Sloth-Nielsen and Benyam D Mezmur, ‘2+2=5? Exploring the Domestication of the CRC in South African Jurisprudence (2002-2006)’ (2008) 16 *Int’l J Child Rts* 1, 21; Marius Pieterse, ‘In Loco Parentis: Third Party Parenting Rights in South Africa’ (2000) 11 *Stellenbosch L Rev* 324, 325; Elsje Bonthuys, ‘The Best Interests of Children in the South African Constitution’ (2006) 20 *Int’l JL Pol’y & Fam* 23–43 to name but only a few articles written on this subject.

³² *FORSA v Minister of Justice and Constitutional Development* [2019] ZACC 34.

unconstitutional and therefore banned the use of corporal punishment in the home, it is necessary to understand the best interests of the child principle as articulated in section 28(2) of the Bill of Rights,³³ and how case law has evolved in assisting the Constitutional Court to interpret and apply section 28(2).

It is acknowledged that the Convention played an influential role in the drafting of the Constitution.³⁴ However, the inclusion of article 3(1) in the Constitution, and consequently the Bill of Rights, has not been without criticism. The consequences of constitutionalising the principle have led to two sets of tension. First, between the case-by-case application of the principle and the general principled application of constitutional norms and human rights. And second, between the need to balance the rights and interests of children with the rights and interests of the other family members and society's needs – ie, the common- and indigenous-law's family-centred approach versus the child-centred legal rules in section 28 of the Constitution.³⁵

Article 3(1) of the Convention provides that the child's best interests 'shall be a *primary* consideration',³⁶ while section 28(2) of the Bill of Rights is emphatic in stating that a child's best interests are of *paramount* importance.³⁷ Freeman succinctly explains the difference between 'primary' and 'paramount' importance. He argues that 'the word "paramount" emphasises that the child's best interests are determinative: they determine the course of action to take'.³⁸ The child's best

³³ Constitution of the Republic of South Africa 1996.

³⁴ Ann Skelton, 'Too Much of a Good Thing: Best Interests of the Child in South African Jurisprudence' (2019) 52 De Jure 557, 559.

³⁵ Elsje Bonthuys, 'The Best Interest of Children in the South African Constitution' (2006) International Journal of Law, Policy and the Fam 23, 24.

³⁶ UN Doc CRC/C/GC/14 paras 36–40.

³⁷ Ann Skelton, 'Too Much of a Good Thing: Best Interests of the Child in South African Jurisprudence' (2019) 52 De Jure 557, 558.

³⁸ Michael Freeman, 'Article 3: The Best Interests of the Child' in André Alen and others (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, 2007) 60.

interests are likely the only considerations to be taken into account depending on the values held by the person making the decision.

In contrast, 'primary' means 'first' (from a list of considerations). The child's best interests should be the first consideration. In other words, the child's best interests are accorded greater weight than any other consideration. In its General Comment No 14, the CRC opined that 'primary considerations' mean that the child's best interests 'may not be considered on the same level as all other considerations'.³⁹

In *De Reuck v DPP, Witwatersrand Local Division (De Reuck)*,⁴⁰ the court affirmed that even the child's best interests, like any other right in the Bill of Rights, are subject to reasonable and justifiable limitations.⁴¹ Sachs J's remarked in *S v M* that the comprehensiveness of the best interests principle risks promising a great deal but delivers very little guidance on the application of the principle.⁴² The most significant criticism of the principle is that it is vague and does not clearly define a child's best interests.⁴³ It is argued that the 'indeterminacy and discretion of the best interest principle can easily invite prejudice and discrimination'⁴⁴ because the predominant focus is on children's rights which may 'obscure the interest of other parties and cause unjust results'.⁴⁵

The question is then: What is the function of the best interests of the child principle in the Constitution? Is it a legal rule, a fundamental constitutional right, a value, or a principle of interpretation? Regardless of the principle's characterisation, it has been argued that it need not be regarded as a right in that it emerges from decided

³⁹ UN Doc CRC/C/GC/14 para 37.

⁴⁰ 2003 (12) BCLR 1333 (CC), 2004 (1) SA 406 (CC).

⁴¹ 2003 (12) BCLR 1333 (CC), 2004 (1) SA 406 (CC) [55].

⁴² *S v M* [2007] ZACC 18, 2008 (3) SA 232 (CC), 2007 (12) BCLR 1312 (CC) [23].

⁴³ See the discussion above in para 2.5.3 for the significant criticisms of the principle from international scholars.

⁴⁴ Elsje Bonthuys, 'The Best Interest of Children in the South African Constitution' (2006) *International Journal of Law, Policy and the Fam* 23.

⁴⁵ See the discussion above in para 2.5.3 for significant criticisms of the principle from international scholars.

cases that there are other constitutional rights better suited to safeguarding children's rights.⁴⁶ Cantwell argues that if the best interests principle is applied without due regard, it can become a problem when another, more applicable right would suffice.⁴⁷ In addition, the issue is further complicated when the best interests principle is applied as the 'ultimate determining factor in decision-making'.⁴⁸

4.2.1 Best Interests of the Child Principle as a Right

The case of *S v M*⁴⁹ (the post-constitution *locus classicus* insofar as the best interest principle is concerned⁵⁰) illustrates that the best interests of the child principle is indeed regarded as a right by the Constitutional Court.⁵¹ M, a single mother of three boys, was convicted in 1996 on several counts of fraud and sentenced to a fine and a term of imprisonment suspended for five years.⁵²

M (together with the *curator ad litem* representing the minor children and the Centre for Child Law as *amicus curiae*) contended that sentencing courts are required, as a matter of general practice, to consider the impact of a custodial sentence on the minor children of a single parent (primary caregiver).⁵³ In *S v M*,⁵⁴ the applicant contended that a correctional supervision order rather than a

⁴⁶ Elsje Bonthuys, 'The Best Interest of Children in the South African Constitution' (2006) *International Journal of Law, Policy and the Fam* 23, 26.

⁴⁷ Nigel Cantwell, 'Are "Best Interests" a Pillar or a Problem for Implementing the Human Rights of Children?' in Ton Liefaard and Julia Sloth-Nielsen (eds), *The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead* (Brill | Nijhoff, 2017) 66.

⁴⁸ Nigel Cantwell, 'Are "Best Interests" a Pillar or a Problem for Implementing the Human Rights of Children?' in Ton Liefaard and Julia Sloth-Nielsen (eds), *The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead* (Brill | Nijhoff, 2017) 67.

⁴⁹ *S v M* [2007] ZACC 18, 2008 (3) SA 232 (CC), 2007 (12) BCLR 1312 (CC).

⁵⁰ Ann Skelton 'Children's Rights' in Jason Brickhill (ed), *Public Interest Litigation in South Africa* (Juta, 2018) 269.

⁵¹ *S v M* [2007] ZACC 18, 2008 (3) SA 232 (CC), 2007 (12) BCLR 1312 (CC) [21].

⁵² *S v M* [2007] ZACC 18, 2008 (3) SA 232 (CC), 2007 (12) BCLR 1312 (CC) [2].

⁵³ *S v M* [2007] ZACC 18, 2008 (3) SA 232 (CC), 2007 (12) BCLR 1312 (CC) [7].

⁵⁴ [2007] ZACC 18, 2008 (3) SA 232 (CC), 2007 (12) BCLR 1312 (CC).

custodial sentence would better serve the 'best interests' of M's children.⁵⁵ The court agreed and held that section 28 serves as a general guideline to the courts, and its normative function is evident in that section 28(2) read with section 28(1), 'establishes a set of children's rights that the courts are obliged to enforce.'⁵⁶

Sachs J, referring to Goldstone J in *Minister of Welfare and Population Development v Fitzpatrick (Fitzpatrick)*,⁵⁷ affirmed that section 28 serves as a right, not merely a 'guiding principle' for the courts and undoubtedly creates enforceable legal rules.⁵⁸ Instead, the question Sachs J wished to answer was what reasonable limits could be imposed on the application of these rules.⁵⁹ In *Fitzpatrick*,⁶⁰ an adoption case, the court held that the principle 'has never been given exhaustive content' and that it should remain flexible and the best interests standard must be determined in accordance with each child's circumstances.

Section 28(2) is indeed an all-encompassing platform for children's rights and is, as predicted by Sloth-Nielsen, the current benchmark used to determine the child's best interests in all matters concerning children.⁶¹ Furthermore, the expansive nature of section 28(2) has its origins in the international instruments of the United Nations which require a change in mindset to accommodate the democratic values in the new dispensation in South Africa.⁶²

In *Jooste v Botha*⁶³ the court questioned the mother's wisdom (in representing her 11-year-old son) in a delictual claim for damages in the form of *iniuria*, emotional distress, and loss of amenities of life. The claim was brought against the father

⁵⁵ *S v M* [2007] ZACC 18, 2008 (3) SA 232 (CC), 2007 (12) BCLR 1312 (CC) [24].

⁵⁶ [2007] ZACC 18, 2008 (3) SA 232 (CC), 2007 (12) BCLR 1312 (CC) [14].

⁵⁷ [2000] ZACC 6, 2000 (3) SA 422.

⁵⁸ [2007] ZACC 18, 2008 (3) SA 232 (CC), 2007 (12) BCLR 1312 (CC) [14], [22].

⁵⁹ 2001 (1) SA 1171 (CC) (*LS v AT and Another*) [2000] ZACC 26, 2001 (2) BCLR 152 (CC) [14].

⁶⁰ [2000] ZACC 6, 2000 (3) SA 422.

⁶¹ Julia Sloth-Nielsen, 'Chicken Soup or Chainsaws: Some Implications of the Constitutionalisation of Children's Rights in South Africa' (1996) *Acta Juridica* 6, 25.

⁶² *S v M* [2007] ZACC 18, 2008 (3) SA 232 (CC), 2007 (12) BCLR 1312 (CC) [16].

⁶³ [2000] JOL 5943 (T), 2000 (2) BCLR 187 (T) [190C-D] and [195A-B].

who had no contact and no relationship with the child. The claim was based on the constitutional right in section 28(1)(b) of the Bill of Rights which grants all children the right to family care, parental care, or appropriate alternative care when not living with their parents. However, the court found that neither the common law nor statute law recognises a child's right to be loved, cherished, comforted, or attended to by a non-custodial parent, thereby establishing a legal duty.⁶⁴

The crux of the plaintiff's argument was that the defendant was legally bound to provide the plaintiff with love and attention.⁶⁵ The court held that there is no legal duty on a father to love, nurture, or care for his child, and a court cannot order a father to love his child.⁶⁶ The court held that:

It is clear that children have a legitimate interest to general physical intellectual and emotional care within the confines of the capabilities of their care givers. Yet it is significant that the Constitution does not state that parents are obliged to love and cherish their children or give them their attention and interest.⁶⁷

In this instance, the court found that the right claimed by the plaintiff could not operate in a vacuum and if the plaintiff's claim were to succeed, the defendant's right to privacy (s 14) and to freedom of association (s 18) would be violated.⁶⁸ Although section 28(2) is conceptually wide, its application cannot be limited solely to the provisions listed in section 28(1).⁶⁹ However, section 28(2), like the other

⁶⁴ [2000] JOL 5943 (T), 2000 (2) BCLR 187 (T) [195A].

⁶⁵ Julia Sloth-Nielsen, *Children's Rights in the South African Courts: An Overview since Ratification of the UN Convention on the Rights of the Child* (2002) 10 Int'l J Child Rts 137, 143.

⁶⁶ [2000] JOL 5943 (T), 2000 (2) BCLR 187 (T) [198E].

⁶⁷ [2000] JOL 5943 (T), 2000 (2) BCLR 187 (T) [195E].

⁶⁸ [2000] JOL 5943 (T), 2000 (2) BCLR 187 (T) [193E-F].

⁶⁹ Section 28(1) states: 'Every child has the right –

- (a) to a name and a nationality from birth;
- (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
- (c) to basic nutrition, shelter, basic health care services and social services;
- (d) to be protected from maltreatment, neglect, abuse or degradation;
- (e) to be protected from exploitative labour practices;
- (f) not to be required or permitted to perform work or provide services that –

rights enshrined in the Bill of Rights, is subject to limitation. Section 36 of the Bill of Rights in Chapter 2 of the Constitution provides for the limitation of rights to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom.⁷⁰

In *De Reuck*,⁷¹ it was held that it should not be assumed that section 28(2) trumps all other rights. *De Reuck* involved an applicant who challenged certain provisions in the Films and Publications Act 65 of 1996 relating to child pornography. The rights referred to in this matter were the appellant's right to freedom of expression and privacy, rights which the court found could be limited by a law of general application provided that the requirements set for limitation under section 36 of the Constitution⁷² were met. In determining the purpose of the limitation, the court stated:

The purpose of the legislation is to curb child pornography which is seen as an evil in all democratic societies. Child pornography is universally condemned for good reason. It strikes at the dignity of children, it is harmful to children who are used in its production, and it is potentially harmful because of the attitude to child sex that it fosters and the use to which it can be put in grooming children to engage in sexual conduct.⁷³

-
- (i) are inappropriate for a person of that child's age; or
 - (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
 - (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be –
 - (i) kept separately from detained persons over the age of 18 years; and
 - (ii) treated in a manner, and kept in conditions, that take account of the child's age;
 - (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
 - (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.'

⁷⁰ Constitution of the Republic of South Africa, 1996.

⁷¹ 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC), 2003 (2) SACR 445 (CC) [54–5]

⁷² Constitution of the Republic of South Africa, 1996.

⁷³ *De Reuck v Director of Public Prosecutions* 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC), 2003 (2) SACR 445 (CC) [61].

The court affirmed the importance of a child's right to dignity and asserted that breaking down these rights (to freedom of expression and privacy) through child pornography causes serious harm to a child's dignity and worth.⁷⁴

It was argued that section 28(2) of the Constitution⁷⁵ which provides that '[a] child's best interests are of paramount importance in every matter concerning the child', applied in this case. However, the court disagreed and stated that even the best interests of the child, like any other right in the Bill of Rights, is subject to reasonable and justifiable limitation. The court elected to apply the actual right that had been violated, rather than resorting to the best interests of the child principle in section 28(2). At the time, this approach was deeply disappointing for the children's rights community, yet the approach has managed to withstand the test of time.⁷⁶

In *Sonderup v Tondelli (Sonderup)*,⁷⁷ a case involving the international abduction of a four-year-old girl, the High Court held that it is in the child's best interests that custody be determined by the court in whose jurisdiction the child usually resides (in this case British Columbia, Canada).⁷⁸ Moreover, the Constitutional Court held in *Sonderup*⁷⁹ that the rule of 'peremptory return' in the Hague Convention on the Civil Aspects of the International Child Abduction Act,⁸⁰ is consistent with section 28(2) of the Constitution. The rule was found to satisfy the long-term best interests of all children. If a child's short-term best interests were to be limited by the Hague Convention, that limitation would be justifiable under section 36 of the

⁷⁴ *De Reuck v Director of Public Prosecutions* 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC), 2003 (2) SACR 445 (CC) [63].

⁷⁵ Constitution of the Republic of South Africa, 1996.

⁷⁶ Ann Skelton, 'Too Much of a Good Thing: Best Interests of the Child in South African Jurisprudence' (2019) 52 De Jure 557, 564.

⁷⁷ *Sonderup v Tondelli* Case Number 1980/2000.

⁷⁸ *Sonderup v Tondelli* Case Number 1980/2000 at 20.

⁷⁹ 2001 (1) SA 1171 (CC) (*LS v AT and Another*) [2000] ZACC 26, 2001 (2) BCLR 152 (CC).

⁸⁰ Act 72 of 1996.

Constitution.⁸¹ Therefore, the order to return the child to Canada was a justifiable limitation under section 36 of the rights in section 28.⁸²

This section affirms that section 28(2) is approached as a right by South African courts. However, it has also become apparent that the right is ubiquitous in South African jurisprudence and the Constitutional Court has applied section 28(2) in numerous cases.

4.2.2 Local Criticism of the Principle

The best interests of the child principle has come in for criticism from international scholars as was shown in Chapter 2. In the South African context, too, it has come in for its fair share of criticism. Bonthuys argues that if the principle is applied in family-law cases, the child's interests could trump those of the parents and/or siblings and lead to an unfair situation in that an overwhelming focus on children's rights might conceal the interests of others.⁸³ This view is similar to that held by Elster who argues that promoting one child's interests in a particular case can compromise all the other children involved. This becomes problematic if one seeks the best decision in each case.⁸⁴

Bonthuys argues further that there is a fear that parental rights could overwhelm the interests of children and so justify the use of the welfare principle (best interests principle).⁸⁵ This fear is, in part, realised when parental rights and

⁸¹ 2001 (1) SA 1171 (CC) (*LS v AT and Another*) [2000] ZACC 26; 2001 (2) BCLR 152 (CC) [29].

⁸² *Sonderup v Tondelli* 2001 (1) SA 1171 (CC) [36].

⁸³ Elsje Bonthuys, 'The Best Interest of Children in the South African Constitution' (2006) *International Journal of Law, Policy and the Fam* 23, 24.

⁸⁴ Jon Elster, 'Solomonic Judgements: Against the Best Interests of the Child' (1987) 54(1) *University of Chicago Law Review* 1, 21.

⁸⁵ Elsje Bonthuys, 'The Best Interest of Children in the South African Constitution' (2006) *International Journal of Law, Policy and the Fam* 23, 38.

interests are disguised as the interests of their children.⁸⁶ Bonthuys further contends that the best interest principle is not a right. She states: 'Since the meaning of this right is so intrinsically nebulous, and given the existence of other explicit constitutional rights awarded to children, it would be neither useful nor effective to treat the best interests standard as a right.'⁸⁷

Bonthuys contends that courts in South Africa have been inconsistent in their application of the principle as a right.⁸⁸ She argues that although the courts call it a right, they do not treat it as such, or in the same way that they treat other constitutional rights.⁸⁹ Some courts ignore the best interest 'right' altogether, while others simply assume that the common law accurately reflects the best interests of the child. Furthermore, she contends that there are courts that use the best interests principle to alter the rules of the common law drastically.⁹⁰

Mills believes that South African courts do not understand the essence of the best interests of the child provision in section 28(2) of the Constitution.⁹¹ It also emerges from case law that South African courts do not apply section 28(2) as a rule.⁹² Couzens argues that the Constitutional Court has provided no standard definition of or 'ascertainable content' to the right in section 28(2) and has avoided

⁸⁶ Elsje Bonthuys, 'The Best Interest of Children in the South African Constitution' (2006) *International Journal of Law, Policy and the Fam* 23, 38. See also Marius Pieterse, 'In Loco Parentis: Third Party Parenting Rights in South Africa' (2000) 11 *Stellenbosch L Rev* 324, 328 with regard to the decision handed down in *Jooste v Botha* [2000] JOL 5943 (T), 2000 (2) BCLR 187 (T).

⁸⁷ Elsje Bonthuys, 'The Best Interest of Children in the South African Constitution' (2006) *International Journal of Law, Policy and the Fam* 23, 37.

⁸⁸ Elsje Bonthuys, 'The Best Interest of Children in the South African Constitution' (2006) *International Journal of Law, Policy and the Fam* 23, 25

⁸⁹ Elsje Bonthuys, 'The Best Interest of Children in the South African Constitution' (2006) *International Journal of Law, Policy and the Fam* 23, 25.

⁹⁰ Elsje Bonthuys, 'The Best Interest of Children in the South African Constitution' (2006) *International Journal of Law, Policy and the Fam* 23, 26.

⁹¹ Constitution of the Republic of South Africa, 1996.

⁹² Lize Mills, 'Failing children: The Courts' Disregard of the Best Interests of the Child in *Le Roux v Dey*' (2014) *SALJ* 847, 857.

doing so intentionally⁹³ – presumably to retain the flexibility required to achieve its purpose.⁹⁴

However, not all scholars feel that the term is vague and indeterminate. Certain South African legal scholars point out that the Constitutional Court has applied section 28(2) as a constitutional right that can be limited much like any other right in the Bill of Rights. Referring to *De Reuck*,⁹⁵ Sloth-Nielsen and Mezmur state:

What stands out in this case, though, is the careful enumeration of the factors and interests underlying the application of the best interest standard insofar as it relates to the protection of children by prohibiting child pornography.⁹⁶

In *De Reuck* it was argued that section 28(2) of the Constitution⁹⁷ should apply.⁹⁸ However, the court disagreed and stated that even the best interests of the child, like any other right contained in the Bill of Rights, is subject to limitation which is reasonable and justifiable and conforms to the requirements set out in section

⁹³ Meda Couzens, 'The Best Interest of the Child and the Constitutional Court' (2019) Constitutional Court Review 363,364

⁹⁴ Meda Couzens, 'The Best Interest of the Child and the Constitutional Court' (2019) Constitutional Court Review 363,364

⁹⁵ 2003 (12) BCLR 1333 (CC), 2004 (1) SA 406 (CC). The applicant in this matter challenged certain provisions of the Films and Publications Act, Act No 65 of 1996 relating to child pornography. The matter made its way to the Constitutional Court on appeal. The rights referred to in this matter were the appellant's right to freedom of expression, and to privacy, rights which the Court found could be limited by a law of general application, provided the requirements of the limitations under section 36 of the Constitution were met. In determining the purpose of the limitation, the court stated at [61]: 'The purpose of the legislation is to curb child pornography which is seen as an evil in all democratic societies. Child pornography is universally condemned for good reason. It strikes at the dignity of children, it is harmful to children who are used in its production, and it is potentially harmful because of the attitude to child sex that it fosters and the use to which it can be put in grooming children to engage in sexual conduct.' The court affirmed at [63] the importance of children's dignity rights and asserted that the degradation of children's dignity rights through child pornography causes serious harm to their dignity and worth.

⁹⁶ Julia Sloth-Nielsen and Benyam D Mezmur, '2+2=5? Exploring the Domestication of the CRC in South African Jurisprudence (2002-2006)' (2008) 16 Int'l J Child Rts 1, 25.

⁹⁷ Constitution of the Republic of South Africa 1996.

⁹⁸ Julia Sloth-Nielsen and Benyam D Mezmur, '2+2=5? Exploring the Domestication of the CRC in South African Jurisprudence (2002-2006)' (2008) 16 Int'l J Child Rts 1, 25.

36.⁹⁹ It is on the basis of this statement that Sloth-Nielsen and Mezmur agree that the best interests of the child principle is indeed treated as a right under the South African Constitution:

For this reason, we do not associate ourselves with the views of E Bonthuys...insofar as she argues that the best interest principle is not in practice treated as a constitutional right, and that the courts use it to avoid dealing with other constitutional rights of children and families, nor that 'courts generally do not view children as the independent bearers or constitutional and common law rights.'¹⁰⁰

Skelton agrees that the best interests of the child principle is an autonomous right and that the courts regard it as such, as is evident from several noteworthy judgments addressing the principle and its meaning.¹⁰¹ In addition, the principle also strengthens other rights.¹⁰²

4.3 The Philosophy of Corporal Punishment in Pre- and Post-Apartheid South Africa

Over the last twenty years, children's rights in South Africa have reached a level of maturity not found in other jurisdictions.¹⁰³ Child rights advocates and practitioners no longer need to justify or argue for children's rights first to be acknowledged

⁹⁹ 2003 (12) BCLR 1333 (CC), 2004 (1) SA 406 (CC) [55].

¹⁰⁰ Julia Sloth-Nielsen and Benyam D Mezmur, '2+2=5? Exploring the Domestication of the CRC in South African Jurisprudence (2002-2006)' (2008) 16 Int'l J Child Rts 1, 25.

¹⁰¹ Ann Skelton, 'South Africa', in Ton Liefaard and Jaap E Doek (eds), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Springer, 2015) 18. See, eg, *S v M* [2007] ZACC 18, 2008 (3) SA 232 (CC) which Skelton described as the locus classicus as far as the best interest principle goes.

¹⁰² Ann Skelton, 'South Africa', in Ton Liefaard and Jaap E Doek (eds), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Springer, 2015) 18.

¹⁰³ Julia Sloth-Nielsen, 'Children's Rights Jurisprudence in South Africa – a 20 year retrospective' (2019) *De Jure* 501, 511.

before they are implemented.¹⁰⁴ It is, furthermore, argued that '[s]ubstantial and measurable' gains have been achieved when it comes to children's rights in South Africa.¹⁰⁵ Current children's rights jurisprudence in South Africa has transcended its traditional family-law roots.¹⁰⁶

It is crucial to contextualise the significant constitutional changes that South Africa experienced during the 1990s and 2000s and how these have affected children's rights and parental responsibilities. Under the apartheid system, children, and Black children in particular, lived under the harshest of conditions.¹⁰⁷ In 1947 the Penal and Prison Reform Commission (the Lansdown Commission) found that given a lack of viable alternative forms of punishment for juvenile offenders¹⁰⁸ – eg, probation and institutional facilities – corporal punishment should be retained.¹⁰⁹ However, this was conditional on juvenile offenders not being whipped where more constructive forms of punishment could be found.¹¹⁰ Despite this condition, whipping became the preferred solution to controlling crime among juveniles during the apartheid era.¹¹¹

While corporal punishment had been abolished in most Western countries, South Africa embraced the 'whipping culture' and used it as a powerful tool in penal

¹⁰⁴ Julia Sloth-Nielsen, 'Children's Rights Jurisprudence in South Africa – a 20 year retrospective' (2019) *De Jure* 501, 511.

¹⁰⁵ Julia Sloth-Nielsen, 'Chicken Soup or Chainsaws: Some Implications of the Constitutionalisation of Children's Rights in South Africa' (1996) *Acta Juridica* 6, 7.

¹⁰⁶ Julia Sloth-Nielsen, 'Children's Rights Jurisprudence in South Africa – a 20 year retrospective' (2019) *De Jure* 501, 511.

¹⁰⁷ Julia Sloth-Nielsen, 'Chicken Soup or Chainsaws: Some Implications of the Constitutionalisation of Children's Rights in South Africa' (1996) *Acta Juridica* 6, 10.

¹⁰⁸ Juveniles were classified as all persons younger than 21 years of age.

¹⁰⁹ Ann Skelton, 'S v Williams: A Springboard for Further Debate about Corporal Punishment' (2015) *Acta Juridica* 336, 336.

¹¹⁰ James O Midgley, 'Corporal Punishment and Penal Policy: Notes on the Continued Use of Corporal Punishment with Reference to South Africa' (1982) 73 *J Crim L & Criminology* 388, 395.

¹¹¹ Ann Skelton, 'S v Williams: A Springboard for Further Debate about Corporal Punishment' (2015) *Acta Juridica* 336, 336–337.

institutions.¹¹² After the Sharpeville Massacre,¹¹³ whipping became the punishment of choice with an estimated 35 000 to 40 000 youth offenders sentenced to whipping annually.¹¹⁴ The epochal shift came, first, in March 1995 when the Constitutional Court handed down its decision in *S v Williams and Others (Williams)*¹¹⁵ prohibiting judicial whipping as a sentence for juveniles; and second, in June 1995 when South Africa ratified the Convention.¹¹⁶

When *Williams* came before the court the interim Constitution had scarcely been enacted. The first democratic elections had been held and the country was finalising a constitution embodying a comprehensive bill of rights. So, when Williams came before a Western Cape magistrate and was sentenced to juvenile whipping (together with five other juveniles), the magistrate, doubting the constitutional validity of the sentence, referred the matter for a special review under section 304(4) of the Criminal Procedure Act.¹¹⁷ The magistrate was concerned that the juvenile whipping sanctioned in section 294 of the Criminal Procedure Act was inconsistent with the provisions of the interim Constitution.¹¹⁸ The applicants contended that section 294 violated sections 8 (equality and equal protection of the law), 10 (dignity), 11 (freedom and security of the person),¹¹⁹ and

¹¹² James O Midgley, 'Corporal Punishment and Penal Policy: Notes on the Continued Use of Corporal Punishment with Reference to South Africa' (1982) 73 J Crim L & Criminology 388, 395.

¹¹³ A peaceful demonstration against the pass-book system held on 21 March 1960 in which scores of people were shot by the police. See South African History Online, 'The Sharpeville Massacre, 21 March 1960' <<https://www.sahistory.org.za/article/sharpeville-massacre-21-march-1960>> accessed 3 December 2020.

¹¹⁴ Julia Sloth-Nielsen, 'Child Justice' in Trynie Boezaart (ed), *Child Law in South Africa* (2nd edn Juta & Co Ltd, 2017) 682.

¹¹⁵ 1995 (3) SA 632 (CC).

¹¹⁶ United Nations, Human Rights Office of the High Commissioner 'Status of Ratification' <<https://indicators.ohchr.org/>> accessed 28 November 2020.

¹¹⁷ Act 51 of 1977.

¹¹⁸ Act 200 of 1993.

¹¹⁹ Section 11 states:

- (1) Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial.
- (2) No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to *cruel, inhuman or degrading treatment or punishment* (emphasis added).'

30 (children's rights) of the interim Constitution in that they discriminated unfairly against male juveniles based on age, sex, and race.¹²⁰

Counsel asked the court to consider the best interests of the child when reaching its decision, but the court ultimately decided the matter on sections 10 and 11(2).¹²¹ Skelton found this unfortunate as a more robust children's rights rationale for the findings (which should have included the other rights in sections 8 and 30) may have laid a firmer basis on which to oppose the defence of reasonable chastisement.¹²² Langa J affirmed the disjunctive reading of section 11(2), which pointed to seven different forms of conduct: torture; cruel treatment; inhuman treatment; degrading treatment; cruel punishment; inhuman punishment; and degrading punishment.¹²³ Moreover, Langa J stated that interpreting the notions in subsection 11(2) 'involves the making of a value judgement...' ¹²⁴ It was suggested that these seven concepts should be approached on a sliding scale with torture as the most severe followed by cruel, inhuman, and degrading treatment in that order.¹²⁵ In this case, Langa J found that juvenile whipping was cruel, inhuman, and degrading punishment and could not be justified under section 33(1) of the Constitution.¹²⁶

Furthermore, Langa J stated that the Constitutional Court should adopt a purposive approach when interpreting the rights in the interim Constitution.¹²⁷ In determining the purpose of the specific right, it should be read with the South

¹²⁰ *S v Williams* 1995 (3) SA 632 (CC) [16].

¹²¹ *S v Williams* 1995 (3) SA 632 (CC) [92]. Ann Skelton, 'Too Much of a Good Thing: Best Interests of the Child in South African Jurisprudence' (2019) 52 De Jure 557, 662.

¹²² Ann Skelton, 'S v Williams: A Springboard for Further Debate about Corporal Punishment' (2015) Acta Juridica 336, 342.

¹²³ *S v Williams* 1995 (3) SA 632 (CC) [20].

¹²⁴ *S v Williams* 1995 (3) SA 632 (CC) [22].

¹²⁵ *S v Williams* 1995 (3) SA 632 (CC) [25].

¹²⁶ *S v Williams* 1995 (3) SA 632 (CC) [52], [79], [91]. Section 33 of the interim Constitution was the equivalent of s 36 in the 1996 Constitution; See n 165 below for the provisions of s 36.

¹²⁷ *S v Williams* 1995 (3) SA 632 (CC) [51].

African people in mind having regard to the high levels of violence at the time.¹²⁸ It is against this backdrop that the Constitutional Court found that section 294 was inconsistent with sections 10 and 11(2) of the interim Constitution and declared it invalid.¹²⁹

Langa J stated that 'sentencing of offenders must conform to standards of decency recognised throughout the civilised world...there is no place for brutal and dehumanising treatment and punishment'.¹³⁰ The court's decision in this case is in line with the philosophical approach adopted in *S v Makwanyane*¹³¹ in which the death penalty was abolished.¹³² The court in *Williams* acknowledged a move away from the pre-constitution attitude of retribution and vengeance to a more humane approach of prevention and correction.¹³³ In *S v M*¹³⁴ this philosophy of a more humane approach to sentencing was carried forward by Sachs J when he stated:

Thus, our courts have observed that one of its strengths is that it rehabilitates the offender within the community, without the negative impact of prison and destruction of the family. It is geared to punish and rehabilitate the offender within the community (by means of correctional supervision) leaving his or her work and domestic routines intact, and without the negative influences of prison.¹³⁵

Following the decision in *Williams*, parliament enacted the Abolition of Corporal Punishment Act¹³⁶ which amended or repealed legislation containing provisions on

¹²⁸ *S v Williams* 1995 (3) SA 632 (CC) [51].

¹²⁹ *S v Williams* 1995 (3) SA 632 (CC) [53] and [96].

¹³⁰ *S v Williams* 1995 (3) SA 632 (CC) [77].

¹³¹ 1995 (6) BCLR 665 (CC) 672, 1995 3 SA 391 (CC).

¹³² *S v Makwanyane* 1995 (6) BCLR 665 (CC) 672, 1995 3 SA 391 (CC) was the first case heard by the Constitutional Court. Moreover, *S v Williams* 1995 (3) SA 632 (CC) was the first children's rights case that was heard by the Constitutional Court.

¹³³ *S v Williams* 1995 (3) SA 632 (CC) [64].

¹³⁴ *S v M* [2007] ZACC 18, 2008 (3) SA 232 (CC), 2007 (12) BCLR 1312 (CC).

¹³⁵ [2007] ZACC 18, 2008 (3) SA 232 (CC), 2007 (12) BCLR 1312 (CC) [62].

¹³⁶ Act 33 of 1997.

judicial corporal punishment.¹³⁷ Furthermore, in 1996 parliament passed the South African Schools Act (Schools Act)¹³⁸ which prohibited corporal punishment in both public and private schools. Section 10 of the Schools Act sets out the prohibition which provides that no person may use corporal punishment on a school student, and that any person convicted of doing so will be liable to be sentenced for assault.¹³⁹ However, there has been some criticism of this section in the Schools Act in that it does not reflect the principle of legality. The Schools Act, and specifically section 10, does not set out the elements of what constitutes the offence of administering corporal punishment – in other words corporal punishment is not clearly defined. Therefore, educators can only be charged with assault and not with administering corporal punishment.¹⁴⁰ It is suggested here that the South African Schools Act adopt the wide definition of corporal punishment found in General Comment No 8.¹⁴¹ Furthermore, states are obliged to take all measures to ensure that school discipline is administered in accordance with the provisions of the Convention and in a manner consistent with the child's human dignity.¹⁴²

Four years later, section 10 of the Schools Act took centre stage in *Christian Education South Africa v Minister of Education (Christian Education)*.¹⁴³ Christian Education is an umbrella body representing some 200 independent Christian schools.¹⁴⁴ During the parliamentary debate on the Schools Act, Christian Education made submissions that the prohibition of corporal punishment infringes

¹³⁷ Section 1 reads: 'Abolition of corporal punishment Any law which authorises corporal punishment by a court of law, including a court of traditional leaders, is hereby repealed to the extent that it authorises such punishment.'

¹³⁸ Act 84 of 1996.

¹³⁹ 'School' is defined in the Schools Act as to mean a public school or an independent school which enrolls learners in one or more grades from grade R (Reception) to grade twelve.

¹⁴⁰ Mariette Reyneke. 'Educator Accountability in South Africa: Rethink Section 10 of the South African Schools Act' (2018) 43(1) *Journal for Juridical Science* 117, 120.

¹⁴¹ UN Doc CRC/C/GC/8. See Chapter 1, n 2.

¹⁴² Article 28(2).

¹⁴³ [2000] ZACC 11, 2000 (4) SA 757 (CC), 2000 (1) BCLR 1051.

¹⁴⁴ *Christian Education South Africa v Minister of Education* [2000] ZACC 11, 2000 (4) SA 757, 2000 (10) BCLR 1051.

on its right to freedom of religion¹⁴⁵ and cultural life¹⁴⁶ guaranteed under the interim Constitution.¹⁴⁷ However, Christian Education failed to secure an exemption to the limitation of the right to delegate the powers of reasonable chastisement by the parents to the teachers, and a legal challenge to the section ensued.¹⁴⁸

Christian Education applied to the South Eastern Cape Local Division of the High Court to have section 10 of the Schools Act declared unconstitutional and invalid in that those provision of section 10 apply to independent schools *alternatively* to the extent that those provision apply to school students at those independent schools whose parents or guardians have given consent for the administration of corporal punishment.¹⁴⁹

The applicant further contended that section 10 of the Schools Act violates the right to freedom of religion and the right to cultural life in so far as it prohibits corporal punishment in the relevant independent schools. Christian Education cited several scripture passages and contended that corporal punishment is a vital aspect of the Christian faith and that 'it is applied in the light of its biblical context using biblical guidelines which impose a responsibility on parents for the training of their children'.¹⁵⁰ The applicant contended that section 10 of the Schools Act 'constituted an intolerable interference with the religious and cultural liberties of the applicant's constituent schools, of their governing bodies, their staff, and also of the parents of pupils attending them.'¹⁵¹

¹⁴⁵ Section 14(1) states: 'Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning.'

¹⁴⁶ Section 31 states: 'Every person shall have the right to use the language and to participate in the cultural life of his or her choice.'

¹⁴⁷ Act 200 of 1993.

¹⁴⁸ [2000] ZACC 11, 2000 (4) SA 757, 2000 (10) BCLR 1051 [3].

¹⁴⁹ *Christian Education SA v Minister of Education of the Government of the RSA* 1999 (9) BCLR 951 (SE) [952B-C].

¹⁵⁰ 1999 (9) BCLR 951 (SE) [959F]–[956A].

¹⁵¹ 1999 (9) BCLR 951 (SE) [952G].

However, the High Court held that these scripture passages are mere 'guidelines' and did not sanction the delegation of the authority of parents to use corporal punishment to teachers.¹⁵² The application was dismissed, and Christian Education applied for and was granted leave to appeal to the Constitutional Court.

Christian Education sought an order from the Constitutional Court to have section 10 of the Schools Act declared unconstitutional and invalid to the extent that it prohibits corporal punishment in independent schools in which parents had consented to its use. They argued that section 10 infringed on the rights contained in the Constitution in sections 14 (privacy), 15 (freedom of religion, belief and opinion), 29 (education), 30 (language and culture) and 31 (cultural, religious and linguistic communities).¹⁵³ Together with the provisions in section 10 of the Schools Act, the court also considered the right to freedom of religion in sections 15¹⁵⁴ and 31¹⁵⁵ of the Constitution.¹⁵⁶ The court questioned whether 'when Parliament enacted a law to prohibit corporal punishment in schools, did it violate the rights of parents of children in independent schools who, in line with their religious convictions, had consented to its use?'

Sachs J¹⁵⁷ referred to a case (*S v Lawrence; S v Negal; S v Solberg*¹⁵⁸) in which Chaskalson P referred to Dickson CJC's observation in *R v Big M Drug Mart Ltd*¹⁵⁹ that:

¹⁵² [2000] ZACC 11, 2000 (4) SA 757, 2000 (10) BCLR 1051 [6].

¹⁵³ [2000] ZACC 11, 2000 (4) SA 757, 2000 (10) BCLR 1051 [7].

¹⁵⁴ Section 15(1) states: '(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.'

¹⁵⁵ Section 31 provides:

- '(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –
 - (a) to enjoy their culture, practise their religion and use their language;
 - (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
- (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.'

¹⁵⁶ Constitution of the Republic of South Africa, 1996.

¹⁵⁷ [2000] ZACC 11, 2000 (4) SA 757, 2000 (10) BCLR 1051 [18].

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.¹⁶⁰

Furthermore, Dickson CJC observed, the right to freedom of religion is a right to 'an absence of coercion or constraint' and that it may be limited by measures that compel adherents to act or to refrain from acting in a particular way that may violate their belief system.¹⁶¹

In *Christian Education* the respondent contended that the state had a responsibility under the new dispensation to protect children from violence and ill treatment and that corporal punishment is inherently violent and involves a 'degrading assault upon the physical, emotional and psychological integrity of the person to whom it is administered'.¹⁶² It further contended that the trend in democratic countries is to abolish corporal punishment in schools.¹⁶³

In a comprehensive analysis of the right to freedom of religion and the power to limit such a right, Sachs J observed that the court must weigh up the seriousness

¹⁵⁸ [1997] ZACC 11, 1997 (2) SA 1176, 1997 (10) BCLR 1348 (CC).

¹⁵⁹ [1985] 1 SCR 295.

¹⁶⁰ [1985] 1 SCR 295 [94].

¹⁶¹ *R v Big M Drug Mart Ltd* [1985] 1 SCR 295 [95].

¹⁶² [2000] ZACC 11, 2000 (4) SA 757, 2000 (10) BCLR 1051 [12].

¹⁶³ [2000] ZACC 11, 2000 (4) SA 757, 2000 (10) BCLR 1051 [13]. Lord Walker in the English case *R v Secretary of State for Education and Employment and others* [2005] UKHL15 attempted to answer how far can democracy go in allowing believers to be exempted from general law. He made the following compelling statement: 'The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim automatic right to be exempted by their beliefs from the laws of the land. At the same time, the state should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law.'

of the impact on the right against the justifications for the limitation.¹⁶⁴ Rights can only be limited under section 36 of the Constitution.¹⁶⁵ In deciding that the limitation of the parents' right to freedom of religion is justifiable, the court considered the best interests of the child but ultimately decided the matter on sections 10 (right to human dignity) and 12 (right to freedom and security of the person) of the Constitution.¹⁶⁶ The court did not regard it as exceptionally onerous to make suitable adaptations to non-discriminatory laws that impact the schools' disciplinary codes.¹⁶⁷ The court held: 'When all these factors are weighed together, the scales come down firmly in favour of upholding the law.'¹⁶⁸ The court concluded that save for this one aspect of corporal punishment, the appellant's schools were not prevented from maintaining their Christian ethos. The appeal was dismissed.¹⁶⁹

The court distinguished between corporal punishment administered in public institutions (public sphere) and corporal punishment administered in the home (private sphere). In both the *Williams* case¹⁷⁰ and the *Christian Education* case,¹⁷¹ the court appeared to consider the institutional nature of corporal punishment as

¹⁶⁴ [2000] ZACC 11, 2000 (4) SA 757, 2000 (10) BCLR 1051 [31].

¹⁶⁵ 'Limitation of Rights

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'

¹⁶⁶ Constitution of the Republic of South Africa, 1996.

¹⁶⁷ [2000] ZACC 11, 2000 (4) SA 757, 2000 (10) BCLR 1051 [51].

¹⁶⁸ [2000] ZACC 11, 2000 (4) SA 757, 2000 (10) BCLR 1051 [52].

¹⁶⁹ [2000] ZACC 11, 2000 (4) SA 757, 2000 (10) BCLR 1051 [52].

¹⁷⁰ 1995 (3) SA 632 (CC).

¹⁷¹ [2000] ZACC 11, 2000 (4) SA 757, 2000 (10) BCLR 1051.

relevant.¹⁷² Both Langa J and Sachs J considered the institutional environment in which a stranger administers the punishment.¹⁷³ In *Williams* the juvenile whipping was carried out by a criminal justice official, a stranger to the offenders. The court consequently found that there is no dignity in the act of whipping – no dignity for the offenders receiving it and no dignity for the person delivering it. The practice is degrading for all involved.¹⁷⁴ In *Christian Education* the court acknowledged that even if the teacher carrying out the physical punishment is not a stranger, corporal punishment in schools remains degrading because of the ‘detached and institutional environment of the school’.¹⁷⁵

This form of corporal punishment is then distinguished from that meted out by parents in the ‘intimate and spontaneous atmosphere of the home’.¹⁷⁶ It is argued that it is unclear whether this can be interpreted as an endorsement of corporal punishment in the home, but the Constitutional Court's later decision (regarding domestic violence¹⁷⁷) appears not to draw this distinction between violence in public and private settings.¹⁷⁸ It is argued that this has alleviated some of the

¹⁷² *S v Williams* 1995 (3) SA 632 (CC) [17], [89]–[90]. See also, *Christian Education South Africa v Minister of Education* [2000] ZACC 11, 2000 (4) SA 757, 2000 (10) BCLR 1051 [49]; Ann Skelton, ‘S v Williams: A Springboard for Further Debate about Corporal Punishment’ (2015) Acta Juridica 336, 350.

¹⁷³ Ann Skelton, ‘S v Williams: A Springboard for Further Debate about Corporal Punishment’ (2015) Acta Juridica 336, 350

¹⁷⁴ *S v Williams* 1995 (3) SA 632 (CC) [89].

¹⁷⁵ Sachs J quoted Mahomed AJA in *Ex parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State* 1991 (3) SA 76 (NmSC) where the court said that corporal punishment is an invasion of the dignity of the students. Furthermore, the court noted that corporal punishment is open to exploitation. It is sometimes used as a tit-for-tat measure that is alienating and degrading even if the teacher administering the punishment is known to the student.

¹⁷⁶ *Christian Education South Africa v Minister of Education* [2000] ZACC 11, 2000 (4) SA 757, 2000 (10) BCLR 1051 [49]. Ann Skelton, ‘S v Williams: A Springboard for Further Debate about Corporal Punishment’ (2015) Acta Juridica 336, 350.

¹⁷⁷ *S v Baloyi (Minister of Justice and Another Intervening)* 2002 (2) 425 (CC) [11].

¹⁷⁸ Ann Skelton, ‘S v Williams: A Springboard for Further Debate about Corporal Punishment’ (2015) Acta Juridica 336, 350.

anxiety engendered by the court possibly having implied that corporal punishment in private is less serious because of the ‘supposed blissful sanctity of the home’.¹⁷⁹

The Constitutional Court's focus moved to corporal punishment administered in the home in 2017 in *YG v S (YG)*.¹⁸⁰ The father, YG, had found his 13-year-old son, M, allegedly watching pornography on an iPad while sitting on his parents’ bed. YG punched M on the thighs with his fists because he argued that pornography is strictly forbidden for Muslims and he needed to discipline his son ‘out of concern to show him in the future what is right and what is wrong’.¹⁸¹ YG was initially charged with assault with intent to do grievous bodily harm but was convicted in the Johannesburg Regional Court on the lesser charge of common assault of M.¹⁸² He appealed to the High Court claiming as defence reasonable and moderate chastisement and the exercise of his right to freedom of religion.¹⁸³ The defence of reasonable and moderate chastisement in the South African context can be traced back to the early twentieth century in *R v Janke and Janke*.¹⁸⁴ Here, Mason J stated:

The general rule adopted both by the Roman, the Roman-Dutch law and the English law is that a parent may inflict moderate and reasonable chastisement on a child for misconduct provided that this be not done in a manner offensive to good morals or for other objects than correction and admonition ... The presumption is that such punishment has not been dictated by improper motives and the court will not lightly interfere with the discretion of parents of those empowered with a similar authority.

¹⁷⁹ Julia Sloth-Nielsen, ‘Southern African Perspectives on Banning Corporal Punishment—a Comparison of Namibia, Botswana, South Africa and Zimbabwe’ in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 257.

¹⁸⁰ [2017] ZAGPJHC 290, 2018 (1) SACR 64 (GJ).

¹⁸¹ [2017] ZAGPJHC 290, 2018 (1) SACR 64 (GJ) [6].

¹⁸² [2017] ZAGPJHC 290, 2018 (1) SACR 64 (GJ) [2].

¹⁸³ [2017] ZAGPJHC 290, 2018 (1) SACR 64 (GJ) [4].

¹⁸⁴ 1913 TPD 382.

The court invited several interested parties to be joined as *amici curiae* and requested counsel, the state, and the *amici* to make submissions on the issue.¹⁸⁵ The Centre for Child Law as *amicus curiae* and the Minister of Social Development were of one view – the defence of moderate and reasonable chastisement is not compatible with the rights set out in the Constitution and should be declared unconstitutional.¹⁸⁶

Keightley J affirmed that courts are obliged to develop the common law to bring it into line with the values in the Constitution.¹⁸⁷ Section 28(1)(d) of the Constitution states that every child has the right to be protected against maltreatment, neglect, abuse, or degradation.¹⁸⁸ Furthermore, section 28(2) has the added requirement that the child's best interests should be of paramount importance in every matter concerning the child.¹⁸⁹ On 19 October 2017, the High Court found the common-law defence of reasonable chastisement unconstitutional and no longer available in South African courts. However, the abolition of the defence of reasonable chastisement was held to apply only prospectively from the date of the judgment.¹⁹⁰

Freedom of Religion South Africa (FORSA) (the 4th *amicus curiae* in the YG-case) applied for and was granted direct access to the Constitutional Court and leave to appeal the YG decision. Interestingly, FORSA is a Christian organisation that lobbied for less government interference regarding corporal punishment. In its

¹⁸⁵ [2017] ZAGPJHC 290, 2018 (1) SACR 64 (GJ) [11]. The Minister of Social Development and several *amici curiae* made oral and written submissions to the court. The *amici curiae* were The Children's Institute (first *amicus curiae*), The Quaker Peace Centre (second *amicus curiae*), Sonke Gender Justice (third *amicus curiae*) – all three represented by the Centre for Child Law at the University of Pretoria (CCL), and Freedom of Religion South Africa (FORSA) (fourth *amicus curiae*). CCL filed an expert opinion in the form of an affidavit by the Director of the Children's Institute, Prof Shanaaz Mathews, linking corporal punishment to violence against children.

¹⁸⁶ YG v S [2017] ZAGPJHC 290, 2018 (1) SACR 64 (GJ) [16], [18].

¹⁸⁷ [2017] ZAGPJHC 290, 2018 (1) SACR 64 (GJ) [27].

¹⁸⁸ Constitution of the Republic of South Africa, 1996.

¹⁸⁹ Constitution of the Republic of South Africa, 1996.

¹⁹⁰ [2017] ZAGPJHC 290, 2018 (1) SACR 64 (GJ) [107].

submissions to the court, *FORSA* expressed some concern that there was an ‘apparent conflation’ by the High Court of reasonable chastisement, blatant child abuse, and brutal assault in the belief that they are ostensibly synonymous,¹⁹¹ although *FORSA* found it challenging to locate instances of reasonable chastisement outside the boundaries of assault.¹⁹²

It is regrettable that *FORSA* does not recognise the nuances of parental discipline. Discipline need not be physical to be effective.¹⁹³ Gershoff and Grogan-Kaylor have already shown that physical punishment is less effective than non-physical punishment.¹⁹⁴ Ironically, there are community and church leaders in South Africa calling for a return to corporal punishment.¹⁹⁵ This will without a doubt neither benefit children nor advance their cause and should not be taken seriously. It is a fictional narrative propagated by conservative right-wing Christian groups that remain opposed to non-violent means of disciplining children.

In the *FORSA* case¹⁹⁶ the Constitutional Court decided the constitutionality of moderate and reasonable chastisement essentially on the provisions of section 12(1)(c) of the Constitution.¹⁹⁷ The court analysed the meaning of ‘assault’ and ‘violence’ before determining that by its very nature chastisement involves

¹⁹¹ *FORSA v Minister of Justice and Constitutional Development* [2019] ZACC 34 [34]. *FORSA* made the submission in its Heads of Argument at [18]: ‘We submit, with respect, that it is on this very point that the Court a quo went wrong, i.e.: the Court a quo confused or conflated reasonable and moderate chastisement with physical violence or abuse. They are not comparable, not on the law as it stands nor conceptually.’

¹⁹² [2019] ZACC 34 [32]– [33].

¹⁹³ Emma C Lubaale, ‘Reconceptualising “discipline” to inform an approach to corporal punishment that strikes a balance between children’s rights and parental rights’ (2019) 20(1) *Child abuse research in South Africa* 36, 37. *FORSA v Minister of Justice and Constitutional Development* [2019] ZACC 34 [69].

¹⁹⁴ Elizabeth T Gershoff and Andrew Grogan-Kaylor, ‘Spanking and Child Outcomes: Old Controversies and New Meta-Analyses’ (2016) 30(4) *Journal of Family Psychology* 453, 465.

¹⁹⁵ Christel Cornelissen, ‘Bespoedig wet wat lyfstraf verbied’ *Maroela Media* (21 November 2019) <<https://maroelamedia.co.za/nuus/sa-nuus/bespoedig-wet-wat-lyfstraf-verbied/>> accessed 13 July 2020.

¹⁹⁶ [2019] ZACC 34.

¹⁹⁷ [2019] ZACC 34 [36].

violence.¹⁹⁸ It queried why one would resort to chastisement if not to cause actual or potential pain and discomfort in the belief that this would have a more significant effect than any other form of discipline¹⁹⁹ Mogoeng CJ observed that the object of corporal punishment is always to cause ‘displeasure, discomfort, fear or hurt’.²⁰⁰ With regard to the best interests of the child, he stated that the principle does not necessarily trump all other fundamental rights.²⁰¹ What then is the difference between ‘a primary’ and ‘*the* primary’ consideration? The use of the phrase ‘a primary’ suggests ‘first amongst other considerations’; it does not suggest ‘absolute priority’ over any remaining considerations.²⁰²

The Constitutional Court acknowledged the painful history of widespread and institutionalised violence in South Africa and that section 12 aims to reduce and eliminate ‘*all forms* of violence’ in both public and private spheres.²⁰³ It also affirmed that under section 10 of the Constitution, ‘[e]veryone has inherent dignity and the right to have their dignity respected and protected’.²⁰⁴ Children are recognised as independent human beings entitled to the enjoyment of human rights. Moderate and reasonable chastisement impacts on a child’s dignity and therefore limits the child’s section 10 right.²⁰⁵ The question then arises whether the limitation of a child’s sections 10 and 12(1)(c) rights can be justified. Mogoeng CJ concluded:

The right to be free from all forms of violence or to be treated with dignity, coupled with what chastisement does in reality entail, as well as the availability of less restrictive means, speak quite forcefully against the preservation of the common law defence of reasonable and moderate parental chastisement. There is, on the material before us, therefore, no justification for its continued

198 [2019] ZACC 34 [39].

199 [2019] ZACC 34 [39].

200 [2019] ZACC 34 [41].

201 [2019] ZACC 34 [57].

202 Michael Freeman, ‘Article 3: The Best Interests of the Child’ in André Alen and others (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, 2007) 1, 3.

203 [2019] ZACC 34 [42].

204 [2019] ZACC 34 [42].

205 [2019] ZACC 34 [45].

existence, for it does not only limit the rights in sections 10 and 12 of the Constitution but also violates them unjustifiably.²⁰⁶

In a unanimous decision, the Constitutional Court found the defence of *reasonable and moderate chastisement* to be inconsistent with the provisions of sections 10 and 12(1)(c) of the Constitution and therefore no longer a valid defence against a charge of common assault.²⁰⁷ The court dismissed the appeal.²⁰⁸

Sloth-Nielsen expressed her disappointment that the court failed to address the child's right to protection from abuse, neglect, degradation, and ill treatment, which, in her view, undermines the value of the judgment.²⁰⁹

4.4 The Children's Act 38 of 2005: A Red Flag to a Bull

A final step in consolidating the elimination of corporal punishment, according to the CRC, will be follow-up legislation banning the use of corporal punishment. In General Comment No 8 the Committee noted that given the widespread use of corporal punishment, 'simply repealing authorization of corporal punishment and any existing defences is not enough'. State parties must expressly prohibit corporal, or any other cruel, degrading, or inhuman punishment in civil and criminal legislation and also in sectoral legislation such as family law, education law, law relating to alternative care and justice systems, and employment law.²¹⁰ However, these obligations set out by the CRC appear to be a bridge too far for

²⁰⁶ [2019] ZACC 34 [71].

²⁰⁷ [2019] ZACC 34 [71] and [73].

²⁰⁸ [2019] ZACC 34 [76].

²⁰⁹ Julia Sloth-Nielsen, 'Sideswipes and Backhanders: Abolition of the Reasonable Chastisement Defence in South Africa', (2020) *Int'l Journal of Law, Policy and the Family* 191, 197. See also Patrick Lenta, 'Corporal Punishment and the Costs of Judicial Minimalism' (2020) 137(2) *SALJ* 185–200 in which the author levels some very relevant criticisms at the Constitutional Court.

²¹⁰ UN Doc CRC/C/GC/8 paras 34–35.

South African legislators. There have been ongoing efforts to introduce a ban on corporal punishment in the Children's Act, but all have so far failed.²¹¹ Commentators are convinced that a change in the law can change attitudes and behaviour, although not in isolation from other child protection and parental support policies.²¹² However, to change societal and cultural attitudes there must first be a change in the law. This is where parliament's ongoing failure to adopt legislation banning corporal punishment in private settings shows unacceptable deference to parental unease and insufficient concern for children's rights.

The Children's Act 38 of 2005 has been in force since 1 April 2010 and is the primary legislative instrument addressing parental responsibilities and rights.²¹³ The South African Law Reform Commission (SALRC) was tasked with reviewing the then Child Care Act of 1983 and bringing it in line with the Convention. One of the main issues was how to tackle the question of corporal punishment in the home.²¹⁴ The SALRC suggested that the common-law defence of reasonable chastisement be removed by amending the Act.²¹⁵ However, Skelton points out that the government expanded on the proposed clause, which became clause 139 of the Children's Bill. Bill 19 of 2006 went far beyond the provisions proposed by the SALRC and included a ban on corporal punishment in the home.²¹⁶ The original clause 139 reads:²¹⁷

²¹¹ Ann Skelton, 'Constitutional Protection of Children's Rights' in Trynie Boezaart (ed), *Child Law in South Africa* (2nd edn Juta & Co Ltd, 2017) 354.

²¹² Michael Freeman and Bernadette J Saunders, 'Can we Conquer Child Abuse if We Don't Outlaw Physical Chastisement of Children?' (2014) 22 Int'l J Child Rts 681, 701.

²¹³ Jacqueline Heaton, 'Parental Responsibilities and Rights' in Trynie Boezaart (ed), *Child Law in South Africa* (2nd edn Juta & Co Ltd, 2017) 77.

²¹⁴ Julia Sloth-Nielsen, 'Southern African Perspectives on Banning Corporal Punishment—a Comparison of Namibia, Botswana, South Africa and Zimbabwe' in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 257.

²¹⁵ Ann Skelton, 'S v Williams: A springboard for further debate about corporal punishment' (2015) *Acta Juridica* 336, 346.

²¹⁶ Julia Sloth-Nielsen, 'Southern African Perspectives on Banning Corporal Punishment—a Comparison of Namibia, Botswana, South Africa and Zimbabwe' in Bernadette J Saunders

- (1) A person who has care of a child, including a person who has parental responsibilities and rights in respect of the child, must respect promote and protect the child's right to physical and psychological integrity as conferred by section 12(1)(c), (d) and (e) of the Constitution.
- (2) No child may be subjected to corporal punishment or be punished in a cruel, inhuman or degrading way.
- (3) The common law defence of reasonable chastisement available to persons referred to in subsection (1) in any court proceedings is hereby abolished.
- (4) No person may administer corporal punishment to a child or subject a child to any form of cruel, inhuman or degrading punishment at a [any] child and youth care centre, partial care facility or shelter or drop-in centre.
- (5) The Department must take all reasonable steps to ensure that-
 - (a) education and awareness-raising programmes concerning the effect of subsections (1), (2), (3) and (4) are implemented throughout the Republic; and
 - (b) programmes promoting appropriate discipline are available throughout the Republic.
- (6) A parent, caregiver or any person holding parental responsibilities and rights in respect of a child who is reported for subjecting such child to inappropriate forms of punishment must be referred to an early intervention service as contemplated in section 144.
- (7) Prosecution of a parent or person holding parental responsibilities and rights referred to in subsection (6) may be instituted if the punishment constitutes abuse of the child.

Clearly, this version aimed to abolish the common-law defence of moderate and reasonable chastisement. Moreover, it explicitly proposed the possible prosecution

217

and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 258.
 Julia Sloth-Nielsen, 'Southern African Perspectives on Banning Corporal Punishment—a Comparison of Namibia, Botswana, South Africa and Zimbabwe' in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 258.

of parents or persons *in loco parentis* in specific circumstances.²¹⁸ Clause 139 was well-received by the South African Human Rights Commission (SAHRC)²¹⁹ which declared that clause 139 ‘seeks to advance a society in which children are free to develop in an atmosphere that promotes the culture of non-violence’.²²⁰ At the request of the Minister of Social Development, the Bill was introduced in the National Council of Provinces by the Select Committee on Social Services on 25 August 2006.²²¹ However, this expanded clause 139 proved highly controversial in parliament – *like raising a red flag to a bull*²²² – and had to be removed.²²³ This put

²¹⁸ Julia Sloth-Nielsen, ‘Southern African Perspectives on Banning Corporal Punishment—a Comparison of Namibia, Botswana, South Africa and Zimbabwe’ in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 258.

²¹⁹ South African Human Rights Commission, ‘Submission on the Children’s Act Amendment Bill [B19B – 2006]’ August 2007 1 <<https://www.sahrc.org.za/home/21/files/39%20SAHRC%20Submission%20on%20Childrens%20Bill%20Clause%20139%20Discipline%20%28Parl%29%20Aug%202007.pdf>> accessed 5 December 2020.

²²⁰ South African Human Rights Commission, ‘Submission on the Children’s Act Amendment Bill [B19B – 2006]’ August 2007 1 <<https://www.sahrc.org.za/home/21/files/39%20SAHRC%20Submission%20on%20Childrens%20Bill%20Clause%20139%20Discipline%20%28Parl%29%20Aug%202007.pdf>> accessed 5 December 2020.

²²¹ South African Parliament, ‘Hansard Papers’ 88 <<https://www.parliament.gov.za/hansard-papers?perPage=50&page=37&offset=1800>> accessed 15 February 2021.

²²² Following a significant public outcry because of a comment made by the National Prosecuting Authority in relation to guilty fines in assault cases, cl 139 was removed from the Bill. ‘The Committee cited that the reasons for this were that the clause required further investigation; that the matter should have been tagged as a section 75 issue (an issue of national competency) and be included in the original Children’s Act 38 of 2005; and that the matter will be “finalised in a proposed amendment Bill to be introduced in 2008”, which will follow the parliamentary route outlined for such matters.’ Samantha Waterhouse, ‘Status of Corporal Punishment in South African Children’s Amendment Bill Law Reform Process’ (Dullah Omar Institute, December 2007) 3 <<https://dullahomarinate.org.za/childrens-rights/Publications/Article%2019/Volume%203%20Number%203%20-%20December%202007.pdf>> accessed 23 May 2021.

²²³ Opponents of corporal punishment consisted mainly of members of the African National Congress (ANC). Proponents were some members of the ANC, the African Christian Democratic Party and the Democratic Alliance. See Samantha Waterhouse, ‘Status of Corporal Punishment in South African Children’s Amendment Bill Law Reform Process’ (Dullah Omar Institute, December 2007) 3 <<https://dullahomarinate.org.za/childrens-rights/Publications/Article%2019/Volume%203%20Number%203%20-%20December%202007.pdf>> accessed 16 February 2021.

an end to the possibility of outlawing the reasonable chastisement defence if the rest of the bill were to be passed.²²⁴

Later attempts to include a similar provision in the Regulations to the Act attracted a similar parliamentary response and again had to be cut.²²⁵ The executive's subsequent attempt to introduce a ban met with strong opposition from parliamentarians, so much so that it threatened to derail the entire Children's Bill during the parliamentary debate process.²²⁶

Opposition by parliamentarians to the new bill, and specifically to clause 139, was based purely on their personal beliefs supporting corporal punishment.²²⁷ It has been clear since 2006 that the executive arm of the South African government wishes to abolish the defence of reasonable chastisement but that the legislator is less so inclined.²²⁸ As Sloth-Nielsen points out, the executive cannot compel the

²²⁴ Julia Sloth-Nielsen, 'Southern African Perspectives on Banning Corporal Punishment—a Comparison of Namibia, Botswana, South Africa and Zimbabwe' in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 258. The Social Development Portfolio Committee, in their Minutes of the Committee's Report on the Children's Amendment Bill dated 24 October 2007, stated: 'The Committee had deleted Section 139, dealing with the corporal punishment of children, from the Bill. It recognised the need for further investigation of the matter and anticipated this matter would be finalised in the anticipated forthcoming Amendment Bill that would be introduced as a Section 75 Bill. This would give the Department the opportunity to prepare itself.' Parliamentary Monitoring Group, 'Children's Amendment Bill [B19B-2006]: Committee Report: adoption' <<https://pmg.org.za/committee-meeting/8491/>> accessed 15 February 2021. No further reasons for the deletion were given.

²²⁵ Julia Sloth-Nielsen, 'Southern African Perspectives on Banning Corporal Punishment—a Comparison of Namibia, Botswana, South Africa and Zimbabwe' in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 259.

²²⁶ Julia Sloth-Nielsen, 'Southern African Perspectives on Banning Corporal Punishment—a Comparison of Namibia, Botswana, South Africa and Zimbabwe' in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 263.

²²⁷ Julia Sloth-Nielsen, 'Sideswipes and Backhanders: Abolition of the Reasonable Chastisement Defence in South Africa' (2020) *Int'l Journal of Law, Policy and the Family* 191, 193.

²²⁸ Julia Sloth-Nielsen, 'Southern African Perspectives on Banning Corporal Punishment—a Comparison of Namibia, Botswana, South Africa and Zimbabwe' in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 260.

legislature to do its bidding.²²⁹ South Africa has progressively eliminated corporal punishment from the legal landscape. There remains only the final hurdle, the adoption of a statutory prohibition of corporal punishment in the home.

The most recent version of the Bill was introduced in the National Assembly on 31 August 2020.²³⁰ However, it contains no reference to corporal punishment.²³¹ This has left children in an untenable situation as regards corporal punishment in private settings. This was an unexpected omission as the South African government has committed to both the African Committee of Experts on the Rights and Welfare of the Child and the CRC, that it intends to prohibit corporal punishment by amending the Children's Act Amendment Bill.²³² The question therefore remains: 'Will corporal punishment now be treated as an assault under criminal law, or will parliament draft some legislative protection for children who suffer abuse from their parents?'²³³ Rosenberg, being the legal realist that he is, argues that it is a revolutionary idea to believe that litigation can effect social change or that rights can overcome politics.²³⁴ Until the mid-twentieth century reform proponents believed that significant cultural change would only come through the establishment of social movements and follow-up legislative

²²⁹ Julia Sloth-Nielsen, 'Southern African Perspectives on Banning Corporal Punishment—a Comparison of Namibia, Botswana, South Africa and Zimbabwe' in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 263.

²³⁰ South African Parliament, 'Bills Currently in Parliament' <<https://www.parliament.gov.za/bills>> accessed 15 February 2021.

²³¹ Julia Sloth-Nielsen, 'Sideswipes and Backhanders: Abolition of the Reasonable Chastisement Defence in South Africa' (2020) *Int'l Journal of Law, Policy and the Family* 191, 203.

²³² Julia Sloth-Nielsen, 'Sideswipes and Backhanders: Abolition of the Reasonable Chastisement Defence in South Africa' (2020) *Int'l Journal of Law, Policy and the Family* 191, 203.

²³³ Julia Sloth-Nielsen, 'Sideswipes and Backhanders: Abolition of the Reasonable Chastisement Defence in South Africa' (2020) *Int'l Journal of Law, Policy and the Family* 191, 202.

²³⁴ Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (2nd edn University of Chicago Press, 2008) 445.

triumphs.²³⁵ It appears that in South Africa this is the case and politics have indeed triumphed over children's rights – at least for now.

4.5 Impactful Public Interest Litigation

The application of the provisions of the Convention has had a significant impact on South African children's rights jurisprudence, arguably more so than in any other jurisdiction in the world.²³⁶ So too has PIL impacted on children's rights. PIL is often a valuable strategy for under-resourced, civil society groups that lack influence in important economic or social policy issues. Litigation, or even the mere threat of litigation, can be a trigger or catalyst to start an influential, well-informed, strategic campaign for law reform. It only takes one court decision to counter the influence of self-interested groups like FORSA, which would prefer the status quo to be maintained and corporal punishment still to be permitted.²³⁷

However, where the courts in fact decide a matter in favour of the public interest – eg, the abolition of corporal punishment – the question arises of how one enforces the judicial ban on corporal punishment in the absence of legislative prohibition (and possible criminal penalty). This situation is reminiscent of what Rosenberg terms the 'Hollow Hope'.²³⁸ Rosenberg argues that the hostility of political leaders creates obstacles to the implementation of progressive laws (such as abortion or protection of the environment).²³⁹ When faced with serious opposition and given

²³⁵ Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (2nd edn University of Chicago Press, 2008) 445.

²³⁶ Julia Sloth-Nielsen, 'Children's Rights in the South African Courts: An Overview since Ratification of the UN Convention on the Rights of the Child' (2002) 10 Int'l J Child Rts 137, 152.

²³⁷ Andrea Dubach et al, 'Public Interest Litigation: Making the case in Australia' (2013) *Alternative Law Journal* 219, 220.

²³⁸ Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (2nd edn University of Chicago Press, 2008).

²³⁹ Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (2nd edn University of Chicago Press, 2008) 436.

their lack of power to implement, courts will also be unsuccessful in effecting social and cultural change.²⁴⁰ Rosenberg notes that legislators are unlikely to pass controversial legislation that they believe most of their voters oppose, while the judiciary will on occasion act without political backup.²⁴¹ In the South African context, the lack of political backup or support is most evident in the failure of the legislature to amend the Children's Act to outlaw corporal punishment in the home.²⁴²

The *FORSA* case is a prime example of how judicial condemnation through strategic litigation can promote children's rights by prohibiting corporal punishment and achieving much-needed law reform. Constitutional and legal provisions appear to be increasingly used to challenge the infliction of corporal punishment in some or all settings.²⁴³ However, Marcus and Budlender point out that even where there are legal victories that lead to legislative change, this is not always reflected in social and cultural change as it is not undertaken in conjunction with advocacy.²⁴⁴ As pointed out in Chapter 2, another aspect of concern is the counter-mobilisation movements like Justice Alliance of South Africa (JASA), a conservative Christian organisation that came to the fore in *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another*.²⁴⁵ Scholars have noted the backlash or resistance

²⁴⁰ Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (2nd edn University of Chicago Press, 2008) 436.

²⁴¹ Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (2nd edn University of Chicago Press, 2008) 440.

²⁴² Children's Act Amendment Bill (Bill 18 of 2020).

²⁴³ Sonia Vohito, 'Using the courts to end corporal punishment – The international score card' (2019) *De Jure* 597, 599.

²⁴⁴ Gilbert Marcus and Steven Budlender, *A strategic evaluation of public interest litigation in South Africa* (Atlantic Philanthropies, 2008) 150-51.

²⁴⁵ [2013] ZACC 35, 2014 (2) SA 168 (CC).

from groups such as JASA and FORSA to progressive social change in PIL matters and the advancement of more conservative actors.²⁴⁶

Public Interest Litigation can also have an indirect impact by generating public support, reinforcing mobilisation efforts, creating media awareness, and increasing political tactics²⁴⁷ such as community and social movement groups outside of the legal fraternity, which can serve to politicise issues and have a far more lasting and profound impact than a court judgment.²⁴⁸ Vohito argues that even if high-level decisions are not implemented in domestic law, they may still provide some pressure at national and international levels and improve the lot of children's rights – albeit to a limited extent only.²⁴⁹

4.6 Conclusion

Children are protected from public but not from private acts of violence perpetrated against them by their parents or persons *in loco parentis*.²⁵⁰ As the holders of a substantial number of rights, children in South Africa still lack the substantive equality that will make them genuinely equal to adults. Substantive equality, especially regarding the offence of assault where the discrepancy between adult and child victims' treatment is so stark, must be addressed. The focus needs to

²⁴⁶ Steven Budlender, Gilbert Marcus and Nick Ferreira, *Public Interest Litigation and social change in South Africa: Strategies, tactics and lessons* (The Atlantic Philanthropies, 2014) 13.

²⁴⁷ Michael W McCann, 'Legal Mobilization and Social Reform Movements: Notes on Theory and its Application' in Michael W McCann (ed), *Law and Social Movements* (Ashgate 2006) 230.

²⁴⁸ Jackie Dugard and Malcolm Langford, 'Art or Science? Synthesising Lessons from Public Interest Litigation and the Dangers of Legal Determinism' (2011) 27(1) SAJHR 39, 55 <<https://doi.org/10.1080/19962126.2011.11865004>>.

²⁴⁹ Sonia Vohito, 'Using the courts to end corporal punishment – The international score card' (2019) *De Jure* 597, 607.

²⁵⁰ Ann Skelton, 'S v Williams: A Springboard for Further Debate about Corporal Punishment' (2015) *Acta Juridica* 336, 347.

shift away from parents and their rights to parental responsibilities and the rights of their children.

Under section 9(1) of the South African Constitution, 'Everyone is equal before the law and has the right to equal protection and benefit of the law.'²⁵¹ Subsection 2 continues that '[e]quality includes the full and equal enjoyment of all rights and freedoms'. Skelton argues that a child's right to equal protection under the law has been compromised by the common-law defence of reasonable chastisement,²⁵² while adults enjoy the full protection of the law against both public and private acts of violence perpetrated against them.²⁵³

It is a truism that corporal punishment is both complex and controversial. It affects parents on both a practical and a philosophical level.²⁵⁴ For this reason, and given its brutal history of human rights abuses, South Africa is to be commended for doing an admirable job in formally and systematically prohibiting corporal punishment in both the public²⁵⁵ and private spheres.²⁵⁶ South Africa has seen a remarkable change from its notorious human rights violations under the apartheid regime to a more rights-conscious judiciary. This is thanks to the adoption of a very progressive Constitution with a dedicated Constitutional Court, which gives effect to the provisions of the Constitution and Bill of Rights – and specifically section 28 which focuses on children's rights.

²⁵¹ Constitution of the Republic of South Africa, 1996.

²⁵² Ann Skelton, 'S v Williams: A Springboard for Further Debate about Corporal Punishment' (2015) Acta Juridica 336, 347.

²⁵³ Ann Skelton, 'S v Williams: A Springboard for Further Debate about Corporal Punishment' (2015) Acta Juridica 336, 347.

²⁵⁴ Gareth Griffith, 'Crimes Amendment (Child Protection – Excessive Punishment) Bill 2000: Background and Commentary' Briefing Paper No 9/2000 (NSW Parliamentary Library Research Service, July 2000) 1 <<https://www.parliament.nsw.gov.au/researchpapers/Documents/crimes-amendment-child-protection-excessive-puni/09-00.pdf>> accessed 27 November 2020.

²⁵⁵ *S v Williams* 1995 (3) SA 632 (CC); *Christian Education South Africa v Minister of Education* [2000] ZACC 11, 2000 (4) SA 757, 2000 (10) BCLR 1051.

²⁵⁶ *FORSA v Minister of Justice and Constitutional Development* [2019] ZACC 34.

Furthermore, an enlightened judiciary has led to a more rights-conscious society with an entire body of jurisprudence to prove it. Children's rights are one of the benefactors of this judicial enlightenment. Skelton lists numerous cases that have come before the Constitutional Court over the last 25 years as evidence that children's rights have gained prominence amongst the judiciary and scholars.²⁵⁷ Whilst South Africa has followed a model path to the abolition of corporal punishment in both public and private settings, in reality corporal punishment is still used in schools and the home.²⁵⁸ While courts are able to bring about change, it is likely to be piecemeal, formalistic, and only sometimes substantive.²⁵⁹ This is clear from the current situation where corporal punishment in the home has been outlawed by the Constitutional Court, but has not been supported by essential follow-up legislation. One of the disadvantages of having only a judicial ban (without supportive legislative reform) is the risk that the ban will be undermined through lack of political will.²⁶⁰

Follow-up legislative reform gives the judicial ban the legitimacy and authority to effect the necessary social change. However, it is argued that the law is a flawed medium for social and economic change.²⁶¹ It does not follow that there will be public adherence to the Constitutional Court's decision merely because it is formalised in a law. Consequently, in South Africa it appears that neither judicial nor legislative law reform is without shortcomings.

²⁵⁷ Ann Skelton, 'Children's Rights' in Jason Brickhill (ed), *Public Interest Litigation in South Africa* (Juta, 2018) 258.

²⁵⁸ Tshepo L Mosikatsana, 'Children's Rights and Family Autonomy in the South African Context: A Comment on Children's Rights Under the Final Constitution' (1998) 3 J Race & L 341, 364.

²⁵⁹ Catherine Albertyn, 'Contested Substantive Equality in the South African Constitution: Beyond Social Inclusion Towards Systemic Justice' (2018) 34(3) SAJHR 441, 459.

²⁶⁰ Benyam Dawit Mezmur, "'Don't Try this at Home?': Reasonable or Moderate Chastisement, and the Rights of the Child in South Africa with *YG v S* in Perspective' *Speculum Juris* 84 <<http://repository.uwc.ac.za/handle/10566/5041>> accessed 25 June 2020.

²⁶¹ Catherine Albertyn, 'Substantive Equality and Transformation South Africa' (2007) 23(2) South African Journal on Human Rights 253, 276.

It remains to be seen how successful the abolition of corporal punishment in the home will be. In the absence of a penalty in legislation, it is difficult to gauge the impact that a judicial ban alone can have. As much as one wishes to believe that the Constitutional Court speaks with authority and wisdom, one is not convinced that society as a whole will pay much attention to the *FORSA* decision. As noted above, Sunstein argues that laws can change social and cultural habits by requiring a change in behaviour through statutory mandate with or without the threat of criminal sanction.²⁶² For South Africa, the Constitutional Court decision has at least created public awareness of the adverse effects of corporal punishment and this will, it is hoped, enable child rights advocates to continue to agitate for legislative reform. Budlender, Marcus and Ferreira contend that for PIL to succeed, in other words, to achieve 'maximum social change', one must ensure that the victory in the courts is implemented.²⁶³

In the *FORSA* case that would require the necessary law reform to outlaw corporal punishment in the home together with enforcement of the prohibition. Only then will the impact of the *FORSA* decision be felt across South Africa and will the need for social change on a moral level improve. Law reform will bring the issue to the fore in the minds of all parents and carers and facilitate a change in religious and cultural views on corporal punishment. Many conservative Christians and adherents to traditional views are also staunch rule-followers. If corporal punishment is banned by legislation, the necessary cultural shift away from hitting children will be far more easily achieved.

As can be seen from the proposed section 139 in the Children's Act debacle, South African parliamentarians, like their Australian counterparts, are loath to legislate a ban on corporal punishment in the home, unlike New Zealand where

²⁶² Cass R Sunstein, 'On the Expressive Function of Law' (1996) 144 U Pa L Rev 2021, 2032.
²⁶³ Steven Budlender, Gilbert Marcus and Nick Ferreira, Public Interest Litigation and Social Change in South Africa: Strategies, Tactics and Lessons (The Atlantic Philanthropies, 2014) 122.

the progressive Green and Labour Parties managed to pass legislation prohibiting the use of corporal punishment in all settings. Budlender, Marcus and Ferreira appear to echo Rosenberg's view in their comments regarding the resistance of the ANC government to PIL:

In sum, there appears to be an increased degree of hostility on the part of government towards public interest litigation and progressive public interests organisations. This is a very serious concern. Public interest litigation is only effective when court orders obtained are properly implemented, and in most cases this requires implementation by government respondents. The increased degree of hostility by government towards public interest litigation means an increased risk of non-compliance ... ²⁶⁴

Sloth-Nielsen asks how the machinery of a legislative ban would work were the government to adopt legislation prohibiting corporal punishment in the home.²⁶⁵ Defining a list of *de minimis*²⁶⁶ actions can only ban the reasonable chastisement defence. The question is whether the legislature will implement criminal sanctions for breaches of the law or will there simply be a retreat to the common-law offences of assault and assault with an intent to do grievous bodily harm.²⁶⁷ A definite requirement will be for the government to fund (compulsory) positive parenting programmes. In this regard, it is suggested that South Africa look to how New Zealand dealt with its legislative ban. The New Zealand legislative process is discussed further in Chapter 5.

²⁶⁴ Steven Budlender, Gilbert Marcus and Nick Ferreira, *Public Interest Litigation and Social Change in South Africa: Strategies, Tactics and Lessons* (The Atlantic Philanthropies, 2014) 22.

²⁶⁵ Julia Sloth-Nielsen, 'Sideswipes and Backhanders: Abolition of the Reasonable Chastisement Defence in South Africa' (2020) *Int'l Journal of Law, Policy and the Family* 191, 203.

²⁶⁶ *De minimis non curat lex* – The law does not concern itself with trivial matters.

²⁶⁷ Julia Sloth-Nielsen, 'Sideswipes and Backhanders: Abolition of the Reasonable Chastisement Defence in South Africa' (2020) *Int'l Journal of Law, Policy and the Family* 191, 203.

Chapter 5

The New Zealand Experience - Law Reform, Society, and Culture

Our tamariki mokopuna (children) carry the divine imprint of our tupuna (ancestors), drawing from the sacred wellspring of life. As iwi (indigenous nations), we share responsibility for the well-being of our whānau (families) and tamariki mokopuna. Hitting and physical force within whānau is a violation of the mana (prestige, power) and tāpu (sacredness) of those who are hit and those who hit. We will continue to advocate for whānau education based on cultural models that provide alternatives to violence. Our capacity for resilience as indigenous people is fed and nourished by our language, traditional practices and oral traditions. We dedicate this important piece of work to the children of Aotearoa New Zealand – may they grow in peace.

*Maha rawa wā tatou mahi te kore mahi tonu, tawhiti rawa to tatou harenga te kore haere tonu.
We have done too much to not do more, we have come too far to not go further.*

Sir James Henare¹

Naida Glavish JP
Chairperson
Te Runanga o Ngāti Whātua (Tribal Authority)

5.1 Introduction

The road to legislative reform of corporal punishment in New Zealand spanned almost three decades starting in 1978 with academic and human rights activists calling for law reform and change.² Jane and James Ritchie, psychologists at the

¹ This dedication appears in Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 93.

² Ian Hassall, 'New Zealand's Landmark Law Change to Prohibit Corporal Punishment of Children' in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 173.

University of Waikato, made submissions to the Parliamentary Select Committee on Violent Offending, in which they advocated an end to corporal punishment in the home.³ In 1979 – the International Year of the Child – at a conference on *The Rights of the Child and the Law*, the Ritchies argued for section 59 of the Crimes Act 1961 to be repealed. The following year, the New Zealand Committee for Children was established. The Committee aimed to carry on with the work begun the previous year by opposing corporal punishment in the home.⁴

This chapter focuses on the lengthy process of the repeal of the notorious section 59 of the Crimes Act, which contained the common-law defence of *reasonable chastisement* to a charge of common assault.⁵ The repeal process started on 9 June 2005, when Sue Bradford of the Green Party of Aotearoa introduced the Crimes (Substituted Section 59) Amendment Bill in parliament.⁶ Almost two years later, the Bill was adopted by the House of Representatives of the New Zealand parliament. The sole purpose of this Bill was to abolish the use of parental force for purposes of correction.⁷

The consequences of having a unicameral parliament with a mixed-member proportional (MMP) system for adopting legislation are considered. The political

³ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 33.

⁴ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 34.

⁵ The former s 59 read as follows:
'(1) Every parent of a child and, subject to subsection (3), every person in the place of the parent of a child is justified in using force by way of correction towards the child, if the force used is reasonable in the circumstances.
(2) The reasonableness of the force used is a question of fact.
(3) Nothing in subsection (1) justifies the use of force towards a child in contravention of section 139A of the Education Act 1989.'

⁶ New Zealand Parliament, 'Crimes (Abolition of Force as Justification for Child Discipline) Amendment Bill – First Reading' <https://www.parliament.nz/en/pb/hansard-debates/rhr/document/47HansD_20050727_00001406/crimes-abolition-of-force-as-a-justification-for-child> accessed 20 May 2020.

⁷ See s 4 of the Crimes (Substituted Section 59) Amendment Act 2007.

party that controls the government is also the party that controls the legislature.⁸ Because of the unicameral parliament, the government does not have to debate and vote on the matter in an Upper House.⁹ This chapter also examines the process that New Zealand followed to mobilise the public in its law-reform campaign. The common arguments put forward by opponents to law-reform are also analysed and discussed.

Furthermore, this chapter examines the significant levels of violence within families to this day and the struggle to change societal attitudes towards corporal punishment. New Zealand has not been able to rid itself of the scourge of violence towards children.¹⁰ Unfortunately, domestic violence (IPV and child abuse) rates remain unacceptably high.¹¹

Ultimately, the question is what lessons one can learn from the New Zealand experience.¹² What processes to achieve law reform should Australia try to emulate, and what processes should be avoided?

⁸ Thomas B Stoddard, 'Bleeding Heart: Reflections on using the Law to make Social Change' (1997) 72 NYU L Rev 967, 970.

⁹ The MMP system gave each member of the public over eighteen years of age two votes – one for their local representative (electoral vote) and the other vote for their party of choice (party vote). Sixty candidates get voted in as electorate MPs, representing the voters of a specific geographical area. The party vote is used to determine the overall composition of parliament so that it reflects the proportion of votes cast across the country for each political party. Some members of parliament join the House of Representatives as 'list' members which increases the number from sixty to approximately 120 members. 'List' members do not represent a geographical area – see New Zealand Electoral Commission, 'What is MMP?' <<https://elections.nz/democracy-in-nz/what-is-new-zealands-system-of-government/what-is-mmp/>> accessed 9 June 2021.

¹⁰ Beth Wood, 'Violence-free childhoods: New Zealand nine years post prohibition of corporal punishment. What now?' 4 <https://epochnz.org.nz/images/stories/media-ol/ResearchAndOtherPapers/Violence_free_childhoods_September_2016.pdf> accessed 28 September 2020.

¹¹ New Zealand Family Violence Clearing House, 'Frequently Asked Questions' <<https://nzfvc.org.nz/frequently-asked-questions>> accessed 23 October 2020.

¹² Beth Wood, 'Violence-free childhoods: New Zealand nine years post prohibition of corporal punishment. What now?' 4 <https://epochnz.org.nz/images/stories/media-ol/ResearchAndOtherPapers/Violence_free_childhoods_September_2016.pdf> accessed 28 September 2020.

5.2 Colonialism, Common Law and Corporal Punishment

New Zealand is a small country situated approximately 1 000 kilometres from its nearest neighbour, Australia. It has an estimated population of five million people,¹³ comprising of Māori (settlers from other Pacific Islands who arrived more than 700 years ago and became the country's indigenous people), migrants of Asian descent, and an extensive group of migrants of European descent who arrived in the early 1800s.¹⁴ It is suggested that prior to European settlement, Māori children enjoyed a quiet and peaceful existence. Their domestic lives were tranquil, and the Māori were never seen to be violent towards their children.¹⁵

Fundamentally, the Māori believed that *tamariki mokopuna* (children) were gifts from the *atua* (spiritual beings). Any negativity expressed towards them broke the *tāpu* (sacredness and special rules and restrictions) by offending the *atua* and the *tipuna* (ancestors) gone before.¹⁶ *Tamariki mokopuna* were treated with *aroha* (loving care) and indulgence. As a method of socialising children, punitive discipline in whatever degree was anathema to the *tipuna*.¹⁷

¹³ Stats NZ Tauranga Aotearoa <<https://www.stats.govt.nz/indicators/population-of-nz>> accessed 28 September 2020.

¹⁴ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 21.

¹⁵ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 22.

¹⁶ Kuni Jenkins and Helen Mountain Harte, 'Traditional Māori Parenting: An Historical Review of Literature of Traditional Māori Child Rearing Practices in Pre-European Times' (2011) Te Kāhui Mana Ririki, Auckland, New Zealand x <<https://www.occ.org.nz/assets/Uploads/Traditional-Maori-parenting.pdf>> accessed 6 January 2021.

¹⁷ Kuni Jenkins and Helen Mountain Harte, 'Traditional Māori Parenting: An Historical Review of Literature of Traditional Māori Child Rearing Practices in Pre-European Times' (2011) Te Kāhui Mana Ririki, Auckland, New Zealand x <<https://www.occ.org.nz/assets/Uploads/Traditional-Maori-parenting.pdf>> accessed 6 January 2021.

In 1840 New Zealand became a British Colony under the provisions of the Treaty of Waitangi.¹⁸ The treaty is a statement of principles agreed upon between the British and the Māori to found the nation state of New Zealand and build a government.¹⁹ It is not part of domestic law save where specific principles are referred to in domestic law.²⁰ Therefore, New Zealand is a constitutional monarchy in which the members of the government are democratically elected and can make law and ‘advise’ the Crown.²¹ The Queen is the Head of State and is represented by the Governor-General. These roles are largely ceremonial and do not affect the day-to-day running of the three branches of government – the judiciary, the legislature, and the executive.²²

New Zealand is a parliamentary democracy with a Westminster parliamentary system where the ‘principle of the separation of powers’ is an important feature. However, as membership of parliament is a prerequisite for appointment as a member of the executive, there is some blurring of the lines that separate the executive and the legislature.²³ New Zealand has a unicameral parliament consisting of the House of Representatives. It does not have an Upper House or Senate to exercise accountability over the executive.²⁴ Because of the first-past-the-post voting system, single-party majority governments are a given.²⁵

¹⁸ New Zealand History, 1 <<https://nzhistory.govt.nz/politics/treaty/the-treaty-in-brief>> accessed 28 September 2020.

¹⁹ Stats NZ Tatauranga Aotearoa, <<https://www.stats.govt.nz/indicators/population-of-nz>> accessed 1 October 2021.

²⁰ New Zealand History, 1 <<https://nzhistory.govt.nz/politics/treaty/the-treaty-in-brief>> accessed 28 September 2020.

²¹ Susan Glazebrook, Natalie Baird and Sasha Holden, ‘New Zealand: Country Report on Human Rights’ (2009) 40 Victoria U Wellington L Rev 57, 57.

²² Susan Glazebrook, Natalie Baird and Sasha Holden, ‘New Zealand: Country Report on Human Rights’ (2009) 40 Victoria U Wellington L Rev 57, 57.

²³ Susan Glazebrook, Natalie Baird and Sasha Holden, ‘New Zealand: Country Report on Human Rights’ (2009) 40 Victoria U Wellington L Rev 57, 65.

²⁴ Susan Glazebrook, Natalie Baird and Sasha Holden, ‘New Zealand: Country Report on Human Rights’ (2009) 40 Victoria U Wellington L Rev 57, 58.

²⁵ This led to criticism that the legislature was subordinate to the executive. See Susan Glazebrook, Natalie Baird and Sasha Holden, ‘New Zealand: Country Report on Human Rights’ (2009) 40 Victoria U Wellington L Rev 57, 65.

This system was criticised as one in which the legislature was subordinate to the executive, so much so that the legislature was dubbed ‘the fastest law-maker in the West’.²⁶ However, in 1993 a mixed-member-proportional representation (MMP) system replaced the first-past-the-post system which had required only a simple majority, so restricting the executive's power.²⁷ The MMP system required that major parties form coalitions with minor political parties to secure a majority to govern effectively and pass new laws.²⁸ This unique feature of the MMP system ensured that political parties provided voters with broader representation.

As a result of the Treaty of Waitangi, many thousands of English, Irish, Scottish, and Welsh migrants arrived and settled in New Zealand in the 1800s – and brought their Christian customs of child discipline with them.²⁹ One of these customs was a belief in the efficacy of physical punishment as way of disciplining children.³⁰ This belief was founded on biblical passages from the Old Testament.³¹ As a result, the physical disciplining of children was established and flourished among the Māori.³²

When New Zealand became a British Colony, corporal punishment was adopted in New Zealand as a means of discipline.³³ Because British common law applied in New Zealand, the defence of *reasonable chastisement* also found its way into New

²⁶ See Susan Glazebrook, Natalie Baird and Sasha Holden, ‘New Zealand: Country Report on Human Rights’ (2009) 40 Victoria U Wellington L Rev 57, 65 where they quote Sir Geoffrey Palmer in n 34.

²⁷ Susan Glazebrook, Natalie Baird and Sasha Holden, ‘New Zealand: Country Report on Human Rights’ (2009) 40 Victoria U Wellington L Rev 57, 58.

²⁸ Beth Wood et al, *Unreasonable Force: New Zealand’s Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 23.

²⁹ Beth Wood et al, *Unreasonable Force: New Zealand’s Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 22.

³⁰ Beth Wood et al, *Unreasonable Force: New Zealand’s Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 22.

³¹ See Chapter 2 para 2.7 for a more detailed discussion on religious teachings about corporal punishment.

³² Beth Wood et al, *Unreasonable Force: New Zealand’s Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 70.

³³ Beth Wood et al, *Unreasonable Force: New Zealand’s Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 23.

Zealand law and in 1893 this defence was given statutory force when it was incorporated in the Criminal Code by way of section 68.³⁴ Williams J in the 1902 case of *R v Drake*³⁵ held that:

The defence set up was under Section 68 of 'The Criminal Code Act, 1893,' which declares that it is lawful for every parent to use force by way of correction towards a child under the care of such parent provided that such force is reasonable under the circumstances.³⁶

This case was an appeal brought by a mother who was found guilty of the manslaughter of her child.³⁷ The Crown introduced evidence that the mother had on previous occasions beaten the child to an extent that could not reasonably be considered anything but excessive. The legal argument on appeal rested on evidence in the court a quo that showed that the accused was a person likely to commit a crime (tendency evidence). Stout CJ remarked: 'I do not see how the Judge could have excluded such evidence. It was in my opinion entirely relevant to the issue I have mentioned.'³⁸ Denniston J held that:

The punishment and its result (on the assumption that the child's death was the result of the punishment) were so monstrously disproportionate to any offence which could be said to have been committed by the child, that it at once raises the question, and must necessarily have suggested to the prosecution the possibility, that what was done was not really done by way of punishment, but was a means adopted by the accused of wreaking her dislike or malice upon this child. That, at all events, was a view which ought to be submitted to the jury. If so, then this evidence was legitimately admitted.³⁹

The appeal was dismissed.

³⁴ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 32.

³⁵ NZCA [1902] NZGazLawRp 141, (1902) 22 NLR 478, (1902) 5 GLR 145.

³⁶ NZCA [1902] NZGazLawRp 141, (1902) 22 NLR 478, (1902) 5 GLR 145, 147.

³⁷ NZCA [1902] NZGazLawRp 141, (1902) 22 NLR 478, (1902) 5 GLR 145.

³⁸ NZCA [1902] NZGazLawRp 141, (1902) 22 NLR 478, (1902) 5 GLR 145, 146.

³⁹ NZCA [1902] NZGazLawRp 141, (1902) 22 NLR 478, (1902) 5 GLR 145, 148.

In 1961, the New Zealand Parliament passed the Crimes Act, and the provision containing the defence was re-enacted into the new legislation in what was the then section 59.⁴⁰ Section 59 provided:

Every parent of a child and, subject to subsection (3), every person in the place of a parent of a child is justified in using force by way of correction towards the child, if the force used is reasonable under the circumstances.

The New Zealand Bill of Rights Act (NZBORA) was enacted to protect human rights and to pledge New Zealand's dedication to the ICCPR.⁴¹ Unlike its South African counterpart, NZBORA is not entrenched. It is also not possible to have legislation struck down for incompatibility with NZBORA or international treaties.⁴² Both Australia and New Zealand adhere to the principle of parliamentary sovereignty inherited from the Westminster system of government.⁴³ It is argued that the NZBORA is New Zealand's most significant rights legislation. Together with the Human Rights Act 1993 (HRA) they protect New Zealanders against discrimination.⁴⁴ As mentioned above, section 19(1) of NZBORA states that: 'Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.'⁴⁵ It bears noting, though, that the HRA made it unlawful to discriminate on the grounds of age, but only from the age of sixteen years and older.⁴⁶ It is therefore ironic that a law which aims to limit

⁴⁰ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 32.

⁴¹ Susan Glazebrook, Natalie Baird and Sasha Holden, 'New Zealand: Country Report on Human Rights' (2009) 40 *Victoria U Wellington L Rev* 57, 58.

⁴² Susan Glazebrook, Natalie Baird and Sasha Holden, 'New Zealand: Country Report on Human Rights' (2009) 40 *Victoria U Wellington L Rev* 57, 58.

⁴³ New Zealand employs a 'pre-enactment scrutiny' process whereby Attorneys-General can, under s 7 of the BORA, review government Bills to determine their compatibility with human rights legislation. See Paul Rishworth, 'Human Rights' [2015] *NZ L Rev* 259, 260; Susan Glazebrook, Natalie Baird and Sasha Holden, 'New Zealand: Country Report on Human Rights' (2009) 40 *Victoria U Wellington L Rev* 57, 58.

⁴⁴ Susan Glazebrook, Natalie Baird and Sasha Holden, 'New Zealand: Country Report on Human Rights' (2009) 40 *Victoria U Wellington L Rev* 57, 59.

⁴⁵ See s 21(1) for a list of prohibited grounds of discrimination.

⁴⁶ Section 21(1)(i).

discrimination, itself discriminates on the basis of age against the youngest and most vulnerable in society.⁴⁷

It therefore becomes clear why New Zealand could not have the previous section 59 of the Crimes Act 1961 struck down as incompatible with NZBORA through litigation. Public interest litigation is not a viable strategy for law reform under the current principle of parliamentary sovereignty. The only strategy available to New Zealanders seeking to abolish the defence of reasonable chastisement in the former section 59 was to use the democratic parliamentary processes.

5.3 Milestones on the Long Road to Abolition

It took 114 years to have the defence of reasonable chastisement repealed.⁴⁸ There have been some remarkable events on the long road to abolition.⁴⁹ A selection of these is listed below and they are briefly discussed.

Towards the end of the twentieth century, New Zealand outlawed physical punishment in care centres and residential institutions. In 1985 the Child Care Regulations removed the right of employees of child care centres to use physical punishment,⁵⁰ and in 1986 the Children and Young People (Residential Care) Regulations banned the use of corporal punishment in residential institutions.⁵¹ On 20 November 1989, the United Nations Convention on the Rights of the Child (Convention) was adopted by the United Nations General Assembly and on 1

⁴⁷ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 62.

⁴⁸ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 32.

⁴⁹ This is only a fraction of the milestones as highlighted in Beth Wood et al, *Unreasonable Force: New Zealand's journey towards banning the physical punishment of children* (Save the Children New Zealand, 2008) 33, which spans almost 20 pages.

⁵⁰ Section 33(d) and 34 of the Education (Early Childhood Centres) Regulation 1998.

⁵¹ Regulation 20 of the Children, Young Persons and their Families (Residential Care) Regulations 1996.

October 1990, New Zealand signed the Convention and ratified it on 13 March 1993.⁵² In 1991, the Department of Social Welfare changed its policy and prohibited corporal punishment in foster homes.⁵³ In 1992, New Zealand experienced its first real public outcry and revulsion over the death of a two-year-old child, Delcilia Witika, at the hands of her parents.⁵⁴

In 1989, the Children, Young Persons and their Families Act 1989 was enacted.⁵⁵ This Act provided for the appointment of a Commissioner for Children. The prominent paediatrician and child advocate, Dr Ian Hassall, was appointed as the first Commissioner and in 1993 he launched a national 'No-hitting' campaign.⁵⁶ This campaign consisted of articles in an academic journal advocating the prohibition of corporal punishment.⁵⁷ Successive Commissioners have continued the work started by Hassall.⁵⁸

In June 2004, the Children's Issues Centre at the University of Otago and the Children's Commissioner's Office published a report titled: 'The Discipline and Guidance of Children: A Summary of Research'.⁵⁹ The purpose of this report was

⁵² United Nations, Office of the High Commissioner, <<https://indicators.ohchr.org/>> accessed 28 September 2020.

⁵³ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 35.

⁵⁴ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 35.

⁵⁵ Ian Hassall, 'New Zealand's Landmark Law Change to Prohibit Corporal Punishment of Children' in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 175.

⁵⁶ Ian Hassall, 'New Zealand's Landmark Law Change to Prohibit Corporal Punishment of Children' in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 175.

⁵⁷ Ian Hassall, 'New Zealand's Landmark Law Change to Prohibit Corporal Punishment of Children' in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 175.

⁵⁸ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 34.

⁵⁹ Anne B Smith et al, 'The Discipline and Guidance of Children: A Summary of Research' (Children's Issues Centre, University of Otago and the Office of the Children's

to provide information for parents and the professionals assisting them so that a mutual appreciation of the risks and benefits of different family disciplinary practices could be established and grow.

In January 1997, the CRC recommended that the New Zealand government review section 59 and prohibit all forms of corporal punishment⁶⁰ – a call which it reiterated in its country report of 2003.⁶¹ On the basis of this report from the Committee, Sue Bradford of the Green Party of Aotearoa proposed a Member's Bill in October 2003 entitled the Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill.⁶² This Bill was drawn from a ballot held on 9 June 2005, and set New Zealand on the road to the abolition of corporal punishment.⁶³

5.4 What Sparked the Change?

Certain events that jarred New Zealand's collective conscience kick-started the process to repeal section 59. In March 1991, New Zealand was rocked by the news of the horrific abuse and death of two-year-old Delcelia 'Delci' Witika at the hands of her biological mother and stepfather. In 1992, Lesley Max, a New Zealand journalist, wrote a two-part article in *Metro*,⁶⁴ a national magazine,

Commissioner, June 2004) <<https://www.occ.org.nz/assets/Uploads/Reports/Parenting/Discipline-and-guidance-a-summary.pdf>> accessed 6 January 2021.

⁶⁰ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 37.

⁶¹ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 42.

⁶² Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 176.

⁶³ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 176.

⁶⁴ Lesley Max, 'The killing of Delcelia Witika and the banality of evil' (*Metro*, June 1992) Part 1, 66–77 and Part 2, 108–114.

describing the ill-treatment and abuse of this little girl.⁶⁵ This led to ‘national soul searching about the status and treatment of children. One response was to question the legitimacy of section 59.’⁶⁶ Opponents of repeal believed there was no connection between ‘reasonable force to correct misbehaviour’ and children’s deaths from violent acts committed by their parents.⁶⁷ They argued that individuals responsible for the deaths of children would most likely not even have heard of section 59, much less have been influenced by it.⁶⁸ However, the link between child homicides and physical correction was widely reported, debated, and ultimately found to exist by the media – although this finding was not generally accepted.⁶⁹

Proponents of repeal believed that to repeal section 59 would be to correct a breach of children’s rights to live free from violence and the threat of violence. Furthermore, it would reduce the number of children at risk of serious physical harm or even death.⁷⁰ Many commentators favouring repeal acknowledged some connection between section 59 and child homicides, although this argument was never the principal argument during the campaign.⁷¹ Campaigners further believed

⁶⁵ Ian Hassall, ‘New Zealand’s Landmark Law Change to Prohibit Corporal Punishment of Children’ in Bernadette J Saunders, Pernilla Leviner and Bronwyn Naylor (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 173, 175. Beth Wood et al, *Unreasonable Force: New Zealand’s Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 35.

⁶⁶ Ian Hassall, ‘New Zealand’s Landmark Law Change to Prohibit Corporal Punishment of Children’ in Bernadette J Saunders, Pernilla Leviner and Bronwyn Naylor (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 173, 175.

⁶⁷ Beth Wood et al, *Unreasonable Force: New Zealand’s Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 25.

⁶⁸ Beth Wood et al, *Unreasonable Force: New Zealand’s Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 25.

⁶⁹ Beth Wood et al, *Unreasonable Force: New Zealand’s Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 152.

⁷⁰ Beth Wood et al, *Unreasonable Force: New Zealand’s Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 25.

⁷¹ Beth Wood et al, *Unreasonable Force: New Zealand’s Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 25.

that children learn about violence by witnessing violence between their parents, experiencing it for themselves, or seeing it being directed at their siblings.⁷²

The CRC criticised New Zealand for its failure to act on section 59 and again recommended an end to corporal punishment and the abolition of section 59 as it had previously done in 1997.⁷³ Moreover, in September 2003, to New Zealand's immense shame, UNICEF published the *Innocenti Report Card*⁷⁴ exposing its poor record on child deaths from violence and abuse. The *Innocenti Report Cards* defined children as persons under the age of fifteen.⁷⁵ New Zealand was identified as having a death rate from child maltreatment (1.2 deaths from maltreatment for every 100 000 children), a figure six times higher than countries with the lowest rates (0.2 maltreatment deaths for every 100 000 children).⁷⁶ At roughly the same time in 2003, yet another child, Coral Burrows, was beaten to death by her stepfather, which again unleashed a media frenzy and debate around section 59 and child discipline.⁷⁷ The attention incidents of child abuse and deaths garnered with media companies helped to increase public awareness of child protection and concern for children's safety.⁷⁸ This awareness created by the media also included

⁷² Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 25.

⁷³ UN Doc CRC/C/SR.364, 23 January 1997.

⁷⁴ The *Innocenti Report Cards* investigate child well-being in rich nations. The series draws data from the 30 members of the Organisation for Economic Co-operation and Development (OECD), the group of countries that produce two-thirds of the world's goods and services. UNICEF, *A League Table of Child Maltreatment Deaths in Rich Nations: Innocenti Report Card No 5*, Innocenti Research Centre, Florence, 2003, 5 <<https://www.unicef-irc.org/publications/pdf/repcard5e.pdf>> accessed 28 October 2020.

⁷⁵ UNICEF, *A League Table of Child Maltreatment Deaths in Rich Nations: Innocenti Report Card No 5*, Innocenti Research Centre, Florence, 2003, 4 <<https://www.unicef-irc.org/publications/pdf/repcard5e.pdf>> accessed 28 October 2020.

⁷⁶ UNICEF, *A League Table of Child Maltreatment Deaths in Rich Nations: Innocenti Report Card No 5*, Innocenti Research Centre, Florence, 2003, 5 <<https://www.unicef-irc.org/publications/pdf/repcard5e.pdf>> accessed 28 October 2020.

⁷⁷ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 42.

⁷⁸ Editorial, 'Kids no longer safe in Godzone' *Sunday Star-Times*, (21 September 2003).

a decrease in the number of violent disciplinary practices reported in assault prosecutions against parents.⁷⁹

5.4.1 The Abolition of Corporal Punishment Campaign Narrative

At the heart of each juncture of the campaign to abolish corporal punishment and its fallout, was a need to develop clear messaging within a historical, anthropological, sociological, legal, religious, and political framework.⁸⁰ What drove change in New Zealand was a campaign that was categorised by common arguments used under three headings: The Good Person/Parent; The Just Society; and The Natural Parent/Society.⁸¹

5.4.1.1 The Notion of a Good Person/Parent

Argument 1: The most basic argument that one can make for protecting children from harm is that one simply *does not* hit children. Intrinsicly we try to minimise any harm to children. Hassall uses the example of when an intravenous drip must be inserted, medical staff try their utmost to be as gentle as possible whilst distracting the child from the discomfort that is sure to follow. Hurting a child

⁷⁹ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 152.

⁸⁰ Ian Hassall, 'New Zealand's Landmark Law Change to Prohibit Corporal Punishment of Children' in Bernadette J Saunders, Pernilla Leviner and Bronwyn Naylor (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 173, 181.

⁸¹ Ian Hassall, 'New Zealand's Landmark Law Change to Prohibit Corporal Punishment of Children' in Bernadette J Saunders, Pernilla Leviner and Bronwyn Naylor (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 173, 181–185.

intentionally is brutal, humiliating, and can do lasting damage to a relationship. It is also wrong.⁸²

Argument 2: Control is not the paramount consideration in raising children, but, where necessary, can be achieved without resorting to violence. Control over children is part of the patriarchal attitude brought to New Zealand by British and European settlers. Māori children had a history of living free, unconstrained lives before the arrival of the settlers.⁸³ Shortland, quoted by Jenkins and Harte, observes that ‘...curbing the will of the child by harsh means was thought to tame his spirit, and to check the free development of his natural bravery’.⁸⁴

Argument 3: Corporal punishment is ineffective as a form of discipline and can have adverse effects;⁸⁵ it does nothing to ensure the desired changes in children’s behaviour.⁸⁶ There is an incontrovertible link between child abuse and domestic violence.⁸⁷ Research shows that children subjected to corporal punishment are more likely to sanction intimate partner violence (IPV) and are routinely more

⁸² Ian Hassall, ‘New Zealand’s Landmark Law Change to Prohibit Corporal Punishment of Children’ in Bernadette J Saunders, Pernilla Leviner and Bronwyn Naylor (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 173, 182.

⁸³ Beth Wood et al, *Unreasonable Force: New Zealand’s Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 91. Ian Hassall, ‘New Zealand’s Landmark Law Change to Prohibit Corporal Punishment of Children’ in Bernadette J Saunders, Pernilla Leviner and Bronwyn Naylor (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 173, 182.

⁸⁴ Kuni Jenkins and Helen Mountain Harte, ‘Traditional Māori Parenting: An Historical Review of Literature of Traditional Māori Child Rearing Practices in Pre-European Times’ (Te Kāhui Mana Ririki, Auckland, New Zealand, 2011) 22 <<https://www.occ.org.nz/assets/Uploads/Traditional-Maori-parenting.pdf>> accessed 6 January 2021.

⁸⁵ Elizabeth T Gershoff and Andrew Grogan-Kaylor, ‘Spanking and Child Outcomes: Old Controversies and New Meta-Analyses’ (2016) 30(4) *Journal of Family Psychology* 453.

⁸⁶ Ian Hassall, ‘New Zealand’s Landmark Law Change to Prohibit Corporal Punishment of Children’ in Bernadette J Saunders, Pernilla Leviner and Bronwyn Naylor (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 173, 182.

⁸⁷ Angelika Poulsen, ‘The Role of Corporal Punishment of Children in the Perpetuation of Intimate Partner Violence in Australia’ (2018) 43(1) *Children Australia* 2.

prone to be associated with IPV in adulthood, either as a victim or an assailant.⁸⁸ During their early years when children are most impressionable, it is critical that they are not subjected to physical violence lest they adopt these forms of aggression as coping mechanisms in dealing with conflict and frustration so perpetuating the cycle of violence.⁸⁹

Argument 4: Some argue that children – and male children in particular – will grow up to be weak and ill-disciplined if they are not subjected to rigorous physical punishment.⁹⁰ However, there is no evidence to support this argument. Moreover, this argument is frequently a projection of stereotypical male power and invulnerability projected onto a child.⁹¹

Argument 5: Corporal punishment is an unacceptable expression of violence and dominance;⁹² it sends the message that the person wielding the whip is in control and is entitled to inflict pain on the powerless and, still more disturbing, that inflicting pain is part of normal human behaviour.⁹³ Moreover, when asked how they would respond to their own misbehaving children, some children eagerly subscribed to the physical punishment ethos regardless of whether or not they perceived their parents' motives for doling out the punishment as reasonable.⁹⁴

⁸⁸ Angelika Poulsen, 'The Role of Corporal Punishment of Children in the Perpetuation of Intimate Partner Violence in Australia' (2018) 43(1) *Children Australia* 3.

⁸⁹ Angelika Poulsen, 'The Role of Corporal Punishment of Children in the Perpetuation of Intimate Partner Violence in Australia' (2018) 43(1) *Children Australia* 3.

⁹⁰ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 145.

⁹¹ Ian Hassall, 'New Zealand's Landmark Law Change to Prohibit Corporal Punishment of Children' in Bernadette J Saunders, Pernilla Leviner and Bronwyn Naylor (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 173, 182.

⁹² Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 144.

⁹³ Ian Hassall, 'New Zealand's Landmark Law Change to Prohibit Corporal Punishment of Children' in Bernadette J Saunders, Pernilla Leviner and Bronwyn Naylor (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 173, 183.

⁹⁴ Michael Freeman and Bernadette J Saunders, 'Can we Conquer Child Abuse if we don't Outlaw Physical Chastisement of Children' (2014) 22 *Int'l J Child Rts* 681, 689.

Argument 6: Corporal punishment results from the difficult and challenging nature of parenting.⁹⁵ Some parents do feel incompetent at some point in their child-rearing journey. The proponents of the campaign argued that advice on parenting should start with a full and frank admission that parenting is complex and that all parents are susceptible to frustration and anger at times.⁹⁶

Argument 7: Smacking a child is not a legitimate way in which to release parental tension. It appears clear that the greatest threat to children's wellbeing is the adults around them. Hassall points out a disturbing and flawed argument, especially among men, that the inability legally to hit a child elevates adult stress and results in 'unspecified harm to the adult and other family members'.⁹⁷

Argument 8: The law does not aim to criminalise good parents.⁹⁸ Opponents frequently use this argument to bemoan the state's interference in their private lives through intrusive investigations and prosecutions. However, evidence suggests that intervention by the police and child protection agencies has been restrained.⁹⁹ Wood observes that the law appears to have been implemented with sensitivity and accompanying education programmes on positive and non-violent parenting methods.¹⁰⁰

⁹⁵ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 143, 144.

⁹⁶ Ian Hassall, 'New Zealand's Landmark Law Change to Prohibit Corporal Punishment of Children' in Bernadette J Saunders, Pernilla Leviner and Bronwyn Naylor (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 173, 183.

⁹⁷ Ian Hassall, 'New Zealand's Landmark Law Change to Prohibit Corporal Punishment of Children' in Bernadette J Saunders, Pernilla Leviner and Bronwyn Naylor (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 173, 183.

⁹⁸ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 144, 146.

⁹⁹ Ian Hassall, 'New Zealand's Landmark Law Change to Prohibit Corporal Punishment of Children' in Bernadette J Saunders, Pernilla Leviner and Bronwyn Naylor (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 173, 183.

¹⁰⁰ Beth Wood, 'Violence-free childhoods: New Zealand nine years post prohibition of corporal punishment. What now?' 7, 10 <[230](https://epochnz.org.nz/images/stories/media-</p></div><div data-bbox=)

Argument 9: The law does not prohibit the legitimate use of force.¹⁰¹ This issue of criminalising good parents was addressed in the legislation to prevent parents from being prosecuted for minor or trivial use of force.¹⁰² The legislation also provides for the use of force to prevent the child from harm or injury, eg, restraining a child from running into oncoming traffic after a ball.¹⁰³

5.4.1.2 *The Concept of a Just Society*

Argument 1: Children have the right to be free from violence and the threat of violence. Hassall opines that in New Zealand there is a general antipathy towards rights.¹⁰⁴ New Zealanders misunderstand what it means to be rights holders and demanding to be treated as such is seen as the last gasp of people who pursue undeserving causes. Children's rights are a notion of self-entitlement amongst the young.¹⁰⁵ This ambivalence towards children as rights holders dates back to Roman times when children were classed as the possessions of their fathers.¹⁰⁶ As discussed in Chapter 2, under Roman law the doctrine of *patria potestas* (paternal power) entitled a father as *paterfamilias* (father of the family) to exercise all proprietary, magisterial, and arbitrary power over his children.¹⁰⁷ It is argued that rights should rather be seen in terms of fairness. Reframing the reliance on rights

ol/ResearchAndOtherPapers/Violence_free_childhoods_September_2016.pdf> accessed 23 October 2020.

¹⁰¹ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 145.

¹⁰² Section 59(4) of the Crimes (Substituted Section 59) Amendment Act 2007.

¹⁰³ Section 59(1) of the Crimes (Substituted Section 59) Amendment Act 2007.

¹⁰⁴ Ian Hassall, 'New Zealand's Landmark Law Change to Prohibit Corporal Punishment of Children' in Bernadette J Saunders, Pernilla Leviner and Bronwyn Naylor (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 173, 184.

¹⁰⁵ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 55.

¹⁰⁶ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 55.

¹⁰⁷ Anne McGillivray, 'Children's Rights, Paternal Power and Fiduciary Duty: From Roman Law to the Supreme Court of Canada' (2011) *Int'l J Child Rts* 21, 25.

to focus on the concept of fairness might be more appealing to the public, and parents in particular.¹⁰⁸ New Zealanders believe strongly in ‘a fair go’¹⁰⁹ and that it is intrinsically unfair that children should be subjected to the deliberate infliction of hurt and discomfort which would not be allowed for either adults or animals.¹¹⁰

Argument 2: Prohibiting corporal punishment will not lead to civil disobedience from children and teenagers. A coalition of opponents of the repeal of corporal punishment, including the Family First charity and lobby group,¹¹¹ relied on overseas personalities to advance their cause in the media.¹¹² In 2006 Ruby Harrold-Claesson, a Jamaican-born Swedish lawyer and legal advocate for parental rights, was flown to New Zealand by those opposing the ban.¹¹³ Harrold-Claesson made representations to the Parliamentary Select Committee on Sue Bradford’s Bill.¹¹⁴ She claimed that since abolishing corporal punishment Swedish children can be characterised by ill-discipline at home and school. However, Swedish experts were able to provide accurate statistics and peer-reviewed

¹⁰⁸ Ian Hassall, ‘New Zealand’s Landmark Law Change to Prohibit Corporal Punishment of Children’ in Bernadette J Saunders, Pernilla Leviner and Bronwyn Naylor (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 173, 184.

¹⁰⁹ ‘A fair go’ in colloquial language in Australia and New Zealand is used to indicate that you want somebody to act in a reasonable way. It also implies being given a chance and then being left to get on with it (to prove oneself – it could be a job opportunity, a study opportunity, or the opportunity to play for a national sports team). See Max Rashbrooke, ‘Inequality and New Zealand’ in Max Rashbrooke (ed), *Inequality: A New Zealand Crisis* (Wellington: Bridget Williams Books Ltd, 2013) 33, 39.

¹¹⁰ Ian Hassall, ‘New Zealand’s Landmark Law Change to Prohibit Corporal Punishment of Children’ in Bernadette J Saunders, Pernilla Leviner and Bronwyn Naylor (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 173, 184.

¹¹¹ Family First New Zealand is a charity and lobby group that opposes the ban on corporal punishment. Family First New Zealand, ‘Protecting Good Parents’ <<http://protectgoodparents.org.nz/>> accessed 1 March 2021.

¹¹² Beth Wood et al, *Unreasonable Force: New Zealand’s Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 104.

¹¹³ Beth Wood et al, *Unreasonable Force: New Zealand’s Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 104.

¹¹⁴ Beth Wood et al, *Unreasonable Force: New Zealand’s Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 105.

results that refuted these claims.¹¹⁵ Harrold-Claesson's representations were resoundingly debunked in the media by supporters of the ban to give a 'balance of opinion' on the issues.¹¹⁶ Prohibition of corporal punishment does not lead to civil unrest.

Argument 3: Parents have no inherent right to punish their children physically.¹¹⁷ Although some parents may see the abolition of corporal punishment as interference by the state in their private lives, the state must protect all its citizens from harm, including children.¹¹⁸ Olsen opines that when there is a breakdown in family relationships it may be essential for the state to protect vulnerable members, especially children, from private maltreatment.¹¹⁹

Argument 4: Christianity teaches love and to refrain from violence.¹²⁰ The corporal punishment debate pits conservative Christians against mainstream Christians. Conservative or fundamentalist Christians believe that children are inherently sinful and need to be physically punished, while mainstream Christians resist the corporal punishment of children based on teachings of love and respect.¹²¹

¹¹⁵ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 105.

¹¹⁶ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 105.

¹¹⁷ Ian Hassall, 'New Zealand's Landmark Law Change to Prohibit Corporal Punishment of Children' in Bernadette J Saunders, Pernilla Leviner and Bronwyn Naylor (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 173, 184.

¹¹⁸ Ian Hassall, 'New Zealand's Landmark Law Change to Prohibit Corporal Punishment of Children' in Bernadette J Saunders, Pernilla Leviner and Bronwyn Naylor (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 173, 184.

¹¹⁹ Frances E Olsen, 'The Myth of State Intervention in the Family' (1985) 18 *University of Michigan Journal of Law Reform* 835, 839.

¹²⁰ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 145.

¹²¹ Ian Hassall, 'New Zealand's Landmark Law Change to Prohibit Corporal Punishment of Children' in Bernadette J Saunders, Pernilla Leviner and Bronwyn Naylor (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 173, 184.

Argument 5: A ban on corporal punishment will, over time, lead to a reduction in physical harm.¹²² Successive reports of child deaths and abuse at the hands of their parents were one reason to push for a ban on corporal punishment.¹²³ Proponents did not believe that child abuse would instantly disappear once corporal punishment was prohibited, but the belief was that over time instances of child abuse would decline as cultural and societal attitudes to physical punishment change. A written law prohibiting physical punishment would, so it was hoped, create a culture in which children are no longer physically disciplined.¹²⁴

However, considering the statistics on incidents of corporal punishment that persist in New Zealand, the question is rather: 'Is the law a constructive tool for social and cultural change?'¹²⁵ Even back in 1997, when Stoddard asked this question, he was astounded by the disjunction between New Zealand's laws and its substantive culture.¹²⁶ New Zealand is one of the most progressive countries in the world when it comes to rights legislation. However, socially and culturally the country struggles to embrace this forward-thinking narrative advanced by politicians, activists, and lawyers. As Stoddard observes, "...New Zealand was not utopia – it merely had the formal rules that ought to govern any utopia..."¹²⁷ The reason given for this anomaly is the simplified method of achieving legislative

¹²² Ian Hassall, 'New Zealand's Landmark Law Change to Prohibit Corporal Punishment of Children' in Bernadette J Saunders, Pernilla Leviner and Bronwyn Naylor (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 173, 184.

¹²³ Ian Hassall, 'New Zealand's Landmark Law Change to Prohibit Corporal Punishment of Children' in Bernadette J Saunders, Pernilla Leviner and Bronwyn Naylor (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 173, 184.

¹²⁴ Ian Hassall, 'New Zealand's Landmark Law Change to Prohibit Corporal Punishment of Children' in Bernadette J Saunders, Pernilla Leviner and Bronwyn Naylor (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 173, 184-5.

¹²⁵ Thomas B Stoddard, 'Bleeding Heart: Reflections on using the Law to make Social Change' (1997) 72 NYU L Rev 967, 970.

¹²⁶ Thomas B Stoddard, 'Bleeding Heart: Reflections on using the Law to make Social Change' (1997) 72 NYU L Rev 967, 970.

¹²⁷ Thomas B Stoddard, 'Bleeding Heart: Reflections on using the Law to make Social Change' (1997) 72 NYU L Rev 967, 969.

change under the MMP system. The political party that controls the government is also the party that controls the legislature.¹²⁸ Because of the unicameral parliament, the government does not have to debate and vote on the matter in an Upper House. As Stoddard stated: “What the government seeks, the government gets.”¹²⁹

To answer the question posed above, Stoddard believes that the law has always been an instrument of change, but in more recent times it has become the favoured method of change used increasingly by lawyer-activists to achieve social and cultural reform.¹³⁰ However, it remains to be seen how long it will take New Zealanders to embrace and accept the legislative change on a substantive level to eliminate all forms of physical punishment of children. Despite the high-profile media exposure of the repeal process through articles, editorials, cartoons, opinion pieces, and letters to the editor spanning two years, a change in the legal framework has not led directly to behavioural change in society.¹³¹ Stoddard concedes that his assumption that the law acts as a conduit for cultural and social change may have been wrong regarding New Zealand.¹³² New Zealand still struggles to overcome entrenched family violence, fourteen years after corporal punishment was banned.¹³³

¹²⁸ Thomas B Stoddard, ‘Bleeding Heart: Reflections on using the Law to make Social Change’ (1997) 72 NYU L Rev 967, 970.

¹²⁹ Thomas B Stoddard, ‘Bleeding Heart: Reflections on using the Law to make Social Change’ (1997) 72 NYU L Rev 967, 970.

¹³⁰ Thomas B Stoddard, ‘Bleeding Heart: Reflections on using the Law to make Social Change’ (1997) 72 NYU L Rev 967, 973.

¹³¹ Beth Wood et al, *Unreasonable Force: New Zealand’s Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 149.

¹³² Thomas B Stoddard, ‘Bleeding Heart: Reflections on using the Law to make Social Change’ (1997) 72 NYU L Rev 967, 970.

¹³³ New Zealand Family Violence Clearing House, ‘Frequently Asked Questions’, <<https://nzfvc.org.nz/frequently-asked-questions>> accessed 23 October 2020.

5.4.1.3 *The Concept of the Natural Parent/Society*

Not resorting to physical punishment is the natural state for communities and individuals. Opponents of change argue that it is ‘against nature’ for parents or persons *in loco parentis* to raise children without physical correction, whilst the counter-argument is that many cultures and societies indeed manage to raise their children without physical punishment.¹³⁴

In pre-colonial New Zealand, Māori children lived free from violence, and their natural behaviour was accepted. In village life, it was socially unacceptable to strike another member because of the proximity to one another.¹³⁵ To hit or strike a beloved member of the clan the protection of whom forms part of clan behaviour, would have been ‘against nature’.¹³⁶ The survival of the species depended on the protection of the vulnerable from harm.¹³⁷ It is an essential element of a harmonious community in which grandparents teach patience and children live mostly unconstrained.¹³⁸

Jenkins and Harte express the hope that parents realise and understand that children are unique and special and that this concept is fundamental to child-

¹³⁴ Ian Hassall, ‘New Zealand’s Landmark Law Change to Prohibit Corporal Punishment of Children’ in Bernadette J Saunders, Pernilla Leviner and Bronwyn Naylor (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 173, 185.

¹³⁵ Ian Hassall, ‘New Zealand’s Landmark Law Change to Prohibit Corporal Punishment of Children’ in Bernadette J Saunders, Pernilla Leviner and Bronwyn Naylor (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 173, 185.

¹³⁶ Ian Hassall, ‘New Zealand’s Landmark Law Change to Prohibit Corporal Punishment of Children’ in Bernadette J Saunders, Pernilla Leviner and Bronwyn Naylor (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 173, 185.

¹³⁷ Ian Hassall, ‘New Zealand’s Landmark Law Change to Prohibit Corporal Punishment of Children’ in Bernadette J Saunders, Pernilla Leviner and Bronwyn Naylor (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 173, 185.

¹³⁸ Ian Hassall, ‘New Zealand’s Landmark Law Change to Prohibit Corporal Punishment of Children’ in Bernadette J Saunders, Pernilla Leviner and Bronwyn Naylor (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 173, 185.

rearing and can be applied immediately. *Tamariki mokopuna* (children) are *tāpu* (sacred) and parents must learn to treat children with consideration. Furthermore, *tamariki mokopuna* need *aroha* (loving care) – not just hugs and kisses but total commitment. Once parents understand and apply these beliefs, they will see their children in a different light.¹³⁹

5.5 The Legislative Process to Repeal Section 59

New Zealand does not have a stand-alone document that can be identified as ‘the Constitution’.¹⁴⁰ Rather, like the UK, it has several pieces of domestic legislation,¹⁴¹ common law, constitutional conventions, Letters Patent, historical laws inherited by New Zealand by virtue of its relationship with the United Kingdom, and the Treaty of Waitangi, all of which make up its constitutional framework.¹⁴² The Constitution does not enjoy the status of ‘supreme law’ and the courts cannot strike down invalid or inconsistent provisions. Furthermore, the Constitution is flexible and easily changed as it falls within regular Acts of Parliament that are easily amended or repealed.¹⁴³

With the MMP system in place, major parties that get to form a government must rely on the smaller parties' support to govern and drive legislation passed by the

¹³⁹ Kuni Jenkins and Helen Mountain Harte, ‘Traditional Māori Parenting: An Historical Review of Literature of Traditional Māori Child Rearing Practices in Pre-European Times’ (Te Kāhui Mana Ririki, Auckland, New Zealand, 2011) 30 <<https://www.occ.org.nz/assets/Uploads/Traditional-Maori-parenting.pdf>> accessed 6 January 2021.

¹⁴⁰ Susan Glazebrook, Natalie Baird and Sasha Holden, ‘New Zealand: Country Report on Human Rights’ (2009) 40 *Victoria U Wellington L Rev* 57, 57.

¹⁴¹ Such as the Constitution Act 1986, the New Zealand Bill of Rights Act 1990, the Judicature Act 1908, the Electoral Act 1993, the Ombudsmen Act 1975, the Privacy Act 1993, and the Official Information Act 1982.

¹⁴² Susan Glazebrook, Natalie Baird and Sasha Holden, ‘New Zealand: Country Report on Human Rights’ (2009) 40 *Victoria U Wellington L Rev* 57, 57.

¹⁴³ Susan Glazebrook, Natalie Baird and Sasha Holden, ‘New Zealand: Country Report on Human Rights’ (2009) 40 *Victoria U Wellington L Rev* 57, 58.

House.¹⁴⁴ In 1999 the left-wing Labour Party won the general election and entered into a coalition with the Green Party to secure the majority required to ensure a stable government.¹⁴⁵ This attribute of New Zealand's political system made it easier to adopt legislation that would ultimately repeal section 59.

On 27 July 2005 the first reading of the Bill to repeal section 59 was held in the New Zealand Parliament. The Bill required a majority vote¹⁴⁶ and received 63 votes for and 54 against repeal.¹⁴⁷ The Labour Party allowed the Bill to proceed on the basis of an agreement reached with the Green Party.¹⁴⁸ After the first vote, the Bill was referred to the Justice and Electoral Select Committee to make written recommendations to parliament by November 2006.¹⁴⁹ It had become clear that specific changes were needed if the Bill was to receive majority support. One of these changes was to allay anxious parents' fears that it would criminalise everyday parenting acts such as restraining a child from entering a dangerous situation such as getting into a bath of scalding water.¹⁵⁰

With the New Zealand Law Commission's help,¹⁵¹ the Crimes (Substituted Section 59) Amendment Bill was drafted. The amended Bill, which had the support of the

¹⁴⁴ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 256.

¹⁴⁵ Ian Hassall, 'New Zealand's Landmark Law Change to Prohibit Corporal Punishment of Children' in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 177.

¹⁴⁶ New Zealand Parliament, <<https://www.parliament.nz/en/pb/bills-and-laws/bills-digests/document/48PLLawBD12781/crimes-abolition-of-force-as-a-justification-for-child>> accessed 28 September 2020.

¹⁴⁷ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 177.

¹⁴⁸ Ian Hassall, 'New Zealand's Landmark Law Change to Prohibit Corporal Punishment of Children' in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 177.

¹⁴⁹ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 178.

¹⁵⁰ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 178.

¹⁵¹ A body that reviews laws that need updating or redrafting.

majority of the Select Committee and the Labour Party, would not only repeal section 59 and its defence but also replace it with a new section. This new section was titled *Parental Control* and addressed situations mentioned earlier such as controlling children in traffic or preventing them from sticking their fingers into an electrical socket. The Bill would also override the common-law defence of *reasonable chastisement* and introduce an explicit ban on the use of physical force in any disciplinary matter.¹⁵²

The Bill proceeded to the second reading and debate in February 2007, this time garnering 70 votes for and 51 votes against.¹⁵³ The next phase included a line-by-line debate in the Committee of the Whole House which commenced on 14 March 2007.¹⁵⁴ At this stage the Bill was amended by affirming prosecutorial discretion on the part of the police.¹⁵⁵ The debate concluded overwhelmingly in favour of amending section 59.

On 16 May 2007, the Bill was read for the third and final time and was passed by an overwhelming majority of 113 votes for and 8 against repeal.¹⁵⁶ On 21 June 2007 the new law, the Crimes (Substituted Section 59) Amendment Act 2007, finally came into force making New Zealand the eighteenth nation to ban the corporal punishment of children, and the first English-speaking country to do so.¹⁵⁷ As Wood et al point out, after many generations of children having endured physical punishment since European settlement, New Zealand's *tamariki*

¹⁵² Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 179.

¹⁵³ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 179.

¹⁵⁴ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 182.

¹⁵⁵ Prosecutorial discretion meant that in instances where the physical punishment was so trivial or minor that Police could decide not to prosecute.

¹⁵⁶ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 186.

¹⁵⁷ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 10, 20.

mokopuna (children) were finally entitled to live peaceful, harmonious, and violence-free lives, as their *tipuna* (ancestors) once did.¹⁵⁸

Instead of merely repealing section 59 of the Crimes Act, the section was replaced by a new section 59 titled *Parental Control* which reads:¹⁵⁹

- (1) Every parent of a child and every person in the place of a parent of the child is justified in using force if the force used is reasonable in the circumstances and is for the purpose of:
 - (a) preventing or minimising harm to the child or another person; or
 - (b) preventing the child from engaging or continuing to engage in conduct that amounts to a criminal offence; or
 - (c) preventing the child from engaging or continuing to engage in offensive or disruptive behaviour; or (d) performing the normal daily tasks that are incidental to good care and parenting.
- (2) Nothing in subsection (1) or in any rule of common law justifies the use of force for the purpose of correction.
- ...
- (4) To avoid doubt, it is affirmed that the Police have the discretion not to prosecute complaints against a parent of a child or person in the place of a parent of a child in relation to an offence involving the use of force against a child, where the offence is considered to be so inconsequential that there is no public interest in proceeding with a prosecution.

Most legal experts argued that a simple repeal of section 59 would have given the common-law defence of reasonable chastisement new life.¹⁶⁰ The assumption was

¹⁵⁸ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 50.

¹⁵⁹ Beth Wood, 'Violence-free childhoods: New Zealand nine years post prohibition of corporal punishment. What now?' 19 <https://epochnz.org.nz/images/stories/media-ol/ResearchAndOtherPapers/Violence_free_childhoods_September_2016.pdf> accessed 23 October 2020.

that in the absence of an act prohibiting the use of corporal punishment, the common-law defence of reasonable chastisement would again apply *unless* it was explicitly prohibited by legislation. Therefore, it was imperative that the new section 59 make it abundantly clear that physical force is never permitted when disciplining a child. The Bill's final version explicitly eliminates the common-law defence of reasonable chastisement that might have come into play once the former section 59 had been repealed.¹⁶¹ The purpose of the new parental control law is to provide children with a safe and secure environment by abolishing corporal punishment as a form of discipline.¹⁶²

The *Parental Control* section has five significant elements:

1. Children now have the same legal protections against assault as adults.
2. Physical punishment in all forms is banned.
3. Parents are permitted to restrict, hamper, constrain or remove children.
4. Police have a prosecutorial discretion for minor infractions.
5. Authorities will pay close attention to the impact of this new law.¹⁶³

5.6 Has Law Reform brought Social and Cultural Change?

Judicial prohibition of corporal punishment without the necessary law reform fails to inform and educate parents on the primary purpose of the prohibition – ie to educate parents in alternative ways to discipline their children to correct

¹⁶⁰ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 84.

¹⁶¹ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 84.

¹⁶² Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 84.

¹⁶³ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 190.

misbehaviour.¹⁶⁴ This is true not only of judicial law reform but also for direct legislative law reform.

Moving from the prohibition of corporal punishment to eradicating all forms of physical punishment is a fitting objective to advance a broader goal of reaching peaceful childhoods for all New Zealand's children.¹⁶⁵ However, this is easier said than done. Domestic violence (IPV and child abuse) rates remain unacceptably high in New Zealand. One in three women has experienced IPV, and there were 78 900 reports of violence involving 57 800 children and young people in the twelve months to December 2020.¹⁶⁶ Too many children are exposed to a range of violence and until this has been eliminated, families and children will bear the brunt of violent behaviour.¹⁶⁷ Associated with family violence are instances of drug and alcohol abuse, poverty, stress, and intergenerational family violence that must be addressed.¹⁶⁸ Once these factors have received the necessary attention, the instances of violence against children will diminish. Commentators have noted strong resistance to change but that law reform to ban corporal punishment was, in part at least, aimed at facilitating change.¹⁶⁹ They argue that changing parental behaviour and public attitudes to corporal punishment would have been a drawn-

¹⁶⁴ Benyam Dawit Mezmur, "'Don't Try this at Home?': Reasonable or Moderate Chastisement, and the Rights of the Child in South Africa with YG v S in Perspective' (2018) 32(2) *Speculum Juris*, 83 <<http://www.saflii.org/za/journals/SPECJU/2018/7.pdf>> accessed 12 July 2020.

¹⁶⁵ Beth Wood, 'Violence-free childhoods: New Zealand nine years post prohibition of corporal punishment. What now?' 10 <https://epochnz.org.nz/images/stories/media-ol/ResearchAndOtherPapers/Violence_free_childhoods_September_2016.pdf> accessed 23 October 2020.

¹⁶⁶ New Zealand Family Violence Clearing House, 'Frequently Asked Questions' <<https://nzfvc.org.nz/frequently-asked-questions>> accessed 15 May 2021.

¹⁶⁷ Beth Wood, 'Violence-free childhoods: New Zealand nine years post prohibition of corporal punishment. What now?' 10 <https://epochnz.org.nz/images/stories/media-ol/ResearchAndOtherPapers/Violence_free_childhoods_September_2016.pdf> accessed 23 October 2020.

¹⁶⁸ Beth Wood, 'Violence-free childhoods: New Zealand nine years post prohibition of corporal punishment. What now?' 4 <https://epochnz.org.nz/images/stories/media-ol/ResearchAndOtherPapers/Violence_free_childhoods_September_2016.pdf> accessed 23 October 2020.

¹⁶⁹ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 147.

out process if it were not for the law reform.¹⁷⁰ Wood et al believe that because of the legislative prohibition of corporal punishment, social change is in fact gathering momentum.¹⁷¹

In August 2009, New Zealand held a citizen-initiated referendum in which fifty six per cent (56%) of eligible voters responded to the question: 'Should a smack as part of good parental correction be a criminal offence in New Zealand?'. In excess of eighty seven per cent (87%) of respondents expressed a wish to return to the system before smacking was outlawed.¹⁷² Those opposed to the referendum complained that the wording was misleading and ambiguous.¹⁷³ The result of the referendum is not binding and the law prohibiting physical punishment remains in place.¹⁷⁴ A decade after the law change, a 2017 study by the University of Auckland found that almost one-third of Kiwi parents smack their children, and ten per cent (10%) admitted to using corporal punishment regularly.¹⁷⁵ It would appear that there is still some way to go in eliminating the use of corporal punishment in New Zealand.

Wood remarks that ending corporal punishment cannot be viewed in isolation. It needs a public campaign promoting the new law, which requires additional

¹⁷⁰ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 147.

¹⁷¹ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 147.

¹⁷² New Zealand Ministry of Justice, Chief Electoral Office, Wellington 'Citizen Initiated Referendum 2009, Final Result' <https://www.electionresults.govt.nz/2009_citizens_referendum/> accessed 22 July 2020.

¹⁷³ Te Ara, *The Encyclopedia of New Zealand*, 'The "anti-smacking" referendum 2009' <<https://teara.govt.nz/en/cartoon/36965/the-anti-smacking-referendum-2009>> accessed 22 July 2020.

¹⁷⁴ Ian Hassall, 'New Zealand's Landmark Law Change to Prohibit Corporal Punishment of Children' in Bernadette J Saunders, Pernilla Leviner and Bronwyn Naylor (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 173, 191.

¹⁷⁵ Susan MB Morton et al, 'Growing Up in New Zealand: A longitudinal study of New Zealand children and their families. Now We Are Four: Describing the preschool years. Auckland: Growing Up in New Zealand, 2017, 40 <https://cdn.auckland.ac.nz/assets/growingup/research-findings-impact/GUiNZ_Now%20we%20are%20four%20report.pdf> accessed 30 December 2020.

resources, and it should be followed up with education and support measures for parents and persons *in loco parentis*.¹⁷⁶ As a suggestion to other countries pursuing legal prohibition of physical chastisement, advocates and campaigners would do well to establish a support network of child and family-related organisations to engage and mobilise the community. Furthermore, political support is essential for long-term non-violent parenting education.¹⁷⁷

Rightly or wrongly, parents are afraid of being labelled criminals for physically punishing their children.¹⁷⁸ Addressing the specific fears that parents and the wider community had about the consequences of abolition, went a long way in increasing public support when the Bill finally passed through parliament.¹⁷⁹ Criminalising smacking, hitting, or spanking should not be the goal. As a society, it will be counter-productive to see parents and carers cuffed and marched to the cells on charges of physical punishment.

A compromise amendment clause was included in the Bill to reassure the public. It confirmed that the police have a discretion not to prosecute where an offence is considered so inconsequential that there would be no public interest in proceeding with a prosecution.¹⁸⁰ The legislation provided for the application of prosecutorial

¹⁷⁶ Beth Wood, 'Violence-free childhoods: New Zealand nine years post prohibition of corporal punishment. What now?' 6 <https://epochnz.org.nz/images/stories/media-ol/ResearchAndOtherPapers/Violence_free_childhoods_September_2016.pdf> accessed 23 October 2020.

¹⁷⁷ Beth Wood, 'Violence-free childhoods: New Zealand nine years post prohibition of corporal punishment. What now?' 11 <https://epochnz.org.nz/images/stories/media-ol/ResearchAndOtherPapers/Violence_free_childhoods_September_2016.pdf> accessed 23 October 2020.

¹⁷⁸ Carol Bower, "'Spanking Judgement': Parents Won't go to Jail for 'Every Little Smack'" News24 < <https://www.news24.com/news24/Columnists/GuestColumn/spanking-judgment-parents-wont-go-to-jail-for-every-little-smack-20171024>> accessed 12 July 2020.

¹⁷⁹ Beth Wood, 'Violence-free childhoods: New Zealand nine years post prohibition of corporal punishment. What now?' 147 <https://epochnz.org.nz/images/stories/media-ol/ResearchAndOtherPapers/Violence_free_childhoods_September_2016.pdf> accessed 23 October 2020.

¹⁸⁰ Beth Wood, 'Violence-free childhoods: New Zealand nine years post prohibition of corporal punishment. What now?' 192 <https://epochnz.org.nz/images/stories/media-ol/ResearchAndOtherPapers/Violence_free_childhoods_September_2016.pdf> accessed 23 October 2020.

discretion by way of the *de minimis*-rule. This is a welcome approach to allay the fears of those parents who feel that they have been branded as criminals by anti-smacking legislation.¹⁸¹

There was also a feeling in the community that the change in the law was an unwarranted intrusion of criminal law in family life.¹⁸² Furthermore, to help police understand what is meant by ‘inconsequential’, descriptions were added to the Police Practice Guide¹⁸³ including ‘minor’, ‘trivial’, and ‘unimportant’.¹⁸⁴ However, when it came to the description of what is ‘not inconsequential’, the Police Practice Guide was very clear that “[t]he use of objects/weapons to smack a child, strikes around the head or kicking would not be considered inconsequential assaults”.¹⁸⁵ This approach of prosecutorial discretion appears to be working with the media reporting that in 2013 there had been only eight prosecutions for smacking in six years.¹⁸⁶

¹⁸¹ Ian Hassall, ‘New Zealand’s Landmark Law Change to Prohibit Corporal Punishment of Children’ in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 173, 183.

¹⁸² Paul Rishworth, ‘Human Rights’ [2015] NZ L Rev 259, 269.

¹⁸³ New Zealand Police, ‘Police Practice Guide for the new Section 59’ <<https://www.police.govt.nz/news/release/3149>> accessed 5 March 2021.

¹⁸⁴ Beth Wood, ‘Violence-free childhoods: New Zealand nine years post prohibition of corporal punishment. What now?’ 193 <https://epochnz.org.nz/images/stories/media-ol/ResearchAndOtherPapers/Violence_free_childhoods_September_2016.pdf> accessed 23 October 2020.

¹⁸⁵ Beth Wood, ‘Violence-free childhoods: New Zealand nine years post prohibition of corporal punishment. What now?’ 193 <https://epochnz.org.nz/images/stories/media-ol/ResearchAndOtherPapers/Violence_free_childhoods_September_2016.pdf> accessed 23 October 2020.

¹⁸⁶ ‘Eight prosecutions for smacking in six years of law’ *NZ Herald* (21 April 2013) <<https://www.nzherald.co.nz/nz/eight-prosecutions-for-smacking-in-six-years-of-law/OEQKBZA4EMNOHIBMOQMJA7UYAU/>> accessed 6 November 2020.

5.7 Judicial Approaches and Discretionary Powers

Selected cases are discussed below to illustrate the discretionary powers exercised by the police and the courts in deciding whether an accused is guilty of assault.

In *DC v R*¹⁸⁷ the appellant, a 43-year-old Information Technology Consultant, worked from time to time for government departments and other security conscious organisations.¹⁸⁸ He was charged in the District Court on four counts of assaulting his sons, two counts for assault with a weapon, one count of sexual violation by unlawful sexual connection, and one count of an indecent act on a child.¹⁸⁹ The complainants were DC's two sons, both aged under twelve years.¹⁹⁰

The appellant pleaded not guilty on all charges. Under cross-examination, the boys' testimony was contradictory, and DC was discharged on six of the charges brought against him.¹⁹¹ On the remaining two representative charges related to physical punishment,¹⁹² DC pleaded guilty.¹⁹³ When interviewed by the police, DC admitted that he disciplined his boys physically from time to time. On 19 December 2012, DC was convicted on two counts of assault and sentenced to 75 hours of community work.¹⁹⁴

¹⁸⁷ [2013] NZCA 255.

¹⁸⁸ [2013] NZCA 255 [19].

¹⁸⁹ [2013] NZCA 255 [1].

¹⁹⁰ [2013] NZCA 255 [1].

¹⁹¹ [2013] NZCA 255 [2].

¹⁹² A charge may be representative if multiple offences of the same type are alleged to have been committed in similar circumstances and the offences are committed over a period of time, and the nature and circumstances of the offences make it unreasonable for the complainant to particularise dates or other details of the offences or it is likely that the same plea would be entered by the defendant to all offences if charged separately, and it would be unduly difficult for the court to manage the charges separately due to the number of offences. See [justice.govt.nz https://www.justice.govt.nz/about/lawyers-and-service-providers/criminal-procedure-act/charging-documents/#rep-charges](https://www.justice.govt.nz/about/lawyers-and-service-providers/criminal-procedure-act/charging-documents/#rep-charges) accessed 18 January 2021.

¹⁹³ [2013] NZCA 255 [3].

¹⁹⁴ [2013] NZCA 255 [4].

DC appealed his conviction and sentence and argued that the judge had erred in not using his discretion under section 106 of the Sentencing Act 2002 to discharge him without conviction. Furthermore, he submitted that the judge had erred in assessing the gravity of the offences; had wrongly placed weight on facts that were not agreed upon; and failed to give due weight to the consequences of a conviction on DC's future employment.¹⁹⁵ Harrison J held that:

A sentencing Judge has a discretion to discharge without conviction a person who has pleaded guilty to an offence. However, that discretion must not be exercised unless the Judge is satisfied that the direct and indirect consequences of the conviction would be out of all proportion to the gravity of the offence.¹⁹⁶

The court concluded that a conviction, regardless of whether it was relevant to the field in which the appellant worked, would have to be disclosed and would have a negative effect.¹⁹⁷ A conviction would immediately disqualify DC from future work opportunities or, at the very least, require him to explain the circumstances.¹⁹⁸ Consequently, the court upheld the appeal and quashed the convictions and sentence.¹⁹⁹

In *H v R*²⁰⁰ the appellant (H) and her partner (G) pleaded guilty in the District Court to a charge of assaulting H's eight-year-old son. Both H and G were convicted and sentenced to 300 and 200 hours of community work, respectively. They appealed to the High Court. The High Court allowed the appeal against G's sentence, and he was discharged without conviction.²⁰¹ However, the court dismissed H's appeal and declined her application for leave to appeal to the Court

¹⁹⁵ [2013] NZCA 255 [4].

¹⁹⁶ [2013] NZCA 255 [30].

¹⁹⁷ [2013] NZCA 255 [45].

¹⁹⁸ [2013] NZCA 255 [45].

¹⁹⁹ [2013] NZCA 255 [55].

²⁰⁰ [2012] NZCA 198.

²⁰¹ [2012] NZCA 198 [1]–[2].

of Appeal.²⁰² The appellant applied to the Court of Appeal for special leave to appeal under section 144(3) of the Summary Proceedings Act 1957 on a question of law. She submitted that the judge had erred in differentiating between her and G and wrongly attributed greater culpability to her as she had earlier admitted to sometimes using a wooden spoon to hit the child.²⁰³

However, the Court of Appeal held that the appellant's appeal on the grounds of differentiation between H and G did not amount to a question of law. Instead, the question of law was whether the District Court had exercised its discretion under section 107 of the Sentencing Act, and whether the High Court appeal was in response to that exercise.²⁰⁴ The Court of Appeal held that the High Court had not treated H's appeal as required by the principles of appellate decisions when applying the proportionality test under section 107 of the Sentencing Act.²⁰⁵ The appellant was entitled to have the decision of the District Court re-examined by the High Court.²⁰⁶ Based on this view,²⁰⁷ the Court of Appeal granted leave to appeal. The appeal was subsequently allowed, and the assault conviction quashed.²⁰⁸

In *Mason v R*²⁰⁹ the appellant was charged with assault of a child under 14 years-of-age by pulling his ear and punching him. He was tried and convicted in the District Court. Mason appealed the conviction stating that the two alleged incidents should have been filed as separate charges. As a result there had been a miscarriage of justice in that he had been denied the defence available under section 59(1) of the Crimes Act 1961 to the ear-pulling but not the punching.²¹⁰ The

202 [2012] NZCA 198 [1]–[2].

203 [2012] NZCA 198 [3].

204 [2012] NZCA 198 [29].

205 [2012] NZCA 198 [36].

206 [2012] NZCA 198 [36].

207 [2012] NZCA 198 [36].

208 [2012] NZCA 198 [47].

209 [2010] NZSC 129, [2011] 1 NZLR 296, (2010) 25 CRNZ 96.

210 [2010] NZSC 129; [2011] 1 NZLR 296, (2010) 25 CRNZ 96 [5].

Supreme Court agreed and stated that the Mason’s defence had indeed been likely to be prejudiced.²¹¹ The appeal was allowed and the conviction quashed.²¹²

In *T v New Zealand Police*²¹³ the appellant pleaded guilty in the District Court to a charge of assaulting her seven-year-old nephew when Child, Youth and Family Services (CYFS)²¹⁴ became involved with the family in an unrelated matter. The victim disclosed to CYFS that he would be smacked on the hand with a wooden spoon by the appellant when he broke the house rules.²¹⁵ The appellant was remanded to enable her voluntarily to attend and complete a counselling course run by the Anglican Trust for Women and Children.²¹⁶ No doubt this was done in the hope of a successful application for a discharge without conviction under section 106 of the Sentencing Act 2002. Compounding the appellant’s legal woes was that she was a Tongan national illegally in New Zealand having been without a visa since May 2009. The court held that although the appellant’s offence could be regarded as ‘low-level’,²¹⁷ Roberts J was not prepared to discharge without conviction.²¹⁸ The appellant appealed to the High Court and stated that the judge ‘erred when balancing the immigration consequences of a conviction against the gravity of her offence’.²¹⁹

The appellant indicated that she was extremely remorseful and realised that her actions were unlawful. The High Court affirmed that a discharge without conviction “may only be granted where the consequences of a conviction are out of all proportion to the offending.”²²⁰ It concluded that deportation was not a

²¹¹ [2010] NZSC 129, [2011] 1 NZLR 296, (2010) 25 CRNZ 96 [14].

²¹² [2010] NZSC 129, [2011] 1 NZLR 296, (2010) 25 CRNZ 96 [16].

²¹³ [2016] NZHC 1773.

²¹⁴ The former statutory child welfare agency in New Zealand. The re-named agency is now called Oranga Tamariki – Ministry for Children.

²¹⁵ *New Zealand Police v Naioka Tuipulotu* [2016] NZDC 9160 [19] and [13].

²¹⁶ [2016] NZHC 1773 [4].

²¹⁷ [2016] NZDC 9160 [19].

²¹⁸ [2016] NZDC 9160 [29].

²¹⁹ [2016] NZHC 1773 [1].

²²⁰ [2016] NZHC 1773 [30].

consequence of her conviction but of her illegal residency in New Zealand. The court, therefore, dismissed the appeal.²²¹

In *New Zealand Police v T*²²² the defendant, T, pleaded guilty in the District Court to a charge under section 9 of the Summary Offences Act 1981 because he did not wish his son to have to go through the process of testifying in court. On 23 November 2012, between 19:00 and 20:00, the defendant grabbed the victim, his 11-year-old son, by the back of the neck and marched him to the dining room. The defendant forced the child into a dining chair to join the rest of the family at the dinner table. This resulted in the victim's head hitting the table. The victim then ran from the house to telephone his mother.

The defendant denied these facts claiming that he had only held the victim by the scruff of the neck and arm to march him back to the dining table as he was violent and abusive toward him and the other members of the family.²²³ The defence submitted that these actions were out of character for the defendant and that he is a "gentle and contemplative person, not taken to outbursts, to the contrary, a conciliator".²²⁴ The defendant acknowledged that there were other options that he could have used. Furthermore, he acknowledged that he had exceeded the objective test of reasonableness when exercising his right to parental control authorised by section 59(1) of the Crimes Act 1961. The defence asked the court to consider a discharge without conviction under section 106 of the Sentencing Act 2002. The court held that the offence was at the lowest level and was, therefore, not considered a grave offence.²²⁵ In considering the gravity of the offence and

²²¹ [2016] NZHC 1773 [35].

²²² Case Number: CRI-2012-070-005867

²²³ Case Number: CRI-2012-070-005867 at [6].

²²⁴ Case Number: CRI-2012-070-005867 at [11].

²²⁵ Case Number: CRI-2012-070-005867 at [18].

personal aggravating and mitigating factors (of which there were many), the court discharged the defendant under section 106 with no conviction recorded.²²⁶

In *New Zealand Police v Lorraine Cummins*²²⁷ the defendant was charged with assaulting her nine-year-old foster child in March 2010. The child had stabbed his brother in the thigh with a pen. To teach him a lesson, the defendant told his brother to do the same. When that did not work, the defendant herself attempted to replicate his actions.²²⁸ She took the pen and made a stabbing motion connecting with the child's thigh in what was described as "she poked into [the child's] leg."²²⁹ The defendant's legal argument was that she had acted under the Parental Control provisions of section 59(1) of the Crimes Act 1961. The District Court considered whether the defendant's actions fell within section 59(1). McHardy J concluded at [13] that the defendant's actions fell within section 59(1)(b) "...preventing the child from engaging or continuing to engage in conduct that amounts to a criminal offence". The matter was dismissed with no conviction recorded.²³⁰

From these cases it appears that the police have taken a conservative view when applying their discretion to prosecute. All the parents/carers in the cases discussed used some form of force against their children. In all but one, the accused's convictions were discharged or no conviction was recorded. It is fair to argue that going through the criminal justice system is a very gruelling experience and can leave many innocent parents traumatised and disillusioned. Because child abuse happens in the privacy of the home it is difficult for law enforcement officials to establish, at first glance, whether or not the force used against a child was inconsequential. Often it is necessary for police and the courts to examine the facts of the case to establish the truth. This process can be traumatising for

²²⁶ Case Number: CRI-2012-070-005867 at [67].

²²⁷ Case Number: CRI-2010-090-002779.

²²⁸ Case Number: CRI-2010-090-002779 at [10].

²²⁹ Case Number: CRI-2010-090-002779 at [10].

²³⁰ Case Number: CRI-2010-090-002779 at [27] and [28].

some. The alternative is not to prosecute any instance of physical force against a child, which will leave children open to abuse. The hope is that as courts and law enforcement become accustomed to exercising their prosecutorial discretion, the system will become more streamlined and bona fide parents will not be caught in the wide net of child abusers.

5.8 Conclusion

Family First New Zealand, a lobby group and charity opposing the ban on corporal punishment, proclaims on its website that:

Family First NZ has been the leading pro-family voice on a number of major public-policy debates in New Zealand recently, including leading the opposition to an anti-smacking law which was introduced in 2007.

Furthermore, it states on its webpage that Family First New Zealand "... seeks to promote strong families, marriage, and the value of life, based on principles that have benefited New Zealand for generations".²³¹ With this statement it appears to ignore or forget that corporal punishment had never been a part of Māori culture until European settlers introduced it.

Corporal punishment has not benefited New Zealand children; on the contrary, this destructive and discriminatory practice has severely violated their fundamental human rights. Opinions held by like-minded charities, community groups, and individuals prove that more education is needed on non-violent disciplinary methods. Furthermore, the government and social support networks need to convince New Zealanders that they must shift their focus from parents to children. The campaign to abolish corporal punishment was not aimed at restricting so-

²³¹ Family First New Zealand, 'About Us' < <https://www.familyfirst.org.nz/about-us/> > accessed 18 January 2021.

called 'parental rights' but rather at advancing children's rights and parental responsibilities. Besides, Hassall has made it abundantly clear that there is no inherent parental right to punish children by physical force.²³²

From the case law it is clear that New Zealand is still grappling with instances of child abuse and assault. Law reform campaigners in the country had as their ultimate goal the abolition of corporal punishment and a clear understanding by all adults that it is wrong to hit children and that they should refrain from doing so.²³³ Law reform was seen as an essential step towards the long-term goal of prohibition. But at the same time, some short-term goals could also be achieved – eg, better legal protection for children against assault and recognition of their rights under human rights law, including equality.²³⁴ A notable consequence of the new section 59 is the lower threshold set for police involvement. There is no longer any need to consider whether the *reasonable chastisement* defence would render prosecution a time-wasting exercise.²³⁵

Interesting however, a year after the change in the law around one-third of respondents to a survey still strongly opposed the new section 59.²³⁶ Furthermore, in 2009 New Zealand held a citizen-initiated referendum in which eighty seven per cent (87%) of respondents indicated a wish to return to the system before

²³² Ian Hassall, 'New Zealand's Landmark Law Change to Prohibit Corporal Punishment of Children' in Bernadette J Saunders, Pernilla Leviner and Bronwyn Naylor (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 173, 184.

²³³ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 190.

²³⁴ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 190.

²³⁵ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 193.

²³⁶ Beth Wood, 'Violence-free childhoods: New Zealand nine years post prohibition of corporal punishment. What now?' 2 <https://epochnz.org.nz/images/stories/media-ol/ResearchAndOtherPapers/Violence_free_childhoods_September_2016.pdf> accessed 23 October 2020.

smacking was outlawed.²³⁷ Some of the issues that influenced these respondents' views were religious belief in corporal punishment, resentment of state interference in private matters, fear of criminalising parents for minor infractions, personal experience of having either used or received physical punishment, and the mistaken belief that corporal punishment is beneficial to a child.²³⁸

What is clear from the literature is that the task of fully protecting children from all forms of violence, including corporal punishment, is a work in progress. Prohibition of corporal punishment through legislation is one step towards the broader recognition of children's rights, and children need to be made aware of their rights and what the law means for them.²³⁹

The question then is: 'What lessons can Australia learn from the New Zealand experience?'²⁴⁰ What processes to achieve law reform should Australia try to emulate, and what processes should be avoided? The answer to these questions is clear. There are advantages to achieving law reform via the Commonwealth parliament in that it involves public debate and democratic processes. Such a process has the added advantage of legislating on a national level which brings clarity to those affected by the new legislation – parents and persons *in loco parentis*. Legislating to ban corporal punishment also gave the legislation a certain level of legitimacy.²⁴¹ As was seen above, Stoddard argues that legislative

²³⁷ New Zealand Ministry of Justice, Chief Electoral Office, Wellington 'Citizen Initiated Referendum 2009, Final Result' <https://www.electionresults.govt.nz/2009_citizens_referendum/> accessed 22 July 2020.

²³⁸ Beth Wood, 'Violence-free childhoods: New Zealand nine years post prohibition of corporal punishment. What now?' 2 <https://epochnz.org.nz/images/stories/media-ol/ResearchAndOtherPapers/Violence_free_childhoods_September_2016.pdf> accessed 23 October 2020.

²³⁹ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 202.

²⁴⁰ Beth Wood, 'Violence-free childhoods: New Zealand nine years post prohibition of corporal punishment. What now?' 4 <https://epochnz.org.nz/images/stories/media-ol/ResearchAndOtherPapers/Violence_free_childhoods_September_2016.pdf> accessed 28 September 2020.

²⁴¹ Thomas B Stoddard, 'Bleeding Heart: Reflections on Using the Law to make Social Change' (1997) 72 NYU L Rev 967, 984.

change is a public exercise that is more likely to result in both a ‘rule change’ and a ‘culture change’.²⁴² Ending corporal punishment is not a stand-alone goal, and publicity on the change in the law on its own is likely to prove futile.²⁴³ What is needed is continuous education and empowerment of parents and persons *in loco parentis* through community-led initiatives to change attitudes. These are all positive steps that should be undertaken.²⁴⁴

²⁴² Thomas B Stoddard, ‘Bleeding Heart: Reflections on Using the Law to make Social Change’ (1997) 72 NYU L Rev 967, 984.

²⁴³ Beth Wood, ‘Violence-free childhoods: New Zealand nine years post prohibition of corporal punishment. What now?’ 10 <https://epochnz.org.nz/images/stories/media-ol/ResearchAndOtherPapers/Violence_free_childhoods_September_2016.pdf> accessed 23 October 2020.

²⁴⁴ Beth Wood, ‘Violence-free childhoods: New Zealand nine years post prohibition of corporal punishment. What now?’ 10 <https://epochnz.org.nz/images/stories/media-ol/ResearchAndOtherPapers/Violence_free_childhoods_September_2016.pdf> accessed 23 October 2020.

Chapter 6

Conclusion

6.1 Introduction

The impetus for this thesis is dissatisfaction with Australia and its inconsistent body of legislation that regulates corporal punishment in its various jurisdictions and settings.¹ Corporal punishment as a means of correction is permitted in the home if administered by parents and persons *in loco parentis* as well as in various other settings in the different jurisdictions, for example, in private schools in Queensland and Western Australia. To date, sixty-three countries have passed laws to prohibit physical punishment against children in all settings in accordance with the Convention,² and still Australia permits physical punishment in the home.

The current laws relating to corporal punishment in all Australian jurisdictions are unclear, inconsistent, and create confusion. This lack of clarity offers no guide to parents as to what level of physical punishment is ‘acceptable’ and also hinders prosecutions.³ This inconsistency prompted the study as set out in the research question: ‘Why should Australia, a signatory to the Convention, implement nation-wide law reform to abolish all forms of corporal punishment?’ Moreover, what, if any, lessons can Australia learn from South Africa (where corporal punishment was outlawed by the courts) and New Zealand (which repealed the part of its criminal law that permitted the use of the defence of reasonable chastisement)?

¹ See Chapter 3 Table 3.3.

² Global Partnership to End Violence Against Children, Progress <<https://endcorporalpunishment.org/countdown/>> accessed 11 May 2020.

³ Tasmania Law Reform Institute, *Physical Punishment of Children* (Final Report No 4, 2003) 11.

Even though Australia ratified the Convention back in 1990, children's human rights are not regarded as being on the same level as those of adults. Australia played a major role in the drafting and passage of the Convention and was one of the first countries to ratify the Convention.⁴ When Australia ratified the Convention, every child in Australia became entitled to the protections it guarantees.⁵ However, in Australia, incorporating aspects of the Convention in domestic legislation has at best been piecemeal⁶ and at worst, blatantly ignored by the government.⁷ Politicians are loath to change the law to prohibit the use of corporal punishment in the home as it may result in a political backlash from parents and persons *in loco parentis*. The focus in Australia is still very much on parental rights rather than on children's rights and parental responsibilities.

Therefore, the answer to the research question is simple: by ratifying the Convention, Australia acknowledged that in all matters concerning children, the best interests of the child will be a primary consideration. The concept of the best interests of the child has at its core the goal of achieving a children's rights-based approach in terms of which all children have the full protection of all the rights in the Convention. Ratification of the Convention requires the signatory state to ensure that its laws, to the extent that they impinge on children's lives, are aligned with the rights set out in the Convention.⁸ Allowing for the use of the defence of reasonable chastisement to a charge of common assault infringes on Article 2

⁴ Faith Gordon and Noam Peleg, "'The Australian Government is not listening': how our country is failing to protect its children" *The Conversation* (8 October 2019) <<https://theconversation.com/the-australian-government-is-not-listening-how-our-country-is-failing-to-protect-its-children-124779>> accessed 26 April 2021.

⁵ John Tobin, 'The Development of Children's Rights' in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 31.

⁶ John Tobin, 'The Development of Children's Rights' in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 34.

⁷ John Tobin, 'The Development of Children's Rights' in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 26.

⁸ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 52.

(non-discrimination provision), Article 3 (best interests of the child principle), Article 19 (to live free from mental and physical violence, abuse, neglect and exploitation), and Article 37 (to live free from torture, cruel, inhuman or degrading treatment or punishment) of the Convention.

Despite Australia having been one of the first countries to ratify the Convention, it has been shown that Australia has a complex relationship with international law and that there has been no comprehensive adoption of the provisions of the Convention in domestic law.⁹ This made it imperative to focus on a jurisdiction that has in fact embraced the provisions of the Convention – South Africa – in this thesis. Has embracing the provisions of the Convention brought a level of enlightenment to the judiciary to the extent that it was able to ban the use of corporal punishment, or was it an already enlightened judiciary that convinced the framers of the Constitution to incorporate the provisions of the Convention in the Constitution¹⁰ and other domestic law instruments? In all likelihood a little bit of each of these scenarios was at play to the benefit of all children and children's rights in South Africa.

The aim in comparing South Africa and New Zealand is to establish which method of law reform – judicial or legislative – would be the more appropriate in prohibiting the use of corporal punishment in the current Australian legal and constitutional landscape. This investigation concludes that that public interest litigation not a viable method of law reform in Australia. Instead, a state-by-state repeal of legislation that permits reasonable chastisement or the introduction of new legislation that prohibits the common-law defence, is the most appropriate way forward for Australian children's rights. Several recommendations are made on

⁹ John Tobin, 'The Development of Children's Rights', in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 26.

¹⁰ Constitution of the Republic of South Africa, 1996.

how law reform prohibiting corporal punishment in all Australian jurisdictions can be implemented on a state-by-state basis.

6.2 The Practical Application of the Theoretical Principles

The general discourse surrounding the corporal punishment debate focuses, in the main, on three theoretical concepts: first, the best interests of the child principle; second, the notion that all people (children and adults alike) should be treated equally under the law; and lastly, that one should be free to practice one's religion without interference either public and private.

6.2.1 *The Best Interests of the Child Principle*

The best interests of the child is more than just a theoretical concept to be discussed in the abstract. Of the three comparator countries, South Africa has embraced the principle most fully. In South African jurisprudence the principle has shown its versatility as a substantive right, a rule of procedure, and a fundamental, interpretative legal principle.¹¹ The principle is entrenched in in section 28(2) of the South African Constitution.¹² This accords the principle an elevated status in its application which means that it is now regarded as a right like all the other rights in section 28(1) and the rest of the Bill of Rights. Children do not merely have the rights of the children's rights section of the Constitution, but also all the other rights that adults have, save for those that cannot apply to children – eg, the right to vote. Furthermore, section 9 of the Children's Act clearly states that in all matters concerning the care, protection, and well-being of a child, the best interests of the

¹¹ UN Doc CRC/C/GC/14 para 6.

¹² Constitution of the Republic of South Africa, 1996.

child are paramount.¹³ Section 7 lists several factors that must be taken into account whenever the best interests principle is applied. Moreover, even South African customary law has been developed in the wake of the Constitution to uphold the rights in the Bill of Rights. This includes the paramountcy of the best interests of the child.¹⁴

The best interests principle has received significant attention in South African courts.¹⁵ Of particular significance are *YG v S*¹⁶ and *FORSA v Minister of Justice and Constitutional Development and Others*¹⁷ which abolished the common-law defence of reasonable and moderate chastisement. In considering the constitutionality of corporal punishment in the home, the parties in *YG v S* were in general agreement that a range of constitutional rights was implicated, one of which was the best interests of the child principle in section 28(2) of the Constitution.¹⁸

In *FORSA* the court held that: 'At the heart of this application lie issues relating to what is in the best interests of children.'¹⁹ The court also acknowledged that the state is responsible for respecting and protecting children and promoting and fulfilling their section 28 rights.²⁰ These obligations require the court to recognise and apply the paramountcy of the best interests of the child in every matter concerning the child.²¹ The court, moreover, made the profound statement that in order for reasonable and moderate chastisement to survive the scrutiny of the Bill

¹³ Act 38 of 2005.

¹⁴ Ronaldah Lerato Karabo Ozah and Zita Mulambo Hansungule, 'Upholding the Best Interests of the Child in South African Customary Law' in Trynie Boezaart (ed), *Child Law in South Africa* (2nd edn Juta & Co Ltd, 2017) 284.

¹⁵ Ann Skelton, 'South Africa' in Ton Liefaard and Jaap E Doek (eds), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Springer, 2015) 18.

¹⁶ [2017] ZAGPJHC 290, 2018 (1) SACR 64 (GJ).

¹⁷ [2019] ZACC 34.

¹⁸ [2017] ZAGPJHC 290, 2018 (1) SACR 64 (GJ) [36].

¹⁹ [2019] ZACC 34 [24].

²⁰ [2019] ZACC 34 [56].

²¹ [2019] ZACC 34 [57].

of Rights, it would have to be established that despite it ordinarily falling within the definition of assault, it does indeed promote the best interests of the child.²² The court continued that where a non-violent form of punishment is available which is consistent with love and care, and respects the rights of the child, it should be used to give better expression to the spirit of section 28(2).²³

In Australia, the best interests principle can be found in the Australian FLA.²⁴ The FLA regulates matters relating to marriage and divorce, including parental responsibility for children such as child protection and the exercise of the welfare power,²⁵ orders in relation to parenting,²⁶ location and recovery²⁷ and financial matters resulting from the breakdown of *de facto* relationships.²⁸ Section 60CC sets out matters that are to be taken into account in determining a child's best interests including the views and wishes expressed by the child, the child's relationship with the parents and others, and the child's maturity, sex, lifestyle, and background, together with any other facts and circumstances that may be considered relevant.²⁹

In New Zealand, the best interests of the child principle can be found in sections 4 and 5 of the Care of Children Act 2004. Section 4(1) provides that in the administration and application of the Act and in any other proceedings involving the guardianship or the role of providing day-to-day care or contact for a child, the child's welfare and best interests must be the first and paramount consideration. Subsection 2(a)(ii) states that any person considering the best interests of the child must consider the principles listed in section 5. Section 5 lists the principles

22 [2019] ZACC 34 [65].

23 [2019] ZACC 34 [66].

24 Part VII Div 1 Subdiv BA of the Family Law Act 1975 (Cth).

25 Section 67ZC.

26 Section 60CA.

27 Section 67L.

28 Section 67V.

29 Brenda McGivern, 'Medical Treatment' in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds) *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 499.

relating to a child's welfare and best interests as: the child's safety;³⁰ the child's care, development, and upbringing;³¹ the child's relationship with both parents and the family group;³² and the preservation and strengthening of the child's identity, including his or her culture, language, and religious denomination and practice.³³

South Africa has given the best interests of the child principle far more prominence in general jurisprudence, applying the principle in a myriad of cases that affect children in South Africa both directly and indirectly. The principle's versatility has been used far more efficiently than in the other comparator countries. New Zealand and Australia are, in the main, still dealing with the traditional 'welfare principle' and have not yet realised the potential of the best interests principle to address children's rights on broader issues than their living arrangements after a family break-up.³⁴ The best interests of the child principle should be applied to every situation involving children – its application stands to be limited only by the imaginations of the adults in charge.

6.2.2 The Right to Equal Protection under the Law

Article 2 (non-discrimination) of the Convention is one of the four general principles which together constitute the *value system* of the Convention. The non-discrimination clause is not a passive obligation prohibiting all forms of discrimination (*de jure*), it also demands appropriate pro-active measures to

³⁰ Section 5(a).

³¹ Section 5(b)–(d).

³² Section 5(e).

³³ Section 5(f).

³⁴ See *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* [1995] HCA 20, (1995) 128 ALR 353, (1995) 69 ALJR 423, (1995) EOC 92-696 (EXTRACT), (1995) 183 CLR 273 where the principle was applied to the possible deportation of the father. The High Court held that it would not be in the children's best interests to have their father deported back to Malaysia.

ensure adequate and equal opportunities for all (*de facto*).³⁵ Poverty, alcohol and drug abuse, and intergenerational domestic violence are the lived reality for many children in all three comparator countries. In Australia, where the common-law defence of reasonable chastisement still applies, children are not afforded the same formal protection against assault and violence as adults; they are not treated equally under the law. The law discriminates against children on the basis of their age. However, even though formal equality is implemented in domestic legislation, substantive equality remains as elusive as ever, including in South Africa³⁶ and New Zealand.³⁷

6.2.3 The Right to Freedom of Religion

Culture and religion are so intrinsically tied in with corporal punishment that it seems virtually impossible to separate one from the other. Even though Australia identifies as largely secular, Christianity is still regarded by many as the source of their moral values. Ironically, conservative Christians in South Africa and New Zealand have shown the most hostility to law reform as exemplified by Christian Education South Africa, an umbrella body for Christian Schools, and Freedom of Religion South Africa, a legal advocacy group. In New Zealand, the Destiny Church and lobby groups like Family First and Family Integrity associated with the conservative Christian Churches are the principal sources of opposition.³⁸ Fear of eternal damnation lies at the heart of many physical and violent episodes between conservative Christian parents and their children. The hope of salvation is seen as a justification for physical punishment aimed at breaking down the will of the

³⁵ UN Doc CRC/C/GC/14 para 41.

³⁶ Catherine Albertyn, 'Contested Substantive Equality in the South African Constitution: Beyond Social Inclusion Towards Systemic Justice' (2018) 34(3) SAJHR 441, 460.

³⁷ Max Rashbrooke (ed), *Inequality: A New Zealand Crisis* (Wellington: Bridget Williams Books Ltd, 2013).

³⁸ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 89–90.

child.³⁹ What has emerged clearly from this study is that the right to freedom of religion does not expressly provide for a parental right to moderate and reasonable chastisement. There is no cultural right justifying the infliction of physical punishment on a child. Furthermore, international law, too, does not recognise the right to physical discipline.⁴⁰

This thesis has identified the mistaken belief that religion mandates corporal punishment and that scripture is an authoritative justification for the use of physical punishment on children. It is argued that many (secular) parents who use physical punishment as a form of discipline do so purely from habit and not out of any religious conviction.⁴¹ The use of physical punishment is so entrenched in Western thinking that it becomes impossible reliably to identify the religious rationale and its influence on society.⁴² Corporal punishment is, however, not the exclusive preserve of religious fundamentalists – secular families, too, inflict corporal punishment on their children. Even though Australia is a predominantly secular country, religious arguments will likely feature strongly in any debate on the abolition of corporal punishment.

These three principles – the best interests of the child, equal protection under the law, and freedom of religion – are far more than mere principles; they are rights. Mezmur singled them out after the *YG v S*⁴³ judgment on the basis of the appellant's flawed arguments regarding these rights.⁴⁴ Addressing the shortcomings in populist arguments is necessary to educate society so that a

³⁹ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 93.

⁴⁰ *FORSA v Minister of Justice and Constitutional Development* [2019] ZACC 34 [63].

⁴¹ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 93.

⁴² Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 93.

⁴³ [2017] ZAGPJHC 290, 2018 (1) SACR 64 (GJ).

⁴⁴ Benyam Dawit Mezmur, "'Don't Try this at Home?': Reasonable or Moderate Chastisement, and the Rights of the Child in South Africa with *YG v S* in Perspective' (2018) 32(2) *Speculum Juris* 85 <<http://www.saflii.org/za/journals/SPECJU/2018/7.pdf>> accessed 25 June 2020.

cultural change can be achieved and corporal punishment can be eliminated globally.

6.3 Law Reform in Australian Jurisdictions

Chapter Three has shown that children are among of the most regulated groups in Australia with approximately thirty pieces of legislation ruling their lives.⁴⁵ Despite all these measures to protect and regulate the lives of children, it was shown that they can still be subjected to physical assault under the guise of reasonable chastisement in various settings, including the most sacred of all, the home. Because of their age, it is lawful to assault children provided it is 'reasonable' and carried out to correct misbehaviour. However, no amount of violence should be 'reasonable'.

Australian criminal law inherited the defence of reasonable chastisement to a charge of common assault from English common law. Furthermore, Australia is one of the few Western democracies that still allows the defence of reasonable chastisement to a charge of common assault in contravention of Article 19 of the Convention.⁴⁶ As is pointed out in Chapter three, the term 'reasonable' is not defined in any state or territory's criminal law legislation. What is deemed reasonable is a question of fact to be determined by the court on a case-by-case basis.⁴⁷

⁴⁵ See Chapter 3 Table 3.3.

⁴⁶ Judy Cashmore and Briony Horsfall, 'Child Maltreatment' in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 105.

⁴⁷ Renata Alexander, Bronwyn Naylor and Bernadette J Saunders, *Lawful Correction or Child Abuse: Clarifying the Boundaries, Sanctions and Decision-making Surrounding the Physical Discipline of Children* (Report to the Legal Services Board Victoria, Melbourne 2011) 12.

It was also shown that there is still very strong cultural resistance to abolishing the defence of reasonable chastisement.⁴⁸ Parents in Australia are simply not ready for a change in the law that will prohibit them from administering corporal punishment to their children. Physical punishment is a common practice that has survived for generations in families that have, by-and-large, been free to act as they see fit against children who are unaware that their parents have no right to punish them physically.⁴⁹ Children have traditionally been silenced and disempowered where children's rights are not recognised or not afforded the necessary respect.⁵⁰ International research has shown that parents tend to approve of the physical and emotional punishment they received as children.⁵¹ Such is the power of custom.

6.4 Lessons from South Africa and Aotearoa New Zealand

On 18 September 2019, the Constitutional Court of South Africa ruled in *FORSA* that corporal punishment is inconsistent with the Constitution⁵² and, therefore, the defence of 'moderate and reasonable chastisement' was pronounced to be invalid.⁵³ Corporal punishment in the home, the last vestige of physical punishment of children still permitted in South Africa, was outlawed by this judgment.⁵⁴ Consequently, the common-law defence of moderate and reasonable

⁴⁸ Judy Cashmore and Briony Horsfall, 'Child Maltreatment' in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 105.

⁴⁹ Bernadette J Saunders, 'Ending the Physical Punishment of Children by Parents in the English-speaking World: The Impact of Language, Tradition and Law' (2013) *Int'l J Child Rts* 278, 287.

⁵⁰ Bernadette J Saunders, 'Ending the Physical Punishment of Children by Parents in the English-speaking World: The Impact of Language, Tradition and Law' (2013) *Int'l J Child Rts* 278, 287.

⁵¹ Joanne J Buntain-Ricklefs et al, 'Punishment: What Predicts Adult Approval' (1994) *18(11) Child Abuse and Neglect* 945.

⁵² Constitution of the Republic of South Africa 1996.

⁵³ [2019] ZACC 34.

⁵⁴ As defined in UN Doc CRC/C/GC/8 para 11.

chastisement is no longer available to parents and persons *in loco parentis* charged with assault. Law reform was, therefore, achieved through the courts.

Chapter five highlighted the different path that New Zealand followed to law reform with the introduction of the Crimes (Substituted Section 59) Amendment Bill in the New Zealand Parliament. The sole purpose of this Bill was to abolish the use of parental force for purposes of correction.⁵⁵ On 21 June 2007, the new law, the Crimes (Substituted Section 59) Amendment Act 2007, came into force.⁵⁶ Consequently, law reform in New Zealand was achieved through parliamentary processes. In contrast to South Africa and New Zealand, Australia still recognises the defence of reasonable chastisement for parents or persons *in loco parentis* charged with the offence of common assault.⁵⁷

6.4.1 Children's rights in South Africa

Children's rights jurisprudence has reached a level of maturity in South Africa not found in other jurisdictions.⁵⁸ Child law practitioners no longer need justify or argue for children's rights to be acknowledged before they can be implemented.⁵⁹

As Sloth-Nielsen points out, 'South African children's rights jurisprudence is consequently arguably the most far-reaching currently in the world in having

⁵⁵ See s 4 of the Crimes (Substituted Section 59) Amendment Act 2007.

⁵⁶ New Zealand Parliament, 'Crimes (Abolition of Force as Justification for Child Discipline) Amendment Bill – First Reading' <https://www.parliament.nz/en/pb/hansard-debates/rhr/document/47HansD_20050727_00001406/crimes-abolition-of-force-as-a-justification-for-child> accessed 20 May 2020.

⁵⁷ Penny Crofts et al, *Waller & Williams Criminal Law: Text and Cases* (13th edn LexisNexis Butterworths, 2016) para 3.20.

⁵⁸ Julia Sloth-Nielsen, 'Children's Rights Jurisprudence in South Africa – a 20 year retrospective' (2019) *De Jure* 501, 511.

⁵⁹ Julia Sloth-Nielsen, 'Children's Rights Jurisprudence in South Africa – a 20 year retrospective' (2019) *De Jure* 501, 511.

expanded the locus of its application far beyond the family law terrain.⁶⁰ The benefits of having a children's rights-focused jurisdiction with the expertise and experience gained through a process of PIL and promulgation of the most progressive and comprehensive Bill of Rights and other significant pieces of legislation such as the Children's Act 38 of 2005, should not be underestimated.

6.4.2 Law Reform in New Zealand

New Zealand prohibited corporal punishment by amending its legislation. On 9 June 2005, Sue Bradford of the Green Party of Aotearoa introduced the Crimes (Substituted Section 59) Amendment Bill in the New Zealand Parliament.⁶¹ Just over two years later, the Bill was adopted by the House of Representatives. The primary aim of this Bill was to abolish the use of parental force as a disciplinary method.⁶²

After a long and arduous process involving media campaigns, public addresses and parliamentary debates, a new law, the Crimes (Substituted Section 59) Amendment Act 2007, came into force on 21 June 2007 and New Zealand took its place as the eighteenth nation to ban corporal punishment of children and the first English-speaking country to do so.⁶³ Instead of merely repealing section 59 of the Crimes Act, it was replaced by a new section 59 titled *Parental Control*. It was felt that that a simple repeal of section 59 would have breathed new life into the

⁶⁰ Julia Sloth-Nielsen, 'Children's Rights Jurisprudence in South Africa – a 20 year retrospective' (2019) *De Jure* 501, 511.

⁶¹ New Zealand Parliament, 'Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill – First Reading' <https://www.parliament.nz/en/pb/hansard-debates/rhr/document/47HansD_20050727_00001406/crimes-abolition-of-force-as-a-justification-for-child> accessed 20 May 2020.

⁶² See s 59 of the Crimes (Substituted Section 59) Amendment Act 2007.

⁶³ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 10, 20.

common-law defence of reasonable chastisement.⁶⁴ The assumption was that in the absence of an Act of Parliament prohibiting the use of corporal punishment, the common-law defence of reasonable chastisement would again apply *unless* it was explicitly prohibited by legislation. Therefore, it was imperative that the new section 59 make it clear that physical force is *never* permitted when disciplining a child.

6.4.3 Does the Prohibition of Corporal Punishment Work?

Does the prohibition of corporal punishment limit or stop violence against children? Opponents of prohibition were at pains to point out that prohibition does not prevent or stop child abuse.⁶⁵ However, opponents miss the point with their argument. Perhaps this is not the right question to ask. The aim of law reform was never to bring an abrupt halt to child abuse. To change societal behaviour takes time. The hope has always been that in time parents will change their habit of resorting to physical punishment by reaching for positive parenting measures instead. Sunstein points out that laws can change social and cultural habits by requiring a change in behaviour through statutory mandate, with or without the threat of criminal sanction.⁶⁶

Rather, the question that should be asked of opponents is what benefits children derive from being physically punished? Gershoff and Grogan-Kaylor have shown that there are no benefits for children; the effects are all harmful.⁶⁷ Afifi et al found

⁶⁴ Beth Wood et al, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 84.

⁶⁵ Beth Wood, 'Violence-free childhoods: New Zealand nine years post prohibition of corporal punishment. What now?' 4 <https://epochnz.org.nz/images/stories/media-ol/ResearchAndOtherPapers/Violence_free_childhoods_September_2016.pdf> accessed 28 September 2020.

⁶⁶ Cass R Sunstein, 'On the Expressive Function of Law' (1996) 144 U Pa L Rev 2021, 2032.

⁶⁷ Elizabeth T Gershoff and Andrew Grogan-Kaylor, 'Spanking and Child Outcomes: Old Controversies and New Meta-Analyses' (2016) 30(4) *Journal of Family Psychology* 453.

in a 2016 study that physical punishment was associated with the increased likelihood of suicide attempts, alcohol abuse, and drug use in adulthood.⁶⁸ Furthermore, the study found a strong link between severe physical punishment and physical and emotional abuse.⁶⁹ The focus needs to shift away from an infringement of parental rights to a more child-centred focus on children's rights and parental duties and responsibilities.

South Africa also struggles with effecting social and cultural change that will stop corporal punishment. Mayisela illustrates how corporal punishment is still used in South African schools even though section 10 of the Schools Act prohibited corporal punishment in public and private schools as far back as 1996.⁷⁰ Reyneke points out that: 'It is not uncommon to read media reports on educators using extreme measures⁷¹ to maintain discipline in the classroom or to deal with students who have allegedly committed crimes.'⁷² The argument is that many educators see corporal punishment as the only way to maintain or restore order in the classroom and that alternative methods of punishment are ineffective.⁷³ Moreover, it is further argued that the abolition of corporal punishment has contributed to the decline in discipline in schools.⁷⁴ It appears law reform has not brought the timely and necessary cultural change in the teaching profession which children's rights

⁶⁸ Tracie O Afifi et al, 'Spanking and Adult Mental Health Impairment: The Case for the Designation of Spanking as an Adverse Childhood Experience' (2017) *Child Abuse & Neglect* 24, 28

⁶⁹ Tracie O Afifi et al, 'Spanking and Adult Mental Health Impairment: The Case for the Designation of Spanking as an Adverse Childhood Experience' (2017) *Child Abuse & Neglect* 24, 29.

⁷⁰ Simangele Gladys Mayisela, 'Corporal Punishment: Cultural-Historical and Socio-Cultural Practices of Teachers in a South African Primary School' (PhD thesis University of Cape Town, 2017) 18.

⁷¹ Such as fan belts, straps, sticks, plastic pipes and sjamboks (a leather whip, traditionally made from animal hide). See Jacomina Margaretha Reyneke, 'The Best Interests of the Child in School Discipline in South Africa' (PhD thesis Tilburg University 2013) 59.

⁷² Jacomina Margaretha Reyneke, 'The Best Interests of the Child in School Discipline in South Africa' (PhD thesis Tilburg University 2013) 59.

⁷³ Mariette Reyneke, 'Educator Accountability in South Africa: Rethink Section 10 of the South African Schools Act' (2018) 43(1) *Journal for Juridical Science* 117, 118.

⁷⁴ Mariette Reyneke, 'Educator Accountability in South Africa: Rethink Section 10 of the South African Schools Act' (2018) 43(1) *Journal for Juridical Science* 117, 118.

advocates hoped it would. However, it is not all doom and gloom. According to Reyneke, the General Household Survey of 2011, indicated that 16.7 per cent of child respondents experienced corporal punishment at school.⁷⁵ However, in her research Mayisela tags this percentage at ninety two percent (92%).⁷⁶ It is unclear why these two scholars have so widely divergent numbers. Regardless of the 2011 number, the percentage had dropped to five point seven per cent (5.7%) nationally by 2018⁷⁷ only again to jump in 2019 to six point eight per cent (6.8%) of respondents.⁷⁸ That is a significant drop from the 2011 percentage if one is to lend credence to Mayisela's number. This reduction in incidents of corporal punishment at school gives substance to the adage that if one changes the law, a cultural and societal change will eventually follow. In South Africa's case, however, it might just take a little longer.

One example of how public health strategies and legislative change has resulted in a cultural change is Australia's ban on smoking. In 1973 the Australian government mandated health warnings on all cigarette packets. From then on, increasing limits on smoking in public and a rise in excise duties on tobacco products started to change public perceptions of smoking. In 2021 the cheapest pack of 20 cigarettes is AUD 27.50 (ZAR 312).⁷⁹ Approximately \$20 goes to government as a tax on tobacco. Furthermore, graphic images on cigarette

⁷⁵ Mariette Reyneke, 'Educator Accountability in South Africa: Rethink Section 10 of the South African Schools Act' (2018) 43(1) *Journal for Juridical Science* 117, 117.

⁷⁶ Simangele Gladys Mayisela, 'Corporal Punishment: Cultural-Historical and Socio-Cultural Practices of Teachers in a South African Primary School' (PhD thesis University of Cape Town, 2017) 18.

⁷⁷ Statistics South Africa, 'General Household Survey 2018' 18 <<http://www.statssa.gov.za/publications/P0318/P03182018.pdf>> accessed 16 February 2021.

⁷⁸ Statistics South Africa, 'General Household Survey 2019' 18 <<http://www.statssa.gov.za/publications/P0318/P03182019.pdf>> accessed 16 February 2021.

⁷⁹ Woolworths Supermarkets <<https://www.woolworths.com.au/shop/search/products?searchTerm=cigarettes>> accessed 31 March 2021.

packets have also reduced smoking rates.⁸⁰ Statistics show that in 2019, eleven point six per cent (11.6%) of adults smoked cigarettes, down from twenty five per cent (25%) in 1991.

Over many decades, successful public health strategies and legislation have resulted in a significant decline in daily smoking numbers, with Australia now having one of the lowest daily smoking percentages among the Organisation for Economic Cooperation and Development countries.⁸¹ Legislating to end corporal punishment in all settings can be a first step towards better protection for children. This could be the watershed moment for children's rights in Australia in years to come.

6.5 Constitutional Implications for Australia

The Commonwealth of Australia has no single set of criminal laws.⁸² The criminal laws of each state, territory and the Commonwealth operate in parallel.⁸³ The Australian Federal Government has no specific power under the Australian Constitution to make national criminal laws.⁸⁴ Under the Australian federal system, the Commonwealth can only make laws involving those powers conferred

⁸⁰ Australian Government, Department of Health, 'Health Warnings on Tobacco Products' <<https://www.health.gov.au/health-topics/smoking-and-tobacco/tobacco-control/health-warnings-on-tobacco-products#:~:text=Cigarette%20packets%20must%3A,least%2090%25%20of%20the%20back>> accessed 31 March 2021. A family member of the author visited Australia in the early 2000s and refused to carry around the cigarette packets with the graphic images depicting persons suffering from various forms of cancer caused by smoking. This family member transferred the cigarettes bought in Australia to an empty cigarette packet brought from South Africa. Such was the repulsion to the images that it caused a change in behaviour. Had the person not had an extra cigarette packet, one wonders if simply giving up smoking would have been an option.

⁸¹ Australian Institute of Health and Welfare, 'Tobacco Smoking' <<https://www.aihw.gov.au/reports/australias-health/tobacco-smoking>> accessed 31 March 2021.

⁸² Penny Crofts, *Criminal Law Elements* (6th edn LexisNexis Butterworths, 2018) 1.

⁸³ Penny Crofts, *Criminal Law Elements* (6th edn LexisNexis Butterworths, 2018) 1.

⁸⁴ Penny Crofts, *Criminal Law Elements* (6th edn LexisNexis Butterworths, 2018) 1.

on it by sections 51 and 52 of the Commonwealth of Australia Constitution Act (the Australia Constitution).⁸⁵ Consequently, any criminal law made by the Commonwealth must be justified under a specific power in the Australian Constitution, for example, powers related to external affairs or trade and commerce.⁸⁶ Under each state's Constitution, the state parliament can pass laws on a broader range of subjects than the Commonwealth Parliament.⁸⁷ For this reason, an important area such as criminal law is regulated primarily by state laws rather than by Commonwealth laws.⁸⁸

The implication of not having a uniform criminal law in Australia is that each Australian jurisdiction will have to legislate separately to ban the use of corporal punishment. This is clear from the push by the Tasmanian Commissioner for Children in January 2021 for a change to or abolition of section 50 of the Tasmanian Criminal Code Act 1924 which permits parents or persons *in loco parentis* to use reasonable force for purposes of correction.⁸⁹ Alternatively, the Federal Government will have to legislate with overriding force under section 109 of the Constitution⁹⁰ and, based on the external affairs power of section 51(xxix), to implement international human rights conventions which call for the abolition of corporal punishment.⁹¹ Any state or territory law inconsistent with the

⁸⁵ Section 51: Legislative powers of the Parliament
'The Parliament shall, subject to this Constitution, have power to make laws for the (xxix) external affairs.'

⁸⁶ Penny Crofts, *Criminal Law Elements* (6th edn LexisNexis Butterworths, 2018) 1.

⁸⁷ 'Overview of The Constitution as in force on 1 July 1999' (Office of Legislative Drafting, Attorney-General's Department, 1999) 6.

⁸⁸ 'Overview of The Constitution as in force on 1 July 1999' (Office of Legislative Drafting, Attorney-General's Department, 1999) 6.

⁸⁹ Leanne McLean, 'Talking Point – Physical Punishment' (CCYP Media Release, January 2021) <<https://www.childcomm.tas.gov.au/wp-content/uploads/CCYP-Talking-Point-Physical-Punishment-FINAL.pdf>> accessed 25 January 2021.

⁹⁰ Section 109 states: 'Inconsistency of Laws – When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.'

⁹¹ See, eg, Jo Lennan and George Williams, 'The Death Penalty in Australian Law' (2012) 34 Sydney Law Review 659 for a discussion on the process of having a law declared invalid.

Commonwealth legislation will then be deemed invalid to the extent of the inconsistency.

6.6 Recommendations

The Tasmania Law Reform Institute made several recommendations on corporal punishment in its 2003 report.⁹² With some amendments, these recommendations could be adapted to all apply in states and territories across Australia.

The recommendations are first, that the defence of reasonable chastisement be abolished. Abolition can be effected by either repealing or changing laws that allow for the defence of reasonable chastisement. The best-case scenario will be for state legislators to change or repeal the laws to include all Australian jurisdictions over time. The result will then be a nationwide prohibition on corporal punishment. As part of the law reform process, the following steps should be implemented:

- (a) Repeal any legislation or parts of legislation that permit the defence of reasonable chastisement to a charge of common assault. In those states that still rely on the common law, new legislation should be enacted to remove the defence of reasonable chastisement and to clarify that physical punishment is illegal in whatever form and in all settings – public and private. Legislation across all jurisdictions should emphasise that all forms of physical punishment are unlawful.⁹³ Underpinning this should be an emphasis on prosecutorial discretion. No parent should fear criminal prosecution for accidental or inconsequential physical contact.

⁹² Tasmania Law Reform Institute, *Physical Punishment of Children* (Final Report No 4, 2003) 5.

⁹³ UN Doc CRC/C/GC/8 paras 34–35.

- (b) Include a clause in the Children, Young Persons and their Families Act (or other similar legislation) which provides that corporal punishment as per the definition of the CRC in General Comment No 8 is prohibited.⁹⁴ It is important to state the definition of corporal punishment clearly so as to adhere to the principle of legality and to provide clarity for parents and persons *in loco parentis*.
- (c) Introduce new legislation to civil proceedings stating that the defence of reasonable chastisement has been abolished.
- (d) Impose a 12-month time delay for the coming into force of all new and amending legislation.
- (e) Start a wide-ranging information and education campaign to inform and support the community, children, parents, and persons *in loco parentis* regarding the new legislation. This process of education and support to bring about a cultural change in community perceptions as to the appropriateness of physical punishment, can start even before the legislative changes are made. Clear guidelines should be published for the public, police, and welfare agencies explaining what accidental or inconsequential contact would entail. Similarly, judicial officers should be made aware of these guidelines.⁹⁵
- (f) Survey communities to gauge opinion after five and ten years, respectively. Provide communities with the survey results to show that community perceptions have changed for the better or that there is a need for additional education. By being transparent and providing ongoing information on societal views, the hope is to create a level of trust within the community and foster a desire for change.

⁹⁴ UN Doc CRC/C/GC/8 para 11.

⁹⁵ UN Doc CRC/C/GC/8 paras 44–49.

- (g) Systematic monitoring and evaluation by government agencies and NGO's of the use of or decline in corporal punishment through the development of appropriate indicators and the collection of reliable data.⁹⁶

6.7 Concluding Remarks

The truth is that South Africa, New Zealand, and Australia can all learn lessons regarding law reform and the prohibition of corporal punishment from one another. From New Zealand, South Africa can note that a law containing a *de minimis*-clause can have the desired effect and will not criminalise good parents. New Zealand and South Africa both understand that continuing education programmes are essential to support parents in the use of non-violent, child-friendly disciplinary methods. Australia can heed the call by opponents of corporal punishment that children's rights demand that children and parents be treated equally and that violence against children is just as wrong as violence against an adult. Whichever law reform method Australia eventually chooses, it would best be done sooner rather than later. Australia has been dragging its feet on children's rights. The welfare of Australia's children depends on this long-overdue measure to curtail the scourge of violence inflicted on children under the guise of reasonable chastisement or lawful correction.

⁹⁶ UN Doc CRC/GC/2003/5 paras 45–47.

Bibliography

Books and Chapters in Books

Akhtar RC and Nyamutata C, *International Child Law* (4th edn Routledge London, 2020)

Aristotle, *Rhetoric* (W Rhys Roberts tr, Dover Publications Inc, 2004)

Bessant J and Watts R, 'Children and the Law: An Historical Overview' in Lisa Young and others (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017)

Blackstone W, *The Commentaries on the Laws of England*, Vol 1 (Philadelphia: JB Lippincott Co, 1893) <http://files.libertyfund.org/files/2140/Blackstone_1387-01_EBk_v6.0.pdf>

Brooks D, *The Road to Character* (Penguin Books, 2015)

Budlender S, Marcus G and Ferreira N, *Public Interest Litigation and Social Change in South Africa: Strategies, Tactics and Lessons* (The Atlantic Philanthropies, 2014)

Cantwell N, 'Are "Best Interests" a Pillar or a Problem for Implementing the Human Rights of Children?' in Ton Liefaard and Julia Sloth-Nielsen (eds), *The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead* (Brill | Nijhoff, 2017)

Cashmore J and Horsfall B, 'Child Maltreatment' in Lisa Young and others (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017)

Commonwealth of Australia Constitution Act 1900, *Overview of the Constitution as in force on 1 July 1999* (Office of Legislative Drafting, Attorney-General's Department, 1999)

Crofts P, Crofts T, Gray S, Krichengast T, Naylor B and Tudor S, *Waller & Williams Criminal Law: Text and Cases* (13th edn LexisNexis Butterworths, 2016)

- Crofts P, *Criminal Law Elements* (6th edn LexisNexis Butterworths, 2018)
- Dodd C, 'Towards Universal Prohibition of Corporal Punishment of Children – Religious Progress, Challenges and Opportunities' in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019)
- Doek JE, 'The Human Rights of Children: An Introduction' in Ursula Kilkelly and Ton Liefaard (eds), *International Human Rights of Children* (Springer, 2019)
- Dworkin R, *Taking Rights Seriously* (Bloomsbury, 1997)
- East EH, *A Treatise of the Pleas of the Crown* (vol 1, A Strahan for J Butterworth, Fleet Street and J Cooke, Dublin, 1803)
- Eekelaar J and Tobin J, 'Article 3: The Best Interests of the Child' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019)
- Freeman M, 'Article 3: The Best Interests of the Child' in André Alen and others (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, 2007)
- , *The Holy Bible* (New International Version, The Zondervan Corporation, 1984)
- Hanson K and Lundy L, 'Does Exactly What it Says on the Tin? A Critical Analysis and Alternative Conceptualisation of the So-called "General Principles" of the Convention on the Rights of the Child' in Michael Freeman (ed), *Children's Rights: New Issues, New Themes, New Perspectives* (Brill Nijhoff, 2018) doi: <https://0-doi-org.oasis.unisa.ac.za/10.1163/9789004358829_004>
- Hassall I, 'Aotearoa New Zealand's Landmark Law Change to Prohibit Corporal Punishment of Children' in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019)
- Heaton J, 'Parental Responsibilities and Rights' in Trynie Boezaart (ed), *Child Law in South Africa* (2nd edn Juta & Co Ltd, 2017)

- Hutchinson T, *Researching and Writing in Law* (4th edn Thomson Reuters (Professional) Australia Limited, 2018)
- Langlaude Doné S and Tobin J, 'Article 14: The Right to Freedom of Thought, Conscience, and Religion' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019)
- Liefaard T and Sloth-Nielsen J, '25 Years CRC: Reflecting on Successes, Failures and the Future' in Ton Liefaard and Julia Sloth-Nielsen (eds), *The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead* (Brill | Nijhoff, 2017)
- Lundy L, Tobin T and Parkes A, 'Article 12: The Right to Respect for the Views of the Child' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019).
- Mann T and Blunden A (eds), '*Australian Law Dictionary*' (Oxford University Press, 2010)
- Marcus G and Budlender S, *A Strategic Evaluation of Public Interest Litigation in South Africa* (Atlantic Philanthropies, 2008)
- McCann MW, 'Legal Mobilization and Social Reform Movements: Notes on Theory and its Application' in Michael W McCann (ed), *Law and Social Movements* (Ashgate 2006)
- McGillivray A, 'Childhood in the Shadow of *Parens Patriae*' in Hillel Goelman, Sheila K Marshall and Sally Ross (eds), *Multiple Lenses; Multiple Images: Perspectives on the Child Across Time, Space and Disciplines* (Toronto University Press, 2004a)
- McGivern B, 'Medical Treatment' in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017)
- Morag T, 'The Ban on Parental Corporal Punishment in Israel – What Facilitated the Change?' in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019) 225

- Naylor B, 'Comparative Legal Approaches to Corporal Punishment: Regulating for Behavioural Change' in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019)
- Ozah RLK and Hansungule ZM, 'Upholding the Best Interests of the Child in South African Customary Law' in Trynie Boezaart (ed), *Child Law in South Africa* (2nd edn Juta & Co Ltd, 2017)
- Peleg N, *The Child's Right to Development* (Cambridge University Press, 2019)
- Peleg N, 'International Children's Rights Law: General Principles' in Ursula Kilkelly and Ton Liefaard (eds), *International Human Rights of Children* (Springer, 2019)
- Rashbrooke M, 'Inequality and New Zealand' in Max Rushbrook (ed), *Inequality: A New Zealand Crisis* (Wellington: Bridget Williams Books Ltd, 2013)
- Rosenberg GN, *The Hollow Hope: Can Courts Bring About Social Change?* (2nd edn University of Chicago Press, 2008)
- Saunders BJ, Leviner P and Naylor B, 'Introduction: "To Prohibition of Corporal Punishment – And Beyond!" Issues and Insights from an Inaugural Workshop in Stockholm on the Corporal Punishment of Children' in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019)
- Skelton A, 'South Africa' in Ton Liefaard and Jaap E Doek (eds), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Springer, 2015)
- Skelton A, 'Constitutional Protection of Children's Rights' in Trynie Boezaart (ed), *Child Law in South Africa* (2nd edn Juta & Co Ltd, 2017)
- Skelton A, 'Children's Rights' in Jason Brickhill (ed), *Public Interest Litigation in South Africa* (Juta, 2018)
- Sloth-Nielsen J, 'Child Justice' in Trynie Boezaart (ed), *Child Law in South Africa* (2nd edn Juta & Co Ltd, 2017)

- Sloth-Nielsen J, 'Southern African Perspectives on Banning Corporal Punishment—a Comparison of Namibia, Botswana, South Africa and Zimbabwe' in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019)
- Spong JS, *The Sins of Scripture: Exposing the Bible's Texts of Hate to Reveal the God of Love* (Kindle edn, 2005)
- Tobin J, 'The Development of Children's Rights' in Lisa Young, Mary Anne Kenny and Geoffrey Monahan (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017)
- Tobin J, 'Introduction: The Foundation for Children's Rights' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019)
- Tobin J and Cashmore J, 'Article 19: The Right to Protection against All Forms of Violence' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019)
- Trindale FA, Cane P and Lunney M, *The Law of Torts in Australia* (4th edn, Oxford University Press, 2007)
- Williams J, 'England and Wales' in Ton Liefaard and Jaap E Doek (eds), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Springer, 2015)
- Wood B, Hassall I, Hook G and Ludbrook R, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children Aotearoa New Zealand, 2008)

Journal Articles

- Afifi TO, Ford D, Gershoff ET, Merrick M, Grogan-Kaylor A, Ports KA, MacMillan HL, Holden GW, Taylor CA, Lee SJ, and Bennett RP, 'Spanking and Adult Mental Health Impairment: The Case for the Designation of Spanking as an Adverse Childhood Experience' (2017) *Child Abuse & Neglect* 24

- Ahmed R, 'The Historical Development of the Concept Reasonableness in the Law of Delict' (2019) 82 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 257
- Albertyn C. 'Substantive Equality and Transformation South Africa' (2007) 23(2) *South African Journal on Human Rights* 253
- Albertyn C, 'Contested Substantive Equality in the South African Constitution: Beyond Social Inclusion Towards Systemic Justice' (2018) 34(3) *South African Journal on Human Rights* 441
- Alston P, 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' (1994) *Int'l JL & Fam* 1
- Bennett TW, 'Ubuntu: An African Equity' (2011) 14(4) *Potchefstroom Elec LJ* 30
<<https://www.ajol.info/index.php/pej/article/view/68745>>
- Bonthuys E, 'The Best Interest of Children in the South African Constitution' (2006) *International Journal of Law, Policy and the Fam* 23
- Buntain-Ricklefs J, Kemper K, Bell M and Babonis T, 'Punishment: What Predicts Adult Approval' (1994) 18 *Child Abuse and Neglect* 945
- Chen B, 'The Quiet Demise of Declarations of Inconsistency under the Victorian Charter' (2021) 44 *Melb U L Rev* 928
- Chen B, 'The *Human Rights Act 2019* (Qld): Some perspectives from Victoria' (2020) 45(1) *Alternative Law Journal* 4
- Couzens M, 'The Best Interests of the Child and the Constitutional Court' (2019) 9 *Constitutional Court Review* 363

Cummings S and Rhode DL, 'Public Interest Litigation: Insights from Theory and Practice' (2009) XXXVI Fordham Urban Law Journal 604

Dawson A, 'The Determination of the Best Interests in Relation to Childhood Immunisation' (2005) 19(2) Bioethics DOI: 10.1111/j.1467-8519.2005.00433.x

Dent K and Kroeze IJ, 'Minority Rights in the South-African Context: An Exploration of the Counter-Majoritarian Dilemma' (2015) 26 Stellenbosch L Rev 518

Dugard J and Langford M, 'Art or Science? Synthesising Lessons from Public Interest Litigation and the Dangers of Legal Determinism' (2011) 27(1) South African Journal on Human Rights 39 <<https://doi.org/10.1080/19962126.2011.11865004>>

Durbach A, McNamara L, Rice S and Rix M, 'Public Interest Litigation: Making the Case in Australia' (2013) 38(4) Alternative Law Journal 219

Durrant JE, Fallon B, Lefebvre R and Allan K, 'Defining Reasonable Force: Does it Advance Child Protection?' (2017) Child Abuse and Neglect 32

Durrant JE and Olsen GM, 'Parenting and Public Policy: Contextualizing the Swedish Corporal Punishment Ban' (1997) 19(4) Journal of Social Welfare and Family Law 443

Eekelaar J, 'The Importance of Thinking that Children Have Rights' (1992) 6 Int'l JL & Fam 221

Eekelaar J, 'Corporal Punishment, Parents' Religion and Children's Rights' (2003) 119(Jul) Law Quarterly Review 370

- Ellison CG and Sherkat DE, 'Conservative Protestantism and Support for Corporal Punishment' (1993) 58(1) *American Sociological Review* 131
- Elster J, 'Solomonic Judgements: Against the Best Interests of the Child' (1987) 54(1) *University of Chicago Law Review* 1
- Finnane M and McGuire J, 'The Uses of Punishment and Exile: Aborigines in Colonial Australia' (2001) 3(2) *Punishment & Society* 279
- Fredman S, 'Substantive Equality Revisited' (2016) 14(3) *International Journal of Constitutional Law* 712
- Freeman M and Saunders BJ, 'Can We Conquer Child Abuse if We don't Outlaw Physical Chastisement of Children?' (2014) 22 *Int'l J Child Rts* 681
- Gershoff ET and Grogan-Kaylor A, 'Spanking and Child Outcomes: Old Controversies and New Meta-analyses' (2016) 30(4) *Journal of Family Psychology* 453
- Hovell D and Williams G, 'A Tale of Two Systems: The Use of International Law in Constitutional Interpretation in Australia and South Africa' (2005) 29 *Melb U L Rev* 95
- Kirby M, 'Deconstructing the Law's Hostility to Public Interest Litigation' (2011) 127 *Law Quarterly Review* 537
- Killingray D, 'The "Rod of Empire": The Debate over Corporal Punishment in the British African Colonial Forces, 1888 – 1946', (1994) 35(2) *Journal of African History* 201
- Krislov S, 'The *Amicus Curiae* Brief: From Friendship to Advocacy' (1963) 72 *Yale Law Journal* 694

- Kroeze IJ, 'Legal Research Methodology and the Dream of Interdisciplinarity' (2013) 16 Potchefstroom Elec LJ 35
- Lennan J and Williams G, 'The Death Penalty in Australian Law' (2012) 34 Sydney Law Review 659
- Lenta P, 'Corporal Punishment and the Costs of Judicial Minimalism' (2020) 137(2) SALJ 185
- Letseka M, 'Ubuntu and Justice and Fairness' (2014) 5(9) Mediterranean Journal of Social Science 544
- Libesman T and Cripps K, 'Aboriginal and Torres Strait Islander Children's Welfare and Well-being' in Lisa Young and Others (eds), *Children and the Law in Australia* (2nd edn LexisNexis Butterworths, 2017) 308
- Lipton J, 'Responsible Government, Representative Democracy and the Senate: Options for Reform' (1996-1997) 19 U Queensland LJ 194
- Louw A, 'The Constitutionality of a Biological Father's Recognition as a Parent' (2010) 13 Potchefstroom Elec LJ 156
- Lowman MK, 'The Litigating *Amicus Curiae*: When Does the Party Begin After the Friends Leave' (1992) 41 American University Law Review 1243
- Mangena F, 'African Ethics through Ubuntu: A Postmodern Exposition' (2016) 9(2) *Africology: The Journal of Pan African Studies* 66
- McCann M, 'Litigation and Legal Mobilization' in Gregory A Caldeira and others (eds), *The Oxford Handbook of Law and Politics* (Oxford University Press, 2009)

McGillivray A, 'Children's Rights, Paternal Power and Fiduciary Duty: From Roman Law to the Supreme Court of Canada' (2011) *Int'l J Child Rts* 21

Mezmur BD, "'Don't Try this at Home?': Reasonable or Moderate Chastisement, and the Rights of the Child in South Africa with YG v S in Perspective' (2018) 32(2) *Speculum Juris*
<<http://www.saflii.org/za/journals/SPECJU/2018/7.pdf>>

Midgley JO, 'Corporal Punishment and Penal Policy: Notes on the Continued Use of Corporal Punishment with Reference to South Africa' (1982) 73(1) *Journal Criminal Law and Criminology* 388

Mills L, 'Failing Children: The Courts' Disregard of the Best Interests of the Child in *Le Roux v Dey*' (2014) *SALJ* 847

Mnookin RH, 'Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39 *Law and Contemporary Problems* 226

Morag T, 'The Ban on Parental Corporal Punishment in Israel – What Facilitated the Change?' in Bernadette J Saunders and others (eds), *Corporal Punishment of Children: Comparative Legal and Social Developments towards Prohibition and Beyond* (vol 4 Brill Nijhoff, 2019)

Mosikatsana TL, 'Children's Rights and Family Autonomy in the South African Context: A Comment on Children's Rights Under the Final Constitution' (1998) 3 *J Race & L* 341

Naylor B and Saunders B, 'Whose Rights? Children, Parents and Discipline' (2009) 34(2) *Alternative Law Journal* 80

Olsen FE, 'The Myth of State Intervention in the Family' (1985) 18 *University of Michigan Journal of Law Reform* 835

- Olsen F, 'Constitutional Law: Feminist Critiques of the Public/Private Distinction' (1993) 10 Const Comments 319
- Otto D, 'From "Reluctance" to "Exceptionalism": The Australian Approach to Domestic Implementation of Human Rights' (2001) 26 Alternative LJ 219
- Pieterse M, 'In Loco Parentis: Third Party Parenting Rights in South Africa' (2000) 11 Stellenbosch L Rev 324
- Pomerleau WP, 'Western Theories of Justice' (2013) <<https://www.iep.utm.edu/justwest/>>
- Poulsen A, 'The Role of Corporal Punishment of Children in the Perpetuation of Intimate Partner Violence in Australia' (2018) 43(1) Children Australia 1
- Reece H, 'The Paramountcy Principle: Consensus or Construct?' (1996) 49 Current Legal Problems 267
- Reyneke M, 'Educator Accountability in South Africa: Rethink Section 10 of the South African Schools Act' (2018) 43(1) Journal for Juridical Science 117
- Richardson I, 'Public Interest Litigation' (1995) Waikato Law Review 1
- Rishworth P, 'Human Rights' (2015) Aotearoa New Zealand Law Review 259
- Saunders BJ, 'Ending the Physical Punishment of Children by Parents in the English-speaking World: The Impact of Language, Tradition and Law' (2013) International Journal of Children's Rights 278
- Schetzer L, 'Queensland's *Human Rights Act*: Perhaps not Such a Great Step Forward?' (2020) 45(1) Alternative Law Journal 12

- Skelton A, 'S v Williams: A Springboard for Further Debate About Corporal Punishment' (2015) Acta Juridica 336
- Sloth-Nielsen J, 'Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law' (1995) 11 SAJHR 401
- Sloth-Nielsen J, 'Chicken Soup or Chainsaws: Some Implications of the Constitutionalisation of Children's Rights in South Africa' (1996) Acta Juridica 6
- Sloth-Nielsen J, 'The Contribution of Children's Rights to the Reconstruction of Society: Some Implications of the Constitutionalisation of Children's Rights in South Africa' (1996) Int'l J Child Rts 323
- Sloth-Nielsen J, 'Children's Rights in the South African Courts: An Overview since Ratification of the UN Convention on the Rights of the Child' (2002) 10 Int'l J Child Rts 137
- Sloth-Nielsen J, 'Children's Rights Jurisprudence in South Africa – A 20 Year Retrospective' (2019) De Jure 501
- Sloth-Nielsen J, 'Sideswipes and Backhanders: Abolition of the Reasonable Chastisement Defence in South Africa' (2020) Int'l Journal of Law, Policy and the Family 191
- Sloth-Nielsen J and Kruuse H, 'A Maturing Manifesto: The Constitutionalisation of Children's Rights in South African Jurisprudence 2007–2012' (2013) 21 Int'l J Child Rts 646
- Sloth-Nielsen J and Mezmur BD, '2+2=5? – Exploring the Domestication of the CRC in South African Jurisprudence (2002–2006)' (2008) 16 Int'l J Child Rts 1

- Smith AB, Taylor NJ and Tapp P, 'Rethinking Children's Involvement in Decision-Making after Parental Separation' (2003) 10(2) *Childhood* 201
- Stoddard TB, 'Bleeding Heart: Reflections on Using the Law to make Social Change' (1997) 72 *NYU L Rev* 967
- Sund LG and Vackermo M, 'The Interest Theory, Children's Rights and Social Authorities' (2015) 23 *Int'l J Child Rts* 752
- Sunstein CR, 'Political Conflict and Legal Agreement' (1994) *The Tanner Lectures on Human Values*, Harvard University 143
- Sunstein CR, 'On the Expressive Function of Law' (1996) 144 *U Pa L Rev* 2021
- Tafa EM, 'Corporal Punishment: The Brutal Face of Botswana's Authoritarian Schools' (2002) 54(1) *Educational Review* 17 - 26
<<https://www.tandfonline.com/doi/abs/10.1080/00131910120110848>>
- Thornton M, 'The Public/Private Dichotomy: Gendered and Discriminatory' (1991) 18 *JL & Soc'y* 448
- Twomey A, 'Minister for Immigration and Ethnic Affairs v Teoh' (1995) 23 *Fed L Rev* 348
- Van Bueren G, 'The Constitutional Rights of Children' (2003) *Amicus Curiae* 27
- Varadan S, 'The Principle of Evolving Capacities under the UN Convention on the Rights of the Child' (2019) 27 *Int'l J Child Rts* 306
- Vohito S, 'Using the Court to End Corporal Punishment – The International Score Card' (2019) *De Jure* 597

Williams G, 'The Federal Parliament and the Protection of Human Rights', (Parliament of Australia, 11 May 1999) 24

Williams G, 'The Amicus Curiae and Intervention in the High Court of Australia: A Comparative Analysis' (2000) 28 Federal Law Review 365

Williams G, 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope' (2006) 30 Melb U L Rev 880

Theses

Ahmed A, 'The Explicit and Implicit Influence of Reasonableness on the Elements of Delictual Liability' (LLD thesis, University of South Africa, 2018)

Couzens M, 'The Application of the United Nations Convention on the Rights of the Child by National Courts (PhD thesis, University of Leiden Law School, 2019)

Doel-Mackaway H, "“Just Ask Us. Come and See Us.” The Participation of Aboriginal Children and Young People in Law and Policy Development' (PhD thesis, Macquarie University, 2016)

Mayisela SG, 'Corporal Punishment: Cultural-Historical and Socio-Cultural Practices of Teachers in a South African Primary School' (PhD thesis, University of Cape Town, 2017)

Reyneke JM, 'The Best Interests of the Child in School Discipline in South Africa' (PhD thesis, Tilburg University, 2013)

Reports/Studies

Alexander R, Naylor B and Saunders BJ, *Lawful Correction or Child Abuse: Clarifying the Boundaries, Sanctions and Decision-making Surrounding the Physical Discipline of Children* (Report to the Legal Services Board Victoria, Melbourne 2011)

Budlender S, Marcus G and Ferreira N, *Public Interest Litigation and Social Change in South Africa: Strategies, Tactics and Lessons* (The Atlantic Philanthropies, 2014)

Marcus G and Budlender S, *A strategic evaluation of public interest litigation in South Africa* (Atlantic Philanthropies, 2008)

Morton SMB, Grant CC, Berry SD, Walker CG, Corkin M, Ly K, de Castro TG, Atatoa Carr PE, Bandara DK, Mohal J, Bird A, Underwood L, Fa'alili-Fidow J, 2017 *Growing Up in New Zealand: A longitudinal study of New Zealand children and their families. Now We Are Four: Describing the preschool years.* (Auckland: Growing Up in New Zealand) <https://cdn.auckland.ac.nz/assets/growingup/research-findings-impact/GUINZ_Now%20we%20are%20four%20report.pdf>

Tasmania Law Reform Institute, *Physical Punishment of Children* (Final Report No 4, 2003)

Tucci J, Mitchell J and Goddard C, *Crossing the Line - Making the Case for Changing Australian Laws About the Physical Punishment of Children* (Australian Childhood Foundation and National Research Centre for the Prevention of Child Abuse, Monash University, 2006)

Legislation

Australia

Adoption Act 2000 (NSW)

Age Discrimination Act 2004 (Cth)

Charter of Human Rights and Responsibilities Act 2006 (Vic)

Children and Young People Act 2008 (ACT)

Child Care Services (Child Care) Regulations 2006 (WA)

Children (Detention Centres) Act 1987 (NSW)

Children (Education and Care Services) National Law (NSW)

Child Protection Act 1999 (Qld)

Children's Services Act 1996 (Vic)

Children, Youth and Families Act 2005 (Vic)

Commonwealth of Australia Constitution Act 1900

Crimes Act 1900 (NSW)

Criminal Code Act 1983 (NT)

Criminal Code Act 1899 (Qld)

Criminal Law Consolidation Act 1935 (SA)

Criminal Code Act 1924 (Tas)

Criminal Code Act, 1913 (WA)

Disability Discrimination Act 1992 (Cth)

Education Act 1990 (NSW)

Education Act 2004 (ACT)

Education Act 2015 (NT)

Education Act 2016 (Tas)

Education and Care Services National Law Act 2010 (Vic)

Education and Care Services National Law (Qld)

Education and Care Services National Law (WA) Act 2012

Education and Children's Services Act 2019 (SA)

Education and Training Reform Act 2006 (Vic)

Education (General Provisions) Act 2006 (Qld)
Family and Community Services Regulations 2009 (SA)
Family Law Act 1975 (Cth)
Human Rights Act 2004 (ACT)
Human Rights Act 2019 (Qld)
Human Rights (Sexual Conduct) Act 1994
Police Offences Act 1935 (Tas)
Public Health (Tobacco) Act 2008 (NSW)
Racial Discrimination Act 1975 (Cth)
Training Reform Regulation 2017 (Vic)
School Education Regulations 2000 (WA)
Sex Discrimination Act 1984 (Cth)
Youth Justice Act 2005 (NT)
Youth Justice Administration Act 2016 (SA)
Youth and Justice Regulation 2016 (Qld)

New Zealand

Bill of Rights Act 1990
Care of Children Act 2004
Children, Young Persons and their Families (Residential Care) Regulations 1996
Crimes Act 1961
Crimes (Substituted Section 59) Amendment Act 2007
Human Rights Act 1993

South Africa

Children's Act 38 of 2005

Constitution of the Republic of South Africa 1996

Criminal Procedure Act 51 of 1977

Constitution of the Republic of South Africa, Act 200 of 1993

Hague Convention on the Civil Aspects of the International Child Abduction Act 72 of 1996

South African Schools Act 84 of 1996

United States of America

Civil Rights Act of 1964

Bills

Australian Human Rights Bill 1973 (Cth)

Australian Human Rights Bill 1985 (Cth)

Australian Bill of Rights Act Bill 2017

Australian Bill of Rights Act Bill 2019

Torts Ordinance (Amendment Number 10: Abolition of Special Protection for Assaulting a Minor) 1999 (Israel)

New Zealand Crimes (Substituted Section 59) Amendment Bill

South African Children's Act Bill 20-2016

South African Children's Act Bill 18-2020

Table of Cases

Australia

B & B [2000] FMCAfam 31

B & P [2002] FMCAfam 220

R v Bedelph [1981] 4 A Crim R 192

Bresnehan v R [1992] TASSC 55, (1992) 1 Tas R 234

Re C [1999] 2 FLR 1004

Collins v Ricardo [2012] FamCA 11

Director of Public Prosecutions v Ty (No 3) (2007) 18 VR 241, [2007] VSC 489

R v Hamilton [1891] 12 LR (NSW) Sup Ct

Higgs v Booth WA (unreported) Supreme Court, A315/316/86, 29 August 1986

JCS v Regina, JMS v Regina, Regina v JCS, Regina v JMS [2006] NSW CCA 221

Johnson v DOCS [1999] NSWSC 1156

KML & RAE [2006] FMCAfam

Lumb v Police [2008] SASC 198

Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh [1995] HCA 20, (1995) 128 ALR 353, (1995) 69 ALJR 423, (1995) EOC 92-696 (EXTRACT), (1995) 183 CLR 273

Momcilovic v The Queen (2011) 245 CLR 1

R v Patton and Others (1998) 1 VR 7

Police v G, DM (Police v Gray) [2016] SASC 39

P v P [2004] FMCAfam 122

P v Tasmania (No 2) [2006] TASSC 35

Re T [1997] 1 FLR 502

T-P v T [2001] FMCAfam 120

R v Terry [1955] VLR 114

W, DL v Police [2014] SASC 102

W v R [2006] FamCa 25

New Zealand

DC v R [2013] NZCA 255

H v R [2012] NZCA 198

Mason v R [2010] NZCA 129, [2011] 1 NZLR296, (2010) 25 CRNZ 96

New Zealand Police v Lorraine Cummins Case Number: CRI-2010-090-002779

New Zealand Police v Naioka Tuipulotu [2016] NZDC 9160

New Zealand Police v T Case Number: CRI-2012-070-005867

R v Drake NZCA [1902] NZGasLawRp 141, (1902) 22 NZLR 478, (1902) 5 GLR
145

T v New Zealand Police [2016] NZHC 1773

South Africa

AD v DW 2008 (3) SA 183 (CC)

Bannantyne v Bannantyne 2003 (2) SA 363 (CC)

Centre for Child Law v the Governing Body of Hoërskool Fochville [2015] ZASCA
155, 2016 (2) SA 121 (SCA)

Christian Education SA v Minister of Education of the Government of the RSA
1999 (9) BCLR 951 (SE)

Christian Education South Africa v Minister of Education [2000] ZACC 11, 2000 (4)
SA 757 (CC), 2000 (10) BCLR 1051

*De Reuck v Director of Public Prosecutions, Witwatersrand Local Division and
Others* 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC), 2003 (2) SACR
445 (CC)

Frazer v Children's Court, Pretoria North and Others [1997] ZACC 1, 1997 (2) SA
261 (CC)

Fraser v Naude and Another [1998] ZACC 13, 1999 (1) SA (CC)

*Freedom of Religion South Africa v Minister of Justice and Constitutional
Development and Others* [2019] ZACC 34

Governing Body of the Juma Masjid Primary School and Others v Essay NO and Others [2011] ZACC 13, 2011 (8) BCLR 761 (CC)

Government of the Republic of South Africa and Others v Grootboom and Others [2000] ZACC 19, 2001 (1) SA 46 (CC)

Jooste v Botha [2000] JOL 5943 (T), 2000 (2) BCLR 187 (T)

S v M [2007] ZACC 18, 2008 (3) SA 232 (CC), 2007 (12) BCLR 1312 (CC)

S v Makwanyane and Another 1995 (6) BCLR 665 (CC), 1995 (3) SA 391 (CC)

Mayelane v Ngwenyama 2013 (4) SA 415 (CC)

MEC for Education, KwaZulu-Natal v Pillay 2008 (1) SA 474 (CC)

Minister of Health v Treatment Action Campaign 2002 (5) SA 721 (CC)

Minister of Welfare and Population Development v Fitzpatrick and Others [2000] ZACC 6, 2000 (3) SA 422

R v Janke and Janke 1913 TPD 382

Sonderup v Tondelli and Another Case Number 1980/2000

Sonderup v Tondelli and Another 2001 (1) SA 1171 (CC), (*LS v AT and Another*) [2000] ZACC 26, 2001 (2) BCLR 152 (CC)

S v S [2011] ZACC 7, 2011 (2) SACR 88 (CC)

Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another [2013] ZACC 35, 2014 (2) SA 168 (CC)

S v Williams and Others 1995 (3) SA 632 (CC)

YG v S [2017] ZAGPJHC 290, 2018 (1) SACR 64 (GJ)

Canada

Canadian Foundation for Children, Youth and the Law v Canada (Attorney-General) 2004 SCC

England

Ash v Ash (1696) COMB 357

J v C [1970] AC 668

R v Greenhill [1836] 4 Ad & E 624, 111 ER 922

R v Hopley [1860] 2 F&F 202, 175 ER 1024

R v Secretary of State for Education and Employment and Others [2005] UKHL15

Italy

Cambria, Cass, sez VI, 18 Marzo 1996, Foro It II 1996, 407- 414

Namibia

Ex parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State 1991 (3) SA 76 (NmSC)

Israel

CA 4596/98 *Anonymous v The State of Israel* PD 54(1) 149 (2000)

United States of America

Brown v Board of Education 347 US 483 (1954)

In re Booth, 253 Minn 395, 91 NW 2d 921 (1958)

In re Tammy F, Civil No 32643 (Cal Ct App 1973)

In re Three Minors 50 Wash 2d 653, 314 P 2d 423 (1957)

In re Watson 95 NYS 2d 798 (Dom Rel Ct 1950)

In re Deborah Gibson Civil No 40391 (Cal Ct App filed June 29, 1973)

International Instruments

African Charter on the Rights and Welfare of the Child 1999

Geneva Declaration on the Rights of the Child 1924

Hague Convention on the Civil Aspects of the International Child Abduction 1980

International Covenant on Civil and Political Rights 1976

International Covenant on Economic, Social and Cultural Rights

Kyoto Declaration 2006

Universal Declaration of Human Rights

United Nations Declaration on the Rights of the Child 1959

United Nations Convention on the Rights of the Child 1989

United Nations Document CCPR/C/50/D/488/1992, 4 April 1994

United Nations Document CRC/C/15/Add.71, 24 January 1997

United Nations Document CRC/C/OPAC/CO/2003/NZL, 5 November 2003

United Nations Document CRC/GC/2003/5, 27 November 2003

United Nations Document CRC/C/GC/8, 2 March 2007

United Nations Document A/RES/66/138, 27 January 2012

United Nations Document CRC/C/AUS/CO/4, 28 August 2012

United Nations Document CRC/C/GC/14, 29 May 2013

United Nations Document CRC/C/ZAF/CO/2, 27 October 2016

United Nations Document CRC/C/AUS/CO/5-6*, 1 November 2019

United Nations Document A/HRC/WG.6/37/AUS/1, 28 December 2020

United Nations Optional Protocol on the Rights of the Child on a Communications Procedure

Vienna Convention on the Law of Treaties 1969

Online and Print News Media

Editor, 'Kids no longer safe in Godzone' *Sunday Star-Times* (21 September 2003).

'Eight prosecutions for smacking in six years of law' *NZ Herald* (21 April 2013)
<<https://www.nzherald.co.nz/nz/eight-prosecutions-for-smacking-in-six-years-of-law/OEQKBZA4EMNOHIBMOQMJA7UYAU/>>

Bower C, "Spanking Judgement": Parents won't go to jail for "Every Little Smack"
News24 < <https://www.news24.com/news24/Columnists/GuestColumn/spanking-judgment-parents-wont-go-to-jail-for-every-little-smack-20171024>>

Cornelissen C, 'Bespoedig wet wat lyfstraf verbied' *Maroela Media*
<<https://maroelamedia.co.za/nuus/sa-nuus/bespoedig-wet-wat-lyfstraf-verbied/>>

Green L, 'Supreme Ambition Review: Trump, Kavanaugh and the Right's big coup' *The Guardian* (Australia, 1 December 2019) <<https://www.theguardian.com/law/2019/nov/30/supreme-ambition-review-ruth-marcus-trump-kavanaugh-gorsuch>>

Gordon F and Peleg N, "The Australian Government is not listening": how our country is failing to protect its children' *The Conversation* (8 October 2019) <<https://theconversation.com/the-australian-government-is-not-listening-how-our-country-is-failing-to-protect-its-children-124779>>

Fraser G, 'Suffer little children' *The Guardian* (8 June 2006) <<https://www.theguardian.com/commentisfree/2006/jun/08/comment.usa1#comments>>

Keller L, 'Australia doesn't have a bill of rights and we need one' *Hatch @Macleay College* (Sydney and Melbourne, 25 November 2019) <<https://hatch.macleay.net/australia-doesnt-have-a-bill-of-rights-and-we-need-one/>>

Matthews A, 'In 2017, corporal punishment is still legal in Qld non-government schools' *Australian Broadcasting Corporation: Triple J Hack* (28 February 2017) <<https://www.abc.net.au/triplej/programs/hack/corporal-punishment-qld/8310160>>

McLean, 'Talking Point – Physical Punishment' (CCYP Media Release, January 2021) < <https://www.childcomm.tas.gov.au/wp-content/uploads/CCYP-Talking-Point-Physical-Punishment-FINAL.pdf>>

Moore T 'Former MP Smack Queensland for Not Banning Cane from Private Schools', *Brisbane Times* <<https://www.brisbanetimes.com.au/national/queensland/former-mp-smacks-queensland-for-not-banning-cane-from-private-schools-20190927-p52vgb.html>>

Internet Sources

Australian Government, Attorney-General's Department, 'Model Criminal Law Officers Committee Reports'
<<https://www.ag.gov.au/crime/publications/model-criminal-law-officers-committee-reports>>

Australian Human Rights Commission, <<https://humanrights.gov.au/>>

Australian Institute of Family Studies,
<<https://aifs.gov.au/cfca/publications/corporal-punishment-key-issues>>

Australian Institute of Health and Welfare, 'Tobacco Smoking' <
<<https://www.aihw.gov.au/reports/australias-health/tobacco-smoking>>

Australian Law Reform Commission, '*The Best Interest Principle as the basis of decisions*' <<https://www.alrc.gov.au/publication/seen-and-heard-priority-for-children-in-the-legal-process-alrc-report-84/16-childrens-involvement-in-family-law-proceedings/the-best-interests-principle/#:~:text=16.11%20The%20Family%20Law%20Act,the%20child%20in%20those%20cases>>

Commonwealth of Australia, (2007) Common Core Document forming part of the reports of States Parties – Australia – incorporating the Fifth Report under the International Covenant on Civil and Political Rights and the Fourth Report under the International Covenant on Economic, Social and Cultural Rights June 2006
<<https://webarchive.nla.gov.au/awa/20071003045148/http://pandora.nla.gov.au/pan/77128/20071003-1424/www.ag.gov.au/www/agd/agd.nsf/Page/Core.pdf>>

Churches' Network for Non-violence, Faith-based support for prohibition and elimination of corporal punishment of children – a global overview
<<http://churchesfornon-violence.org/wp/wp-content/uploads/2012/02/Global-faith-support-summary-2015.pdf>>

Freedom of Religion South Africa <<https://FORSA.org.za/about-us/>>

Global Initiative to End All Corporal Punishment of Children, 'Corporal Punishment of Children in Australia' <<http://www.endcorporalpunishment.org/wp-content/uploads/country-reports/Australia.docx>>

Global Partnership to End Violence Against Children
<<https://endcorporalpunishment.org/>>

Independent Schools Australia, 'Autonomy and Accountability'
<<https://isa.edu.au/about-independent-schools/about-independent-schools/autonomy-and-accountability/>>

Law Institute of Victoria, Submission No 54 to 2015 Review of the Charter of Human Rights <<https://www.liv.asn.au/getattachment/f069f70d-366b-4b3a-933f-ab9064aed587/2015-Review-of-the-Charter-of-Human-Rights-and-Res.aspx>>

Mangena F, 'Hunhu/Ubuntu in the Traditional Thought of Southern Africa' (2016)
<<https://iep.utm.edu/hunhu/>>

New Zealand Electoral Commission, 'What is MMP?' <
<<https://elections.nz/democracy-in-nz/what-is-new-zealands-system-of-government/what-is-mmp/>>

New Zealand Parliament, 'Crimes (Abolition of Force as Justification for Child Discipline) Amendment Bill – First Reading'
<https://www.parliament.nz/en/pb/hansard-debates/rhr/document/47HansD_20050727_00001406/crimes-abolition-of-force-as-a-justification-for-child>

New Zealand Police, 'Police Practice Guide for the new Section 59'
<<https://www.police.govt.nz/news/release/3149>>

Northern Territory Law Handbook
<<http://ntlawhandbook.org/foswiki/NTLawHbk/WebHome>>

NSW, *Parliamentary Debates*, Legislative Assembly, 21 June 2001, Bob Debus – Attorney-General, 15025 <file:///C:/Users/juris/Downloads/HANSARD-1323879322-61516.pdf>

NSW, *Parliamentary Debates*, Legislative Assembly, 28 November 2001, Bob Debus – Attorney-General, 19112 <file:///C:/Users/juris/Downloads/HANSARD-1323879322-61544.pdf>

Parliament of Australia, 'Parliamentary Business' <https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansardr/c81b363c-b13c-4875-9e05-d8d7236d649b/&sid=0086>

Public Interest Advocacy Centre Ltd, 'Public Interest Cases', <<https://piac.asn.au/legal-help/public-interest-cases/>>

Queensland Government, 'Corporal Punishment' (15 April 2019) <<https://education.qld.gov.au/about/history/Pages/corporalPunishment.aspx>>

Queensland Government, 'Human Rights Bill 2018: Explanatory Notes' <<https://www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-2018-076>>

Sonke Gender Justice, 'Does Sparing the Rod Really Spoil the Child? A fact sheet to address religious justifications of corporal punishment' <file:///C:/Users/juris/Downloads/MenCare-Factsheet-5.pdf>

Statistics South Africa, 'General Household Survey 2018' <<http://www.statssa.gov.za/publications/P0318/P03182018.pdf>>

Statistics South Africa, 'General Household Survey 2019' <<http://www.statssa.gov.za/publications/P0318/P03182019.pdf>>

Statutory Review Section 61AA Crimes Act 1900 (NSW) Lawful Correction (Department of Justice and Attorney-General, 2010) <<https://www.justice.nsw.gov.au/justicepolicy/Documents/Statutory%20Review.pdf>>

The Uniting Church in Australia, 'Bible rethink on corporal punishment gathers pace around the world' <<https://journeyonline.com.au/queensland-synod-news/bible-rethink-on-corporal-punishment-gathers-pace-around-the-world/>>

UNICEF: *Worlds of Influence: Understanding what Shapes Child Well-being in Rich Countries Report Card No 16*, Innocenti Office of Research, Florence, 2020 <<https://www.unicef-irc.org/publications/pdf/Report-Card-16-Worlds-of-Influence-child-wellbeing.pdf>>

United Nations, Human Rights Council <<https://www.ohchr.org/EN/HRBodies/UPR/Pages/AUIndex.aspx>>

United Nations Human Rights Council, Universal Periodic Review – Australia <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/004/89/PDF/G1600489.pdf?OpenElement>>

United Nations, Office of the High Commissioner, 'Status of Ratification' <<https://indicators.ohchr.org/>>

United Nations Human Rights, Office of the High Commissioner, 'UN Treaty Body Database' <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=9&Lang=EN>

United Nations Human Rights Committee, CCPR General Comment No. 6: Article 6 (Right to Life), 30 April 1982 <<https://www.refworld.org/docid/45388400a.html>>

University of Minnesota, Human Rights Library, 'Toonen v Australia'
<<http://hrlibrary.umn.edu/undocs/html/vws488.htm>>

Watchers H and Griffiths-Cook J, 'Australia's progress in implementing the United Nations Convention on the Rights of the Child' (1 June 2018, ACT Human Rights Commission) <https://humanrights.gov.au/sites/default/files/2020-02/97._dr_helen_watchirs_oam_jodie-griffiths_cook_human_rights_commission_act_.pdf>

Waterhouse S, 'Status of Corporal Punishment in South African Children's Amendment Bill Law Reform Process' (Dullah Omar Institute, December 2007) 3 <<https://dullahomarinstitute.org.za/childrens-rights/Publications/Article%2019/Volume%203%20Number%203%20-%20December%202007.pdf>>

Williams G, 'The Federal Parliament and the Protection of Human Rights', <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp9899/99rp20>

Other

Griffith G, 'Crimes Amendment (Child Protection – Excessive Punishment) Bill 2000: Background and Commentary' Briefing Paper No 9/2000 (NSW Parliamentary Library Research Service, July 2000) 1 <<https://www.parliament.nsw.gov.au/researchpapers/Documents/crimes-amendment-child-protection-excessive-puni/09-00.pdf>>

Hinchey J, 'Submissions to the Standing Committee on Justice and Community Safety, Inquiry into Domestic and Family Violence – Policy approaches and responses' (6 October 2017, ACT Human Rights Commission) 7 <<https://hrc.act.gov.au/wp-content/uploads/2015/04/HRC-Submission-DFV-Inquiry-October-2017-1.pdf> >

Tables

Table 3.1: Categories of Australian Jurisdictions

Table 3.2: Summary of Legal Status of Corporal Punishment in all settings

Table 3.3: Applicable Legislation/Regulation relating to corporal punishment in specific settings

Table 4.1: Timeline for the Formal Demise of Corporal Punishment in Public and Private Settings