

Forthcoming in Hong Kong Law Journal – draft, please do not cite without permission.

Just a Slap on the Wrist? Corporal Punishment of Children and the Defence of Reasonable
Chastisement in Hong Kong

David Birchall* & Jack Burke*

Abstract

This article describes the current laws regarding parental corporal punishment against children in Hong Kong and contrasts them with the region’s obligations under the Convention on the Rights of the Child. Hong Kong permits certain forms of corporal punishment through the defence of “reasonable chastisement” and is therefore in prima facie breach of the Convention. However, the Convention invokes the *de minimis* principle to restrict the scope of prosecutions in favour of keeping families together. It advocates education and sensitization in all but extreme cases. Hong Kong’s restrictions on the application of this defence and its positive actions to shift cultural norms away from corporal punishment, mean that the substance, if not the letter, of the law is relatively well-aligned to that of the Convention. However, the continuance of the defence may provide an obstacle to early-stage intervention and the evolution of cultural norms. The article considers whether the defence of reasonable chastisement remains necessary today, the possible virtues and costs of removing the defence, as well as policy improvements in light of human rights law that could help to realize the right of children to be protected from corporal punishment.

* Visiting Fellow, City University of Hong Kong School of Law. The authors would like to thank John Reading, SC, and the anonymous reviewer for their extremely helpful comments on earlier drafts of this article.

* Senior Teaching Fellow, City University of Hong Kong School of Law.

1. Introduction

In early 2019, at the United Nations Universal Periodic Review (UPR), the government of Hong Kong accepted a recommendation to “introduce internal legislation to implement the Convention of the Rights of Child (CRC).”¹ This entails a duty “to protect the child from all forms of physical or mental violence”,² which thereby prohibits “any level of legalized violence against children.”³ This specifically requires the prohibition of all forms of corporal punishment of children as “an immediate and unqualified obligation of States parties.”⁴ Corporal punishment is defined as “any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light.”⁵ Currently, the defence of reasonable chastisement (sometimes called the law of correction) permits parental corporal punishment against children,⁶ unless it is

¹ For the recommendations see: Human Rights Council, Report of the Working Group on the Universal Periodic Review, China, A/HRC/40/6, 26 December 2016, para 28.346, available at https://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/the_rights_of_the_individuals/human/upr_3rd/report_working_group_upr_3rd_e.pdf [China UPR] (visited 8 July 2019); for the acceptance see: Human Rights Council, Report of the Working Group on the Universal Periodic Review, China, Addendum: Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies Presented by the State Under Review A/HRC/40/6/Add.1, 15 February 2019, para 2, 28.346, available at https://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/the_rights_of_the_individuals/human/upr_3rd/addendum_report_working_group_upr_3rd_e.pdf [Response of China to the UPR] (visited 8 July 2019).

² Convention on the Rights of the Child, adopted, 20 November 1989, entry into force 2 September 1990, Article 19(1) (CRC).

³ 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”, CRC/C/GC/8, 2 March 2007, para 18, available at <https://www.refworld.org/docid/460bc7772.html> [General Comment on Corporal Punishment] (visited 8 July 2019).

⁴ *Ibid.*, para 22.

⁵ *Ibid.*, para 11.

⁶ Any further references to corporal punishment will be to parental corporal punishment of their children. Hong Kong has already prohibited corporal punishment outside of the home, including in schools, childcare centres, and penal institutions. The Hong Kong Education Regulations as updated in 1991 state in S8 (58): “Corporal punishment of pupils prohibited... No teacher shall administer corporal punishment to a pupil.”⁶ Child Care Services Regulations 1976 (amended 2000), regulation 15: “No person shall administer corporal punishment to a child in a [childcare] centre”. Rule 37 of the Probation of Offenders Rules 1997: “(2)(a) No corporal punishment of any kind shall be inflicted on a probationer in an approved institution.”

Forthcoming in Hong Kong Law Journal – draft, please do not cite without permission.

“excessive”.⁷ In maintaining a defence of reasonable chastisement, Hong Kong is therefore prima facie in breach of its international obligations.⁸ A year earlier the Legislative Council of the Hong Kong Special Administrative Region Subcommittee on Children's Rights (Subcommittee on Children's Rights) recommended abolition of corporal punishment in the home “to deliver a strong message that physical punishment is a form of violence, not parenting.”⁹

Similar defences were until recently very common around the world, but since 1979 they have been abolished in 58 countries.¹⁰ A comparable common law jurisdiction, Wales, has drafted a bill to prohibit the defence,¹¹ while another common law jurisdiction, New Zealand abolished the defence in 2007.¹² Beyond obligations under human rights law, there are three main sociological arguments in favour of legal reform. Corporal punishment may have detrimental effects on child development;¹³ it can slide easily into child abuse¹⁴ and it may be ineffective at correcting bad behaviour.¹⁵ The major concern that states and societies have with removing the defence is that it would criminalize behaviours that some members of society consider normal and

⁷ Discussed in Simon Parsons, “Human Rights and the Defence of Chastisement” (2007) 71(4) *The Journal of Criminal Law* 308-317, 309 [Parsons, Chastisement].

⁸ Convention on the Rights of the Child (1989), available at <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx> (visited 8 July 2019).

⁹ Legislative Council of the Hong Kong Special Administrative Region *Subcommittee on Children's Rights, Report (May 2018) Part XI – Recommendations* para 20, available at <https://www.legco.gov.hk/yr17-18/english/hc/papers/hc20180525cb4-1118-a-e.pdf> (Subcommittee on Children's Rights) (visited 13 December 2019).

¹⁰ The Global Initiative to End All Corporal Punishment of Children, ‘Progress’, available at <https://endcorporalpunishment.org/countdown/> (visited 11 December 2019).

¹¹ Welsh Government, Children (Abolition of Defence of Reasonable Punishment) (Wales) Bill Summary, available at www.assembly.wales/research%20documents/19-019/19-019-web-eng.pdf (visited 8 July 2019).

¹² Ministry of Justice of New Zealand, The Crimes (Substituted Section 59) Amendment Act 2007.

¹³ Elizabeth T Gershoff, “Corporal Punishment by Parents and Associated Child Behaviours and Experiences: A Meta-Analytic and Theoretical Review” (July 2002) 128(4) *Psychological Bulletin*, 535-579, 539.

¹⁴ Jennifer E Lansford and others, “Corporal Punishment of Children in Nine Countries as a Function of Child Gender and Parent Gender” (2010) *International Journal of Pediatrics* 1, 2.

¹⁵ *Ibid.*, 11; Elizabeth T Gershoff, “Spanking and Child Development: We Know Enough to Stop Hitting Our Children” (2013) 7(3) *Child Development Perspectives* 133-137, 136.

Forthcoming in Hong Kong Law Journal – draft, please do not cite without permission.

natural, constituting a significant intrusion into the private sphere.¹⁶ However, the Committee on the Convention of the Rights of the Child (the Committee) is clear that the prosecution of parents “is in most cases unlikely to be in their children’s best interests”.¹⁷ Rather, the aim is to promote the moral norm that violence towards children is socially unacceptable,¹⁸ with criminal law reserved for extreme cases and educational, informational, monitoring and social welfare programmes prioritized.¹⁹ The government of Hong Kong is undertaking a range of such programmes.²⁰ In light of these factors, the continuance of the defence of reasonable chastisement in Hong Kong could amount to merely a doctrinal, rather than a substantive, departure from human rights law.

The major problem with introducing additional social protection programmes without removing the defence is that it creates a grey area within which abusers, victims and professionals may believe that there are no grounds for intervention to protect children.²¹ We argue that Hong Kong should consider removing the defence of reasonable chastisement, while reifying the desire to avoid prosecutions in all but the extreme cases. This would, if implemented effectively,

¹⁶ See e.g. Welsh Government, Children (Abolition of Defence of Reasonable Punishment) (Wales) Bill. Explanatory Memorandum. Incorporating the Regulatory Impact Assessment and Explanatory Notes (March 2019), section 3.50, page 18, available at <http://www.assembly.wales/laid%20documents/pri-ld12454-em/pri-ld12454-em-e.pdf> (Wales Memo) (visited 8 July 2019).

¹⁷ General Comment on Corporal Punishment, (n 3 above), para 40; The Committee explicitly references the ‘de minimis’ principle to make this point, as discussed below, at para 41.

¹⁸ General Comment on Corporal Punishment, (n 3 above) at paras 38- 41; Elizabeth T. Gershoff, *Report on Physical Punishment in the United States: What Research Tells Us About Its Effects on Children* Columbus, OH: Center for Effective Discipline, 2008, p 23 (Gershoff, Physical Punishment).

¹⁹ As recommended to Hong Kong by the CRC see: CRC, Concluding Observations on the Combined Third and Fourth Periodic Reports of China, adopted by the Committee at its sixty-fourth session (16 September–4 October 2013) 29 October 2013 CRC/C/CHN/CO/3-4, para 46 (c) (CRC, HK Report).

²⁰ See e.g. The Government of the Hong Kong Special Administrative Region’s Response to the List of Issues raised by the United Nations Committee on the Rights of the Child, (September 2013) paras 5.14-5.16 (HK Response to CRC), available at https://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/List_of_Issues_201309.pdf (visited 23 July 2019).

²¹ Wales Memo (n 16 above), 40, 8.17; 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) *The International Journal of Children's Rights*, 165-195, 186-8.

Forthcoming in Hong Kong Law Journal – draft, please do not cite without permission.

encourage social care interventions at an early stage without increasing prosecutions and family break-ups.²² To this end, we advocate that a Law Reform Commission consultation paper on the subject be initiated to garner a range of expert and general public views on the subject. We also provide suggestions for changes to the Department of Justice’s *Policy for Prosecuting Cases involving Domestic Violence*,²³ and the applicable legislation under s 27(1) of the Offences Against the Person Ordinance (Cap 212) (OAPO).

The paper proceeds by first introducing the common law regarding corporal punishment in the criminal realm²⁴ and the defence of reasonable chastisement and its particular interpretation in Hong Kong. It then discusses the social science literature on the extent and effects of corporal punishment, before turning to international human rights law and the prohibition therein on all forms of corporal punishment. Finally, we discuss how the Hong Kong government could address the issue.

2. The Common Law Concerning Parental Corporal Punishment of their Children in Criminal Matters in Hong Kong

In 1860, in *R v Hopley*, Cockburn J formulated the common law defence of chastisement as follows, “By the law of England, a parent...may for the purpose of correcting what is evil in the child inflict moderate and reasonable corporate punishment, always, however, with this condition, that it is

²² Gershoff, USA Report, (n 18 above), p 23.

²³ Department of Justice, *The Policy for Prosecuting Cases involving Domestic Violence*, available at <https://www.doj.gov.hk/eng/public/pubppcdv.html> (visited 8 July 2019).

²⁴ It is worth noting that the defence of reasonable chastisement is also applicable to an action in tort for assault: James Goudkamp, *Tort Law Defences* (Oxford Bloomsbury 2013) pp 117-118. Although we do not discuss this element specifically, the substantive arguments apply equally to the defence therein. Notably, international human rights law seeks the complete removal of the defence in both criminal and tort law. See General Comment on Corporal Punishment, (n 3 above), para 31.

Forthcoming in Hong Kong Law Journal – draft, please do not cite without permission.

moderate and reasonable”.²⁵ Hopley was an extreme case in which the defendant, who was a schoolmaster,²⁶ beat an obstinate thirteen or fourteen-year-old boy who was in his care to death. At best, what was established in Hopley, is that those entitled to the defence of lawful chastisement, can only do so to children who are sufficiently old enough to understand the purpose of it, and provided it is reasonable, rather than excessive punishment.²⁷ Therefore, in order to negate such a defence, the prosecution will need to prove beyond a reasonable doubt that the degree of any chastisement is excessive, and hence unlawful.²⁸ About 10 years after Hopley, it was established in *R v Griffin* that this common law defence would only apply when a child was capable of understanding the punishment, so creating one of the many potential grey areas discussed below in applying this defence.²⁹ In *R v Robert Mackie*,³⁰ it was held that not all acts which “might be expected to cause slight harm to the child would be unlawful on the part of a person in loco parentis”³¹ (acting in loco parentis, such as in the role of a parent, like a common law stepfather, is a situation which the law will tend to treat the same as that involving parents).³²

Lawful chastisement is permitted as a defence to assault occasioning actual bodily harm in Hong Kong: *R and William Ryan Erisman*.³³ This principle still applies by virtue of Article 8 of

²⁵ [1860] 2F&F 202.

²⁶ While, in the circumstances outlined immediately below in England, schoolmasters could administer corporal punishment at that time, corporal punishment is no longer permissible in schools in Hong Kong; Section 58 Education Regulations (Cap 279a) states, “No teacher shall administer corporal punishment to a pupil”.

²⁷ Parsons, (n 7 above), p 309.

²⁸ *Ibid.*, p 310.

²⁹ 11 Cox C.C. 402.

³⁰ 1973 453, 460.

³¹ *Ibid.*, p 29.

³² See n 30 above at p 454 and p 460. For the sake of simplicity, these notes will (as far as possible) focus on the rights of parents to exercise corporal punishment on their children rather than those acting in loco parentis. It might be that different arguments could be put forward as to the need for parents, rather than others acting in this position, to retain this defence into the future.

³³ (High Court) Magistracy Appeal No.861 of 1987 per Roberts CJ [1988] 1 HKLR 372 F.

Forthcoming in Hong Kong Law Journal – draft, please do not cite without permission.

the Basic Law of Hong Kong 1997.³⁴ Excessive chastisement has been rather vaguely characterised as amounting to the infliction of more than “moderate or reasonable chastisement of the child”: *R v Smith (David George)*.³⁵ In this case, a jury found that the use of a belt buckle on a six-year-old boy constituted assault occasioning actual bodily harm.³⁶

Other decisions, based on the previously operating common law in England and Wales,³⁷ have been more liberal as to what reasonable chastisement might constitute; juries have acquitted parents using implements on their children including garden canes, electric flexes and slippers.³⁸ Thirwell J summarised the common law on reasonable chastisement as amounting to “a defence of an allegation of assault, including serious assaults on a child”.³⁹ In a debate in the parliamentary House of Lords in 2004 on the abolition of the parental defence of reasonable chastisement (which inter alia sought to shed light on the limits of this defence) it was generally accepted that light or even relatively heavy smacking would usually not be unlawful.⁴⁰ Nevertheless, the boundaries of when chastisement became unlawful were not made clear in this forum.⁴¹ One example in this

³⁴ Article 8 of the Basic Law states that, “The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region”. Article 18 of the Basic Law also states, amongst other matters, “The laws in force in the Hong Kong Special Administrative Region shall be this Law, the laws previously in force in Hong Kong as provided for in Article 8 of this Law, and the laws enacted by the legislature of the Region.”

³⁵ *Crim.L.R* [1985] p 42.

³⁶ *Ibid.*

³⁷ In 2004, pursuant to s.58 of the Children Act 2004 the law on reasonable chastisement was amended so as to be described as reasonable punishment and essentially limited to more moderate forms of smacking: Department for Children, Schools and Families, *Review of Section 58 of the Children Act 2004* (October 2007) paras 1-15, available at <https://www.gov.uk/government/.../review-of-section-58-of-the-childrens-act-2004> (visited on 23 July 2019).

³⁸ See PR Ghandi and JA James, “Parental Rights to Reasonable Chastisement and the European Court of Human Rights” (1999) 3(3) *The International Journal of Human Rights* 97, 101-102.

³⁹ *XA v YA* [2010] EWHC QB.

⁴⁰ Joint Committee on Human Rights, *Nineteenth Report* (September 2004) para 164, available at <https://publications.parliament.uk/pa/jt200304/jtselect/jtrights/161/16102.htm> (visited 8 July 2019).

⁴¹ *Ibid.*, para 167.

Forthcoming in Hong Kong Law Journal – draft, please do not cite without permission.

parliamentary debate, that was proffered by Baroness Ashton of Upholland, as one that would not cross the legal line, was as follows:⁴²

Consider the mum in a supermarket, whose child for the fifteenth time has taken the sweets off the shelf and put them in the trolley, and who says, "If you do that again, I will slap your hand". Noble Lords may find that offensive; others may feel that it is acceptable. My question is: would I wish the mother to be prosecuted if that happened? My answer would probably be no.

Baroness Ashton of Upholland's remarks encapsulate the rationale of, and tension within, reasonable chastisement as a legal defence. There are some forms of physical punishment that are so minimal that, even if considered to be wrongful, should not trouble the courts. However, where to set this standard, and how to address acts which fall below that standard, is open to debate.

The somewhat uncertain state of what can amount to reasonable chastisement in Hong Kong can be found in the reference by the Law Reform Commission by Liu⁴³ about parents' right to use "moderate punishment" on their children.⁴⁴ This was apparently seen in the arrest of a mother who slapped the hand of her seven-year-old son, who subsequently ran away as a result.⁴⁵ With this case as a backdrop, it was established in the LegCo that there are no ordinances banning corporal punishment in Hong Kong. However, punishment of children by parents that is likely to cause persons under sixteen unnecessary suffering or injury to their health will constitute a breach of section 27(1) OAPO.⁴⁶ Likewise, it would be a breach of sections 39 and 40 of the OAPO,

⁴² *HL Deb 20* (May 2004) Vol 661 cc890-914 16, available at <https://api.parliament.uk/historic-hansard/lords/2004/may/20/reasonable-chastisement> (visited 8 July 2019).

⁴³ Dr Athena Liu, *Family Law for the Hong Kong SAR* (1999, HKU Press) 217 [Liu, Family Law].

⁴⁴ *Law Reform Commission of Hong Kong Report, Guardianship of Children* (January 2002) para 1.5, available at <http://www.info.gov.hk/hkreform> (visited 24 July 2019).

⁴⁵ Press Releases, *Corporal Punishment* LCQ8 (October 18 2006), available at <https://www.info.gov.hk/gia/general/200610/18/P200610180156.htm> (visited 23 July 2019).

⁴⁶ Section 27 OAPO(1): "If any person over the age of 16 years who has the custody, charge or care of any child or young person under that age wilfully assaults that child, or ill-treats, neglects, abandons or exposes such child or young person or causes or procures such child or young person to be assaulted, ill-treated, neglected, abandoned or exposed in a manner likely to cause such child or young person unnecessary suffering or injury to his health

Forthcoming in Hong Kong Law Journal – draft, please do not cite without permission.

creating the offences of assault occasioning actual bodily harm and common assault, respectively.⁴⁷ There are no other statutory provisions seeking to protect children from harm or providing criminal sanctions specifically for corporal punishment by parents.⁴⁸

According to Liu, identifying whether discipline is moderate or not depends on matters such as the cultural context, the age of the child and the nature of the punishment.⁴⁹ Furthermore, as Hong Kong parents reportedly adopt a favourable attitude toward corporal punishment of their children as being a useful method of raising them, drawing the line between permitted corporal punishment and criminalized child abuse in Hong Kong is a particularly difficult matter.⁵⁰ Complicating the search for certainty even more here is that the requirement of reasonableness has been interpreted to mean the standards which apply in “contemporary society”.⁵¹ This general uncertainty is further compounded by the lack of a clear definition of child abuse.⁵² Child abuse, as defined by the Social Welfare Department, encompasses “any act of commission or omission that endangers or impairs the physical/psychological health and development of an individual under the age of 18”.⁵³ Spanking per se does not fall within this definition, as far as physical abuse

(including injury to or loss of sight, or hearing, or limb, or organ of the body, or any mental derangement) such person shall be guilty of an offence and shall be liable— (a) on conviction on indictment to imprisonment for 10 years; or (b) on summary conviction to imprisonment for 3 years.

⁴⁷ Response by the Secretary for Health, Welfare and Food, Dr York Chow to a question by the Hon Dr Fernando Cheung as Legislative Council – 18 October 2006 89 Official Record of Proceedings Corporal Punishment 151-152, available at <https://www.legco.gov.hk/yr06-07/english/counmtg/hansard/cm1018-translate-e.pdf> [visited 8 July 2019].

⁴⁸ For example, see Crimes Ordinance (Cap 200) and the Protection of Children and Juveniles Ordinance (Cap 213).

⁴⁹ Liu, (n 43 above) pp 219-220.

⁵⁰ Charles O’Brian and Laurel S W Lau, “Defining Child Abuse in Hong Kong” (1995) 4(1) *Child Abuse Review*, 38-46, 40.

⁵¹ *A v United Kingdom* [1998] ECHR 25599/94 para 14.

⁵² Legislative Council of the Hong Kong Special Administrative Region. Subcommittee on Children’s Rights, *Report* (May 2018) Annex 1. Paragraph 2.1, available at <https://www.legco.gov.hk/yr17-18/english/hc/papers/hc20180525cb4-1118-a-e.pdf> (visited 8 July 2019).

⁵³ *Ibid.*, p 3; Social Welfare Department, *Procedural Guide for Handling Child Abuse Cases Revised 2015* (circa 2015) para 2.1, available at https://www.swd.gov.hk/en/index/site_pubsvc/page.../sub_fcwprocedure/id_1447/ (visited 7 August 2019).

Forthcoming in Hong Kong Law Journal – draft, please do not cite without permission.

is concerned, although the causing of large and multiple bruises may do so.⁵⁴ Finding cases in both Hong Kong and comparable common law jurisdictions to clearly delineate the boundaries of reasonable chastisement is difficult, probably because only more serious types of punishment that cross over into violent assault find their way before the courts.⁵⁵ The uncertain boundaries create risks in that they are likely to discourage potential victims from coming forward, and provide inadequate guidance to parents and professionals.

3. The Extent of Corporal Punishment in Hong Kong

Numerous studies have been conducted from the 1980s on the extent of parental corporal punishment in Hong Kong.⁵⁶ A 2004 study, published in 2011, found minor physical assault (that occurred at some point in the child’s lifetime) to be as high as 32.8% from fathers and 32.1% from mothers. The incidence of this type of assault was 35.2% on boys and 30.5% on girls by fathers and 31.9% on boys and 32.2% on girls by mothers.⁵⁷ A 2003 study conducted in Shatin of 489 students, found that 4.5% of those sampled had received corporal punishment (beating with a reason - so it was regarded as discipline rather than abuse) from family members within the last six months.⁵⁸ Conversely, a 2015 study of 1,562 Hong Kong children (although not seemingly, as

⁵⁴ *Ibid.*, paras 2.4 and 2.9.

⁵⁵ This problem is discussed in the Australian context in: Gareth Griffith, *Crimes Amendment (Child Protection – Excessive Punishment) Bill 2000: Background and Commentary* pp 12-13, available at <https://www.parliament.nsw.gov.au/researchpapers/Documents/crimes-amendment-child-protection-excessive-puni/09-00.pdf> (visited 8 July 2019).

⁵⁶ Dr PLS Ip, “Child Abuse and Neglect in Hong Kong” (2000) 5 *Hong Kong Journal of Paediatrics* 61-64, 61-62, available at <http://www.hkjaed.org/details.asp?id=249&show=12> (visited 8 July 2019); Catherine So-kum Tang, “Corporal Punishment and Physical Maltreatment Against Children: A Community Study on Chinese Parents in Hong Kong” (2006) 30(8) *Child Abuse and Neglect* 893-907; Elizabeth Cheung, ‘Hong Kong Child Rights Group Calls For Total Ban on Corporal Punishment’ *South China Morning Post* (April 28, 2015), available at <https://www.scmp.com/news/hong-kong/law-crime/article/1778175/hong-kong-child-rights-group-calls-total-ban-corporal> (visited 8 July 2019).

⁵⁷ Ko Ling Chan, “Comparison of Parent and Child Reports on Child Maltreatment in a Respective Household Sample in Hong Kong” (2012) 27(1) *Journal of Family Violence* 11, 13-16.

⁵⁸ Joseph T F Lau and others, “Psychological Correlates of Physical Abuse in Hong Kong Chinese Adolescents” (2003) 27(1) *Child Abuse and Neglect* 63-75 [Lau Abuse].

Forthcoming in Hong Kong Law Journal – draft, please do not cite without permission.

yet, published in a peer-reviewed journal) found that over 50% of them had received corporal punishment from their parents.⁵⁹ Although there is a degree of variation in the results of these studies, they collectively provide evidence that parental corporal punishment has been and probably remains widespread in families in Hong Kong.

4. The Effects of Corporal Punishment in Hong Kong

According to the findings in Lau's study,⁶⁰ corporal punishment did not lead to any statistically significant damaging psychological outcomes amongst those affected, such as drug abuse problems, tendency to self-harm or low perceptions of parental support. Being beaten without any reason or beaten to injury by family members though was statistically connected to self-injury and substance abuse problems and lower perceptions of parental support.⁶¹ Other adverse findings were detected in a study by Mok and others who found that discipline characterized as corporal punishment in Hong Kong resulted in lower self-esteem, greater anxiety and depression, loss of sleep and a greater propensity toward self-harm.⁶² This has received a degree of confirmation from a study in Finland which found that a ban on familial corporal punishment (which was generally complied with by the Finnish community) led to better child psychological outcomes.⁶³ Conversely, Ferguson⁶⁴ came to a more nuanced conclusion about the effects of spanking

⁵⁹ Anon, "Corporal Punishment by Parents Rampant: Child Welfare Group" *EJInsight* (April 28 2015), available at <http://www.ejinsight.com/20150428-corporal-punishment-by-parents-a-big-concern-says-hk-child-rights-group/> (visited 8 July 2019).

⁶⁰ Lau, (n 58 above).

⁶¹ *Ibid.*, pp 64-72.

⁶² PLS Ip, "Child Abuse and Neglect in Hong Kong" (2000) 5 *Hong Kong Journal of Paediatrics* 61, 62, at hkjpaed.org/details.asp?id=249&show=1234 (visited 8 July 2019); referring to JWS Mok, PLS Ip and SL Cheung and others, 'An Empirical Study of Children's Perception of Corporal Punishment and Their Psychological Functioning in a Chinese Community', *Proceedings of the ISPCAN 5th Asian Conference on Child Protection* (November 25-27 1999).

⁶³ Suleman Ibrahim, "Physical Punishment in Ghana and Finland; Criminological, Sociocultural, Human Rights and Child Protection Implications" (2016) 4(1) *International Journal Human Rights and Constitutional Studies* 54-74.

⁶⁴ Christopher J Ferguson, "Spanking, Corporal Punishment and Negative Long-term Outcomes: A Meta-analytic Review of Longitudinal Studies" (2013) 33(1) *Clinical Psychology Review* 196-208.

Forthcoming in Hong Kong Law Journal – draft, please do not cite without permission.

(described as “open handed swats to the buttock or extremities”)⁶⁵ on psychological externalities (aggression, disobeying rules etc.); the negative effects of spanking were trivial in children aged 0-7, but non-trivial in older children.⁶⁶ Slightly more indirectly, conflict oriented parental behaviour is connected to delinquent style attitudes⁶⁷ or even, when caustic/nasty, to delinquency.⁶⁸

Recent advances in neurology have shown that any form of physical punishment, like spanking, hinders the development of higher-level executive functions such as the coordination of “thinking, emotions, language and behavior”.⁶⁹ Better ways of disciplining a child, to more effectively promote these functions, are through empathetic and supportive interaction.⁷⁰ Smith asserts that reasoning and explanation, rather than spanking, are likely to lead to greater moral internalization and less aggressive behaviour by recipients.⁷¹ Gershoff notes that corporal punishment “does not teach children why their behavior was wrong or what they should do instead”.⁷² In this regard, it has been argued that parental corporal punishment instils a tendency to employ physical force to resolve conflicts and/or promote higher levels of aggression within those on the receiving end of

⁶⁵ *Ibid.*, p 199.

⁶⁶ *Ibid.*, p 201.

⁶⁷ Hing Keung Ma and others, “Parental, Peer and Teacher Influences on the Social Behaviour of Hong Kong Chinese Adolescents” (2000) 161(1) *The Journal of Genetic Psychology* 65-78, 76.

⁶⁸ Michael Adorjan and Wing Wong Chui, *Responding to Youth Crime in Hong Kong. Penal Elitism, Legitimacy and Citizenship* (London: Routledge 2014) 21.

⁶⁹ Joan Durrant and Ashley Stewart-Tufescu. “What is “Discipline” in the Age of Children’s Rights?” (2017) 25.2 *The International Journal of Children's Rights* 359, 366-367.

⁷⁰ *Ibid.*, pp 372-373.

⁷¹ Anne B Smith, *The State of Research on the Effects of Physical Punishment*, available at <https://www.msd.govt.nz/about-msd-and-our-work/publications-resources/journals-and-magazines/social-policy-journal/spj27/the-state-of-research-on-effects-of-physical-punishment-27-pages114-127.html> (visited 25 July 2019).

⁷² Elizabeth T Gershoff, “Spanking and Child Development: We Know Enough Now to Stop Hitting Our Children” (2013) 7(3) *Child Development Perspectives* 133, 134 referring to M L Hoffmann, “Affective and Cognitive Processes in Moral Internalization” in ET Higgins, DN Ruble and W W Hartup (eds.) *Social Cognition and Social Development* (New York Cambridge University Press 1983).

Forthcoming in Hong Kong Law Journal – draft, please do not cite without permission.

it.⁷³ Although the evidence of harm resulting from more minor forms of corporal punishment is not absolutely conclusive, there is at least a strong case that it is not the ideal form of parental discipline.⁷⁴ Finally, even where more minimal forms of corporal punishment are employed, this can increase likelihood of future parental child abuse,⁷⁵ which constitutes a particularly compelling reason to legislate against it.

Adopting a prohibition against parental corporal punishment broadly follows the policy rationale of harm reduction theory (that behaviour should be criminalized if it causes harm to others), subject to determining the more nuanced issue of whether the harm is sufficiently significant to warrant criminalization.⁷⁶

The Constitutional Court of South Africa, in a unanimous judgment in the case of *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others*⁷⁷ delivered on 18th September 2019, decided that the defence of reasonable correction and chastisement should be abolished. Part of their reasoning was based on the best interests of the child.⁷⁸ While this part of the Constitutional Court’s ruling arose in the context of s 28(2) of the Constitution of the Republic of South Africa (which states that, “[a] child’s best interests are of

⁷³ Frank J Elgar and others, “Corporal Punishment Bans and Physical Fighting in Adolescents: An Ecological Study of 88 Countries” (Oct 2018) 8(9) *BMJ Open*, available at <https://www.pubfacts.com/author/Frank+Elgar> (visited 23 July 2019).

⁷⁴ Elizabeth T Gershoff, “Corporal Punishment by Parents and Associated Child Behaviours and Experiences: A Meta-analytic and Theoretical Review” (2002) 128(4) *Psychological Bulletin* 539.

⁷⁵ Hong Kong Committee for UNICEF and Department of Social Work and Social Administration, (2008) *UNICEF Study on Child Friendly Families* para 5.2.8; Ahrim Oh and others, “Exploring Relationships among Child Maltreatment Experience in Childhood and Behaviour Problems as Young Adults: Role of Social Support Among College Students in Hong Kong” (2018) *International Social Work* 1, 2 referring to JL Fung and others (2011) “Directions in Understanding, Preventing, and Treating Disruptions in Parenting and Child Behavioural Problems in Asian American Families” in F Leong and others, *Asian American and Pacific Islander Children’s Mental Health*, available at <http://lualab.psych.ucla.edu/wp-content/uploads/2013/11/Fung-et-al-Chapter-8.pdf> (visited 23 July 2019).

⁷⁶ Michael Jackson, *Criminal Law in Hong Kong* (Hong Kong: Hong Kong University Press 2003) p 13

⁷⁷ [2019] ZACC 34.

⁷⁸ *Ibid.*, para 55.

Forthcoming in Hong Kong Law Journal – draft, please do not cite without permission.

paramount importance in every matter concerning the child”)⁷⁹ the overall reasoning of the Constitutional Court on this point probably has a sufficiently general application so as to enable it to be extended to the Hong Kong context. Namely, rational apprehensions about children’s inherent vulnerability.⁸⁰ Quoting from the judgment, “Children, are, after all, most vulnerable. Some of them are so young that they are incapable of lodging a complaint about abusive or potentially injurious treatment or punishment, however well-intentioned it may have been.”⁸¹

5. Human Rights Law on the Subject of Corporal Punishment of Children

As noted in the introduction, the empirical findings set out above are backed by international human rights law, including that which is binding on Hong Kong, most notably the CRC. The UN General Assembly adopted the CRC in 1989. It came into force on 2 September 1990. Currently 196 countries are party to it, including every United Nations member state bar the United States.⁸² The Committee on the Rights of the Child (Committee) is the body of 18 Independent experts that monitors implementation of the Convention on the Rights of the Child by its State parties.⁸³ The Committee also drafts General Comments providing “authoritative interpretations” of the content of the treaty.⁸⁴

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² Office of the High Commission on Human Rights, “Status of Ratification”, available at <http://indicators.ohchr.org/> (visited 23 July 2019).

⁸³ Office of the High Commission on Human Rights, “The Committee on the Rights of the Child”, available at <https://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx> (visited 8 July 2019).

⁸⁴ Commission on Human Rights, The Right to Food: Report on the Third Expert Consultation on the Right to Food, para14, U.N. Doc. E/CN.4/2001/148 (Mar. 30, 2001); Andrew Byrnes, “Women, Feminism and International Human Rights Law: Methodological Myopia, Fundamental Flaws or Meaningful Marginalisation?” (1989) 12 *Australian Yearbook of International Law* 205, 216; discussed in Kerstin Mechlem, “Treaty Bodies and the “Interpretation of Human Rights” (2009) 42 *Vanderbilt Journal of Transnational Law* 905, 928-30.

Forthcoming in Hong Kong Law Journal – draft, please do not cite without permission.

Although the CRC makes no explicit mention of corporal punishment, several articles relate to violence against children. Article 37 of the CRC requires States to ensure that “no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment”.⁸⁵ Article 19(1) requires States to “take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence”.⁸⁶ The Committee discusses corporal punishment in General Comment No.8, covering “[t]he right of the child to protection from corporal punishment and other cruel or degrading forms of punishment”.⁸⁷ The Committee concludes that the CRC confers an obligation on State parties to implement immediately an absolute prohibition on corporal punishment.⁸⁸ Corporal punishment is defined as “as any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light.”⁸⁹ Corporal punishment is described as “invariably degrading”⁹⁰ and therefore inconsistent with human dignity.⁹¹ The Committee writes:

There is no ambiguity: “all forms of physical or mental violence” [citing A.19] does not leave room for any level of legalized violence against children. Corporal punishment and other cruel or degrading forms of punishment are forms of violence and States must take all appropriate legislative, administrative, social and educational measures to eliminate them.⁹²

[I]t is clear that the practice [of corporal punishment] directly conflicts with the equal and inalienable rights of children to respect for their human dignity and physical integrity. The distinct nature of children, their initial dependent and

⁸⁵ CRC, (n 2 above).

⁸⁶ *Ibid.*

⁸⁷ General Comment on Corporal Punishment, (n 3 above).

⁸⁸ *Ibid.*, para 22.

⁸⁹ General Comment on Corporal Punishment, (n 3 above), para 11.

⁹⁰ *Ibid.*, para 11.

⁹¹ *Ibid.*, para 17.

⁹² *Ibid.*, para 18.

Forthcoming in Hong Kong Law Journal – draft, please do not cite without permission.

developmental state, their unique human potential as well as their vulnerability, all demand the need for more, rather than less, legal and other protection from all forms of violence.⁹³

The Committee therefore “emphasizes that eliminating violent and humiliating punishment of children, through law reform and other necessary measures, is an immediate and unqualified obligation of States parties.”⁹⁴ This is argued despite that “[t]he *travaux préparatoires* for the Convention do not record any discussion of corporal punishment during the drafting sessions”.⁹⁵ The Convention must be regarded as a “living instrument” and since the drafting of the Convention “the prevalence of corporal punishment... has become more visible.”⁹⁶ The argument is strengthened by the work of other treaty bodies. The Committee on Economic, Social and Cultural Rights (CESCR), in its General Comment on The Right to Education, has stated that corporal punishment of children “is inconsistent with the fundamental guiding principle of international human rights law... the dignity of the individual.”⁹⁷ More recent General Comments by the Committee recall and reify this prohibition. The General Comment on Children’s Rights in Juvenile Justice states that corporal punishment “must be strictly forbidden”.⁹⁸ General comment No. 13 covers “the right of the child to freedom from all forms of violence”.⁹⁹ This reaffirms the previous definition,¹⁰⁰ and clarifies a “no exceptions” principle.¹⁰¹ “The Committee has

⁹³ *Ibid.*, para 21.

⁹⁴ *Ibid.*, para 22.

⁹⁵ *Ibid.*, para 22.

⁹⁶ *Ibid.*, para 20.

⁹⁷ *Ibid.*, para 22; Committee on Economic, Social and Cultural Rights, General Comment No. 13 The Right to Education (article 13 of the Covenant) E/C.12/1999/10 (8 December 1999), para 41.

⁹⁸ Committee on the Rights of the Child, General Comment No. 24 (201x), replacing General Comment No. 10 (2007) Children’s Rights in Juvenile Justice, CRC/C/GC/24, para 108.

⁹⁹ Committee on the Rights of the Child, General comment No. 13, The Right of the Child to Freedom From All Forms of Violence, CRC/C/GC/13, (18 April 2011) (General Comment 13).

¹⁰⁰ *Ibid.*, p 24.

¹⁰¹ *Ibid.*, p 101.

Forthcoming in Hong Kong Law Journal – draft, please do not cite without permission.

consistently maintained the position that all forms of violence against children, however light, are unacceptable.¹⁰²

The Committee provides a non-exhaustive list of prohibited actions which meet the definition of “punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light [including] “smacking”, “slapping”, “spanking”.¹⁰³ It covers only punitive force, rather than physical force used to protect children.¹⁰⁴ This definition comprehensively encompasses all forms of even minor physical punishment and specifies that “the Convention requires the removal of any provisions (in statute or common - case law) that allow some degree of violence against children.”¹⁰⁵ Singapore made a declaration upon accession to the treaty stating that, “The Republic of Singapore considers that articles 19 and 37 of the Convention do not prohibit the judicious application of corporal punishment in the best interest of the child”.¹⁰⁶ A similar view was expressed in a report by the UK Secretary of State for Children, Schools and Families in 2007.¹⁰⁷ As noted above, the Welsh government is currently considering removing the defence. The CRC’s interpretations have also been described by the House of Lords and House of Commons Parliamentary Joint Committee on Human Rights as “authoritative” on this issue, as the CRC is “the only body charged with monitoring the obligations undertaken by States in the CRC”.¹⁰⁸

¹⁰² *Ibid.*, p 17.

¹⁰³ General Comment on Corporal Punishment, (n 3 above) para 11.

¹⁰⁴ *Ibid.*, pp 14-15.

¹⁰⁵ *Ibid.*, para 31.

¹⁰⁶ Reservations and Declarations to the CRC: Singapore, 2(c), available at

http://www.bayefsky.com/html/singapore_t2_crc.php (visited 8 July 2019).

¹⁰⁷ Department for Children, *Schools and Families, Review of Section 58 of the Children Act 2004* (October 2007), para 18, available at

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/344503/Review_of_Section_58_of_the_Children_Act_2004.pdf (visited 24 July 2019).

¹⁰⁸ Joint Committee on Human Rights, *Children Bill Nineteenth Report of Session 2003-2004* (2004), available at <https://publications.parliament.uk/pa/jt200304/jtselect/jtrights/161/16102.htm> (visited 24 July 2019).

Forthcoming in Hong Kong Law Journal – draft, please do not cite without permission.

The Committee has specifically addressed this issue with Hong Kong. In the second periodic report on China it stated that “[t]he Committee is concerned that corporal punishment within the family is not prohibited by law and continues to be practiced in the home in Hong Kong.”¹⁰⁹ The government was urged to “explicitly prohibit by law corporal punishment in [all settings].”¹¹⁰ The government responded at the next reporting cycle by stating that “[w]e do not consider that legislation at this stage would be the most effective means of dealing with the issue in Hong Kong. Rather, public education and intervention by professionals are considered more effective.”¹¹¹ Subsequently, the Committee reaffirmed that Hong Kong is required to ban all corporal punishment, including that occurring within the “family”.¹¹² Given these statements by the Committee, Hong Kong’s lack of legislative action banning parental corporal punishment, is, on one very influential view of it, in breach of its international legal obligations.

A significant change may have occurred in 2019, perhaps precipitated by the 2018 Subcommittee on Children’s Rights report previously cited,¹¹³ at the China UPR. Here, the PRC agreed to “[e]xplicitly prohibit corporal punishment in all settings, including in the home.”¹¹⁴ The recommendation applying to Hong Kong pursuant to the third periodic report was broader in nature, being that Hong Kong “should introduce internal legislation to implement the Convention of the

¹⁰⁹ Concluding observations: China (including Hong Kong and Macau Special Administrative Regions) CRC/C/15/Add.271, (30 September 2005) para 47, available at https://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/CRC_Concluding_observations_2005_e.pdf (visited 8 July 2019).

¹¹⁰ *Ibid.*, para 48(a).

¹¹¹ Second Report of the Hong Kong Special Administrative Region under the Convention on the Rights of the Child (27 June 2003) para 150, available at https://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/childright2/2nd_CRC_Report-e.pdf [HK report to CRC] (visited 8 July 2019).

¹¹² Concluding Observations on the Combined Third and Fourth Periodic Reports of China, adopted by the Committee at its sixty-fourth session (16 September–4 October 2013), para. 6(c), Available at [https://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/Concluding\(eng\).pdf](https://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/Concluding(eng).pdf) (visited 8 July 2019).

¹¹³ Subcommittee on Children’s Rights, (n 9 above).

¹¹⁴ China UPR and Response of China to the UPR, (both n 1 above) both at para 28.346.

Forthcoming in Hong Kong Law Journal – draft, please do not cite without permission.

Rights of the Child.”¹¹⁵ The HKSAR government accepted this recommendation, which arguably incorporates the prohibition on corporal punishment.¹¹⁶ However, it is not necessarily certain that the HKSAR government will share this interpretation, nor that it will be expeditious in delivering on its promise. It is timely therefore to consider exactly what a prohibition on corporal punishment would entail, its potential benefits and costs, and how it might be implemented effectively and in accordance with international human rights law.

6. Prohibition without Prosecution?

While the Committee of the CRC has explicitly called for the removal of the reasonable chastisement defence, and defined corporal punishment as all forms of punitive force “however light”, it also invokes the common law *de minimis* principle (which holds that the law does not concern itself with “trivial matters”), to state that “minor assaults” comprising less serious instances of corporal punishment should generally not be referred to prosecution.¹¹⁷

Two important points are raised in this section. First, in the view of the CRC some “assaults” on children are to be considered “minor” and too “trivial” for judicial engagement.¹¹⁸ Here, the Committee is positing that there exists a subset of corporal punishment, here termed “minor assaults” that are both prohibited and not suitable for punitive sanction. The idea that some forms of corporal punishment are “trivial” may seem difficult to square with the rest of the General

¹¹⁵ *Ibid.*, para 28.246.

¹¹⁶ Panel on Constitutional Affairs, *Updated Background Brief Prepared by the Legislative Council Secretariat for the Meeting on 15 April 2019*, Annex F paragraph (f) at page 5. Accepting recommendations does not always mean that the government will immediately move to fully implement that recommendation, however, nor that the recommendation will be interpreted in line with human rights law. See: Edward McMahon and Marta Ascherio, "A Step Ahead in Promoting Human Rights: The Universal Periodic Review of the UN Human Rights Council" (2012) 18 *Global Governance* 231.

¹¹⁷ General Comment on Corporal Punishment, (n 3 above) para 40.

¹¹⁸ *Ibid.*

Forthcoming in Hong Kong Law Journal – draft, please do not cite without permission.

Comment, particularly the classification of prohibited corporal punishment as encompassing all physical punishment, “however light”.¹¹⁹ However, the second important point provides the rationale for this approach. This is the positive argument that “the aim [of prohibition] should be to stop parents from using violent or other cruel or degrading punishments *through supportive and educational, not punitive, interventions.*”¹²⁰

As such, reasonable chastisement could be viewed as having a similar scope to the *de minimis* principle. There is a distinction, however, in that human rights law creates a prohibition on corporal punishment allowing for wider-ranging, and earlier, welfare interventions.¹²¹ While reasonable chastisement permits and thereby ethically legitimatizes some forms of corporal punishment, human rights law is grounded in its normative and legal prohibition.¹²² This encourages and necessitates State parties to engage in a range of positive regulatory and welfare acts short of prosecution to help embed this moral norm. Removing the defence of reasonable chastisement could open space for the redevelopment of social norms away from corporal punishment. Alternatively, the continuance of the defence may be preventing early-stage interventions from occurring, allowing harmful practices to embed and develop within families.

This is an important distinction. However, it could still be argued that were a common law country with such a defence to engage in the various monitoring and educational campaigns recommended by the Committee, it would be in substantive compliance. A rule can remain *de jure* as it goes through the process of *de facto* social de-legitimation required to expunge it.¹²³ Indeed,

¹¹⁹ *Ibid.*, para 11.

¹²⁰ *Ibid.*, para 40 (italics added).

¹²¹ Gerschoff, Physical Punishment, (n 18 above), at 23.

¹²² General Comment on Corporal Punishment, (n 3 above) para 18; para 40.

¹²³ Discussed in Eric Posner, “Symbols, Signals, and Social Norms in Politics and the Law” (1998) 27(2) *The Journal of Legal Studies* 765; Eric Posner, *Law and Social Norms* (Cambridge MA: Harvard University Press, 2009).

Forthcoming in Hong Kong Law Journal – draft, please do not cite without permission.

for some states with engrained social norms toward corporal punishment, an immediate prohibition of the technique may cause outrage that would do little to assist the development of normative evolution, particularly as “prohibition” may be understood as coterminous with criminal prosecution.¹²⁴ Whether this applies to Hong Kong is a sociological question. The relatively high rates of corporal punishment identified above suggest it may be an issue and that therefore an incremental approach may be necessary, particularly focusing on positive measures to educate and change attitudes. We next review the positive measures currently enacted in Hong Kong.

7. The Role of Positive Measures

The Committee employs a dual approach of prohibition and sensitization which marries negative and positive obligations in an attempt to holistically address the problem of corporal punishment.

In 2005 comments, the Committee defined this dual approach as requiring that Hong Kong:

- a) explicitly prohibit by law corporal punishment in the family, schools, institutions and all other settings, including penal institutions; and,
- b) expand public education and awareness-raising campaigns with the involvement of children on alternative non-violent forms of discipline in order to change public attitudes about corporal punishment.”¹²⁵

This was reiterated in the Committee’s 2013 periodic report to China with regard to Hong Kong.¹²⁶ Regarding positive measures, the Committee stated that “[Hong Kong should] establish

¹²⁴ Adam J Zolotor and Megan E Puzia, "Bans Against Corporal Punishment: A Systematic Review of the Laws, Changes in Attitudes and Behaviours" (2010) 19(4) *Child Abuse Review* 229-247, 242.

¹²⁵ Committee on the Rights of the Child, “Fortieth Session, Consideration of Reports of State Parties under Article 44 of the Convention. Concluding Observations: China Including Hong Kong and Macau Special Regions”) Unedited version CRC/C/15/Add.271 (30 September 2005), para 48, available at https://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/CRC_Concluding_observations_2005_e.pdf (visited 8 July 2019).

¹²⁶ United Nations, “Committee on the Rights of the Child, Concluding Observations on the Combined Third and Fourth Periodic Reports of China (including Hong and Macau Special Economic Regions)”, adopted by the Committee at its sixty-fourth session (16 September–4 October 2013). CRC/C/CHN/CO/3-4, (4 October 2013) para 7(c); para 45(a), available at [https://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/Concluding\(eng\).pdf](https://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/Concluding(eng).pdf) (visited 8 July 2019).

Forthcoming in Hong Kong Law Journal – draft, please do not cite without permission.

effective and child-friendly procedures and mechanisms, including free helplines accessible to children, to receive, monitor and investigate complaints; and to undertake awareness-raising activities among children.”¹²⁷ The Committee also recommended that Hong Kong “establish effective consultative mechanisms to ensure respect for the views of children”.¹²⁸ Finally, the Committee recommended the establishment of “a children’s commission or another independent human rights institution with a clear mandate to monitor children’s rights.”¹²⁹ The government, in response, listed various positive measures to discourage the use of corporal punishment and promote family development. These include the establishment of the Family Council in 2007 to review policies from a family perspective,¹³⁰ The Child Care Centres Advisory Inspectorate,¹³¹ and that NGOs operate “138 integrated children and youth services centres.”¹³² Positive measures are also implemented through the Social Welfare Department (SWD), the main body charged with matters related to child abuse and family life. It provides “family and child welfare services with the objective of preserving and strengthening the family as a unit,”¹³³ including “preventive, supportive and remedial services.”¹³⁴ It also includes Family and Child Protective Services Units, tasked with safeguarding children against abuse assisting those affected by custody disputes.”¹³⁵ Other points were raised in response to the CESCR in 2014, including a publicity campaign “to arouse public awareness of the importance of family solidarity, prevention of child abuse and

¹²⁷ *Ibid.*, para 45(c).

¹²⁸ *Ibid.*, para 37.

¹²⁹ *Ibid.*, para 19.

¹³⁰ The Government of the Hong Kong Special Administrative Region’s Response to the List of Issues raised by the United Nations Committee on the Rights of the Child (undated), para 4.3, available at https://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/List_of_Issues_201309.pdf (visited 8 July 2019).

¹³¹ *Ibid.*, para 5.15.

¹³² *Ibid.*, para 5.16.

¹³³ *Ibid.*, para 5.14.

¹³⁴ *Ibid.*, para 5.14.

¹³⁵ *Ibid.*, para 5.14.

Forthcoming in Hong Kong Law Journal – draft, please do not cite without permission.

domestic violence” and the establishment of a “Family Life Education Resource Centre... promoting family functioning, strengthening family relationship and preventing family breakdown.”¹³⁶ The government also described that it was “closely monitoring the problem of child abuse”.¹³⁷ The Hong Kong government has therefore adopted a range of measures to address both corporal punishment and the societal problems that may propagate it. Nonetheless, the legal defence may still constitute a legal and practical barrier to early interventions by police, social workers and other concerned parties, as well as to victim reporting and to the development of parental norms against corporal punishment. Some further reforms to augment this strategy in the Swedish, Hong Kong, and Welsh contexts are considered below.

7.1 The Use of Positive Parenting and Early Intervention Measures

7.1.1 The Swedish Approach

Sweden was the first nation to abolish parental corporal punishment in 1979.¹³⁸ In Sweden, cases involving physical corporal punishment that are automatically referred to Social Services and must be investigated.¹³⁹ While this may place a strain on resources,¹⁴⁰ it can help ensure that families get adequate support.¹⁴¹ A key aspect of this process is identifying whether there is a problem with

¹³⁶ The Hong Kong Special Administrative Region (HKSAR) Government’s Response to the List of Issues raised by the United Nations Committee on Economic, Social and Cultural Rights in Relation to the Second Periodic Report of the People’s Republic of China (undated) para 53.2, available at [https://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/Response_to_LOI-ICESCR\(Eng\)\(3_3_14\).pdf](https://www.cmab.gov.hk/doc/en/documents/policy_responsibilities/Response_to_LOI-ICESCR(Eng)(3_3_14).pdf) (visited 8 July 2019).

¹³⁷ *Ibid.*, para 53.3.

¹³⁸ Joan E Durrant and Staffan Janson, “Law Reform, Corporal Punishment and Child Abuse: The Case of Sweden” (2005) 12 *International Review of Victimology* 139, 141.

¹³⁹ Non-Violent Childhoods, Council of the Baltic Sea States and End All Corporal Punishment of Children, *National Consultation in Sweden* (8-10 May 2017) p 17, Available at http://www.childrenatrisk.eu/nonviolence/wp-content/uploads/sites/3/2017/05/NVC-National-Consultation-Sweden-Report-May-2017-Final-update_cover.pdf (visited 28 November 2019).

¹⁴⁰ *Ibid.*, p 19.

¹⁴¹ *Ibid.*, p 20.

Forthcoming in Hong Kong Law Journal – draft, please do not cite without permission.

parental physical abuse and how best to address it.¹⁴² One of the interventions utilized by Swedish social work agencies in addressing parental corporal punishment has been the instigation of appropriate referrals to a programme called Combined Parent-Child Cognitive Behavioural Therapy (“CPC-CBT”). This programme provides counselling for both parents and children, including, inter alia, training in parenting skills and anger management.¹⁴³ A recent study conducted in Sweden showed that participation in the CPC-CBT programme led to statistically significant reductions in parental corporal punishment amongst the subjects.¹⁴⁴

7.1.2 The Hong Kong Approach

Various Hong Kong studies have shown that Hong Kong parents who have engaged in corporal punishment are open to referral to participation in parenting programmes that can significantly reduce levels of corporal punishment by them,¹⁴⁵ suggesting that this type of intervention could be a promising one in Hong Kong. Furthermore, a significant point which has been made in these Hong Kong studies is the critical importance of early intervention to address harsh parenting practices in helping to ensure the better social and psychological development of children with

¹⁴² *Ibid.*, pp 17-19.

¹⁴³ Johanna Thulin and Cecilia Kjellgren, *Implementing and Evaluating the CPC-CBT Intervention in a Swedish Context* (2018) 5-8, Available at http://www.allmannabarnhuset.se/wp-content/uploads/2018/03/KIBB-artikeln_rapport_eng_webb1.pdf (visited 29 November 2019).

¹⁴⁴ Johanna Thulin and Cecilia Kjellgren, “Treatment in Barnahus: Implementing Combined Treatment for Children and Parents in Physical Abuse Cases”, Chapter 4 in *Collaborating Against Child Abuse Exploring the Nordic Barnahus Model* Susanna Johansson, Kari Stefansen, Elisiv Bakketeig, Anna Kaldal (Eds.) (Palgrave 2017) p 75, pp 87-88.

¹⁴⁵ Sandra Tsang, Cynthia Leung and Tung Wah Group of Hospitals, *The Outcome and Process Evaluation of the Parent-Child Interaction Therapy (PCIT) in Treating Families with Children with Behaviour Problems in Hong Kong* (October 2007); Cynthia Leung, Sandra Tsang, Tammy C S Sin and Siu-yan Choi, “The Efficacy of Parent-Child Interaction With Chinese Families: Randomized Controlled Trial” (2015) 25(1) *Research on Social Work Practice* 117-128 at 121 and 123; Cynthia Leung, Sandra Tsang, Gene S H Ng and S Y Choi, “Efficacy of Parent-child Interaction Therapy With Chinese ADHD Children: Randomized Controlled Trial” (2017) 27(1) *Research on Social Work Practice* 36, 42-44.

Forthcoming in Hong Kong Law Journal – draft, please do not cite without permission.

behavioural disorders.¹⁴⁶ A key issue arising in this context is that “the relationship between child physical abuse and child behaviour problems is likely to be bi-directional. Parental problems might lead to child behaviour problems which might increase the risk of child physical abuse.”¹⁴⁷

However, an amendment to prosecutorial discretion, such as the one proposed for Hong Kong, arguably strikes a rational balance here by slightly ameliorating the mandatory interventionist approach employed in Sweden (that could ensnare innocuous incidents and risk creating a social backlash), while espousing a highly vigilant system to ensure that potential instances of abuse do ‘not fall through the cracks’. Ultimately, in furtherance of this end, suitable protocols would need to be developed between the Hong Kong Police Force, the Department of Justice and the Social Welfare Department (SWD).

The SWD already has procedures in place to allow for investigation of matters pertaining to the welfare of the child,¹⁴⁸ and subsequent referral of parents for “parent education or parent-child activities or courses.”¹⁴⁹ The SWD’s current policy is to work cooperatively with parents as far as deciding what remedial action needs to be taken, subject to the possibility the Hong Kong Police Force or the SWD applying to the Juvenile Court for an order for care or protection for the child pursuant to Section 34(2) of the Protection of Children and Juveniles Ordinance (Cap 213).¹⁵⁰ In conjunction with removal of the defence of reasonable chastisement, these procedures could be

¹⁴⁶ Sandra Tsang, Cynthia Leung and Tung Wah Group of Hospitals (n 145), at 6 and Cynthia Leung, Sandra Tsang, Gene S H Ng and S Y Choi (n 145) at 37 referring to C Webster-Stratton and T Taylor, “Nipping Early Risk Factors In the Bud: Preventing Substance Abuse, Delinquency, and Violence in Adolescence Through Interventions Targeted at Young Children (0-8 years)” (2001) *Prevention Science* 231-256.

¹⁴⁷ *Ibid.*, p 6 referring to Amy D Herschell and Cheryl B McNeil “Theoretical and Empirical Underpinnings of Parent-Child Interaction Therapy with Child Physical Abuse Populations” (May 2005) 28(2) *Education and Treatment of Children* 142.

¹⁴⁸ Social Welfare Department, *Procedural Guide for Handling Child Abuse Cases Revised 2015* (December 2015) 73-75, Available at [http://www.swd.gov.hk/storage/asset/section/1447/en/Procedural_Guide_for_Handling_Child_Abuse_Cases\(Revised_2015_updated_201906_Engpdf\)](http://www.swd.gov.hk/storage/asset/section/1447/en/Procedural_Guide_for_Handling_Child_Abuse_Cases(Revised_2015_updated_201906_Engpdf)) (accessed 30 November 2019).

¹⁴⁹ *Ibid.*, p 77.

¹⁵⁰ *Ibid.*, pp 78-79.

Forthcoming in Hong Kong Law Journal – draft, please do not cite without permission.

modified to allow for an apposite ‘slightly lighter touch’ to be employed when more moderate instances of parental corporal punishment arise. For instance, as a matter of common sense, something akin to a simple warning could be delivered to offending parent where the incident was very minor and that type of warning could be expected to lead to a cessation of such behaviour, as is envisaged in policy reform discussions in Wales.

7.1.3 Intended Policy Reforms in Wales

The Welsh government is currently considering these questions as it debates whether to remove the defence of corporal punishment in Wales. Its research and conclusions may be informative to Hong Kong, given their shared common law system. The tabled Bill aims “to help protect children’s rights by abolishing the common law defence of reasonable punishment of children so it can no longer be relied on by parents in any criminal or civil court proceedings within the territory of Wales.”¹⁵¹ As such, it would “align Welsh law with the Convention on the Rights of the Child.”¹⁵² Currently, in Wales, the defence of reasonable chastisement is only available for offences of assault or battery, or the tort of trespass, against a child,¹⁵³ with the former defined as an ‘injury [that] is transient and trifling and amounts to no more than a temporary reddening of the skin.’¹⁵⁴ The explanatory memorandum shows that the defence is rarely used in the UK, citing a 2007 government study. Between 2005 and 2007 the defence was successful only four times in its appropriate context, was used four times erroneously, and was not used explicitly but could have been a contributory factor a further four times.¹⁵⁵ However, it also notes that the existence of the

¹⁵¹ Wales Memo, (n 16 above), para 3.28.

¹⁵² *Ibid* para 3.38.

¹⁵³ *Ibid.*, p 4, IV.

¹⁵⁴ *Ibid.*, p 4, V.

¹⁵⁵ *Ibid.*, para 3.17.

Forthcoming in Hong Kong Law Journal – draft, please do not cite without permission.

defence – available only to parents or those in loco parentis and only where the charge of common assault or battery - may disincline prosecutors from pursuing cases.¹⁵⁶

The memorandum does not mention the *de minimis* principle. It does however state that “[p]rohibiting the physical punishment of children will allow frontline professionals to provide unequivocal advice to parents about how to provide discipline and guidance for their children through non-physical means.”¹⁵⁷ The government proposes a range of measures to support parents and raise awareness that align with human rights law.¹⁵⁸ It states further that the government is continuing to develop how the police, social services and other agencies should “work together to respond to reported incidents of parental assault on a child.”¹⁵⁹ This suggests that in time guidance will be produced elaborating upon which cases should be prosecuted and which should be left to social services. However, the memorandum is clear that parents could face prosecution, acknowledging that the police and prosecutors have a range of options, including “the potential for a statutory or non-statutory out of court disposal [such as cautions and community disposals] to be used rather than prosecution.”¹⁶⁰ The explanatory memorandum leaves some key questions unanswered, namely around the line between prosecution and other interventions, but these may be addressed directly in the near future. The approach nonetheless appears broadly coherent with the approach suggested herein. It suggests that if the Hong Kong government is considering this change, that developments in Wales should be tracked closely.

8. Should the Defence of Reasonable Chastisement be removed in Hong Kong?

¹⁵⁶ *Ibid.*, pp 4-5, V.

¹⁵⁷ *Ibid.*, para 8.52.

¹⁵⁸ *Ibid.*, paras 3.57-3.66

¹⁵⁹ *Ibid.*, para 9.3.

¹⁶⁰ *Ibid.*, para 8.53.

Forthcoming in Hong Kong Law Journal – draft, please do not cite without permission.

The Global Initiative to End All Corporal Punishment of Children (Initiative) offers the following rationale for Hong Kong to remove the defence of reasonable chastisement:

Given the near universal acceptance of corporal punishment in childrearing, this defence [of reasonable chastisement] must be repealed so that the law clearly states that no degree or kind of corporal punishment is acceptable or lawful. Prohibition of corporal punishment of children, however light, should be enacted in relation to all those with parental authority over children.¹⁶¹

As with the Committee, the Initiative cites the moral, social and legal rationales for the prohibition on corporal punishment. The defence “must be repealed” because corporal punishment has “near universal acceptance” – this is a rationale rooted in social norms. Corporal punishment must be made neither “acceptable” (a social and moral rationale), nor “lawful” (a legal rationale specifically engaged over corporal punishment “however light”). Prohibition is important to punish offenders, but more so to improve the culture around caregiving. As global norms, including those of Hong Kong, gradually acculturate towards the norm against corporal punishment, it may be that the continuance of the defence of reasonable chastisement becomes a barrier against progress.¹⁶²

As noted, Hong Kong does not deviate significantly from human rights law. The aim of human rights law is to prevent corporal punishment by improving parenting cultures through education and other soft methods, an aim that the Hong Kong government appears to share.¹⁶³ However, if Hong Kong is to seriously consider removing the defence an incremental approach is almost certainly needed. Otherwise, it could risk infringing upon what many Hong Kong citizens

¹⁶¹ The Global Initiative to End All Corporal Punishment of Children, *Corporal Punishment of Children in Hong Kong*, (November 2018), p 1, available at <http://www.endcorporalpunishment.org/wp-content/uploads/country-reports/HongKong.pdf> (visited 8 July 2019).

¹⁶² Kai Ji and David Finkelhor, “A Meta-Analysis of Child Physical Abuse Prevalence in China” (2015) 43 *Child Abuse and Neglect* (2015) 61, 62.

¹⁶³ HK report to CRC, (n 111 above), 150.

Forthcoming in Hong Kong Law Journal – draft, please do not cite without permission.

see as their own private sphere. Hong Kong family dynamics can involve a complex mix of parents, grandparents and domestic helpers.¹⁶⁴ A 2018 report states that “traditional Chinese families may consider appropriately limited physical punishment as a method of teaching.”¹⁶⁵ Therefore, the precise nature of social care interventions needs to be carefully constructed in consultation with a range of actors. To this end, the starting point could be a Law Reform Commission Consultation Paper soliciting the views of the public on the matter. Particularly important would be those of parenting groups, social workers, teachers and legal professionals. This would allow discussion around the nature of interventions for those aspects of corporal punishment that are to be prohibited but not prosecuted. As this is an area of both moral contention and technical expertise across a range of legal areas,¹⁶⁶ soliciting such views is a vital first step.

It should also be clarified that those acts of corporal punishment that currently fall under “reasonable chastisement” would now fall under a set of minor offences that would allow the government, at most, to take monitoring and social care interventions. To return to Baroness Upholland’s example, there is no reason Hong Kong prosecutors need be involved over a mild smack on the hand witnessed in a supermarket.

If the common law defence were to be abolished,¹⁶⁷ concerns about consequential prosecutions could be avoided by the insertion of a paragraph in the *Policy for Prosecuting Cases*

¹⁶⁴ LegCo, *Notes of the First Meeting of the Commission of Children* (25 June 2018) para16(c), available at <https://www.legco.gov.hk/index.html> (visited 8 July 2019).

¹⁶⁵ Chung Wai So and others, “A Local Review of Child Abuse in Hong Kong: From the Perspective of Emergency Physicians” (November 2018) 25(6) *Hong Kong Journal of Emergency Medicine* 350, 355.

¹⁶⁶ Consequences for parental discipline can also apply in the family law arena: *C v S* [2017] HKEC 2141. Furthermore, parents may be liable for fines, damages and costs in relation to their child’s criminal acts pursuant to s 10 of the Juvenile Offenders Ordinance: Liu, (n 43 above), pp 216-220.

¹⁶⁷ This could be achieved by the insertion of a paragraph as follows in a new s 27(4) OAPO, “The common law defence of reasonable chastisement is abolished in criminal and civil matters.”

Forthcoming in Hong Kong Law Journal – draft, please do not cite without permission.

involving Domestic Violence published by the Department of Justice (“the proposed amendment to the DoJ’s Policy on Prosecuting Domestic Violence”).¹⁶⁸

The removal of the defence of reasonable chastisement means that all forms of corporal punishment against children would now be prohibited in law. However, the prosecutor will only accept cases involving parental corporal punishment which meet the standard of "endanger[ing] or impair[ing] the physical/psychological health and development of an individual under the age of 18" [as is the current standard]. For cases of parental corporal punishment falling short of this standard, referrals for social care interventions should be considered, where appropriate, taking into account the strong desire, also a requirement of human rights law, to keep families together and to work with families to ensure the healthy development of children in Hong Kong. For the purposes of this paragraph, the reference to parental corporal punishment will include cases involving those acting in loco parentis.

A criticism could be raised that providing this type of complete discretion to the prosecution abrogates the rule of law,¹⁶⁹ in that the prosecution would now in effect have the power to decide whether the parent should be prosecuted and potentially convicted.¹⁷⁰ Particular concerns might be the degree to which courts in common law systems, rather than prosecutors, are able to maintain principles of equity and transparency.¹⁷¹ Of course, a high degree of prosecutorial discretion, as

¹⁶⁸ Department of Justice, *The Policy for Prosecuting Cases involving Domestic Violence*, available at <https://www.doj.gov.hk/eng/public/pubppcdv.html> (visited 8 July 2019).

¹⁶⁹ In discussing the rule of law, Bibas has stated, “Rules should be clear, general, stable, announced in advance, applied prospectively and consistently, and capable of being followed.”; Stephanos Bibas, “The Need for Prosecutorial Discretion” (2010) *Faculty Scholarship Repository, Paper 1427*, 369, 375 at 371 Available at https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?context=faculty_sch... (accessed on 26 November 2019)

¹⁷⁰ See Austin Sarat and Conor Clarke, “Beyond Discretion: Prosecution and the Logic of Sovereignty, and the Limits of Law” (Spring 2008) 33(2) *Law and Social Inquiry* 387-416 389 as to general concerns about the potential detrimental impact of prosecutorial discretion in maintenance of the precision of the rule of law.

¹⁷¹ See, The Government of the Hong Kong Special Administrative Region, *Press Releases CJ’s Speech at Ceremonial Opening of the Legal Year 2019 2* available at <https://www.info.gov.hk/gia/general/201901> >

Forthcoming in Hong Kong Law Journal – draft, please do not cite without permission.

reflected in the Prosecution Code, exists under the common law of Hong Kong in deciding whether or not to lay charges; the only real issue that arises is when that discretion should be exercised.¹⁷²

Consistent with the existence of this principle of prosecutorial charging discretion in Hong Kong, the Department of Justice has published a chapter in its Prosecution Code as to the public interest criteria that should be applied in determining how this discretion should be applied in domestic violence cases¹⁷³ (which would logically encompass all forms of parental corporal punishment, should the defence of reasonable correction and chastisement be abolished). In particular, the Department of Justice has envisaged that not all domestic violence cases should be prosecuted. Quoting from *The Policy for Prosecuting Cases involving Domestic Violence* of the Department of Justice: “On rare occasions, the public interest might not require a prosecution in cases involving domestic violence. Such situations might arise where

- the violence involved was minimal;
- the accused has no history of spousal or other forms of violence such that the risk to the victim's safety can credibly be assessed as ‘low’;
- the accused is motivated to change (as evidenced, for example, by participation in counselling sessions).”¹⁷⁴

A strong argument can be presented then that the proposed amendment to the Department of Justice’s Policy on Prosecuting Domestic Violence at page 29 of this article, along with existing

P2019011400413 (visited 26 November 2019); Stephanos Bibas, “Prosecutorial Regulation Versus Prosecutorial Accountability” (April 2009) 157(4) *University of Pennsylvania Law Review* 963 and 975.

¹⁷² Michael Fisher Text, *Cases and Commentary on the Hong Kong Legal System* (Hong Kong: Hong Kong University Press 2019) 551-564; *D v Secretary for Justice* [2013] HKCA 304; [2013] 3 HKLRD; [2013] 6 HKC 543; CACV 98/2013 (24 June 2013).

¹⁷³ The Department of Justice. Hong Kong Special Region, *The Policy for Prosecuting Cases involving Domestic Violence* (last reviewed date March 2015) available at <https://www.doj.gov.hk> (visited 26 November 2019).

¹⁷⁴ *Ibid.*, para 17.

Forthcoming in Hong Kong Law Journal – draft, please do not cite without permission.

policy, is generally in alignment with accepted principles of prosecutorial discretion, and more particularly, should militate against any perceived possibilities of (using a phrase coined by Bibas) “idiosyncratic” prosecutorial discretion.¹⁷⁵

The most meaningful scope of the legal change would be to empower those agencies, victims, and witnesses, to report acts of corporal punishment that fall short of abuse, particularly if they are regular or severe. This would help to shift the burden of proof away from the victim and encourage early-interventions.

Such a change could well help to foster progressive social development in Hong Kong. This aligns with Gerschoff’s review of those states that have banned corporal punishment. In almost all cases it 1) removes the relevant legal defence, 2) does not create an offence of “smacking” or similar, 3) aligns child and adult assault laws (e.g. through the *de minimis* principle), 4) is aimed at setting a clear standard of caregiving, not at prosecuting parents.¹⁷⁶ Therefore, it would appear that Hong Kong could follow suit without risking an increase in prosecutions. Such a move could reduce harm to children, and help embed the social norm against violence toward children in future generations. Hong Kong is working in this direction but the reasonable chastisement defence may be a barrier to comprehensive reform, based on findings in other countries.

The findings of a 2011 study by Bussmann et al of five European countries were strongly suggestive that a combination of both legal deterrents and education provide the most effective means of reducing incidences of parental corporal punishment.¹⁷⁷ The authors discovered that, at

¹⁷⁵ Bibas, (n 171 above).

¹⁷⁶ Gerschoff, (n 18 above), p 23.

¹⁷⁷ Kai-D Bussmann, Claudia Erthal, and Andreas Schroth, “Effects of Banning Corporal Punishment in Europe. A Five-Nation Comparison” in J E Durrant and A B Smith (Eds.) *Global Pathways to Abolishing Physical Punishment: Realizing Children’s Rights* 299-332 (New York, NY: Routledge).

Forthcoming in Hong Kong Law Journal – draft, please do not cite without permission.

the time of the study, in relation to the category of violent parenting,¹⁷⁸ two countries which both prohibited corporal punishment and funded countrywide educational campaigns discouraging its use, namely Sweden (at 3.4%) and Germany (at 13.8%) had the lowest rates in this category.¹⁷⁹ Spain (at 47.7%) had nationwide publicity campaigns counselling against parental corporal punishment, but did not ban it.¹⁸⁰ France, which neither banned parental corporal punishment, nor had nationwide campaigns publicly advocating against it, had a similar, but slightly lower rate than Spain in this category at 46.7%.¹⁸¹ Austria, which had a rate of “violent parenting” of 14.2%, banned corporal punishment but did not launch a nationwide publicity campaign against it.¹⁸² Generally, this pattern was largely reversed in relation to the category of “Nonviolent parenting”, being parents who abstained from corporal punishment.¹⁸³

The authors of this study surmised that the main reason why Germany’s figures were different to Sweden was that non-physical means of parental corporal punishment had been the societal norms for a longer period in Sweden and the Swedish publicity campaign against this type of corporal punishment had been ongoing,¹⁸⁴ whereas the German publicity campaign had only been a few years in duration.¹⁸⁵

Overall, these results should be perhaps expected, as, according to Landsford et al, (writing in the context of factors affecting use of parental corporal punishment) aside from the conventional ways that laws regulate conduct through reward and punishment, “laws induce behaviour change

¹⁷⁸ This encompassed the use of severe corporal punishment relating to the items, “resounding slap on the face, beating with an object, severe beating”: *Ibid.*, p 304.

¹⁷⁹ *Ibid.*, pp 299- 304.

¹⁸⁰ *Ibid.*, pp 301-304.

¹⁸¹ *Ibid.*,

¹⁸² *Ibid* pp 300-304.

¹⁸³ The figures for “Nonviolent parenting” for Sweden, Austria, Germany, Spain and France were 75.9%, 30%, 28.2%, 16.1% and 7.9% respectively: *Ibid.*, p 305.

¹⁸⁴ *Ibid.*, p 308

¹⁸⁵ *Ibid.*, p 310.

Forthcoming in Hong Kong Law Journal – draft, please do not cite without permission.

because they function as a public instantiation of societal beliefs about the appropriateness of a particular behaviour.”¹⁸⁶ Furthermore, “the use of public awareness campaigns and interventions may help to promote changes in individual’s own beliefs about corporal punishment...and to move individuals toward later stages of behaviour change...such as feeling efficacious about using nonviolent forms of discipline.”¹⁸⁷

Conclusion

This article has reviewed the defence of reasonable chastisement in Hong Kong in relation to the region’s commitments under international human rights law. The defence has been construed by the influential and authoritative Committee as an explicit breach of these commitments, although, through a multitude of negative and positive undertakings, Hong Kong’s practice is well-aligned with the standards outlined under the CRC. Moreover, the removal of the defence according to human rights law standards is not designed to increase prosecutions. Rather, it promotes interventions to assist families in providing more stable home environments. We have argued therefore that a well-defined and carefully implemented and publicized removal of the defence could have significant benefits without the obvious drawback of increasing prosecutions of parents. Rather, it would allow early-stage monitoring, reporting, and advice, and an increased role for social workers to intervene where it was felt necessary. As such, we submit that the government of Hong Kong follow the approach of the Welsh government in beginning conversations around this change, starting with a Law Reform Commission Consultation Paper.

¹⁸⁶ Jennifer E Landsford, Claudia Cappa, Diane L Putnick, Marc H Bornstein, Kirby Deater-Deckard and Robert H Bradely, “Change Over Time in Parents’ Beliefs About and Reported Use of Corporal Punishment in Eight Countries With and Without Legal Bans” (September 2017) *Child Abuse and Neglect* 44, 53.

¹⁸⁷ *Ibid.*