THE INCONSISTENCY OF THE 'LAWFUL CORRECTION' OF CHILDREN DEFENCE WITH QUEENSLAND'S NEW *HUMAN RIGHTS ACT 2019* (QLD)

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Despite persistent criticism from international human rights bodies and experts, Queensland continues to permit the 'lawful correction' of children as a defence to criminal offences committed against them. The recent introduction of a human rights framework in Queensland further highlights the disconnect between the State's correction defence, contemporary understandings of the deleterious effects of physically punishing children, and children's human rights principles. This article examines that disconnect and the consistency of the Queensland defence with the Human Rights Act 2019 *(Qld). To this end, it outlines the current position in the medical and psychological literature that corporal punishment has severe consequences for children. It also explains the scope of the Queensland defence and compares it to other Australian jurisdictions. The article then turns to an analysis of the consistency of the defence with the* Human Rights Act*. It concludes that the defence offends against human rights guarantees in Queensland, as well as the international framework for children's rights, and identifies avenues for reform.*

I INTRODUCTION

In 1997, seven years after Australia ratified the *United Nations Convention on the Rights of the Child* ('*UNCRC*'),[1] the Committee on the Rights of the Child expressed its 'concern about the lack of prohibition in local [Australian] legislation of the use of corporal punishment, however light, [against children] in schools, at home

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1 *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*UNCRC*').

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and in institutions'.[2] By 2019, the Committee had become 'seriously' and 'gravely concerned at the high levels of violence against … children'.[3]

Despite over three decades of Committee criticism of the 'lawful correction' of children, and the introduction of humans rights legislation in three states,[4] the criminal laws of all Australian jurisdictions still contain a defence permitting the corporal punishment of children.[5] While the form, scope and name of the 'lawful correction' defence varies across Australia, in every jurisdiction it operates to protect adults who perpetrate violence against children as an exception to the general rule that applying force to another person is unlawful.[6] Other circumstances in which ordinary people can lawfully use force against another include in self-defence, defence of property, and restraint of a person about to harm themselves or another.[7]

In Queensland, the defence is titled 'domestic discipline' and is included under s 280 of the *Criminal Code Act 1899* (Qld) ('*Criminal Code*'). This provision makes it lawful for parents and those in *loco parentis* to punish children using reasonable force for the purpose of 'correction, discipline, management or control'.[8] The conduct captured by the Queensland defence, and the corresponding defences of 'reasonable chastisement' and 'lawful correction' in other states,[9] is encompassed by the definition of 'corporal punishment' used throughout this paper, being: physical force used and intended to cause pain or discomfort, *however light*, to correct or punish a child's behaviour. This definition

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2 Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Australia*, 16th sess, UN Doc CRC/C/15/Add.79 (21 October 1997) [15] ('*Concluding Observations: Australia 1997*').

3 Committee on the Rights of the Child, *Concluding Observations: Australia*, UN Doc CRC/C/AUS/CO/4 (28 August 2012) [46] ('*Concluding Observations: Australia 2012*'). See also Committee on the Rights of the Child, *Concluding Observations: Australia*, 40th sess, UN Doc CRC/C/15/Add.268 (20 October 2005) [33], [35], [42] ('*Concluding Observations: Australia 2005*'); Committee on the Rights of the Child, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia*, 82nd sess, UN Doc CRC/C/AUS/CO/5-6 (1 November 2019), [28]–[30] ('*Concluding Observations: Australia 2019*').

4 *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT); *Human Rights Act 2019* (Qld) ('*HRA*').

5 *Criminal Code Act 1899* (Qld) s 280; *Criminal Code Act Compilation Act 1913* (WA) s 257; *Criminal Code Act 1924* (Tas) s 50; *Criminal Code Act 1983* (NT) s 27(p); *Crimes Act 1900* (NSW) s 61AA(2). In Victoria and the ACT, the defence arises at common law. Although the defence predominantly arises at common law in South Australia, it is also contemplated by the *Criminal Law Consolidation Act 1935* (SA) s 20(2)(b) according to Bampton J in *W, DL v Police* [2014] SASC 102, [36].

6 In Queensland and at the common law, this extends to *all* offences against the person, as there is no element of assault in the formulation of the defence: respectively, Andreas Schloenhardt and Thomas Cottrell, 'Lawful Correction of Children under s 280 of Queensland's Criminal Code: Retain, Reform, or Rubbish?' (2013) 33 *Queensland Lawyer* 75, 79; *R v Hughes* [2015] VSC 312, [98].

7 *Criminal Code Act 1899* (Qld) ss 271, 277.

8 Ibid s 280.

9 These are the two labels most commonly used in other states: cf (n 5). 'Reasonable chastisement' tends to appear in older cases and in common law jurisdictions, whereas 'lawful correction' is often used in legislation.

is derived from that used by the UNCRC Committee.[10] It is designed to distinguish physical punishment from restraint, which may be necessary to protect a child from harming themselves or others.[11] Where a child is restrained rather than punished, the intent is not punitive but protective, for example, holding onto a child to stop them from running across a busy road. The defence is not required to prevent prosecution for the latter action, as other laws allow for the use of non-punitive and necessary force.[12]

This paper will critically analyse the domestic defence in light of Queensland's new *Human Rights Act 2019* ('*HRA*'), which gives children 'the right, without discrimination, to the protection that is needed by the child, and is in the child's best interests, because of being a child'.[13] It argues that the 'lawful correction' doctrine is incompatible with children's rights because it ultimately fails to protect children from violence and therefore to uphold their right to protection. Indeed, 'lawful correction' has now been abolished by 65 states around the world due to this basic incompatibility.[14] Queensland's failure to follow suit is increasingly inconsistent with international children's rights obligations *and* jurisprudence, making an exploration of the doctrine overdue.

To this end, Part II will canvass the medical and sociological literature regarding the impacts of corporal punishment on children. Despite limited debate, it finds that a large body of current research strongly indicates the impacts on children are adverse.[15] Additionally, there is no evidence that

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10 This is very similar to and derived from the UNCRC Committee's definition in Committee on the Rights of the Child, *General Comment No 8 (2006): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (Arts 19; 28, Para 2; and 37, inter alia)*, 42nd sess, UN Doc CRC/C/GC/8 (2 March 2007) [11] ('*General Comment No 8*').

11 Andrew Rowland, Felicity Gerry and Marcia Stanton, 'Physical Punishment of Children: Time to End the Defence of Reasonable Chastisement in the UK, USA and Australia' (2017) 25(1) *International Journal of Children's Rights* 165, 168; Bernadette Saunders, 'Ending the Physical Punishment of Children by Parents in the English-Speaking World: The Impact of Language, Tradition and Law' (2013) 21(2) *International Journal of Children's Rights* 278, 285.

12 See *General Comment No 8* (n 10) [15] for a discussion of the distinction. As an example, see also *Criminal Code Act 1899* (Qld) ss 271, 277.

13 *HRA* (n 4) s 26(2).

14 End Corporal Punishment, 'Progress', *Countdown to Universal Prohibition* (Web Page, 2022) <https://endcorporalpunishment.org/countdown/> ('End Corporal Punishment').

15 See Elizabeth Gershoff and Andrew Grogan-Kaylor, 'Spanking and Child Outcomes: Old Controversies and New Meta-Analyses' (2016) 30(4) *Journal of Family Psychology* 453; 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, 2006); Joan Durrant and Ron Ensom, 'Physical Punishment of Children: Lessons from 20 Years of Research' (2012) 184(12) *Canadian Medical Association Journal* 1373 ('Physical Punishment of Children'), updated in Joan E Durrant and Ron Ensom, 'Twenty-Five Years of Physical Punishment Research: What Have We Learned?' (2017) 28(1) *Journal of Korean Academy of Child Adolescent Psychiatry* 20, 21 ('Twenty-Five Years of Physical Punishment Research').

corporally punishing a child has any benefits in the short or long-term, rather it is more likely to increase bad behaviour and escalate later punishments.[16]

Part III will analyse the Queensland defence in s 280 of the *Criminal Code.* The paper examines the section's elements and interpretation, context in relevant government policy, and operation in the few cases that have recently arisen.[17] It then analyses s 280 in the context of attempted law reform in other Australian jurisdictions.[18] Ultimately, it finds that the doctrine in Australia is controversial, uncertain and requires reform.

Part IV of the paper assesses the validity of retaining the provision in the context of the rights of Queensland children under the *HRA*.[19] It investigates whether the *HRA* is likely to have imported international standards of care for children and their human rights into Queensland.[20] This paper observes that this seems likely, because the *UNCRC* can be used to interpret the *HRA,* due to, *inter alia,* its textual ambiguity.[21] As the defence prevents children from receiving the protection from violence they require, there is a tension between the defence and Australia's obligations under the *UNCRC*. These are likely to be replicated on a state level, rendering the defence incompatible with Queensland's human rights obligations.

Finally, Parts V and VI examine the avenues for reform to make Queensland's defence consistent with its obligations under the *HRA.* It explores how foreign jurisdictions have dealt with the tension between similar defences and their human rights obligations. Two directions for reform are evaluated: amending or abolishing the defence. Jurisprudence from the UNCRC Committee reveals that compliance with international and domestic human rights obligations requires the abolishment of 'lawful correction' defences and the education of parents and children on the meaning of children's rights. It finds that mere amendment is insufficient.

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16 Renata Porzig-Drummond, 'Help, Not Punishment: Moving on from Physical Punishment of Children' (2015) 40(1) *Children Australia* 43, 46; Durrant and Ensom, 'Physical Punishment of Children' (n 15) 1375; Michael Freeman and Bernadette Saunders, 'Can We Conquer Child Abuse If We Don't Outlaw Physical Chastisement of Children?' (2014) 22(4) *International Journal of Children's Rights* 681, 687; Bernadette Saunders and Chris Goddard, 'Some Australian Children's Perceptions of Physical Punishment in Childhood' (2008) 22(6) *Children & Society* 405, 405 ('Some Australian Children's Perceptions').

17 See *ACP v Queensland Police Service* [2019] QCA 9; *R v DBG* (2013) 237 A Crim R 581; [2013] QCA 370; *R v SDJ* [2020] QCA 157.

18 See, eg, Explanatory Notes, Crimes Amendment (Child Protection: Excessive Punishment) Bill 2000 (NSW); Department of Justice and Attorney General (NSW), *Statutory Review: Section 61AA, Crimes Act 1990 (NSW)* (Statutory Review, February 2010); Tasmania Law Reform Institute, *Physical Punishment of Children* (Final Report No 4, October 2003) <https://www.utas.edu.au/___data/assets/pdf_file/0005/283784/PhysPunFinalReport.pdf>.

19 Specifically, in *HRA* (n 4) ss 15(3), 26(2).

20 Explanatory Notes, Human Rights Bill 2018 (Qld) 22.

21 *Acts Interpretation Act 1954* (Qld) s 14B(1)(a).

This paper concludes that Queensland's defence of 'lawful correction' is out of step with contemporary standards and fails to protect children from violence or uphold their rights. Repealing the defence would align Queensland's laws with the *HRA* and international human rights law, strengthen children's rights and better protect them from violence.

II Impacts of Corporal Punishment on Children

Throughout this paper it is presumed that corporal punishment has negative physical and psychological impacts on children. That presumption is based on the plethora of international (and some domestic) evidence that attests to the harmful nature of corporal punishment. Although there is some debate, the evidence demonstrating negative impacts of corporal punishment on children significantly outweighs contrary research. Further, there is no evidence demonstrating that corporal punishment benefits children. Rather, evidence suggests that children subjected to physical punishment are more likely to suffer later in life, as they do not internalise their own standards of behaviour, empathy or productive problem-solving skills,[22] leading to aggression and antisocial behaviour.[23]

Commonly cited studies on the impacts of corporal punishment on children include those by Elizabeth Gershoff and Andrew Grogan-Kaylor,[24] Bernadette Saunders and Chris Goddard,[25] and Angelika Poulsen.[26] Gershoff's studies in particular have resulted in statistically significant findings that the impact of mild to moderate corporal punishment puts children at risk of social, behavioural and psychological problems in childhood and sets children up for violence as adolescents and adults.[27]

Gershoff's seminal study was a meta-analysis of 88 studies conducted since 1938 analysing the associations between parents' use of physical punishment and child outcomes, with four of the eleven outcomes assessed being measured in adulthood.[28] The total number of participants in these studies was 36,309.[29] Gershoff found that physical punishment, though possibly leading to a child's

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22 Judy Cashmore and Nicola de Haas, *Legal and Social Aspects of the Physical Punishment of Children* (Discussion Paper, Commonwealth Department of Human Services and Health, 1995) 93.

23 Durrant and Ensom, 'Twenty-Five Years of Physical Punishment Research' (n 15) 21.

24 Gershoff and Grogan-Kaylor (n 15).

25 Bernadette Saunders and Chris Goddard, *Physical Punishment in Childhood: The Rights of the Child* (Wiley-Blackwell, 2010) ('*Physical Punishment in Childhood*').

26 See Tucci, Mitchell and Goddard (n 15).

27 See Elizabeth Gershoff, 'Corporal Punishment by Parents and Associated Child Behaviours and Experiences: A Meta-Analytic and Theoretical Review' (2002) 128(4) *Psychological Bulletin* 539. The findings of this study are also considered in Anne McGillivray, 'Child Physical Assault: Law, Equality and Intervention' (2003–2004) 30(2) *Manitoba Law Journal* 133, 142–4.

28 Gershoff (n 27) 543.

29 Ibid.

immediate compliance, was associated with ten negative short and long-term outcomes, including: decreased moral internalisation; increased child aggression and delinquent and antisocial behaviour; decreased quality of parent-child relationship; worse mental health; increased likelihood of being abused and injured; increased aggression, criminal and antisocial behaviour in adulthood; worse adult mental health; and increased risk of abusing a future child or spouse.[30] Thus, children who are corporally punished by their parents are more likely to replicate those behaviours, hitting peers and siblings, and later in life are more likely to hit their intimate partners.[31] Other literature supports this view, and further purports that these negative effects are the consequence of parents modelling to children that violence is an acceptable way to resolve conflict.[32]

Gershoff conducted a follow-up study with Grogan-Kaylor in 2016, which sought to address concerns that the existing literature used weak methodology and conflated abusive parenting with corporal punishment.[33] Their study defined corporal punishment as 'noninjurious, open-handed hitting with the intention of modifying child behaviour',[34] thereby purporting to distinguish abuse from punishment. The authors identified studies for inclusion on this basis and constructed a comprehensive literature review.[35] Seventy-five studies, including data from 160 927 children,[36] were ultimately used in the meta-analysis.[37] The authors observed that the individual studies were highly consistent in denoting a significant association between corporal punishment and a detrimental child outcome.[38] Their findings also suggested the adverse impacts of spanking reach into adulthood,[39] evidencing a strong correlation between corporal punishment and adverse outcomes for children and even adults, corroborating the results of Gershoff's 2002 study.

In 2010, Saunders and Goddard conducted a qualitative study with Victorian children (n=31), parents, grandparents (n=34) and professionals (n=21).[40] They used in-depth individual interviews and focus groups to investigate the impact of corporal punishment on children.[41] In their study, adults defined 'a good smack'

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30 Ibid 544.

31 Porzig-Drummond (n 16) 45.

32 Tucci, Mitchell and Goddard (n 15) 28; Sallie McLean, 'Lawful Correction: Why the Legal and Cultural Discourse of Corporal Punishment is a Human Rights Issue' (2013) 19(2) *Australian Journal of Human Rights* 115, 133; David Birchall and Jack Burke, 'Just a Slap on the Wrist? Parental Corporal Punishment of Children and the Defence of Reasonable Chastisement in Hong Kong' (2020) 50(1) *Hong Kong Law Journal* 167, 175.

33 Gershoff and Grogan-Kaylor (n 15) 453.

34 Ibid.

35 Ibid 456.

36 Ibid.

37 Ibid.

38 Ibid 463.

39 Ibid.

40 Saunders and Goddard, *Physical Punishment in Childhood* (n 25) 61.

41 Ibid 52–3.

as '[i]nflicting pain' and 'bordering on [a] beating'.[42] This was in dramatic contrast with how adults punished as children vividly recalled the trauma associated with physical punishment by their parents within the context of power: 'I was scared … you are so powerless' and 'I certainly felt … lesser than [adults]',[43] and how children perceived physical punishment: 'adults have basically more power' and 'adults can … hurt [children]'.[44] Adults described a variety of implements being used to punish, including belts, spoons, jug cords, slippers, sticks and straps, resulting in red marks, bruises and welts and feelings of embarrassment, anger, fear, resentment, and hatred.[45] These feelings are not constructive and impede development and learning. They reinforce children's powerlessness and vulnerability and have adverse impacts upon children's sense of self.[46] Additionally, corporal punishment lowers children's perceptions of the adults they love and respect.[47]

More recently, Poulsen conducted a rigorous literature review of Australian research on corporal punishment published over the last 20 years. This included empirical academic research, government data, grey literature (from the Australian Institute of Family Studies and the Australian Institute of Health and Welfare) and online surveys.[48] Although she found a lack of Australian data and research on corporal punishment, there is a plethora of data from overseas, with findings that support the above studies. Examining this data, Poulsen concludes that corporal punishment is 'with very few exceptions, associated with adverse outcomes in childhood, adolescence and adulthood'.[49] Poulsen additionally finds that the literature consistently shows strong associations between corporal punishment and the likelihood of child abuse.[50] This is corroborated in the literature, which indicates that children who are smacked by their parents are seven times more likely to be seriously assaulted, and more than twice as likely to suffer an injury requiring medical attention than those who are not corporally punished.[51] Saunders and Goddard suggest this is because children's bad behaviour is likely to increase following corporal punishment, which prompts parents to increase the intensity of the next punishment and results in an

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42 Ibid 67–8.

43 Ibid 69–70.

44 Ibid 137, 230.

45 Ibid 71.

46 Saunders and Goddard, 'Some Australian Children's Perceptions' (n 16).

47 Ibid 412.

48 Angelika Poulsen, 'Corporal Punishment of Children in the Home in Australia: A Review of the Research Reveals the Need for Data and Knowledge' (2019) 44(3) *Children Australia* 110, 110.

49 Ibid.

50 Ibid 114. This is supported by other literature: McGillivray (n 27) 144; McLean (n 32) 126–128; Alistair Nicholson, 'Choose to Hug, Not Hit' (Speech, Parliament House, 30 April 2007); Birchall and Burke (n 32) 176; Rowland, Gerry and Stanton (n 11); Freeman and Saunders (n 16) 693–709; Rhona KM Smith, '"Hands-Off Parenting?": Towards a Reform of the Defence of Reasonable Chastisement in the UK' (2004) 16 (3) *Child and Family Law Quarterly* 261, 261, 268.

51 Rowland, Gerry and Stanton (n 11) 178.

escalation of the physical force used when punishing the child.[52] Indeed, most cases of child abuse purportedly begin as instances of child discipline by a parent or someone in *loco parentis*.[53] Almost all literature on the impacts of physical punishment on children therefore evidences a correlation between the exposure to violence and significant adverse psychological effects. These include a greater tendency for behavioural problems and risk of abuse than those who are not hit.[54]

The literature emphasises several trends in parents' justifications for physically punishing their children. Most commonly, parents defend hitting their children by saying that their parents hit them and that it is morally acceptable because many Australians do so.[55] These parents justify their behaviour by arguing that it is an effective and harmless method of discipline. The belief that corporal punishment is harmless stems from some parents' own perceptions of their experiences, in addition to the socialised use of minimised language, such as 'smacking' to describe the use of physical force in correcting children.[56] Using such terminology makes the behaviour *sound* less harmful and more acceptable, allowing parents to justify it. However, Saunders and Goddard found that 'smacking' can be defined by parents as '[a] single strike' or 'intensive' and 'painful' and '[w]ith a wooden spoon'.[57] Adults in the same study also described *assaulting* a child in this way: as 'a slap' or 'a good smack' and 'hitting'.[58] Further, 'smacking' is included in definitions of physical punishment and child abuse in government literature.[59] The frequent use of corporal punishment indicates that it is not harmless, instead leading to more severe hitting and the escalation of punishment.[60] Additionally, corporal punishment is often used when parents lose control or as a last resort, suggesting that it is not used because of its acceptability as 'harmless'.[61]

A second common justification that parents use to defend hitting their children is that it is a parent's right to treat their children how they wish. Children are aware of this position, describing their parents as 'the boss' and 'owners' and

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52 Freeman and Saunders (n 16) 687; Porzig-Drummond (n 16) 46, citing Saunders and Goddard, 'Some Australian Children's Perceptions' (n 16).

53 Tasmania Law Reform Institute (n 18) 33; Freeman and Saunders (n 16) 687. See Ben Phillips and Priscilla Alderson, 'Beyond "Anti-Smacking": Challenging Violence and Coercion in Parent-Child Relations' (2003) 11(2) *International Journal of Children's Rights* 175, 177.

54 Durrant and Ensom, 'Physical Punishment of Children' (n 15) 1373–4; McGillivray (n 27) 142–4; Gershoff and Grogan-Kaylor (n 15).

55 Tasmania Law Reform Institute (n 18) 26.

56 Saunders (n 11) 286, 299; Saunders and Goddard, 'Some Australian Children's Perceptions' (n 16) 408.

57 Saunders and Goddard, *Physical Punishment in Childhood* (n 25) 67–8.

58 Ibid 68.

59 Australian Institute of Family Studies, 'Corporal Punishment: Key Issues' (Web Page, 2014) <https://www3.aifs.gov.au/cfca/publications/corporal-punishment-keyissues>; Australian Institute of Family Studies, 'What is Child Abuse and Neglect?' (Web Page, 2012) < https://www3.aifs.gov.au/cfca/publications/what-child-abuse-and-neglect>.

60 Freeman and Saunders (n 16) 687.

61 Tasmania Law Reform Institute (n 18) 26.

therefore accepting that they could 'legitimately hurt them'.[62] This is disturbingly premised on the archaic notion of children as their father's property,[63] which is at odds with internationally agreed conceptions of children as autonomous beings with rights transcending those of the family.[64] It is unsurprising then that scholars have also found strong correlations between violence against women and violence against children — being two classes of person historically considered 'property'.[65]

Thirdly, it has been suggested by some scholars that the reason that parents use corporal punishment as discipline is due to a perceived absence of alternative parenting strategies. This stems from a lack of education and governmental support for parents,[66] and explains inter-generational cycles of violence.[67] Ultimately, corporal punishment imposes a high risk of negative outcomes, making children and adults more violent and less functional in society, contrary to its purported intent.

Despite the large body of evidence showing that corporal punishment is harmful for children and the misguided reasons parents have for using corporal punishment, some scholars suggest that adverse conclusions about the long-term psychological effects of corporal punishment are based on unreliable studies using limited methodology and statistics procedures.[68] However, Gershoff and Grogan-Kaylor specifically undertook their 2016 study to address such allegations and made similar findings to Gershoff's original investigation.[69] Furthermore, there is little evidence suggesting there are no impacts on children and none which demonstrates the benefits of corporal punishment on children or their psychological development.[70] The impacts on children are considered sufficiently established for experts to denounce corporal punishment as harmful, and support alternative disciplinary measures. For example, the Royal Australasian College of Physicians have denounced the physical punishment of children as harmful, ineffective, symptomatic of abuse, and as a violation of

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62 Saunders and Goddard, *Physical Punishment in Childhood* (n 25) 69.

63 Schloenhardt and Cottrell (n 6) 75; McLean (n 32) 135; Phillips and Alderson (n 53) 184.

64 McLean (n 32) 135.

65 United Nations Children's Fund (UNICEF), *The State of the World's Children: Women and Children* (United Nations Report, 2007) 76, citing Paulo Sérgio Pinheiro, *Report of the Independent Expert for the United Nations Study on Violence Against Children*, 61st sess, UN Doc A/61/299 (29 August 2006). For an analysis between the reform of laws around violence against women and those around violence against children, see Phillips and Alderson (n 53).

66 Porzig-Drummond (n 16) 44.

67 McGillivray (n 27) 146.

68 See, eg, Christopher Ferguson, 'Spanking, Corporal Punishment and Negative Long-Term Outcomes: A Meta-Analytic Review of Longitudinal Studies' (2013) 33(1) *Clinical Psychology Review* 196, 197–8.

69 Gershoff and Grogan-Kaylor (n 15) 453, 465.

70 Porzig-Drummond (n 16) 46.

children's human rights.[71] In comparison, analyses of cognitive-behavioural parenting techniques have shown that cognitive-behavioural strategies are not associated with adverse outcomes, but instead promote psychological wellbeing and problem-solving skills.[72] The short and long-term adverse impacts upon children, ignorance of parents' misguided justifications, and availability of a multitude of healthy, positive and non-violent methods of discipline mean there can be no argument for the legitimacy of corporal punishment under any guise, including the 'domestic discipline' defence.

III The Doctrine in Australia

A *Queensland*

1 *History*

The Queensland defence of 'lawful correction' has its genesis in Blackstone's Commentaries, which stated that the legal basis for the defence was a father's 'natural right' of control over 'the person and property of his child' with the enumerated purpose being 'for the benefit of [the child's] education'.[73] Its origin therefore lies in notions of children as their parents' property. The defence first became part of the common law in Queensland through Chubb J's approving citation of the English case *R v Hopley*[74] in *Smith v O'Byrne*; *Ex parte O'Byrne*.[75] At that stage, it also applied to other classes of persons, allowing husbands to lawfully discipline their wives and servants.[76] Subsequently, the defence as it relates to children was codified in the *Criminal Code* by Sir Samuel Griffith and, subject to one amendment in 1997, remains in an identical form. The 1997 amendment involved widening the circumstances in which the defence applies from 'correction' to 'correction, discipline, management or control'.[77] This was prompted by the decision in *Horan v Ferguson* where 'correction' was expansively interpreted to include physical contact beyond that which is disciplinary.[78] The defence currently reads that '[i]t is lawful for a parent or a person in the place of

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71 Royal Australasian College of Physicians, 'Physical Punishment of Children' (Position Statement, July 2013).

72 Porzig-Drummond (n 16) 46.

73 Sir William Blackstone, *Commentaries on the Laws of England* (Thomas Tegg, 17th ed, 1830) 120, cited in Schloenhardt and Cottrell (n 6) 75-76; Robert Ludbrook, 'The Child's Right to Bodily Integrity' (1995) 7(2) *Current Issues in Criminal Justice* 123, 123 and commented on by McHugh J in *Secretary, Department of Health & Community Services v JWB (Marion's Case)* (1992) 175 CLR 218, 314.

74 (1860) 175 ER 1024.

75 (1894) 5 QLJ 126, 254.

76 Blackstone (n 73) 397, cited in Schloenhardt and Cottrell (n 6) 76.

77 *Criminal Law Amendment Act 1997* (Qld) s 43(1).

78 [1995] 2 Qd R 490; Explanatory Notes, Criminal Law Amendment Bill 1996 (Qld) 11; Schloenhardt and Cottrell (n 6) 77.

a parent, or for a schoolteacher or 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 in the circumstances'.[79] Although there have been no further amendments to the provision, other legislation now restricts its application by making the 'disciplinary' use of force unlawful against children in juvenile detention[80] and against policy for children in state schools.[81] However, teachers in state schools may rely on the defence in criminal proceedings,[82] and the criminalised behaviour does not need to have occurred within school grounds.[83] It is unclear if juvenile detention staff could do the same.[84]

2 *Operation*

The defence is now located in s 280 of the *Criminal Code*, under Part 5, Chapter 26 'Assaults and Violence to the Person Generally: Justification and Excuse'. Although s 280 is a defence to the use of force, it is not specifically limited to any violent conduct such as assault. Therefore, its application is not limited to charges of assault or offences containing assault as an element,[85] and it may excuse more serious offences, such as wounding,[86] doing grievous bodily harm[87] and even manslaughter.[88] The Queensland government suggests,[89] however, that most cases raising the defence do so in relation to the charges of assault occasioning bodily harm and common assault.[90]

Section 280 will only excuse conduct by parents, a person in *loco parentis* or a schoolteacher or master.[91] These terms are left undefined in the *Criminal Code*, although whether a person is in *loco parentis* is a question of fact in the circumstances.[92] Further, the defence only excuses the use of force against children and pupils in the context of a parent-child or teacher-student relationship. The accused bears the evidentiary onus to raise the defence, meaning they must provide sufficient evidence to raise the issue prima facie.[93]

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79 *Criminal Code Act 1899* (Qld) s 280.

80 *Youth Justice Regulation 2003* (Qld) reg 17(4).

81 Department of Education, Training and Employment, Parliament of Queensland, *Annual Report of the Minister of Education* (Report, 1995) 6.

82 *Horan v Ferguson* [1995] 2 Qd R 490, 504 (Demack J).

83 *Cleary v Booth* [1893] 1 QB 465.

84 *Horan v Ferguson* [1995] 2 Qd R 490, 505 (Demack J): 'when the *Criminal Code* uses the word "unlawful", that does not confine the issue within the limits of the *Criminal Code* itself'.

85 Schloenhardt and Cottrell (n 6) 79.

86 *Criminal Code Act 1899* (Qld) s 323.

87 Ibid ss 1 (definition of 'grievous bodily harm'), 320.

88 Ibid ss 303, 310.

89 Department of Justice and Attorney-General (Qld), *Review of Section 280 of the Criminal Code (Domestic Discipline)* (Parliamentary Review, 25 November 2008) 2.

90 Respectively, *Criminal Code Act 1899* (Qld) ss 335, 339.

91 Ibid s 280.

92 *R v Murphy* (1996) 108 CCC (3d) 416, 421.

93 Schloenhardt and Cottrell (n 6) 79.

The prosecution then holds the persuasive onus to disprove the excuse beyond reasonable doubt.[94]

The defence contains two elements: the purpose of the force used and reasonableness. The purpose of the force used must be the 'correction, discipline, management or control' of a child. These four purposes encompass a broad range of conduct. Whether force was used for an enumerated purpose is subjective, as the phrase 'by way of correction' makes the 'motive for [the] infliction of pain … crucial'.[95] This illustrates the difference between the conduct considered by the defence and conduct involved in restraining a child likely to hurt themselves or others. Force used that is 'ill-disciplined',[96] administered in 'rage',[97] or for 'revenge',[98] or any other reason unconnected with the purposes in the defence will not be excused.[99] Moreover, the defence only applies to the 'use' of force, and it appears unlikely that it would excuse merely threatening to use force.[100]

Whether the force used is 'such force as is reasonable under the circumstances'[101] is an objective inquiry of fact.[102] Reasonableness is therefore determined through an application of current community standards at trial by a jury, or in a summary trial by a magistrate.[103] There are several factors in Australian case law that are considered relevant to determining the reasonableness of the use of force. In *R v Terry*,[104] Sholl J held that punishment must be moderate and reasonable,[105] have a proper relation to the age, physique and mentality of the child, and be carried out with a reasonable means or instrument.[106] A substantial body of jurisprudence has evolved around these factors. For force to be reasonable, and have a proper relation to the age, physique and mentality of the child, the child must be able to understand the idea of discipline.[107] Several cases thus suggest that it cannot be reasonable to corporally

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94 *Mullen v The King* [1938] St R Qd 97, 121 (Douglas J); Nicolee Dixon, Parliament of Queensland, *Parental Smacking: The Issues and the Law* (Research Brief No 28, 2008) 4.

95 Rochelle Urlich, 'Physical Discipline in the Home' (1994) 7(3) *Auckland University Law Review* 851, 852.

96 *R v H; Ex parte Attorney-General* [2001] QCA 174, [6]–[7].

97 *W, DL v Police* [2014] SASC 102, [29], citing *R v Hopley* (1860) 175 ER 1024, 1026 [206] (Lord Cockburn CJ).

98 *R v Drake* (1902) 22 NZLR 478, 487 (Edwards J).

99 *R v Kinloch* (1996) 187 LSJS 124, 130; *R v Ottaviano* [1997] QCA 338, [6].

100 In *R v Hamilton* [1891] 8 WN (NSW) 9. Windeyer J held at page 10 that the fact that the assault was by nature of a threat did not prevent the defence from being considered. However, this has not been tested in Queensland and *Hamilton* is now well over a century old.

101 *Criminal Code Act 1899* (Qld) s 280.

102 *RDP v Westphal* [2010] NTSC 50, [16].

103 Department of Justice and Attorney-General (Qld) (n 89) 1.

104 [1955] VLR 114.

105 Note that this echoes Lord Cockburn CJ's judgment in *R v Hopley* (1860) 175 ER 1024.

106 *R v Terry* [1955] VLR 114, 116–17.

107 Ibid 117; *Smith v O'Byrne*; *Ex parte O'Byrne* (1894) 5 QLJ 126, 253.

punish a child under 12 months old,[108] with others suggesting that some older children are also unable to comprehend punishment.[109]

Additionally, the force used against the child must be applied with a reasonable means or instrument.[110] Although using a cane or similar instrument has historically been acceptable,[111] this may no longer be the case.[112] The reasonableness of the force used is also influenced by any injury to the child and where the blows occurred on the child's body. However, the law around each is so inconsistent as to provide little guidance to parents, police or courts on what is lawful. Some cases have held that bruising and welts on an eight-year-old child alone failed to establish an unreasonable application of force,[113] but similar wounds on a five-year-old were found to be evidence of bodily harm and an unreasonable use of force.[114] Furthermore, courts have found blows to the head to be both reasonable,[115] and definitively unreasonable.[116] Psychological harm may also be relevant,[117] as is prior treatment, the relationship between the child and parent(s),[118] and the time lapse between the child's misbehaviour and the punishment.[119] Given that reasonableness is evaluated against current community standards, and the case law contains varying and contradicting standards, it is questionable whether these uses of force would be found reasonable now.

3 Case Law

The inconsistencies and contradictions evident in the operation of the defence are not clarified by the little Queensland case law that exists on s 280, which is limited to Court of Appeal decisions (all unreported) where the defence was raised unsuccessfully. Because Court of Appeal decisions often deal with atypical circumstances and each found the defence was unsuccessful, there has been no development of legal principles in the defence. Although the defence may be raised more often at the Magistrates Court level, or via a 's 222 appeal' in the District Court, such data is not publicly available. There is thus a dearth of judicial guidance available as to the conduct that falls within 'lawful correction' in Queensland and the standard of the defence is unclear.

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108 *R v Miller* [1951] VLR 326, 350; *R v Griffin* (1869) 11 CCC 402.

109 *Cramer v R* [1998] WASCA 300.

110 *R v Terry* [1955] VLR 114, 116.

111 Ibid 116–17 (Sholl J); *Sparks v Martin*; *Ex parte Martin* (1908) 2 QJPR 12; *Mansell v Griffin* (1908) 1 KB 160; *King v Nichols* (1939) 33 QJP 171; *Craig v Frost* (1936) 30 QJP 140.

112 *R v Kinloch* (1996) 187 LSJS 124.

113 *Byrne v Hebden*; *Ex parte Hebden* [1913] St R Qd 233. See also *R v HBP* [2017] QCA 130, [7].

114 *Cramer v R* [1998] WASCA 300.

115 *White v Weller*; *Ex parte White* [1959] Qd R 192; *R v Haberstock* (1970) 1 CCC (2d) 433.

116 *R v Ottaviano* [1997] QCA 338, [2]; *R v Griffin* [1998] 1 Qd R 659; *W, DL v Police* [2014] SASC 102.

117 Gareth Griffith, Parliamentary Library, 'Crimes Amendment (Child Protection: Excessive Punishment) Bill 2000: Background and Commentary' (Briefing Paper No 9, 2000) 28–9.

118 *R v Drake* (1902) 22 NZLR 478; *McClintock v Noffke* [1936] St R Qd 73.

119 *R v Haberstock* (1970) 1 CCC (2d) 433.

In *R v DBG*,[120] the appellant was convicted of assault occasioning bodily harm after hitting his 14-year-old daughter with a bamboo stick because she was secretly using Facebook and swore at him. He caused her injuries so severe that she could not sleep.[121] The appellant unsuccessfully raised the defence at trial and upon appeal, where the court held that it was open to the jury to find that the prosecution had proved that the conduct was unlawful beyond reasonable doubt.[122]

In *R v HPB*,[123] the appellant was convicted of assaulting and causing bodily harm to her 8-year-old son because her conduct 'went beyond what is authorised by s 280 … as domestic discipline'.[124] She had struck the child twice with a belt on the collar bone and then hit the child behind his legs and on his buttocks before he ran away.[125] The child was left with two five-centimetre-long marks on his collar bones and bruising.[126] The appellant admitted her offending to police but said that she was unaware that she had committed an offence.[127] She was fined $400 by the Magistrate.[128] Because this behaviour was, *inter alia*, a breach of a suspended sentence, the appellant was convicted in the Supreme Court for that breach.[129] In determining the sentence, the sentencing judge found that of the behaviour breaching the suspended sentence, 'the assault occasioning bodily harm was the more serious of the breaching offences'.[130] The focus of the appeal was the sentence imposed, rather than the domestic discipline defence.

In *ACP v Queensland Police Service*,[131] a man was convicted of common assault after dragging his 14-year-old stepson out of bed by the ear, slapping him in the head, neck and face three times, dragging him outside, screaming at him and throwing him to the ground where he kicked the child twice with steel capped boots for being lazy.[132] Whether the defence was available was the central issue at trial and on appeal. The appeal court found the conclusion that the force used was not reasonable was open on the evidence. This is because the Magistrate at first instance found that the prosecution had discharged its onus of disproving the application of s 280 by considering the inappropriateness of the applicant's 'nudg[ing]' the child in the chest with steel capped boots, causing a red mark in injury.[133]

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120 [2013] QCA 370.
121 Ibid [8]–[13].
122 Ibid [31]–[32].
123 [2017] QCA 130.
124 Ibid [7].
125 Ibid.
126 Ibid.
127 Ibid.
128 Ibid.
129 Ibid [8].
130 Ibid [9].
131 [2019] QCA 9.
132 Ibid [4]–[7].
133 Ibid [8].

Finally, and most recently, the s 280 defence was mentioned in *R v SDJ*,[134] where the appellant was convicted of common assault and choking, suffocation or strangulation in a domestic setting.[135] The complainant's evidence was that the appellant had kicked him in the leg, slapped him in the head and face and strangled him for using too much body wash in the shower.[136] At trial, the jury was directed that the law permits a parent to use reasonable force for correction, discipline, management or control of a child and that the prosecution had to satisfy them beyond reasonable doubt that the acts were not for those purposes or that the force used was not reasonable.[137] Given the cogency of evidence against the appellant, the Court of Appeal found that it was not unreasonable for the jury to have been convinced beyond reasonable doubt that the force used was not reasonable and to convict the appellant.[138]

The commonalities among these cases reveal the misconception that parents have regarding their rights in relation to their children in Queensland. Each case involves injury to a child via the use of an instrument or trauma to the head and an unsuccessful attempt to raise the defence of lawful correction. This indicates that in each circumstance, the (step-)parent believed that their actions were lawful and justifiable in the name of discipline, demonstrating the inadequacy of the defence's guidance for parents in Queensland. Additionally, due to a lack of data from the inferior courts where the defence is more likely to arise, there is no opportunity for its meaningful development. Even where the defence has been discussed in the Court of Appeal, because it was unsuccessful in each case, the judiciary had no opportunity to discuss its application in detail. Hence, there is little judicial guidance around the defence's application to form a reliable precedent, leaving future courts, prosecutors, and parents in the dark.

B *Policy and Law Reform Options in Australia*

There has been very little consideration of s 280 by the Queensland government in relation to policy or law reform. The most recent governmental consideration of the defence was a 2008 review by the Department of Justice and Attorney-General ('DJAG').[139] This review coincided with Dean Wells MP's unsuccessful attempt to amend s 280 to restrict its application to a charge of common assault.[140] DJAG's review of the defence was only cursory. It relied on limited data from 2006–07, which had to be manually audited as the relevant entities did not collect

134 [2020] QCA 157.
135 *Criminal Code Act 1899* (Qld) ss 245, 315A, 335.
136 See *R v SDJ* [2020] QCA 157, [3].
137 Ibid [13].
138 Ibid [15].
139 Department of Justice and Attorney-General (Qld) (n 89).
140 Bronwyn Naylor and Bernadette Saunders, 'Whose Rights?: Children, Parents and Discipline' (2009) 34(2) *Alternative Law Journal* 80, 85.

data on where the defence has been raised.[141] Ultimately, the review did not have very clear findings, and the Department concluded that it had failed to reveal evidence that s 280 is significantly relied upon or that it impacts upon the ability to charge or prosecute parents.[142] However, it did reveal a concerning trend of parents punishing their children with a variety of implements and by applying force to children's heads, often through punches and slaps to the face.[143] Furthermore, the review acknowledged that abuse is a continuum with no clear boundaries demarcating where excessive punishment ends, and abuse begins.[144] This justifies concerns by scholars about the lack of distinction and connections between corporal punishment, 'discipline', and child abuse.[145]

Because of the dearth of material in Queensland on 'lawful correction', other states' treatment of corporal punishment is relevant. All other Australian jurisdictions also contain a defence to the corporal punishment of children by their parents and those in *loco parentis.* As in Queensland, the defence has been codified in Western Australia,[146] Tasmania[147] and the Northern Territory.[148] Contrastingly, Victoria, the Australian Capital Territory ('ACT') and South Australia have retained the defence at common law, while New South Wales ('NSW') is in the unique position of having legislated the defence, without excluding its common law operation.[149] The defence has only received significant attention in NSW and Tasmania; therefore, its evolution in those states will be examined.

1 NSW

The NSW position is singular among the Australian states. The defence was amended after a review in 2010, resulting in the Crimes Amendment (Child Protection: Excessive Punishment) Bill 2000, which implemented s 61AA of the *Crimes Act 1900* (NSW). The Attorney General's Second Reading Speech introducing the Bill asserted that the defence seeks 'to ensure that children are protected from unreasonable punishment, without limiting the ability of parents to discipline their children in the appropriate manner'.[150] This objective was underpinned by the NSW government's policy that children should not be

141 Department of Justice and Attorney-General (Qld) (n 89) 1–2.
142 Ibid 4.
143 Ibid.
144 Ibid 2.
145 See above (n 53).
146 *Criminal Code Act Compilation Act 1913* (WA) s 257.
147 *Criminal Code Act 1924* (Tas) s 50.
148 *Criminal Code Act 1983* (NT) s 27(p).
149 *Crimes Act 1900* (NSW) s 61AA(5).
150 New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 June 2001, 15025 (Bob Debus).

immune from 'ordinary parental discipline'.[151] The Explanatory Notes to the Bill further explain that s 61AA was intended to clarify the law on using physical force to punish children by restricting what is 'reasonable' through prohibiting the use of implements or weapons and blows to the head and neck.[152] It also prohibits blows to the body where likely to cause harm lasting for more than a short period, unless that force could reasonably be considered trivial or negligible.[153]

The 2010 review of the amendment recommended maintaining the defence, as it was ostensibly uncontroversial and met the policy objective of balancing children's and parents' rights.[154] This is because the restrictions on the defence were asserted to successfully protect children from 'unreasonable punishment' while providing parents and carers with guidelines on acceptable punishment and discipline.[155] However, two submissions to the review and several experts disagreed with this finding, considering the NSW reform failed in its stated objectives of clarification and balancing rights.[156] This is because it merely displaced interpretational uncertainty from 'reasonableness' onto the underfined terms of 'harm', 'short period' and 'trivial or negligible'.[157] The 'trivial or negligible' test in s 61AA(2) was particularly controversial as it introduced a different, subjective, test to the objective 'reasonableness' test in s61AA(1).[158] Thus, the defence is contradictory and left open to case-by-case interpretation.[159]

Furthermore, the defence still fails to balance parents' and children's rights by reinstating the legitimacy of corporal punishment by parents. This undermines and dilutes the intended message of restraint and weakens the amendment's objective of providing clear guidance.[160] It also conflicts with other well-established bodies of Australian law which consider the safety, wellbeing and best interests of the child to be paramount,[161] and Australia's obligations under the *UNCRC*.[162] Indeed, the National Youth Law Centre submitted that affording less

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151 New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 November 2001, 19112 (Bob Debus).

152 Explanatory Notes, Crimes Amendment (Child Protection: Excessive Punishment) Bill 2000 (NSW) 1–2. Note that the prohibition of implement usage was never legislatively introduced.

153 *Crimes Act 1900* (NSW) s 61AA(2)(b).

154 Department of Justice and Attorney General (NSW) (n 18) 16.

155 Ibid 4.

156 The objectives are elucidated in Department of Justice and Attorney General (NSW) (n 18) 4, 10, 16. Academics who disagree include: McLean (n 32) 116; Schloenhardt and Cottrell (n 6) 86; Bernadette Saunders, 'Children's Human Rights and Social Work Advocacy: "Lawful Correction"' (2019) 72(4) *Australian Social Work* 490, 495; Nicholson (n 50).

157 Schloenhardt and Cottrell (n 6) 86.

158 Standing Committee on Law and Justice, Parliament of New South Wales, *Report on the Inquiry into the Crimes Amendment (Child Protection: Excessive Punishment) Bill 2000* (Report No 15, 24 October 2000) 49.

159 Ibid.

160 McLean (n 32) 124.

161 See, eg, *Child Protection Act 1999* (Qld) s 5A; *Family Law Act 1975* (Cth); Tasmania Law Reform Institute (n 18) 38.

162 Department of Justice and Attorney General (NSW) (n 18) 14.

legal protection from violence to children than is provided to adults was a form of age discrimination, supporting practices causing adverse health and developmental outcomes for children.[163] The NSW Standing Committee on Law and Justice and two submissions to the review were also concerned that the Bill provided no clear distinction between 'where excessive punishment ends and abuse begins'.[164] This is a concern echoed by scholars, who posit that s 61AA is inattentive to the 'sensitive and complex nature of discipline, punishment and abuse', and fails to comprehend that corporal punishment and abuse are violent 'outlets of aggression' distinguishable only by degree, not kind.[165] This suggests the defence is insufficiently restrictive upon parents' rights. Therefore, even narrowed, the NSW defence has failed to achieve its objectives, casting the failings of the broader Queensland defence into stark relief.

2 *Tasmania*

As the NSW defence suffers from significant inadequacies and cannot be used to guide legal reform in Queensland, it is useful to examine the defence in Tasmania. The Tasmanian defence is very similar to Queensland's, except it applies only to 'correction' and does not cover the use of force by 'a schoolteacher or master'.[166] Because of this similarity, the extensive government policy evaluating it is highly relevant for an analysis of the Queensland defence. Most of the Tasmanian policy stems from an unsuccessful attempt to repeal the defence in 2003. The attempt was the consequence of an Issues Paper in October 2002 and public consultation examining corporal punishment of children, producing a detailed report published by the Tasmania Law Reform Institute.

This report criticised the 'lawful correction' provision's lack of clarity on what constitutes 'reasonable force'.[167] Although the lack of definition in the *Criminal Code Act 1924* (Tas) could mean that the law is flexible and reflects changes in community standards of acceptability, it also means that it is so 'imprecise and uncertain' that it provides no guidance to parents, police or courts on what constitutes an 'acceptable' level of corporal punishment.[168] Courts must

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163 Ibid.

164 Standing Committee on Law and Justice, Parliament of New South Wales (n 158) 49 [7.4]. Note that this view was shared by politician Andrew Stoner who expressed concern that the terms used in the provision would 'muddy the waters' between discipline and abuse because 'one might as well ask: How long is a piece of string?': New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 November 2001, 19111 (Andrew Stoner). Note also that Gershoff's studies support this view, stating that 'corporal punishment and physical abuse are two points along a continuum': Gershoff (n 27) 553.

165 McLean (n 32) 127.

166 This is because s 82A of the *Education Act 1994* (Tas) makes it an offence for a staff member or 'other person instructing or teaching, or assisting or supporting teaching, at a school' to corporally punish a student.

167 Tasmania Law Reform Institute (n 18) 7.

168 Ibid 3, 7.

therefore determine the meaning of 'reasonable' on a case-by-case basis, in which they can be guided by their own experience, knowledge of community standards and previous case law.[169] Because there are relatively few reported cases considering the defence in Tasmania and across Australia, there is little to define 'reasonable force' and the case law that does exist (examined below) holds such 'significant inconsistencies' that it cannot assist in demarcating the parameters of 'reasonable force'.[170]

The report from the Tasmania Law Reform Institute compared the uses of force that were considered 'reasonable' or 'unreasonable' in cases from various jurisdictions. Examples from those cases that a court considered to be reasonable include: slaps to the face leaving some bruising and abrasion,[171] a slap to the face chipping a tooth,[172] beating with a belt causing facial bruising,[173] a slap to the face bursting an ear drum.[174] Examples of force considered unreasonable include: a strike to the head rupturing an eardrum,[175] a strike to the head with a piece of wood,[176] slapping across the face several times leaving red marks,[177] pulling ears,[178] tapping on the head with a chair rung,[179] a slap to the face cutting an ear,[180] and ten blows to the head.[181] Furthermore, the use of an instrument to inflict punishment (such as a cane) has been considered both reasonable and unreasonable.[182] In *Byrne v Hebden; Ex parte Hebden* the Court held that bruising or welts do not necessarily determine the 'unreasonableness' of the force,[183] however, other cases have held that punishments causing welts or bruising are unreasonable.[184] Finally, the principle that children incapable of understanding discipline should not be punished has been applied both to children less than 12 months old and to children two-and-a-half years old.[185] Ultimately, the Institute

169 Ibid 7.
170 Ibid 8.
171 *White v Weller; Ex parte White* [1959] Qd R 192.
172 *R v Haberstock* (1970) 1 CCC (2nd) 433.
173 Tasmania Law Reform Institute (n 18) 8, citing Cashmore and de Haas (n 22) which did not provide a full citation, only 'UK, 1992'.
174 Ibid 8, citing 'UK, 1985'.
175 *Ryan v Fildes* [1938] 3 All ER 517.
176 *Pemberton v A-G (Tas)* [1978] Tas SR 1.
177 Ibid.
178 Ibid.
179 Ibid.
180 Tasmania Law Reform Institute (n 18) 8, citing Cashmore and de Haas (n 22) which did not provide full citation, only 'Rome, February 1994'.
181 Ibid, citing 'Adelaide, 1994'.
182 Cf Tasmania Law Reform Institute (n 18) 8, citing *R v Terry* [1955] VLR 114; *R v Taylor* [1983] *The Times* High Court (this is the only citation provided); *Higgs v Booth* (Supreme Court of Western Australia, Kennedy J, 29 August 1986).
183 [1913] St R Qd 233.
184 Tasmania Law Reform Institute (n 18) 8, citing Cashmore and de Haas (n 22) which did not provide full citation, only 'Ontario, 1992'; 'UK, 1985'; 'Victoria, 1994'.
185 Cf *R v Miller* [1951] VLR 346 with *R v Griffin* (1869) 11 CCC 402; *Higgs v Booth* (Supreme Court of Western Australia, Kennedy J, 29 August 1986).

found that the failure to define 'reasonable force' has led to contradictory legal precedent,[186] illustrating that there is no consensus or common understanding of what is 'reasonable'.[187] The Institute was also concerned that the lack of legal guidance on what is acceptable could prevent the development of a community consensus on appropriate punishment because of the resulting lack of dialogue in the community.[188]

Contrary to the Queensland DJAG review of the s 280 defence, the Tasmanian Institute found that the contradictory legal precedent made prosecutions more difficult, even in cases of serious child abuse.[189] The Institute found that this perpetuates the lack of clarity in the law, because the case law with the potential to clarify what is 'reasonable' is never created.[190] Additionally, like in Queensland, the Tasmanian provision can be raised in defence of any charge involving an application of force to a child by a parent or person in *loco parentis* and such charges can range from minor assaults to grievous bodily harm or manslaughter.[191] Without clear guidance on what is 'reasonable', punishment beginning as 'reasonable' can easily escalate to 'excessive'. The Institute echoed experts and observed that '[w]hen there is no clear line, it may be easily overstepped' and that most cases of child abuse in Tasmania are the result of corporal punishment becoming excessive.[192] Clearly, the defence is unable to effectively protect children from violence or guide parents.[193]

Consequently, the Institute proposed two avenues of reform: abolition or legislative clarification of what constitutes 'reasonable' force. The Institute favoured abolishing the defence because it would achieve maximum legal clarity, abolition has been successful in many other countries, it would align Tasmanian law with international human rights, outlaw harmful conduct, afford children the same protections as adults, be in their best interests and increase the efficacy of educating the public on children's rights.[194] Therefore, the Tasmania Institute's analysis of the defence provides some guidance to Queensland decision-makers, but rather than demonstrating how the defence could be made workable, it concludes that it is not and cannot be made so.

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186 Tasmania Law Reform Institute (n 18) 8.
187 Ibid 11.
188 Ibid 12.
189 Ibid 5; Porzig-Drummond (n 16) 47.
190 Tasmanian Law Reform Institute (n 18) 13.
191 Ibid 7. Note that although the defence extends to people standing in *loco parentis* to a child, it is significantly limited by policy in this regard in relation to, for example, foster parents (also schools and childcare) who are prohibited from inflicting any form of corporal punishment: at 10.
192 Ibid 12. See (n 53).
193 Tasmanian Law Reform Institute (n 18) 14.
194 Ibid 3.

3 Judicial Critique

The fundamental deficiencies of the domestic discipline defence have been felt by the judiciary in other jurisdictions. Courts have criticised the 'lawful correction' defence in numerous cases. For example, Austin J has twice observed that the use of violence against children has 'fall[en] out of public favour'.[195] In 2019 the Supreme Court of Western Australia observed that, 'the provisions of s 257 … reflect the attitudes of the 19th century'.[196] Additionally, in 2015 the Victorian Supreme Court observed that '[i]t might be thought at least anomalous that what would not be a defence to an allegation of assaulting or killing an adult could be a defence to an allegation of assaulting or killing a child, who … will be more vulnerable'.[197] Despite such disapproval, courts remain bound to apply the defence and have found difficulty doing so consistently. This was clearly demonstrated by the Tasmania Law Reform Institute, when they compared 'disciplinary' conduct found reasonable and unreasonable by courts. This comparison revealed significant inconsistencies in the case law and the Institute concluded that it provides 'minimal assistance' in determining the content of 'reasonableness'.[198] An examination of the limited case law and policy suggests that this trend of confusing legal precedent has continued,[199] emphasising, in every iteration, the doctrine's fundamental incoherence and futility.

IV The *Human Rights Act 2019* (Qld)

When viewed through a children's rights lens, Queensland's defence of 'legal correction' appears to be prima facie inconsistent with two rights doctrines and fundamentally inconsistent with the tenor of children's human rights. Firstly, corporal punishment is manifestly inconsistent with children's 'best interests' and secondly, the defence discriminates against children by unjustifiably depriving them of equal protection against violence under the law. In the Queensland context, these arguments can be grounded in the recently enacted *HRA.* The Explanatory Notes explain that the *HRA* was enacted to 'consolidate and establish statutory protections for certain human rights recognised under international law including those drawn from the [*International Convention on Civil and Political Rights*], as well as the rights to health services and education drawn from the [*International Convention on Economic, Social and Cultural Rights*],

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195 *Sandham & Drego* [2018] FamCA 150, [53]. See also *Cao & Cao* [2018] FamCAFC 252, [42].

196 *A v Doubikin* [2019] WASC 426, [92], citing *Cramer v R* [1998] WASCA 300, 304–5, where White J (Pidgeon and Steytler JJ agreeing on this point) referred to *Higgs v Booth* (Supreme Court of Western Australia, Kennedy J, 29 August 1986) 7–8.

197 *R v Hughes* [2015] VSC 312, [100].

198 Tasmania Law Reform Institute (n 18) 8.

199 Cf *W, DL v Police* [2014] SASC 102; *A v Doubikin* [2019] WASC 426; *Ruse v Thew* (Supreme Court of New South Wales, 23 September 1995).

and property rights drawn from the [*Universal Declaration of Human Rights*]'.[200] It further outlines that the *HRA* joins a suite of legislation containing mechanisms to hold the Queensland government accountable to the public,[201] as it requires compliance with the enumerated rights by public entities.[202] If a law cannot be interpreted consistently with the *HRA*, the court must consider whether the law justifiably infringes upon the enumerated right.[203] If not, the Supreme Court may issue a declaration of incompatibility.[204] Although this is a weak measure, it may stimulate positive normative change.

The 'best interests' principle is found in s 26(2) of the *HRA*, which provides that '[e]very child has the right, without discrimination, to the protection that is needed by the child, and is in the child's best interests, because of being a child.' The Explanatory Notes to the *HRA* specify that the s 26(2) right to protection recognises that children have a 'particular vulnerability' and must therefore be afforded 'special protection'.[205] It provides that this 'protection is to be afforded to the child by the child's family, society and the State'.[206] Therefore, the *HRA* appears to recognise that children are entitled to the same rights as adults in addition to further protections, required by their best interests and vulnerabilities. It also imposes a duty upon the Queensland government to enact 'positive measures for protection of children'.[207] The content of this duty should involve promoting children's survival, development and wellbeing as much as possible.[208] The Explanatory Notes also observe that the best interests principle stems from the *UNCRC*, which stipulates that it shall be a 'primary consideration' in actions regarding children.[209]

The freedom from discrimination right is found in s 15(3) of the *HRA*, which stipulates that 'every person is … entitled to the equal protection of the law without discrimination'. The Explanatory Notes explain that 'discrimination' in the *HRA* includes direct or indirect discrimination within the meaning of the *Anti-Discrimination Act 1991* (Qld) ('*ADA*').[210] The *ADA* prohibits discrimination on the basis of certain attributes, relevantly including age.[211] Section 10(3) stipulates that the motive for discrimination is irrelevant. Therefore, discrimination against

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200 Explanatory Notes, Human Rights Bill 2018 (Qld) 2.

201 Ibid 5–6. Other legislation in this suite includes the: *Right to Information Act 2009* (Qld); *Information Privacy Act 2009* (Qld); *Judicial Review Act 1991* (Qld); *Ombudsman Act 2001* (Qld); *Anti-Discrimination Act 1991* (Qld); *Crime and Corruption Act 2001* (Qld).

202 *HRA* (n 4) s 4(b). 'Public entities' is defined in s 9 and relevantly includes government entities: s 9(1)(a).

203 Ibid s 13.

204 Ibid s 53(2).

205 Explanatory Notes, Human Rights Bill 2018 (Qld) 22.

206 Ibid.

207 Ibid.

208 *Application for Bail by HL (No 2)* [2017] VSC 1, [123].

209 Explanatory Notes, Human Rights Bill 2018 (Qld) 22.

210 Ibid 18.

211 *Anti-Discrimination Act 1991* (Qld) s 7(f).

children based on their age cannot be justified by arguing that it is in their best interests to do so. Although the *ADA* outlines some exceptions to this rule, none are relevant to using physical force to punish children.

Because the rights enumerated in the *HRA* are derived from international human rights and interpretation of the *HRA* is nascent, international and foreign jurisprudence may guide the application of rights in Queensland and assist analyses of laws' compatibility with the *HRA*.[212]

A *Best Interests of the Child*

1 HRA

The first right with which the domestic discipline defence is prima facie inconsistent is the right to 'protection that is needed by the child, and is in the child's best interests, because of being a child'.[213] The best interests of the child principle is already firmly embedded in Australian law as the paramount consideration for a court when making decisions with respect to children.[214] However, the term has been criticised in Australia for its uncertainty, an issue not addressed by the *HRA*, which leaves it undefined.[215] Therefore, because what constitutes the best interests of the child remains ambiguous and obscure, it should be considered flexibly and adaptably having regard to the circumstances of the case at hand.[216] Furthermore, extrinsic materials (like the *UNCRC*) may guide its interpretation and application,[217] especially since the *HRA* Explanatory Notes refer to the *UNCRC* in relation to s 26(2). Indeed, Garde J of the Victorian Supreme Court considered the factors set out in the *UNCRC* pertaining to children's best interests in *Certain Children by Their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children* to interpret the corresponding provision in the Victorian *Charter of Human Rights and Responsibilities 2006*.[218] Thus, the *UNCRC* is likely to strongly influence the *HRA's* interpretation.

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212 See *HRA* (n 4) s 48.

213 Ibid s 26(2).

214 The principle appears in several sections in the *Family Law Act 1975* (Cth): see, eg, ss 60CA, 60CC, 60D, 65AA, 67L and 67V and in Queensland law in the Child Protection Act 1999 (Qld), where s 5A enumerates the Act's main purpose of protecting children and to ensure that the safety, wellbeing and best interests of a child, both through childhood and the rest of the child's life, are paramount.

215 Robert Harris Mnookin, 'Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39(3) *Law and Contemporary Problems* 226, 260; M Rayner, 'Protection and Promotion of the Best Interests of the Child' (Conference Paper, Children's Rights: The Next Step Conference, 3 April 1997) 9.

216 Committee on the Rights of the Children, *General Comment No 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)*, 62nd sess, UN Doc CRC/C/GC/14 (29 May 2013) [32].

217 *Acts Interpretation Act 1954* (Qld) s 14B(1)(a).

218 (2016) 51 VR 473, 497 [146].

2 *International Law*

Using the *UNCRC* to interpret the *HRA* introduces international standards into Queensland law, which emphasise the foundational incompatibility of corporal punishment with children's human rights. Additionally, it exposes Australia and Queensland's departure from their obligations under international human rights law and the *HRA.* In 1998 the Australian government's position was that the *UNCRC* 'should not be interpreted [as requiring the prohibition of correction by force] because the Convention outlaws "torture or other cruel, inhuman or degrading treatment or punishment" and not *all* punishment'.[219] This is despite art 19 specifically requiring States to 'take *all* appropriate legislative, administrative, social and educational measures to protect the child from *all forms of physical or mental violence* ... while in the care of parent(s), legal guardian(s) or [carers]'.[220] The UNCRC Committee disagrees with Australia's interpretation, stipulating that '[t]here is no ambiguity: "all forms of physical or mental violence" does not leave room for any level of legalized violence against children.'[221] Although the UNCRC Committee has not made any decisions regarding corporal punishment, its substantial jurisprudence (including General Comments, Reports, and Concluding Observations) clearly requires State Parties to prohibit physical punishment of children.[222] For example, the Committee has specified that what is 'appropriate' excludes a justification of violent discipline because the article must be interpreted consistently with the whole Convention.[223] Therefore, what is in a child's best interests 'cannot be used to justify practices, including corporal punishment and other forms of cruel or degrading punishment, which conflict with the child's human dignity and right to physical integrity'.[224] It is important to note that the UNCRC Committee also deliberately recognises the distinction between using force to punish and using it reasonably to protect a child from themselves or others, in which case the principle of the minimum necessary force for the shortest necessary period of time must always apply.[225]

Despite requiring the best interests of the child to be a primary consideration in all actions concerning children, the *UNCRC,* like the *HRA,* leaves the term

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219 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, Parliament of Australia, *Model Criminal Code: Chapter 5: Non-Fatal Offences against the Person* (Report, 1998) 135 (the government based its position on the European Court of Human Rights case *Campbell and Cosans v United Kingdom* 4 Eur Court HR).

220 *UNCRC* (n 1) art 19(1) (emphasis added).

221 *General Comment No 8* (n 10) [18].

222 Ibid. This is probably because there was no complaints procedure under the *UNCRC* until 2014 when the *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*, 66th sess, UN Doc A/RES/66/138 (14 April 2014, adopted 19 December 2011) came into force, and it has only 48 state parties and 16 signatories to date. Australia is not one of them.

223 *General Comment No 8* (n 10) [28].

224 Ibid [26].

225 Ibid [14]–[15].

undefined.[226] While the Convention provides no explicit guidance on what 'best interests' are, the Committee has observed that the interpretation of a child's best interests must be consistent with the whole Convention.[227] Thus, the content of children's interests is likely to include being treated with dignity and worth,[228] and having their voices heard in matters concerning them.[229] In addition to the UNCRC Committee's explicit prohibition on corporal punishment, this content is contrary to Australia's interpretation of the Convention as allowing legalised violence against children.

The current Australian conception of best interests therefore not only conflicts with the international content of the principle, but also fundamentally fails to recognise children as rights-holders. The Committee specifically notes that the prohibition on corporal punishment applies to parents and those in *loco parentis* and highlights that it does not conflict with their rights and duties.[230] This is because, as Lord Fraser observed in *Gillick v West Norfolk and Wisbech Area Health Authority*, parents' duties and rights in relation to their children are conferred for the benefit of the child, not for the benefit of parents.[231] Lord Fraser's observation was a vital turning point in children's rights because it challenges the concept of rights *over* children. This challenge was taken up by the *UNCRC* in two ways. Firstly, as above, it prohibits violence against children. A prohibition is necessary because legal tolerance of corporal punishment enables and endorses parents' right to use violence against their children, which is inconsistent with children's human rights.[232] Secondly, it challenges traditional perceptions of children as powerless. Rather than portraying children as vulnerable, dependent, and irrational 'becomings', the *UNCRC* endorses a participatory approach to children, which depicts them as active, developing beings with evolving capacities, entitled to respect for their human dignity as autonomous humans and rights-bearers.[233] The *UNCRC* does this by limiting parents' duties to provide 'appropriate direction and guidance' to children 'in a manner consistent with the evolving capacities of the child'.[234] This means that children's rights transcend that of the family, and as children grow older and empowered, parental rights and duties as to guidance

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226 *UNCRC* (n 1) art 3(1). Note the slightly lesser standard of 'primary' in the *UNCRC* than 'paramount' under Australian law.

227 *General Comment No 8* (n 10) [26].

228 *UNCRC* (n 1) art 40(1).

229 Ibid art 12.

230 *General Comment No 8* (n 10) [27], [47].

231 [1985] 3 All ER 402, 410.

232 Phillips and Alderson (n 53) 184. Note McLean's interesting discussion about how children's rights don't fit well within the traditional rights framework: McLean (n 32) 135. See also John Tobin, 'Understanding a Human Rights Based Approach to Matters Involving Children: Conceptual Foundations and Strategic Considerations' in Antonella Invernizzi and Jane Williams (eds), *The Human Rights of Children: From Visions to Implementation* (Ashgate Publishing Ltd, 2011) 61, 90.

233 Phillips and Alderson (n 53) 179; Freeman and Saunders (n 16) 698; *UNCRC* (n 1) arts 5, 12.

234 *UNCRC* (n 1) art 5.

correspondingly decrease.[235] The *UNCRC* thus strengthens children's power, providing effective protection against family violence.[236] Without this, children's abilities to defend their human rights are limited by a system that traditionally and otherwise upholds parents' rights over children's rights and which rewards more powerful and articulate lobby groups.[237] Therefore, the best interests principle in the *HRA* can be given content by examining its interpretation by the UNCRC Committee and by the fundamental conception of children as rights holders.

Although some claim that affording children the protection of such rights represents undue interference in family life, the law already does so in manifold ways.[238] It currently imposes reasonableness limits around the correction of children and requires that parents raise their children according to the minimum standards set by Parliament.[239] Moreover, significant incursions into the private sphere are also evident in laws around family violence.[240] Thus, parents are already bound to raise children within the parameters of the law. Arguments regarding family privacy are outmoded and abhorrent because of their historical use to undermine laws regarding domestic violence and marital rape.[241] By excluding any justification of corporal punishment under 'best interests', the *UNCRC* (and by extrapolation, the *HRA*) empowers children through their rights and strengthens their protection against corporal punishment. International conceptions of children and their rights are therefore fundamentally inconsistent with a defence allowing children's dignity and physical integrity to be violated by the use of force.

B *Equal Protection*

1 HRA

The 'lawful correction' defence is also prima facie and substantively incompatible with the right of every person to the equal protection of the law.[242] Chapter 26 of the *Criminal Code* protects all Queenslanders from assaults and other offences of

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235 That arts 5 and 19 should be read together is advised by the Committee on the Rights of the Child, *General Comment No 13 (2011): The Right of the Child to Freedom from All Forms of Violence*, 61st sess, UN Doc CRC/C/GC/13 (18 April 2011) [66] ('*General Comment No 13*').

236 Phillips and Alderson (n 53) 176.

237 Tasmania Law Reform Institute (n 18) 38; Freeman and Saunders (n 16) 698; Phillips and Alderson (n 53) 175.

238 Naylor and Saunders (n 140) 81.

239 Freeman and Saunders (n 16) 701.

240 Tasmania Law Reform Institute (n 18) 38; Rowland, Gerry and Stanton (n 11) 184; Anne McGillivray, '"He'll Learn It on His Body": Disciplining Childhood in Canadian Law' (1997) 5(2) *International Journal of Children's Rights* 193, 229.

241 Tasmania Law Reform Institute (n 18) 38.

242 *General Comment No 13* (n 235) [61].

violence to the person.[243] However, s 280 withdraws this protection from a single class of person – children – while leaving it intact for all others. Children's inferior protection against offences to the person is based on age, despite their need for more, not less, protection due to their evolving capacity and vulnerability. Children's need for more protection is exacerbated by the dependent relationship in which the defence applies.[244] Therefore, the defence clearly fails to afford children their right to the equal protection of the law, and the protection they need.

2 *International Law*

Children's status in international human rights law is influential to the application of the *HRA* rights to domestic law. The Queensland defence denies children equal protection of physical integrity, contrary to s 15(2) of the *HRA*, supported by arts 2 of the *UNCRC* and 26 of the *International Convention on Civil and Political Rights* ('*ICCPR*'),[245] which reinforce children's equality. Article 2 of the *UNCRC* provides that 'State Parties shall respect and ensure the rights set forth … without discrimination of any kind'.[246] Similarly, art 26 of the *ICCPR* stipulates that '[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law'.[247] The Human Rights Committee has held that all rights in the *ICCPR* apply to children, and has explained that non-discrimination may require greater protections for vulnerable groups such as children, not less.[248] As s 15(2) of the *HRA* is based upon this article, it is likely this interpretation would apply to an application of the right in Queensland, requiring children to have greater protections from violence than adults.[249] According to the *International Convention on Economic, Social and Cultural Rights* ('*ICESCR*')[250] Committee, subjecting children to corporal punishment (as s 280 allows) deprives them of the same dignity and respect as adults.[251] Because

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243 *Criminal Code Act 1899* (Qld) ch 26, ss 245, 246.

244 *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)* [2004] 1 SCR 76, [226] ('*Canadian Foundation*').

245 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

246 *UNCRC* (n 1) art 2(1).

247 *ICCPR* (n 245) art 26.

248 Human Rights Committee, *General Comment No 17: Article 24 (Rights of the Child)*, 35th sess (7 April, 1989) [2]; Human Rights Committee, *General Comment No 18: Non-Discrimination*, 37th sess (10 November, 1989) [8].

249 Explanatory Notes, Human Rights Bill 2018 (Qld) 22; This may be interpreted to mean that the Queensland government must not only abolish the defence, but explicitly outlaw corporal punishment as suggested by the UNCRC Committee in *General Comment No 8* (n 10) [34].

250 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

251 Committee on Economic, Social and Cultural Rights, *General Comment No 13: The Right to Education (Art 13)*, 21st sess, UN Doc E/C.12/1999/10 (8 December 1999) [41].

this discrimination violates the principle of dignity of the individual, it undermines the very foundation of human rights law and must be abolished.[252] Affording this dignity to children is vital to successfully challenging children's traditional status and providing them with the same protections they receive at international law. By reducing the protections children receive from violence relative to adults, the Queensland defence is diametrically opposed to the equal protection doctrine.

Indeed, treaty committees have characterised Australia as having particular problems with equal treatment of children and have been uncompromising in their prohibition on corporal punishment. The UNCRC Committee has restated its concern regarding Australia's high rates of violence against children in every response to Australia's periodic reports under the Convention. Consequently, it has specifically required Australian states abolish the defence that makes corporal punishment lawful.[253] Because of the frequency of this observation and States' failure to comply, the UNCRC Committee published General Comment No. 8, expressly addressing children's right to protection from corporal punishment.[254] The Committee defined corporal punishment broadly and found that it is 'invariably degrading'.[255] The latter finding means that States allowing corporal punishment will also violate art 37(a) of the *UNCRC*,[256] which prohibits subjecting children to torture or other cruel, inhuman or degrading treatment or punishment.[257] Indeed, the Human Rights Committee has interpreted this right broadly, as 'extend[ing] to corporal punishment, including excessive chastisement ordered as punishment for … [a] disciplinary measure'.[258] This interpretation was reinforced by the Special Rapporteur on the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment*,[259] who observed that 'any form of corporal punishment [against children] is contrary to the [established principles on the] prohibition of torture and other cruel, inhuman or

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252 Ibid [31]; Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: United Kingdom of Great Britain and Northern Ireland, the Crown Dependencies and the Overseas Dependent Territories*, 28th sess, UN Doc E/C.12/1/Add.79 (5 June 2002) [36].

253 Committee on the Rights of the Child, *Concluding Observations: Australia 1997* (n 2) [15]; Committee on the Rights of the Child, *Concluding Observations: Australia 2005* (n 3) [33], [35], [42]; Committee on the Rights of the Child, *Concluding Observations: Australia 2012* (n 3) [8], [43]–[47]; Committee on the Rights of the Child, *Concluding Observations: Australia 2019* (n 3) [28]–[30].

254 *General Comment No 8* (n 10). These comments have been further expressed more broadly in *General Comment No 13* (n 235); Pinheiro (n 65).

255 *General Comment No 8* (n 10) [11].

256 Ibid [18], [30]; *General Comment No 13* (n 235) [24], [26].

257 *UNCRC* (n 1) art 37(a).

258 Human Rights Committee, *General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 44th sess, UN Doc A/44/40 (10 March 1992) [5] ('*General Comment No 20*').

259 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

degrading treatment or punishment'.[260] Viewed through the lens of international law and the *HRA*, Queensland's legalisation of corporal punishment thus invariably exposes children to degradation and cruel and inhuman punishment.

C *Reasonable Limits that are Demonstrably Justified*

Unlike the *UNCRC*, the rights protected by the *HRA* are not absolute. The *HRA* Explanatory Notes explains that the human rights in the Act 'may be balanced against the rights of others and public policy issues'.[261] Thus, s 13 of the *HRA* subjects the enumerated rights to 'reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom'.[262] This general limitations clause is not unusual in human rights instruments and can be found in the two instruments on which this general limitations clause is based, the Canadian *Charter of Rights and Freedoms* ('*Canadian Charter*') and the South African Constitution.[263] A limitation imposed upon a right is reasonable where it is 'demonstrably justified'. This places the onus on the State (or public entity) seeking to limit an enumerated right to demonstrate that the limit is justified.[264] Relevant to this demonstration is the nature of the human right, the purpose of the limitation and whether it is consistent with a free and democratic society based on human dignity, equality and freedom, whether the limitation helps to achieve the purpose, whether there are less restrictive and more reasonable ways to achieve the purpose, and the balance between the importance of limiting the right and of preserving it.[265]

The children's rights enumerated in the *HRA* are founded upon children's 'particular vulnerability' and need to be afforded 'special protection' due to being a child.[266] However, the limitation of their rights through the enactment of the defence is not for the purpose of protecting children from violence. Rather, the defence protects parents inflicting pain as discipline.[267] When s 280 was implemented in 1899, and arguably contemporaneously,[268] the objective of shielding parents, teachers and masters from liability for assault was based in

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260 Manfred Nowak, *Report of Special Rapporteur Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 60th sess, UN Doc A/60/316 (30 August 2005) [28].

261 Explanatory Notes, Human Rights Bill 2018 (Qld) 16.

262 *HRA* (n 4) s 13(1).

263 Canada Act 1982 (UK) c 11, sch B pt I ('Canadian Charter of Rights and Freedoms'); Constitution of the Republic of South Africa Act 1996 (South Africa); Kent Blore, 'Proportionality under the *Human Rights Act 2019* (Qld): When Are the Factors in s 13(2) Necessary and Sufficient, and When Are They Not?' (2022) 45(2) *Melbourne University Law Revue* 419, 426–7.

264 Explanatory Notes, Human Rights Bill 2018 (Qld) 16.

265 *HRA* (n 4) ss 13(2)(a)–(g).

266 Explanatory Notes, Human Rights Bill 2018 (Qld) 22.

267 Tasmania Law Reform Institute (n 18) 29; *Canadian Foundation* (n 244) [235] (Deschamps J).

268 Schloenhardt and Cottrell (n 6) 84.

traditional notions of children as property,[269] capable of learning through physical violence.[270] Some have attempted to reclassify the enumerated legislative objective, justifying the corporal punishment of children by emphasising that children are not adults and cannot be treated as such.[271] This is because they allegedly do not have adult experience, understanding or reasoning and parents are responsible for them and have duties to guide them into adulthood.[272]

Even if the purported purpose of the limitation on children's right to protection from violence did benefit children, the putative benefits should not be used to justify a rights violation.[273] Furthermore, the limitation categorically fails to achieve its purpose because the limitation embodied by the defence subjects children to violence and other harms. The limitation on children's rights, allowing them to be corporally punished, cannot be related to the purported purpose of the limitation, 'to protect children from violence' and help them learn. Further, the UNCRC Committee, Human Rights Committee and Special Rapporteur have explicitly stated that the corporal punishment of children is invariably degrading,[274] making it fundamentally antithetical to a free and democratic society based on human dignity, equality and freedom. There are also other less restrictive, less degrading and reasonably available ways to protect and discipline children that uphold their equalised and special status in human rights law.[275] Therefore, the limitations imposed by s 280 on children's rights cannot be justified under international or domestic law due to punitive violence it permits and its inconsistency with human dignity, equality and freedom. In allowing the defence to continue in its current form, Queensland violates domestic and international human rights.

V Limiting the Defence

Despite almost universal support for the *UNCRC*, much of the Western world appears reluctant to abolish 'lawful' corporal punishment.[276] The doctrine remains good law in Australia, England, Canada and the United States, where the

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269 McLean (n 32) 135.

270 *Canadian Foundation* (n 244) [235] (Deschamps J).

271 See, eg, the Supreme Court in *Canadian Foundation* (n 244).

272 Tasmania Law Reform Institute (n 18) 23.

273 Joan Durrant, 'The Empirical Rationale for Eliminating Physical Punishment' in Joan E Durrant and Anne B Smith (eds), *Global Pathways to Abolishing Physical Punishment: Realizing Children's Rights* (Routledge, 2011) 42, 42.

274 *General Comment No 8* (n 10) [11]; Human Rights Committee, *General Comment No 20* (n 258) [5]; Nowak (n 260) [28].

275 See Part II of this paper.

276 Note that although corporal punishment was not discussed in the *travaux préparatoires* of the *UNCRC* (n 1), the Committee has emphasised that like other Conventions, it is a 'living instrument', and since its drafting, corporal punishment has become more visible: *General Comment No 8* (n 10) [20].

legitimacy of corporal punishment has been challenged on human rights grounds. The Canadian case of *Canadian Foundation for Children, Youth and the Law v Canada* ('*Canadian Foundation*')[277] provides an example of the defence being limited and many problems associated with that approach.

In *Canadian Foundation*, the Canadian Supreme Court considered whether s 43 of the Canadian *Criminal Code*[278] was unconstitutional because of its inconsistency with the *Canadian Charter*. Section 43 is similar to Queensland's 'lawful correction' defence, providing that '[e]very schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances'.[279] The Canadian Foundation claimed that this is inconsistent with arts 7, 12 and 15(1) of the *Canadian Charter* because the defence respectively fails to: give procedural protections to children, does not further their best interests and is overbroad and vague; it constitutes cruel and unusual punishment or treatment; and denies children the legal protection against assault accorded to adults.[280]

The Supreme Court held by a 6:3 majority that s 43 was not unconstitutional and violated none of the enumerated rights under the *Canadian Charter*. Writing the leading judgment, McLachlin CJ (Gonthier, Iacobucci, Major, Bastarache and LeBel JJ agreeing) held that s 43 did not unjustifiably infringe the *Canadian Charter*[281] because 'the substantial social consensus on what is reasonable correction … gives clear content to s. 43' and 'exempting parents and teachers from criminal sanction for reasonable correction does not violate children's equality rights … this section provides a workable, constitutional standard that protects both children and parents'.[282] Her Honour's reference to social consensus highlights that she made this finding by effectively redefining a constitutional issue as a policy consideration, deferring to social consensus to define what is constitutional and in a child's best interest.[283]

Mechanically, McLachlin CJ achieved this by first demarcating a protected space for corporal punishment of children in reading down s 43 to include 15 new qualifications on the substantive defence.[284] These were intended to clarify the

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277 *Canadian Foundation* (n 244).

278 *Criminal Code*, RSC 1985, c C-46.

279 Ibid s 43.

280 *Canadian Foundation* (n 244) [1].

281 Ibid [129]–[130].

282 Ibid [2].

283 Sonja Grover, 'A Commentary on *Canadian Foundation for Children, Youth and the Law v. Canada (AttorneyGeneral)*' (2004) 11(2) *eLaw Journal: Murdoch University Electronic Journal of Law* 14, [3]–[4].

284 See Lucinda Ferguson, 'Commentary on *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*' in Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore (eds), *Rewriting Children's Rights Judgments from Academic Vision to New Practice* (Hart Publishing, 2017) 381 for an enlightening critique and re-write of the judgment from a children's rights perspective.

reasonableness requirement[285] and included: a prohibition on the use of implements, blanket exclusions for the use of force on children under two and on teenagers, a prohibition on blows to the head,[286] and the inapplicability of the defence to charges other than common assault.[287] Further, McLachlin CJ held that, in direct contradiction of the section's text, teachers fell outside of its scope because corporal punishment by them is always unreasonable, unacceptable and degrading treatment within the meaning of art 7 of the *ICCPR*.[288] Only after interpreting the provision thus, did McLachlin CJ consider whether it was unconstitutional.

This decision has been subjected to wide-ranging judicial and academic criticism,[289] including by the dissenting judges, Arbour and Deschamps JJ, who targeted the Court's reinterpretation of the section to preserve its constitutionality.[290] As Arbour J observed, 'it is useful to note how much work must go into making the provision constitutionally sound and sufficiently precise'.[291] Her Honour dissented on the basis that the provision could not be read down as the majority asserted and was therefore unconstitutional for its infringement of children's rights.[292] Deschamps J, also dissenting, did so on the grounds that the defence unjustifiably violated children's right to equality before the law.[293] Both dissenting judges believed the provision should be struck down.[294]

Moreover, scholars have criticised the majority and Binnie J's judgments for confusing whom the section protected and benefitted. They posited that the defence's infringement upon children's rights (if found) was justified by its protection of parents, rather than its benefit to children, despite the challenge to the provision's constitutionality being founded upon its harm to children.[295] For example, McLachlin CJ's judgment, in using social consensus to give content to s 43, depends upon the assumption that a consensus adult perspective has automatic legitimacy and is unquestionably in children's best interests. This assumption disturbingly reflects the nineteenth century 'Blackstone-esque' attitudes which gave rise to the provision. Such attitudes were alluded to by

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285 *Canadian Foundation* (n 244) [39].

286 Ibid [37], [40].

287 Ibid [59].

288 Ibid [33]–[42].

289 See, eg, McGillivray (n 27) 151–64; Ferguson (n 284); Sanjeev Anand, 'Reasonable Chastisement: A Critique of the Supreme Court's Decision in the "Spanking Case"' (2004) 41 *Alberta Law Review* 871.

290 Ferguson (n 284) 383–5.

291 *Canadian Foundation* (n 244) [190] (Arbour J).

292 Ibid [211].

293 Ibid [213], [240], [246].

294 Ibid [194] (Arbour J), [242] (Deschamps J).

295 McGillivray (n 27) 136 (writing about the earlier instance decisions). Note that in *Canadian Foundation* (n 244), while Binnie J agreed that s 43 did violate children's right to equal protection of the law, his Honour found that such violation was justified because of the section's protection of children.

Deschamps J, who found that the legislator's intention when enacting the defence was to protect parents using physical force on their children from prosecution, rather than protecting children from the intrusion of the criminal law, supported by the heading under which the defence is placed, being 'Protection of Persons in Authority'.[296] The *Canadian Foundation* majority decision was therefore not only dubious as a matter of law but also antiquated as a matter of principle.

It is unlikely that this case would be decided in the same way in 2022 as the majority's restrictive interpretation substantially relied on now-outdated international law to determine the content of 'reasonableness'. The Chief Justice correctly identified that, at the time, neither the *UNCRC* nor the *ICCPR* 'explicitly require[d] state parties to ban all corporal punishment of children'.[297] Further, while the Human Rights Committee had expressed the view that corporal punishment of children in schools engages the prohibition of degrading treatment or punishment, '[the UNCRC] Committee ha[d] not expressed a similar opinion regarding parental use of mild corporal punishment'.[298] However, the debate around corporal punishment and human rights had been raging in Canada since at least 1987, when the Law Reform Commission of Canada decided, by majority, that the defence should remain: 'A minority felt that … [the defence] blunts the general message of the criminal law on force, and singles out children as not meriting full personal security and equal legal protection. The majority felt that such a provision should be retained to prevent the intrusion of law enforcement into the privacy of the home for every trivial slap or spanking'.[299] Since then, the UNCRC Committee has definitively held that the Convention cannot be used to endorse corporal punishment against children, with other treaty bodies following suit and making similarly strong statements.[300]

The United Kingdom ('UK') also attempted to make its 'reasonable chastisement' defence more palatable to the UNCRC Committee, following the landmark decision in *A v The United Kingdom*.[301] This case arose with the English courts' prosecution of a man who punished his nine-year-old stepson by hitting him with a garden cane. The man was acquitted on the basis of 'reasonable chastisement'.[302] However, the European Court of Human Rights ('ECtHR') found that the stepfather's conduct breached art 3 of the *Convention for the Protection of*

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296 *Canadian Foundation* (n 244) [235].

297 Ibid [33].

298 Ibid.

299 Law Reform Commission of Canada, *Recodifying Criminal Law* (Report No 31, 1987) 40, cited in Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, Parliament of Australia (n 219) 133.

300 See Part IV.B.2 of this paper.

301 (1999) 27 EHRR 611. Note that of the nations included in the UK, Scotland and Wales have both abolished corporal punishment: *Children (Equal Protection from Assault) (Scotland) Act 2019* (Scot); *Children (Abolition of Defence of Reasonable Punishment) (Wales) Act 2020* (Wales).

302 *A v United Kingdom* [1998] 3 FCR 597.

Human Rights and Fundamental Freedoms ('*ECHR*'),[303] which provides that no one shall be subjected to torture, inhuman or degrading treatment or punishment.[304] In allowing 'reasonable chastisement', the ECtHR found England liable for failing to provide children with the adequate protection against serious breaches of personal integrity required by art 3, and also cited inter alia arts 19 and 37 of the *UNCRC*.[305] In efforts to comply with their human rights obligations,[306] the UK government enacted s 58 of the *Children Act 2004*, which limits the availability of the defence to parents or those in *loco parentis* charged with common assault.

This section, which has limited the defence like the *Canadian Foundation* case and NSW's s 61AA, has been subject to much criticism from the treaty committees, scholars and children's advocate groups for failing to comply with the international children's rights obligations. The Concluding Remarks on the UK's second report to the ICESCR Committee observed that the government's proposals to limit, rather than remove, the defence of 'reasonable chastisement' do not comply with the tenor of the Convention since they constitute a serious violation of the dignity of the child.[307] Moreover, the UNCRC Committee considered that amending rather than repealing the provision suggests that some forms of corporal punishment are acceptable, undermining educational measures to promote positive and non-violent discipline.[308] The Committee therefore requires abolition of 'reasonable chastisement' defences, as well as the explicit prohibition of corporal punishment and other cruel or degrading forms of treatment in civil or criminal legislation.[309] This is to make it absolutely clear that it is as unlawful for an adult to hit, smack or spank a child and to establish that the criminal offence of assault applies equally to such violence, regardless of whether it is 'discipline' or 'reasonable correction'.[310]

The Committees' views are shared by several scholars, who characterise the limited defences as ethically legitimating violence against children,[311] and 'bungling',[312] 'dilut[ing]'[313] and 'weak'[314] compromises that fail to address the real

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303 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

304 *A v United Kingdom* (1999) 27 EHRR 611, 624, 627, 629.

305 Ibid 618.

306 Michael Freeman, 'Upholding the Dignity and Best Interests of Children: International Law and the Corporal Punishment of Children' (2010) 73(2) *Law and Contemporary Problems* 211, 218, 235–236; Simon Parsons, 'Human Rights and the Defence of Chastisement' (2007) 71(4) *Journal of Criminal Law* 308, 312.

307 Committee on the Rights of the Child, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, 31st sess, UN Doc CRC/C/15/Add.188 (9 October 2002) [37].

308 Ibid.

309 *General Comment No 8* (n 10) [34].

310 Ibid.

311 Birchall and Burke (n 32) 7.

312 Freeman (n 306) 236.

313 McLean (n 32) 116.

314 Nicholson (n 50) 24.

issues. They posit that these defences create a grey area where parents, abusers, children and professionals may believe that there are no grounds for intervention to protect children.[315] Additionally, they argue that mere amendments perpetuate the traditional conceptions of children as property and signal that their bodily integrity and physical security are to be sacrificed to the wills of their parents.[316] Observing children's human rights therefore requires much more than limiting the defence, and merely restricting Queensland's 'lawful correction' defence is unlikely to comply with the State's or Australia's human rights obligations.

VI Moving Forward

At the time of writing, the defence of 'lawful correction' has been repealed in 65 states around the world, first in Sweden and most recently in South Korea and Colombia.[317] From a study of several of these States, Bussman et al found the most effective reforms involve a combination of legal deterrents and education. This supports the recommendations made by the UNCRC Committee for educational campaigns to accompany legal change.[318] The Committee envisions that legal deterrents will be constituted by dual positive and negative obligations, like those used in Sweden, to address violence against children.[319] Swedish parents have both negative and positive obligations in relation to raising children. They are obliged not to use violence against their children, and to provide them with care, security and a good upbringing.[320] This reform was grounded in a view that children are not parental property, but 'independent individuals with a right to full respect for their integrity'.[321] If Queensland is to be similarly successful in repealing its defence, educating children (and parents) of their rights and the former's independent and equal status is vital, as access to knowledge empowers children and increases their safety.[322]

Although parents have been cited as fearing prosecution as a consequence of prohibiting corporal punishment, that is not supported by evidence from states which have done so.[323] This is because the defence of necessity and the principle of *de minimis* are still available. Emphasising these defences may make abolition more palatable by excluding some conduct constituting physical punishment

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315 Birchall and Burke (n 32) 2.

316 *Canadian Foundation* (n 244) [231] (Deschamps J).

317 'End Corporal Punishment' (n 14).

318 *General Comment No* 8 (n 10) [18], [46]; *General Comment No 13* (n 235) [44].

319 See *General Comment No 8* (n 10) [34]. This method was so described by Birchall and Burke (n 32) 7.

320 *Parent Code (Föräldrabalken)* (Sweden) 1949:381 §6.1.

321 Pernilla Leviner, 'The Ban on Corporal Punishment of Children: Changing Laws to Change Attitudes' (2013) 38(3) *Alternative Law Journal* 156, 156, citing the Swedish *travaux preparatoires* reforming the law in the following way: Legislative Bill, prop. 1978/79:67 *Om förbud mot aga.*

322 Phillips and Alderson (n 53) 188.

323 Freeman and Saunders (n 16) 700; Naylor and Saunders (n 140) 83; Leviner (n 321) 158.

required by emergency or too trivial to warrant prosecution.[324] Doing so is inconsistent with the UNCRC Committee's definition of corporal punishment, which applies to any force used, *however light*.[325] However, it is justified by the positive object of abolition, to prevent parents from using corporal punishment through supportive and educational, not punitive, interventions.[326] This is consistent with the tenor of human rights law, which is grounded in normative and legal change.[327] Moreover, the test for prosecutorial discretion would still apply, requiring consideration of whether there is sufficient evidence for a prosecution, and whether it would be in the public interest to do so.[328]

The 'lawful correction' doctrine therefore must be abolished in Queensland, and Australia. It is currently unworkable because it has been interpreted and applied inconsistently across the country to produce contrary legal precedent. It thus offers little guidance to parents, prosecutors and the bench. Additionally, the Queensland doctrine is contrary to international and domestic human rights law through interpretation of the *HRA*. It treats children unequally by depriving them of the status of being human through a denial of their rights to dignity and bodily integrity. Further, corporal punishment is not in children's best interests and fails to protect them from violence because it is invariably degrading and occasions actual harm.[329] This inconsistency is evidenced by international jurisprudence on the *UNCRC* and other relevant treaties, which absolutely condemn the use of corporal punishment against children. Repealing the defence and educating parents and children would allow the Queensland government to clarify the law, educating Queensland citizens on the normative unacceptability of corporal punishment and provide children with protections from violence equal to those of adults. This protection would also demarcate a clear boundary between discipline, which should *never* be physically punitive, and child abuse, which is. Perhaps most fundamentally, however, it would establish children's status as autonomous human beings with enforceable rights, in compliance with Queensland's and Australia's human rights obligations.

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324 Phillips and Alderson (n 53) 191–2.
325 *General Comment No 8* (n 10) [11].
326 Ibid [40].
327 Ibid [18],[40]; Birchall and Burke (n 32).
328 Department of Justice and Attorney-General (Qld), *Director's Guidelines* (Guidelines, July 2016) 4.
329 See Part II of this paper.