# Corporal Punishment: Law Reform Lessons for Australia from South Africa and New Zealand

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## Abstract

This article compares the law reform methods employed by South Africa and New Zealand to eliminate the defence of 'moderate and reasonable chastisement' to a charge of common assault, to determine the best possible law reform strategy for Australian jurisdictions, within the context of its federal system of governance. South Africa and New Zealand banned corporal punishment on a national level, with South Africa prohibiting the use of corporal punishment by way of the judicial condemnation of the Constitutional Court in 2019, and New Zealand's legislation to ban corporal punishment through Parliamentary processes in 2007. Corporal punishment in the home is still legal in Australia if administered by parents or those in loco parentis. This article focuses on the three Australian States that have enacted human rights legislation—Victoria, the Australian Capital Territory (ACT) and Queensland—and the impact of this legislation on judicial law reform. In this regard, the doctrine of parliamentary sovereignty is discussed in terms of its ability to limit public interest litigation's viability to strike down inconsistent legislation. The article suggests that all three countries can learn from one another concerning the successes and/or failures of law reform. Furthermore, the article concludes by acknowledging that even though formal abolition is the norm in South Africa and New Zealand, corporal punishment remains widespread. Parents and those in loco parentis must be supported by continual education initiatives to bring about requisite social and cultural change.

**Keywords:** corporal punishment; moderate and reasonable chastisement; assault; parents and persons in loco parentis; human rights; law reform; Convention on the Rights of the Child

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## Introduction*

On 18 September 2019 the Constitutional Court of South Africa in *Freedom of Religion South Africa (FORSA) v Minister of Justice and Constitutional Development and Others*[1] finally declared that corporal punishment was inconsistent with the Constitution[2] and therefore, the defence of moderate and reasonable chastisement was invalid. This judgment ruled that corporal punishment was outlawed in the domestic sphere, the last vestige of physical punishment of children still permitted in South Africa.[3] Consequently, the common law defence of moderate and reasonable chastisement is no longer available to parents and persons in loco parentis. Law reform was achieved through judicial condemnation. However, law reform took a different path in New Zealand with the introduction of the Crimes (Substituted Section 59) Amendment Bill to the New Zealand Parliament. The sole purpose of this Bill was to abolish the use of parental force for the purpose of correction.[4] On 21 June 2007, the new law, the Crimes (Substituted Section 59) Amendment Act 2007, came into force.[5] Consequently, law reform in New Zealand was reached through parliamentary processes. In contrast to South Africa and New Zealand, Australia has the defence of reasonable chastisement available to parents or persons in loco parentis charged with the offence of common assault.[6] This article discusses the different law reform methods to abolish the defence of reasonable chastisement and their viability in Australia.

The motivation behind a comparative analysis between South Africa, New Zealand and Australia is the English common law history that these countries share. They all refer to

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* This article is based on the author's LLD thesis titled 'A Comparative Legal Study of Corporal Punishment and Tri-Nation Law Reform' (University of South Africa).

1 [2019] ZACC 34.

2 Constitution of the Republic of South Africa, 1996.

3 As defined in CRC/C/GC/8 at para 11: '[A]s any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light. Most involves hitting ("smacking", "slapping", "spanking") children, with the hand or 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.'

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

5 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.

6 Penny Crofts and others, *Waller & Williams Criminal Law: Text and Cases* (13th edn, LexisNexis Butterworths 2016) para 3.20.

*R v Hopley*[7] as the seminal English case in which the defence of reasonable chastisement was first mentioned in the oft-quoted dictum of Cockburn J at [206]:[8]

> … 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.

Furthermore, all three comparator countries have ratified the United Nations Convention on the Rights of the Child (CRC)—Australia in 1990, New Zealand in 1993 and South Africa in 1995.

Moreover, this article will remind readers that physical punishment is still widespread in South Africa and New Zealand, despite its prohibition. The article concludes with recommendations on how law reform and continuous educational programmes can support parents and bring about social and cultural change that will benefit all children and protect them from violence.

## Corporal Punishment in South Africa

Children's rights in South Africa have, over the past twenty years, reached a level of maturity not found in other jurisdictions.[9] No longer do practitioners have to justify

7 (1860) F&F 202; 175 ER 1204; [1860] EW Misc J73. In this case, the defendant was a schoolmaster who was entrusted with the care of a thirteen-year-old boy. The schoolmaster had found the boy to be 'obstinate' and had written to his father to ask the father to suggest how 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 the defendant was heard beating the boy exessively before he was found dead the next morning. Evidence presented in court revealed the cause of death to be bruising, bleeding and exhaustion. The court held that the defendant was guilty of beating the boy, but given that the father had authorised the discipline, it remained to be determined if the beating was excessive as no parent can authorise excessive punishment. The court accepted that the defendant had viewed the boy as obstinate, but that did not excuse the severe beatings by the schoolmaster. However, the personal views of the schoolmaster were irrelevant to the case, but not the punishment, which was excessive, and led to the guilty verdict of manslaughter.

8 *R v Janke and Janke* 1913 TPD 385; *R v Terry* [1955] VR 114. Ann Skelton, 'S v Williams: A Springboard for Further Debate about Corporal Punishment' (2015) Acta Juridica 336, 337.

9 Julia Sloth-Nielsen, 'Children's Rights Jurisprudence in South Africa – a 20 Year Retrospective' (2019) De Jure 501, 511.

children's rights before being acknowledged and implemented.[10] 'Substantial and measurable' gains have been achieved concerning children's rights in South Africa.[11]

As Sloth-Nielsen points out, 'South African children's rights jurisprudence is arguably the most far-reaching currently in the world by having expanded the locus of its application beyond the family law terrain.'[12] The benefits of having a children's rights-focused jurisdiction with the expertise and experience gained through a process of public interest litigation and promulgation of the most progressive and comprehensive Bill of Rights and other significant pieces of legislation, like the Children's Act 38 of 2005, should not be underestimated.

The issue of corporal punishment administered in the private sphere (home) was addressed by the Constitutional Court in 2017 in *YG v S*.[13] A father found his thirteen-year-old son, M, allegedly watching pornography on an iPad while sitting on his parents' bed. The father, YG, hit the boy because he argued that pornography is strictly forbidden in Muslim religion and culture, and he needed to discipline the boy 'out of concern to show him in the future what is right and what is wrong.' YG was initially charged with assault with intent to do grievous bodily harm. However, he was convicted of the lesser charge of common assault of M in the Johannesburg Regional Court. The father appealed to the High Court and claimed the defence of reasonable and moderate chastisement and the exercise of his right to freedom of religion.[14]

The defence of moderate and reasonable chastisement in South Africa can be traced back to the early twentieth century in *R v Janke and Janke*.[15] Mason J stated that:

> 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.[16]

The court in the *YG*-case invited several interested parties to be joined as *amici curiae* and requested counsel, the State and the *amici* to make submissions on the issue. Several *amici curiae* made oral and written submissions to the court. They were The Children's

10 ibid.
11 Julia Sloth-Nielsen, 'Chicken Soup or Chainsaws: Some Implications of the Constitutionalisation of Children's Rights in South Africa' (1996) Acta Juridica 6, 7.
12 Sloth-Nielsen (n 9) 511.
13 [2017] ZAGPJHC 290; 2018 (1) SACR 64 (GJ).
14 ibid para 4.
15 *Janke* (n 8).
16 ibid para 385.

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*). The Minister for Social Development also submitted written submissions to the court. The CCL *amici* and the Minister were all of the view that the defence of moderate and reasonable chastisement was not compatible with the rights set out in the Constitution and that it should be declared unconstitutional.[17] Furthermore, CCL submitted an expert opinion by the Director of the Children's Institute, Prof Shanaaz Mathews, connecting corporal punishment to violence against children.

Keightley J affirmed that courts have a constitutional obligation to develop the common law and bring it in line with the Constitution's provisions.[18] Section 28(1)(d) of the Constitution states that every child has the right to be protected from maltreatment, neglect, abuse or degradation.[19] Furthermore, section 28(2) has the added requirement that the child's best interests should be of paramount importance in every matter concerning a child.[20] Of the utmost importance is the influence that the Bill of Rights (as contained in Chapter 2 of the Constitution)[21] has had on the development of the common law in South Africa in such a way that children's rights *must* be advanced and protected in order to comply not only with section 28 of the Constitution but also the CRC.

Keightley J furthermore stated that the defence of moderate and reasonable chastisement treats children who have been assaulted under the guise of correction differently from adult victims of assault.[22] This is not in accordance with section 9(1) of the Constitution, which provides for equal protection under the law, both for adults and children. Furthermore, discriminating against children because of their age violates their rights under section 9(3).[23] On 19 October 2017, the South Gauteng High Court in Johannesburg found the common law defence of reasonable and moderate chastisement inconsistent with the Constitution. [24]

None of the parties before the High Court in the *YG*-case were willing or able to apply for leave to appeal and challenge the constitutionality of the decision. FORSA (the fourth *amicus curiae* in the *YG*-case) applied for direct access to the Constitutional Court and for leave to appeal the *YG*-decision. The court considered relevant case law in determining if a party who previously acted as an *amicus curiae* has locus standi and

17 *FORSA* (n 1) para 16, 18.
18 *YG* (n 13) para 27.
19 Constitution (n 2).
20 ibid.
21 ibid.
22 *YG* (n 13) para 74.
23 ibid para 75.
24 ibid para 107.

is genuinely acting in the public interest by becoming a party to an appeal.[25] If the parties in the lower courts cannot or will not apply for leave to appeal, several factors need to be considered to determine whether a party is acting in the public interest, before granting standing to such a party.[26]

These factors were set out in *Ferreira v Levin NO*[27] by O'Regan J and included the possibility of another appropriate way to resolve the issues; the kind of remedy and its scope. Furthermore, the reach of persons who may be impacted by any order of the court and the occasion of these persons to present evidence and make submissions to the court need to be considered.[28] Moreover, in *Lawyers for Human Rights v Minister of Home Affairs,*[29] Yacoob J stated that the list of factors is not fixed and can include: The level of insecurity of the affected people, the right that is allegedly violated, and the repercussions of the violations, which are critical factors in the analysis.[30]

The uncertainty created by the decision in *YG v* S,[31] where corporal punishment was banned in Gauteng province but not in the rest of the country, needed to be addressed.[32] The Constitutional Court held that corporal punishment in the home and the common law defence of reasonable and moderate chastisement is of sufficient public interest and affects almost all parents and children in South Africa. Furthermore, the matter involves the interests of children who are a vulnerable group and have the right to be protected from all forms of violence. The court held that inflexibility, technical and otherwise, should never prevent the prudent realisation of justice.[33] Therefore, FORSA was granted standing and allowed to intervene under section 38(d).[34]

The court decided the substantive issue of the constitutionality of moderate and reasonable chastisement, primarily on the provision of section 12(1)(c) of the Constitution,[35] Section 12(1)(c) states that: 'Everyone has the right to freedom and security of the person which includes the right to be free from all forms of violence from either public or private sources.'[36] The court analysed the meaning of 'assault' and 'violence' before determining that chastisement does, by its very nature, entail some violence.[37] The court then asked why it was necessary to resort to chastisement in the

25 *FORSA* (n 1) para 13–20.
26 ibid para 15–16.
27 [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC).
28 ibid para 234.
29 [2004] ZACC 12; 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC).
30 ibid para 18.
31 *YG* (n 13).
32 *FORSA* (n 1) para 20.
33 ibid para 19.
34 *FORSA* (n 1) para 20.
35 *FORSA* (n 1) para 36.
36 *FORSA* (n 1).
37 ibid para 39.

first place if not to cause actual or potential pain and discomfort that will have a more significant effect than any other method of discipline?[38] Mogoeng CJ observed that the object is always to cause 'displeasure, discomfort, fear or hurt.'[39]

The court acknowledged the painful history of widespread and institutionalised violence in South Africa and that section 12 aims to reduce and eliminate violence, in whatever form, from both public and private settings.[40] Furthermore, the court affirmed that according to the provision contained in section 10, that '[e]veryone has inherent dignity and the right to have their dignity respected and protected.' For this reason, children are recognised as independent human beings, entitled to the enjoyment of human rights. Moderate and reasonable chastisement does impact on the dignity of a child and therefore limits the child's section 10 right.[41] The question that remains, whether the limitations of a child's sections 10 and 12(1)(c) rights are justified. Mogoeng CJ concluded that the right to be free from all forms of violence, the right to human dignity and the availability of less restrictive disciplinary measures is a clear indication that the common law defence of reasonable and moderate chastisement can no longer be allowed. There can be no justification for its continued existence since it violates the rights in the Constitution.[42]

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 is therefore no longer a valid defence against a charge of common assault.' The court dismissed the appeal,[43] however, it did not address the child's right to protection from abuse, neglect, degradation and maltreatment, and, consequently, this *lacuna* is seen as undermining the judgment.[44]

## The Children's Act 38 of 2005: Raising a Red Flag to a Bull

The Children's Act 38 of 2005 (in force from 1 April 2010) is the primary legislative document pertaining to parental responsibilities and rights.[45] The South African Law Reform Commission (SALRC) was responsible for reviewing the then Child Care Act of 1983 and bringing it in line with the CRC. At issue was the problem of how to tackle

38 ibid.
39 ibid para 41.
40 ibid para 42
41 ibid para 48.
42 ibid para 71.
43 ibid 76.
44 Julia Sloth-Nielsen, 'Sideswipes and Backhanders: Abolition of the Reasonable Chastisement Defence in South Africa' (2020) Intl J of Law, Policy and the Family 191, 197.
45 Jacqueline Heaton, 'Parental Responsibilities and Rights' in Trynie Boezaart (ed), *Child Law in South Africa* (2nd edn, Juta 2017) 77.

the question of corporal punishment in the home.[46] The SALRC suggested that the common law defence of reasonable chastisement be removed by legislative amendment.[47] This was to minimise the likely publicity that such a move would generate in the hope of moving it almost unseen through all the parliamentary hurdles.[48] However, the government expanded on the proposed clause, which became clause 139 of the Children's Bill. Bill 19 of 2006 surpassed the proposed provisions of the SALRC and included the prohibition of corporal punishment in the home.[49] The original clause 139 stated:

> (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.[50]

Consequently, this version aimed to prohibit the common law defence of moderate and reasonable chastisement. Moreover, it explicitly mentioned the possible prosecution of parents or persons in loco parentis in certain circumstances.[51] Clause 139 was well-received by the South African Human Rights Commission (SAHRC), which declared

46 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.
47 Skelton (n 8) 346.
48 Sloth-Nielsen (n 46) 257.
49 ibid 258.
50 ibid.
51 ibid.

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.'[52] However, the expanded clause 139 became highly controversial in Parliament—*like raising a red flag to a bull*—and had to be removed, thereby also putting an end to the possibility of removing the reasonable chastisement defence in order for the rest of the Bill to be passed.[53]

Further endeavours to add a similar provision in the Regulations of the Act caused a similar parliamentary response and had to be omitted again.[54] The executive's further endeavour to introduce a ban met with severe opposition from parliamentarians, so much so, that it threatened to wreck the entire Children's Bill during the parliamentary debate process.[55] Opposition to the new bill among parliamentarians, and specifically section 139, was based purely on their personal beliefs supporting corporal punishment.[56] It has been evident since 2006 that the executive arm of the South African government wanted to abolish the defence of reasonable chastisement but that the legislator was less inclined to do so.[57] As Sloth-Nielsen pointed out, the executive cannot compel the legislature to do its bidding.[58]

The most recent Children's Act Amendment Bill (Bill 18 of 2020) was tabled before the cabinet, but it contained no reference to corporal punishment.[59] This was an unexpected omission, since the South African government has made a commitment to both the African Committee of Experts of the Rights and Welfare of the child and the United Nations (UN) Committee on the Rights of the Child that it intends to prohibit corporal punishment through legislative change to the Children's Act Amendment Bill.[60] Not having a law that prohibits the use of corporal punishment leaves a gaping hole in children's rights jurisprudence. As seen from the New Zealand discussion below, judicial law reform is crucial in bringing about social and cultural change to eradicate corporal punishment. Law reform need not necessarily be restricted to the Children's Act. Corporal punishment sits comfortably within the criminal law sphere and can also be prohibited in this area of the law.

52 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 4 February 2021.
53 Sloth-Nielsen (n 46) 258.
54 ibid 259.
55 ibid 263.
56 Sloth-Nielsen (n 44) 193.
57 Sloth-Nielsen (n 46) 260.
58 ibid 263.
59 Sloth-Nielsen (n 44) 203.
60 ibid.

Furthermore, much like New Zealand's criminal law, the *de minimis non curat lex*-rule (the law does not concern itself with trivial matters) can also be incorporated so as not to prosecute minor or accidental offences.[61] However, Sloth-Nielsen is not very optimistic about this method, arguing that the difficulty with a *de minimis* approach is the discretionary powers that can lead to discrepancies in applying the doctrine at the grass-roots level.[62] In its Police Practice Guide, New Zealand, resolved this problem by describing what constituted 'inconsequential', 'minor', 'trivial' and 'unimportant' touching.[63] Furthermore, it was made clear that the use of any weapon or implement to smack or strike a child around the head, or any kicking, would not be considered an inconsequential form of assault.[64]

## Litigating for Change

One of the disadvantages of a judicial ban of corporal punishment is the risk that it will be undermined owing to a lack of political will.[65] Follow-up legislative reform is crucial to give the judicial ban the legitimacy and authority to bring about the necessary social change. Another possible drawback is the high cost of litigation, and it is time-consuming, demanding and risky and is not always effective.[66]

However, strategic litigation is often a valuable strategy for under-resourced civil society groups that may lack influence when it comes to economic or social policy issues. Litigation, or even just the threat of litigation, could be a trigger or a catalyst to start an influential, well-informed strategic campaign for law reform. It only takes one court decision, such as *FORSA v Minister of Justice and Constitutional Development*,[67] to counter the influence of self-interested groups, like *FORSA*, who prefer the status quo where children's human rights are ignored and they are treated as lesser beings.[68]

It is acknowledged that children's constitutional rights are often relegated to the side-lines, yet those under eighteen make up most of the population in many states.[69] However, South Africa had a healthy children's rights movement, even before the

61 See s 59(4) of the New Zealand Crimes Act 1961.

62 Sloth-Nielsen (n 44) 203.

63 Beth Wood and others, *Unreasonable Force: New Zealand's Journey Towards Banning the Physical Punishment of Children* (Save the Children New Zealand, 2008) 193.

64 ibid.

65 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 84 <http://repository.uwc.ac.za/handle/10566/5041> accessed 4 February 2021.

66 Andrea Durbach and others, 'Public Interest Litigation: Making the Case in Australia' (2013) Alternative Law Journal 219, 219 <https://doi.org/10.1177/1037969X1303800404>.

67 *FORSA* (n 1).

68 Durbach (n 66) 220.

69 Geraldine Van Bueren, 'The Constitutional Rights of Children' (2003) Amicus Curiae 27, 28.

introduction of the Constitution and the Bill of Rights.[70] During the consultation process for the drafting of the Constitution, children's rights organisations made submissions to the Constitutional Assembly, which resulted in the broader reach of section 28 than the former children's rights section, section 30 of the interim Constitution.[71] Nevertheless, the children's rights movement did not stop there. Several public interest cases followed the introduction of either the interim or the final Constitution[72] with issues relating to adoption,[73] juvenile whipping,[74] socio-economic rights,[75] and basic education.[76] This was a critical move by advocacy groups like the CCL at the University of Pretoria, which endeavours to advance the best interests of those children whose rights and interests have been ignored.

Public Interest Litigation (PIL) has provided some of the most influential and profound decisions handed down by the Constitutional Court, as noted above. This, in part, is because of the adoption and constitutionalisation of Article 3 of the CRC as part of the Bill of Rights,[77] which gave the Convention a superior status in South African children's rights jurisprudence.[78] As has been pointed out, children by virtue of their status as children are 'unlikely litigants.'[79]

Public Interest Litigation had a slow start in South Africa.[80] Many a children's rights case that reached the courts were brought by adults out of self-interest, in that they only

70 Ann Skelton, 'Children's Rights' in Jason Brickhill (contr ed), *Public Interest Litigation in South Africa* (Juta 2018) 258, 259.

71 ibid.

72 Constitution (n 2).

73 *Fraser 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). The Centre for Applied Legal Studies (CALS) at the University of the Witwatersrand and Lawyers for Human Rights were admitted as amici curiae. *Minister of Welfare and Population Development v Fitzpatrick and Others* [2000] ZACC 6; 2000 (3) SA 422. CALS was admitted as amicus curiae.

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

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

76 *Governing Body of the Juma Musjid Primary School and Others v Essay NO and Others* [2011] ZACC 13; 2011 (8) BCLR 761 (CC). The Centre for Child Law (CCL) at the University of Pretoria and the Socio-Economic Rights Institute were admitted as amici curiae.

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

78 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 Intl J Child Rts 137, 138.

79 Julia Sloth-Nielsen, 'The Contribution of Children's Rights to the Reconstruction of Society: Some Implications of the constitutionalisation of Children's Rights in South Africa' (1996) Intl J Child Rts 323, 342.

80 Skelton (n 70) 260–263.

highlighted children's rights issues when they aligned with their own interests.[81] Sloth-Nielsen referred to this approach as 'the invisibility of the non-litigant children'[82] and then points to two adoption cases to illustrate this point.

First, *Fraser v Children's Court, Pretoria North and Others*[83] centred around unmarried fathers' rights. Of significance was the striking down by the court of a section in the Child Care Act 74 of 1983, which discriminated against unmarried fathers regarding their consent to the adoption of their children born out of wedlock. Furthermore, the court considered the child's best interests, who, after three years, was happily settled with his new adoptive parents, prompting the court to disallow any further litigation. Central to this issue is that no children's rights arguments were raised in any of the three preceding decisions. For the first time, children's rights were raised some three years after litigation commenced and only when the matter finally reached the Constitutional Court.[84]

Second, in the case *Minister of Welfare and Population Development v Fitzpatrick and Others*,[85] a foreign family wanted to adopt a child they had fostered for two years but was prevented from doing so by a provision in the Child Care Act.[86] The court held that it was obviously in the child's best interests to remain with the foster family. The absence of children's representation (apart from their parents) in all matters concerning children that come before the courts, has had both academics[87] and the judiciary[88] lament the situation's unacceptability.

In *Centre for Child Law v The Governing Body of Hoërskool Fochville*,[89] thirty-seven Black English-speaking high school students were placed in a single-medium Afrikaans high school by the Department of Basic Education. The students filled out questionnaires to assist the Centre for Child Law and Legal Resources Centre. When the application was made to intervene on the students' behalf, the existence of these questionnaires was mentioned. The High Court ordered that the questionnaires be handed over to the governing body of the school. However, the Centre for Child Law refused and took the matter on appeal. The appeal was upheld, and the court remarked that to strike the right balance, the court must give the best interests of the child the

81 Sloth-Nielsen (n 78) 150.
82 ibid 149.
83 [1997] ZACC 1; 1997 (2) SA 261 (CC). *Fraser v Naude and Another* [1998] ZACC 13; 1999 (1) SA (CC).
84 Sloth-Nielsen (n 78) 140.
85 [2000] ZACC 6; 2000 (3) SA 422.
86 Act 74 of 1983.
87 Sloth-Nielsen (n 78) 149.
88 *Christian Education South Africa v Minister of Education* [2000] ZACC 11; 2000 (4) SA 757; 2000 (10) BCLR 1051 [53]. See the postscript to this decision where Sachs J penned the 'The Voice of the Child' para 53.
89 [2015] ZASCA 155; 2016 (2) SA 121 (SCA).

appropriate consideration. First, children have the right to be represented as entities separatefrom their parents, with the right to have a say in all matters that concern them. This right is generally accepted in international and South African law. [90]

Public interest litigation and the application of the CRC have had such a significant impact in South African children's rights jurisprudence, arguably more so than in any other jurisdiction in the world.[91] The issue of standing of the *amicus curiae* needed careful consideration in the *FORSA*-case.[92] Section 38 of the Constitution sets out the requirements of standing. Section 38 states:

> A matter alleging a breach in the Bill of Rights may be brought by any person (natural or legal):(a) representing their own interest;(b) representing another who can not represent themselves or act in their own name;(c) representing a group as a member or representing the interests of a group or class of persons;(d)acting in the public interest; and (e)an association representing the interest of its members.[93]

Underpinning the rules of standing is the requirement of the justiciability of an issue—a case should not be merely academic or hypothetical.[94] Furthermore, it is important to note that the court in the *FORSA*-case was at pains to point out that section 28(2) applies not only in some matters but in *every matter* concerning a child.[95] This is an excellent example of how judicial condemnation through strategic litigation can be a successful way of prohibiting corporal punishment and thereby achieving much-needed law reform. Constitutional and legal provisions appear to be used increasingly to challenge the use of corporal punishment in some or all settings.[96] If legislative reform is impossible or difficult to achieve, this alternative way of reaching the same outcome needs serious consideration.

## Reality Bites

Corporal punishment is a complex and controversial subject.[97] For this reason, and given its brutal history of human rights abuses, South Africa should be commended for an admirable job in formally and systematically prohibiting corporal punishment, in

90 [2015] ZASCA 155; 2016 (2) SA 121 (SCA) para 19.
91 Sloth-Nielsen (n 78) 152.
92 *FORSA* (n 1).
93 Constitution (n 2).
94 Ann Skelton, 'Constitutional Protection of Children's Rights' in Trynie Boezaart (ed), *Child Law in South Africa* (2nd edn, Juta 2017) 329.
95 *FORSA* (n 1) para 57.
96 Sonia Vohito, 'Using the Court to End Corporal Punishment—The International Score Card' (2019) De Jure 597, 599.
97 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.

public[98] as well as private spheres.[99] South Africa has seen a remarkable change in human rights violations—from the apartheid regime to a more rights-conscious judiciary thanks to the adoption of a progressive Constitution with a dedicated Constitutional Court, which gives effect to the provisions contained in the Constitution and Bill of Rights, specifically section 28, which focuses on children's rights. An enlightened judiciary has led to a more rights-conscious society with a full body of jurisprudence to support it. Children's rights have benfitted as evidenced by Skelton, who listed many cases that have come before the Constitutional Court over the last twenty-five years, gaining prominence amongst the judiciary and scholars.[100]

Whilst South Africa has had a model run in the abolition of corporal punishment both in public and in private settings, the reality is that the practice is still continuing in schools and the home.[101] As recently as October 2016, the Committee on the Rights of the Child stated in their concluding comments on the second periodic report that corporal punishment is still practiced extensively throughout South Africa in homes and schools.[102] In the General Household Survey of 2011, ninety-two per cent of the child respondents indicated that they experienced corporal punishment at school.[103] Fortunately, this number dropped to 5.7 per cent nationally in 2018[104] but jumped again in 2019 to 6.8 per cent of respondents.[105]

It remains to be seen how successful the abolition of corporal punishment in the home will be. In the absence of legislation, it is difficult to perceive the impact of a mere judicial ban. As much as one would want to believe that the Constitutional Court speaks with authority and wisdom, it remains to be seen whether the South African public will pay much attention to the *FORSA*-decision. Under section 9(1) of the South African Constitution:[106] 'Everyone is equal before the law and has the right to equal protection and benefit of the law.' Subsection 2 continues with: 'Equality includes the full and equal enjoyment of all rights and freedoms.' Skelton argues that a child's right to equal protection under the law is compromised by the common law defence of reasonable

98 *S v Williams and Others* [1995] ZACC 6; 1995 (3) SA 632 (CC); *Christian Education South Africa v Minister of Education* [2000] ZACC 11; 2000 (4) SA 757; 2000 (10) BCLR 1051.

99 *FORSA* (n 1) para 76.

100 Skelton (n 70) 261.

101 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 Michigan J Race & L 341, 364.

102 CRC/C/ZAF/CO/2 para 35.

103 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.

104 Statistics South Africa, 'General Household Survey 2018' 18 <http://www.statssa.gov.za/publications/P0318/P03182018.pdf> accessed 16 February 2021.

105 Statistics South Africa, 'General Household Survey 2019' 18 <http://www.statssa.gov.za/publications/P0318/P03182019.pdf> accessed 16 February 2021.

106 Constitution (n 2).

chastisement.[107] Adults have the benefit of full protection of the law against both public and private acts of violence perpetrated against them.[108] However, children are protected from public acts of violence, but not from private acts of violence perpetrated against them by their parents or persons in loco parentis.[109] Children in South Africa still lack substantive equality that will genuinely make them equal to their parents.

South African parliamentarians, like their Australian counterparts, are loath to legislate for a ban on corporal punishment in the home, as will be seen from this article. The debacle surrounding the proposed section 139 of the Children's Act is evidence of this. This stance is difficult to fathom—unlike New Zealand, where the left-wing Green and Labour Parties managed to pass legislation prohibiting the use of corporal punishment in all settings.

## Law Reform in Aotearoa New Zealand

In New Zealand the prohibition of corporal punishment was attained through legislative change. On 9 June 2005, Ms Sue Bradford of the Green Party of Aotearoa[110] introduced the Crimes (Substituted Section 59), Amendment Bill to parliament.[111] Almost two years later, the Bill was adopted by the House of Representatives, the sole purpose being to abolish the use of parental force for the purpose of correction.[112]

It is suggested that prior to European settlement, Indigenous Māori children enjoyed a quiet and peaceful existence. Their domestic lives were tranquil, and the Māori were never observed to be violent towards their children.[113] Fundamentally, the Māori believed that *tamariki mokopuna* (children) were gifts from the *atua* (spiritual beings). Any negativity expressed to them broke the *tāpu* (sacredness and special rules and restrictions) by offending the *atua* and the *tipuna* (ancestors) who had gone before. *Tamariki mokopuna* were treated with *aroha* (loving care) and indulgence. As a method of socialising children, punitive discipline in whatever degree was an anathema to the *tipuna*.[114]

107 Skelton (n 8) 347.
108 ibid.
109 ibid.
110 This is the indigenous Māori name for New Zealand.
111 Aotearoa 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.
112 See s 59 of the Crimes (Substituted Section 59) Amendment Act 2007.
113 Wood (n 63) l22.
114 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

In 1840, New Zealand became a British Colony under the provisions of the Treaty of Waitangi.[115] The Treaty is a statement of principles agreed upon between the British and the Mãori, who had settled first in New Zealand. It is not part of domestic law except where specific principles are referred to in domestic law.[116] The Treaty of Waitangi enabled thousands of English, Irish, Scottish and Welsh migrants to settle in Aotearoa in the 1800s and brought their Christian customs with them,[117] together with the belief in the efficacy of physical punishment as a disciplinary measure in child-rearing.[118] This belief was founded on biblical passages in the Old Testament.[119] As a result, physical discipline of Mãori children took hold.[120]

Because the law in New Zealand uses the British common law system, the defence of reasonable chastisement formed part of the country's law, and in 1893 this defence was given statutory force when it was incorporated into the Criminal Code by way of section 68.[121] Williams J in the 1902 case of *R v Drake*,[122] 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.'[123]

This case was an appeal brought by the mother, who was charged with and found guilty of the manslaughter of her child.[124] The Crown introduced evidence that the mother had beaten the child on previous occasions to such an extent that it could not reasonably be considered as not excessive. The legal argument on appeal rested on evidence in the court a quo that showed that the accused is a person likely to commit a crime. 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.' [125] Denniston J held that:

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Mana Ririki, Auckland, New Zealand <https://www.occ.org.nz/assets/Uploads/Traditional-Maori-parenting.pdf> accessed 6 January 2021.

115 New Zealand History 1 <https://nzhistory.govt.nz/politics/treaty/the-treaty-in-brief> accessed 28 September 2020.

116 ibid.

117 Wood (n 63) l22.

118 ibid.

119 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.

120 Wood (n 63) l70.

121 ibid 32.

122 NZCA [1902] NZGazLawRp 141; (1902) 22 NLR 478; (1902) 5 GLR 145.

123 ibid 147.

124 ibid 122.

125 ibid 146.

> 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.[126]

The appeal was dismissed.

In 1961, the New Zealand parliament passed the Crimes Act, and the provision containing the defence was re-enacted into new legislation in what was the then section 59.[127] Section 59 stated that: '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.'

## What Sparked the Change?

Certain events that jarred New Zealand's collective conscience would start the process to repeal section 59. In March 1991, the country was rocked by the news of the horrific abuse and death of two-year-old Delcelia Wikita at the hands of her biological mother and stepfather. In 1992, Lesley Max, a New Zealand journalist, wrote an article in *Metro*,[128] a national magazine describing the ill-treatment and abuse of this little girl.[129] According to Hassall, this led to 'national soul searching about the status and treatment of children. One response was to question the legitimacy of section 59.'[130]

Opponents of repeal believed that there was no connection between 'reasonable force to correct misbehaviour' and children's deaths from violent acts committed by their parents.[131] They argued that individuals responsible for the deaths of children would most likely not even have heard of section 59, much less be influenced by it.[132] However, the link between child homicides and physical correction was widely reported in the media, debated and ultimately concluded to exist, even though it was not generally accepted to be so.[133] Proponents of repeal believed that to repeal section 59 would be to

126 ibid 148.
127 Wood (n 63) 32.
128 Lesley Max, 'The Killing of Delcelia Witika and the Banality of Evil' (*Metro*, June 1992) Part 1 66–77 and Part 2 108–114.
129 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; Wood (n 53) 35.
130 Hassall (n 129) 175.
131 Wood (n 63) 25.
132 ibid.
133 Wood (n 63) 152.

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.[134]

The UN Committee on the Rights of the Child criticised New Zealand for its failure to act on section 59 and again recommended an end to corporal punishment.[135] On one previous occasion, in 1997, it had criticised the provision in section 59.[136] Moreover, in September 2003, to New Zealand's shame, UNICEF published the *Innocenti Report Card*,[137] exposing its poor record concerning child deaths from violence and abuse. The *Innocenti Report Cards* defined children as persons younger than fifteen years of age.[138] New Zealand was identified as having a death rate from child maltreatment (1.2 maltreatment deaths for every 100 000 children) six times higher than those with the lowest rates (0.2 maltreatment deaths for every 100 000 children).[139] More or less at the same time in 2003, yet another child, Coral Burrows, was beaten to death by her stepfather Stephen Williams, which caused another media frenzy and debate about section 59 and child discipline.[140] The attention incidents of child abuse and deaths garnered with media companies helped create more public awareness of child protection and concern for children's safety.[141] This awareness resulted in a reduced number of oppressive disciplinary actions.[142]

On 21 June 2007, the new law, the Crimes (Substituted Section 59) Amendment Act 2007, finally came into force, and New Zealand thus became the eighteenth nation to ban corporal punishment of children and the first English-speaking country to do so.[143] After many generations of children have endured physical punishment since European settlement, New Zealand's children were now finally entitled to live peaceful, harmonious and violence-free lives, like their ancestors once did.[144]

134 ibid 25.
135 Wood (n 63) 42.
136 CRC/C/15/Add.71 para 16.
137 The *Innocenti Report Cards* investigate child well-being in rich nations. The series draws data from the thirty 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.
138 UNICEF (n 128) 4.
139 ibid 5.
140 Wood (n 63) 42.
141 Editorial, 'Kids No Longer Safe in Godzone' (*Sunday Star-Times*, 21 September 2003).
142 Wood (n 63) 152.
143 ibid 10, 20.
144 Wood (n 63) 50.

Instead of merely repealing section 59 from the Crimes Act, it was replaced by a new section 59 titled *Parental Control*, which reads:

> (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 in New Zealand argued that a simple repeal of section 59 would have given the common law defence of reasonable chastisement new life.[145] The assumption was that in the absence of an act that prohibits the use of corporal punishment, the common law defence of reasonable chastisement would again apply *unless* it is 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 was repealed.[146] The purpose of the new parental control law was to provide children with a safe and secure environment by abolishing corporal punishment as a means of discipline.[147]

The *Parental Control* section has five significant elements:

- Children now have the same legal protection against assault as adults do.
- All forms of physical punishment are banned.
- Parents are permitted to restrict, hamper, constrain or remove children.
- Police have prosecutorial discretion for minor infractions.
- Authorities will pay close attention to the impact of this new law.[148]

## Did Law Reform Bring Social and Cultural Change?

It has been said that judicially based prohibition of corporal punishment without the necessary law reform fails to inform and educate parents on the main purpose of the

145 ibid 84.
146 ibid.
147 ibid.
148 Wood (n 63) 190.

prohibition, namely to educate parents about alternative ways to discipline their children to correct misbehaviour.[149] This is true not only for judicially-based law reform but also for direct legislative law reform.

As Wood observed, 'moving from the prohibition to elimination of corporal punishment is an appropriate goal within the wider goal of achieving "non-violent childhoods" for all our children.'[150] This seems easier said than done. Domestic violence (IPV and child abuse) rates remain unacceptably high in New Zealand. One in three women have experienced IPV, and there were 80 900 reports of concern relating to 58 600 children and young people in the twelve months to June 2020.[151] Too many children are exposed to a range of anti-social behaviour, and until these are eliminated, families and children will bear the brunt of bad behaviour. Associative factors such as drug and alcohol abuse, poverty and stress, and inter-generational family violence need to be addressed.[152] Commentators remarked that there was a strong resistance to change and that law reform was, in part, aimed at facilitating the change.[153]

Furthermore, they argue that if it were not for the law reform, changing parental behaviour and public attitudes towards corporal punishment would have been a prolonged process.[154] However, it does not seem as though attitudes have changed that much. In August 2009, New Zealand held a citizen-initiated referendum whereby fifty-six per cent of eligible voters responded to the question 'Should a smack as part of good parental correction be a criminal offence in New Zealand?,' which resulted in more than eighty-seven per cent of respondents indicating a wish to return to the system before smacking was outlawed.[155] Opponents of the referendum complained that the wording was misleading and ambiguous.[156] The result of the referendum is non-binding, and the law that prohibits physical punishment remains in place.[157] A decade after the law change, a 2017 study at the University of Auckland found that almost one-third of Kiwi parents smacked their children and ten per cent admitted to using corporal punishment

149 Mezmur (n 65) 83.

150 Beth Wood, 'Violence-free Childhoods: Aotearoa 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.

151 New Zealand Family Violence Clearing House, 'Frequently Asked Questions' <https://nzfvc.org.nz/frequently-asked-questions> accessed 23 October 2020.

152 Wood (n 150) 4.

153 Wood (n 63) 147.

154 ibid.

155 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.

156 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.

157 Hassall (n 129) 191.

regularly.[158] It does, indeed, seem as if there is still a long way to go to eliminate the use of corporal punishment in New Zealand.

Rightly or wrongly, parents are afraid of being labelled criminals for physically punishing their children.[159] 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 was finally passed by parliament.[160] Criminalising smacking, hitting or spanking should not be the goal. It will be counter-productive for a society to see parents and carers cuffed and marched to the cells for physical punishment. In order to reassure the public, a compromise amendment clause was inserted into the Bill, which affirmed that the police had a discretion not to prosecute where an offence was considered so inconsequential that there would be no public interest in proceeding with a prosecution.[161] The legislation provided for the application of prosecutorial discretion by way of the *de minimis*-rule. This is a welcome approach to allay the fears of parents who felt that they were turned into criminals by anti-smacking legislation.[162]

There was also a perception in the community that the law change was an unwarranted intrusion of criminal law into family life.[163] Furthermore, to help the police understand what is meant by 'inconsequential,' descriptions such as 'minor', 'trivial' and 'unimportant' were added to the Police Practice Guide.[164] 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.'

## Legislative Paralysis in Australia

The Commonwealth of Australia has no single set of criminal laws,[165] because each State, Territory and the Commonwealth operate in parallel with each other.[166] The Australian Federal Government has no specific power under the Australian Constitution

158 Susan MB Morton and others, *Growing Up in New Zealand: A Longitudinal Study of New Zealand Children and Their Families. Now We Are Four: Describing the Preschool Years* (2017) 40 <https://cdn.auckland.ac.nz/assets/growingup/research-findings-impact/GUiNZ_Now%20we%20are%20four%20report.pdf> accessed 30 December 2020.

159 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.

160 Wood (n 63) 147.

161 ibid 192.

162 Hassall (n 129) 183.

163 Paul Rishworth, 'Human Rights' (2015) NZ L Rev 259, 269.

164 Wood (n 63) 193.

165 Penny Crofts, *Criminal Law Elements* (6th edn, LexisNexis Butterworths 2018) 1.

166 ibid.

to make national criminal laws.[167] Under the Australian federal system, the Commonwealth can only make laws in relation to those powers given to it under sections 51 and 52 of the Commonwealth of Australia Constitution Act (the Australia Constitution).[168] Therefore, any criminal law made by the Commonwealth has to be justified under a specific power in the Australian Constitution, for example, powers related to external affairs or trade and commerce.[169] Under each State's constitution, the State Parliament can pass laws on a broader range of subjects than the Commonwealth Parliament.[170] For this reason, an important area such as criminal law is regulated primarily by state laws rather than by Commonwealth laws.[171]

The Commonwealth has the power to intervene to bring about state-based reform in criminal law under the external affairs power, as was demonstrated in the 1994 case of *Toonen v Australia* when a state law was found to be in breach of the International Convention on Civil and Political Rights (ICCPR).[172] Tasmanian criminal law had criminalised a range of sexual activities between adult men. Nicholas Toonen, a gay man, had complained to the United Nations Human Rights Committee, which found the Commonwealth in breach of its international obligations under the Covenant.[173] As a result, the Commonwealth Government passed the Human Rights (Sexual Conduct) Act 1994, overriding the Tasmanian Criminal Code[174], specifically section 122, which prohibited intercourse against nature and section 123, which prohibited indecent practice between male persons.[175]

In an attempt to codify general principles of criminal responsibility to be applied when interpreting criminal law, the Criminal Code Act 1995 (Cth) was enacted.[176] This Act substantially adopted the recommendations made by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General.[177] The hope was that this legislation would be adopted in all States and Territories in Australia so that a national

167 ibid.

168 Section 51 provides that 'The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to: [among others] (xxix) external affairs.'

169 Crofts (n 165) 1.

170 Attorney-General's Department 'Overview of The Constitution as in Force on 1 July 1999' (Office of Legislative Drafting, 1999) 6.

171 ibid.

172 [1994] PrivLawPRpr 33; (1994) 1(3) Privacy Law & Policy Reporter 50.

173 UN Document CCPR/C/50/D/488/1992, April 4, 1994.

174 Crofts (n 165) 1.

175 University of Minnesota, Human Rights Library, 'Toonen v Australia' <http://hrlibrary.umn.edu/undocs/html/vws488.htm> accessed 22 October 2020.

176 Crofts (n 165) 2.

177 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.

Criminal Code could be established. The view is that it seems unlikely that the states will implement the Model Criminal Code.[178] Moreover, since the Commonwealth has limited powers to make criminal law, it has meant that this responsibility has mainly fallen on the States' legislature. However, parts of the Code have been adopted in the ACT Crimes Act 1900 (ACT) and the Northern Territory in Part IIAA of the Criminal Code Act 1983 (NT).[179] As time passes, the Criminal Code may play a more influential role than merely serve as a tool of interpretation.[180] Some Australian scholars have expressed the hope 'that the Commonwealth Criminal Code may one day form the basis for a uniform Australian criminal law.'[181]

The implication of Austrialia not having a uniform criminal law, is that each Australian jurisdiction will have to legislate separately to ban corporal punishment. This is evident in the push by the Tasmanian Commissioner for Children in January 2021 for a change 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 the purpose of correction.[182] Alternatively, the federal government will have to legislate with overriding force according to section 109 of the Constitution,[183] based on the external affairs power of section 51(xxix), to implement international human rights conventions which call for the abolition of corporal punishment.[184] Any State or Territory law inconsistent with the Commonwealth legislation shall then be deemed invalid to the extent of the inconsistency.

## Human Rights Legislation in Australia

It would be beneficial for children if Australia can adopt a children's rights approach. Defining a children's rights approach has been described as a work in progress.[185] It has been described as an approach that acknowledges and applies children's rights when a decision can impact them. They are treated with the same rigour bestowed on all other rights, including an appreciation of the substantive content of the rights in question.[186] It stands to reason then that any state that enacted human rights legislation must value

178 Crofts (n 165) 2.
179 Crofts (n 6) 31.
180 ibid 30.
181 ibid 31.
182 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.
183 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.'
184 See for example Jo Lennan and George Williams, 'The Death Penalty in Australian Law' (2012) 34 Sydney LR 659 for a discussion on the process of having a law declared invalid.
185 Meda Couzens, 'Le Roux v Dey and Children's Rights Approaches to Judging' (2018) 21 PELJ 1, 4.
186 ibid.

the human rights of all its citizens—adults and children alike. Victoria, the ACT and Queensland have adopted legislation to protect their citizens' human rights. The Victorian Charter of Human Rights and Responsibilities Act of 2006 (Victorian Charter), the ACT Human Rights Act of 2004 (ACT HR Act) and the Queensland Human Rights Act of 2019 (Qld HR Act) are all based on the 'dialogue' model of human rights, which aims to promote a discussion about human rights between the Executive, Parliament and the courts.[187] This model protects parliamentary sovereignty and does not provide for the striking down of incompatible legislation.[188] 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 because it is incompatible with a provision(s) of the Charter or Act.

The Victorian Charter provides several protections for children against physical violence (section 10), discrimination (section 17) and freedom of religion (section 14). Section 10 of the Charter states that a person should not be tortured or treated or punished in a cruel, degrading and 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.' The Charter was initially designed to not lead to a significant increase in litigation.[189] Therefore, this human rights legislation is an ordinary Act of Parliament similar to the New Zealand Bill of Rights Act of 1990.[190] These rights acts are not constitutionally enshrined like the South African Bill of Rights, which appears in Chapter 2 of the Constitution.[191]

The Victorian Charter has a limitations clause in subsection 7(2) which states that a human right may be justifiably limited in a free and democratic society based on human dignity, equality and freedom and considering the nature of the right; the significance and aim of the limitation; the character and scope of the limitation; the link between the

187 George Williams, 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope' (2006) 30 Melbourne Univ LR 880, 901.

188 Louis Schetzer, 'Queensland's *Human Rights Act*: Perhaps not such a Great Step Forward?' (2020) 45(1) Alternative LJ 12 <https://doi.org/10.1177/1037969X19898538>

189 Williams (n 187) 894.

190 ibid 893.

191 Constitution (n 2).

limitation and its purported aim; and less restrictive means to achieve the same outcome. This clause draws heavily on the drafting of section 36 of the South African Bill of Rights.[192]

The ACT Human Rights Act of 2004 (ACT HR Act) came into force on 2 March 2017 andsection 40B imposes direct obligations on the ACT public authorities to take relevant human rights into account in decision making. In October 2017, the ACT Human Rights Commission made submissions to the Standing Committee on Justice and Community Safety by stating the following:

> 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.[193]

Children and young people are entitled to all human rights guaranteed under the ACT HR Act. Section 10 is in line with section 37(a) of the CRC, which states: 'No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.'[194] 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.'[195]

In February 2019, Queensland became the third jurisdiction in Australia to pass 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 for an accessible complaints mechanism for alleged breaches by a public body.[196] The Qld HR Act protects mainly civil and political rights enshrined in the International Covenant on Civil and Political Rights (ICCPR).[197] They are among others: equality before the law (section 15); protection from torture and cruel, inhuman or degrading treatment (section 17); freedom of thought, conscience, religion and belief (section 20); and the protection of families

192 Williams (n 187) 898.

193 John Hinchey, 'Submissions to the Standing Committee on Justice and Community Safety, Inquiry into Domestic and Family Violence – Policy approaches and responses' ACT Human Rights Commission 6 October 2017 7 <https://hrc.act.gov.au/wp-content/uploads/2015/04/HRC-Submission-DFV-Inquiry-October-2017-1.pdf> accessed 13 May 2020.

194 UNCRC 1989.

195 Helen Watchers and Jodie Griffiths-Cook, 'Australia's Pprogress in Implementing the United Nations Convention on the Rights of the Child' ACT Human Rights Commission (1 June 2018) <https://humanrights.gov.au/sites/default/files/2020-02/97._dr_helen_watchirs_oam_jodie-griffiths_cook_human_rights_commission_act_.pdf> accessed 17 August 2020.

196 Schetzer (n 188) 12.

197 ibid.

and children (section 26). Section 13 provides for the limitation of human rights in the act, and section 48 consists of the interpretation clause.

Like the ACT HR Act and the Victorian Charter, the Qld HR Act is based on the dialogue model, which does not focus on enforcement by the courts but preserves parliamentary sovereignty.[198] Under these rights Acts, it is unlawful for a public entity to act or make a decision that is not compatible with human rights; or, in making a decision, to fail to consider a relevant human right.[199] While these acts create a ground for unlawfulness, it does not allow for a stand-alone cause of action. Litigants are therefore not able to complain directly to the court but can do so in the process of a hearing based on another law. The Acts, therefore, create a 'piggy-back' clause, and there is no provision for a stand-alone cause of action. This means that, '[I]n practical terms, … where individuals have an independent cause of action against a public entity (for example, the right to seek judicial review of a decision of a public entity), a claim of unlawfulness under the Bill can be added to that existing claim.'[200] The piggy-back provision is a theoretical concept since the aim of the provision is to limit litigation. Consequently, there are no practical examples in case law.

The Victorian Charter was criticised by the Law Institute of Victoria, which stated that the piggy-back clause would result in significant resources being expended.[201] The Victorian Bar Council criticised the piggy-back clause as a barrier to accessible, just and timely remedies for fundamental human rights infringements.[202] Both organisations argued for a stand-alone cause of action.[203] The ACT HR Act is the exception to which section 40C(2) provides for a stand-alone cause of action in the ACT Supreme Court and allows a person to start proceedings against a public authority in respect of any human rights violations or to rely on his/her rights in any other legal proceedings.[204]

Unfortunately, the implication for 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 like section 280 of the Criminal Code 1899 (Qld),[205] cannot be struck down by the Supreme Court for incompatibility with sections 15 (equality before the law), 17 (protection from torture and cruel,

198 ibid.

199 ibid.

200 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.

201 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.

202 Schetzer (n 188) 13.

203 ibid.

204 ibid.

205 Which provides for parents and teachers to use physical force by way of correction.

inhuman or degrading treatment) and 26 (protection of families and children) of the Qld HR Act. Litigants can apply for a Declaration of Incompatibility in terms of section 53. However, the effect of a Declaration of Incompatibility is negligible. Section 54 states that the Declaration does not affect in any way the legality of the clause for which the Declaration was made and does not provide for any legal right to a civil cause of action.

These three states were lauded for the introduction of their respective rights legislation in the absence of other legislative reforms to protect the human rights of their citizens. 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.[206] Article 2(3) of the ICCPR states that access to effective dispute resolution mechanisms is considered an essential component of an effective regime that endeavours to protect the human rights of its people.[207]

This is a step back for children's rights in Victoria and Queensland since there is no stand-alone cause of action. Moreover, since corporal punishment violates the right to equal protection of the law and the right to protection from torture and cruel, inhuman or degrading treatment, it seems children are doomed to be discriminated against without any recourse or remedy. Therefore, it seems that the rights espoused by these charters ring particularly hollow for children and do not bode well for children's rights in Australia.

## Conclusion

Corporal punishment and its abolishment must be addressed via public campaigns promoting the new law. This would require additional resources, and it should be followed-up by education and support measures for parents and persons in loco parentis.[208] Countries seeking legal prohibition of physical chastisement, their advocates and campaigners will do well to engage in a support network of child and family-related organisations to mobilise and engage communities. Furthermore, political support is essential for long-term non-violent parenting education.[209] It is clear how a lack of support from the government appears when one considers what happened to the proposed section 139 of the South African Children's Act. Furthermore, the same could be said of Australia, where there seems to be a lack a commitment to children's rights and law reform. Thirty years have passed since Australia ratified the CRC and corporal punishment is still permitted by parents and persons in loco parentis.

206 Bruce Chen, 'The Human Rights Act 2019 (Qld): Some Perspectives from Victoria' (2020) 45(1) Alternative LJ 4, 10 <https://doi.org/10.1177/1037969X19899661>. See also Schetzer (n 188) 16.

207 Schetzer (n 188) 12.

208 Wood (n 150) 6.

209 ibid 11.

What is clear from scholarly literature on the subject, is that the task of protecting children adequately from all forms of violence, including corporal punishment, is an ongoing endeavour. Prohibition of corporal punishment is a move towards the broader recognition of children's rights, and the fact that children need to be made aware of their rights how the law could protect them.[210]

South Africa, New Zealand and Australia could all benefit from law reform and the prohibition of corporal punishment. South Africa can take heed from New Zealand that a law containing a *de minimis*-clause would not criminalise good parents. New Zealand and South Africa are aware that continuous education programmes are essential to support parents and persons in loco parentis to use non-violent child-friendly disciplinary methods. Australia can heed the call by opponents of corporal punishment that children's rights demand that they be treated equally to their parents and that violence against them is as erroneous as violence against an adult. Australia would be well advised to choose a law reform best suited to the country's constitutional dispensation and heed the fact that its children's welfare depends on this long-overdue measure to curtail the scourge of violence inflicted on their children under the guise of reasonable chastisement.

210 Wood (n 63) 202.

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