

Standing Committee on Law and Justice

**Report on the inquiry into
the Crimes Amendment
(Child Protection –
Excessive Punishment) Bill
2000**

Ordered to be printed Tuesday 24 October according to the
Resolution of the House

New South Wales Parliamentary Library cataloguing-in-publication data:

New South Wales. Parliament. Legislative Council. Standing Committee on Law and Justice

Report on the inquiry into the Crimes Amendment (Child Protection – Excessive Punishment) Bill 2000 / Legislative Council, Standing Committee on Law and Justice. [Sydney, N.S.W.] : The Committee, 2000. – 113 p. ; 30 cm. (Parliamentary paper ; no 461) (Report 15, October 2000)

Chair: Ron Dyer

“Ordered to be printed according to the resolution of the House”.

ISBN 0731397428

New South

1. New South Wales. Parliament. Crimes Amendment (Child Protection – Excessive Punishment) Bill 2000.
2. Child welfare—New South Wales—Law and legislation.
3. Discipline of children—New South Wales—Law and legislation.
- I. Title
- II. Dyer, Ron.
- III. Series: Parliamentary paper (New South Wales. Parliament) ; no. 461
- IV. Series: New South Wales. Parliament. Legislative Council. Standing Committee on Law and Justice Report ; 15

328.37 (DDC21)

How to contact the committee

Members of the Standing Committee on Law and Justice can be contacted through the Committee Secretariat. Written correspondence and enquiries should be directed to:

The Director

Standing Committee on Law and Justice

Legislative Council

Parliament House, Macquarie Street

Sydney New South Wales 2000

Internet www.parliament.nsw.gov.au

Email lawandjustice@parliament.nsw.gov.au

Telephone (02) 9230 3311

Facsimile (02) 9230 3371

Terms of Reference

That the Standing Committee inquire into and report on:

- 1)** The Crimes Amendment (Child Protection – Excessive Punishment) Bill; and
- 2)** The Committee report within 5 months.

These terms of reference were referred to the Committee by The Legislative Council¹

¹ Minutes of the Proceedings of the Legislative Council, 2 June 2000, p 489.

Committee Membership

The Hon Ron Dyer MLC Australian Labor Party Chair

The Hon John Ryan MLC Liberal Party Deputy Chair

The Hon Peter Breen MLC Reform the Legal System Member

The Hon John Hatzistergos MLC Australian Labor Party Member

The Hon Janelle Saffin MLC Australian Labor Party Member

Table of Contents

	Chair’s Foreword	ix
	Executive Summary	x
	Summary of Recommendations	xii
Chapter 1	Introduction	1
	Reference from the Legislative Council	1
	Conduct of this inquiry	1
	Structure of this report	2
Chapter 2	The Bill in context	3
	The common law defence of “lawful correction”	3
	Recent use of the defence of “lawful correction”	4
	Reform Proposals	6
Chapter 3	The Bill	8
	61AA (1) – restatement of the common law defence	8
	Proposed subsection 61AA (2) – definition of where the use of physical force is not reasonable	9
	Subsections 61AA (3) and (4)	10
	Subsection 61AA (5) definitions, including person acting for a parent	10
	Remaining provisions of the Bill, including delayed commencement	12
Chapter 4	Arguments Supporting the Bill	13
	Introduction	13
	Injuries Can be Prevented	14
	Bill has an Educative Role	16
	Parents will not be Prosecuted for Trivial Offences	17
	Current Laws are Inadequate	18
	The Bill Reflects Current Community Standards	19
	Overseas Experience shows Legislation can Influence Parental Discipline	20
	Australia’s Human Rights Obligations would be Advanced by the Bill	22
	The Bill will Reduce Psychological Harm	22
Chapter 5	Arguments Against the Bill	25
	Introduction	25
	Existing Laws are Adequate	25

	Bill will Criminalise Ordinary Parents	26
	Interference of State with Families	27
	Cultural Issues	29
	Bill Confuses Pain with Harm	30
	Bill will contribute to Decline in Discipline	31
	Creation of Uncertainty	31
	Stepping Stone to Banning Smacking	32
	Community Education Campaign is Better	32
Chapter 6	Other Views on the Bill: Legal And Technical Issues	34
	Introduction	34
	Restatement of the Common Law in s 61 AA (1)	35
	Uncertainty caused by “trivial or negligible in all the circumstances”	36
	Meaning of “Threaten to Cause”	37
	“Harm to the child that lasts for more than a short period”	37
	Age of child	39
	Person Acting for a Parent – Child Care Workers and Teachers	40
	Person Acting for a Parent – Express Authorisation	44
	Person Acting for a Parent - Siblings	46
	Person Acting for a Parent - Indigenous communities	47
Chapter 7	The Committee’s View	49
	Reasons for Supporting the Bill	49
	Recommended Amendments to the Bill	51
	Community Education Campaign	53

Appendix 1	Crimes Amendment (Child Protection - Excessive Punishment) Bill	55
Appendix 2	Submissions and Letters Received	64
Appendix 3	Witnesses at Hearings	68
Appendix 4	Advice from Professor Patrick Parkinson	71
Appendix 5	Child Physical Abuse Statistics - Westmead Children's Hospital	83
Appendix 6	Minutes of the Proceedings	86

Chair's Foreword

This report is the result of detailed consideration of the Crime Amendment (Child Protection – Excessive Punishment) Bill 2000 by the Standing Committee on Law and Justice. At the conclusion of its inquiry, which has involved the review of 40 submissions, and the taking of evidence from some 21 expert witnesses, the Committee has unanimously resolved to recommend that the Legislative Council support the passage of the Bill, subject to minor modification.

The Committee believes that the Crimes Amendment (Child Protection – Excessive Punishment) Bill is not only an advance on the common law defence of “lawful correction”. Most importantly, the Bill also serves an essential educative purpose, providing parents with guidance as to what is acceptable and what is not acceptable physical punishment of children.

The message of the Bill is clear: it is unlawful to strike a child on the head or neck, or with a belt or stick. The Bill does not ban smacking. It is not, and should not be portrayed as, an anti-smacking Bill.

The Committee does recommend a number of minor amendments to the Bill. The most significant of these, set out in Recommendation Three, resolves an unintended consequence of the Bill drawn to the Committee's attention by teachers and child care workers. This and other issues have been fully explored during the Committee's inquiry. As one of the witnesses to give evidence has written to Committee: “The Committee's inquiry into the Bill demonstrates the benefits of such careful scrutiny of legislation prior to enactment.”

On behalf of the Committee, I would like to thank all those who made submissions and who gave evidence during the course of the inquiry. It was the high quality of the evidence that enabled the Committee to thoroughly explore both the intent and consequences of the Bill. I would particularly like to acknowledge the assistance provided by Professor Parkinson, who not only made a submission and gave evidence but also provided the Committee with helpful written advice.

I would like to thank the members of the Committee for their balanced and considered approach to this inquiry. Committee members have fairly and conscientiously examined each of the issues raised and views expressed in relation to the Bill. It is appropriate to point out that this report reflects the unanimous views of three Government members, one Opposition member and one Cross-Bench member.

I would also like to acknowledge the role of the Committee Secretariat in this inquiry. Committee Director, David Blunt, and Senior Project Officer, Steven Reynolds, shared the drafting of this report. Committee Officer, Phillipa Gately, provided essential administrative support and formatted the report.

I trust that the report will be of assistance to the House in its further consideration of the Crimes Amendment (Child Protection – Excessive Punishment) Bill 2000. I commend the report to the House.

Hon Ron Dyer MLC
Committee Chair

Executive Summary

The Crimes Amendment (Child Protection – Excessive Punishment) Bill 2000 was introduced into the Legislative Council by the Hon Alan Corbett MLC on 5 May 2000. Prior to a vote being taken on the second reading, the Legislative Council referred the Bill to the Standing Committee on Law and Justice on 2 June 2000. The Committee was required to inquire into the Bill and report within 5 months.

The Committee placed advertisements in newspapers for submissions, and the Chair wrote to more than 60 individuals or organisations inviting them to make submissions. These included persons suggested by either Mr Corbett or Rev the Hon Fred Nile MLC (an opponent of the Bill). The Committee received 40 submissions and held four days of public hearings at which 20 witnesses gave evidence in relation to the Bill.

The Bill is a codification of the common law defence of “lawful correction” or “reasonable chastisement”. Currently it is a defence to a charge of assault that the person was administering corporal punishment while acting in a parental role, provided the punishment was reasonable in all the circumstances. The Bill seeks to codify this common law defence by inserting it in the Crimes Act. The Bill modifies the defence so that it cannot be pleaded when a parent uses sticks, belts or other objects (other than in trivial cases); when a parent strikes a child above the shoulders (other than in trivial cases); or when a parent causes harm which lasts for more than a short period. The Bill also restricts the use of the defence to only family members, some of whom (such as step parents) require express authorisation to impose physical punishment.

Those supporting the Bill came from medical, child protection and legal backgrounds. Their views are summarised in Chapter Four. Supporters argue that the Bill will have an educative effect by making it clear that forceful blows to the head of a child, or any forceful blows with objects, are unacceptable as a means of parental discipline. They argue that the Bill reflects current community standards. The Bill’s supporters believe it is pragmatic, providing sufficient safeguards to protect ordinary parents from trivial prosecutions. Supporters argue that overseas experience demonstrates the significant improvements in child protection that can be made by legislation backed by community education campaigns. The Bill is also said to advance implementation of Australia’s human rights undertakings.

Those opposing the Bill came primarily from religious organisations or groups representing parents. The arguments against the Bill are outlined in Chapter Five. The main concerns are that the Bill is an inappropriate interference in the family unit and in particular in the rights of parents to discipline their children. They fear the Bill is a stepping stone to the banning of all physical punishment, including smacking. At worst the Bill is seen as potentially criminalizing ordinary parents, and at best as creating uncertainty or undermining the confidence of parents. Opponents of the Bill share the concerns of supporters to prevent abusive discipline but believe child protection laws rather than the criminal law should be the means by which abuse is deterred.

Legal experts were asked by the Committee to examine technical issues regarding the Bill. These views are discussed in Chapter Six. The issues raised are mainly concerned with the narrowing the class of persons to whom the defence of lawful correction is available. Concern was expressed as to how the current wording of “person acting for a parent” would affect child care workers, teachers, babysitters

and siblings aged under 18. Lesser concerns raised include the definition of “harm for more than a short period”, the usefulness of the words “trivial or negligible in all the circumstances”; and whether the common law defence was correctly restated. The Committee itself raised the issue of age of the child to which physical discipline could be applied.

The Committee’s view and recommendations are contained in Chapter Seven. The Committee is persuaded by the arguments from those best placed to understand the way in which abuse and injuries occur. Apart from a very small minority of sociopathic parents who will abuse children under any conditions, there is no clear cut-off where excessive punishment ends and abuse begins. Many of the very serious injuries seen by hospitals come as a result of physical discipline gone wrong rather than premeditated abuse.

The Bill provides parents with a guide to what is acceptable, normal discipline. Smacking with an open hand is acceptable; striking a child above the neck, or with objects such as sticks or belts is unacceptable. The Bill is an advance on the common law, which at present gives no guidance to parents on acceptable/non-acceptable physical discipline. The Committee does not accept the arguments that the child protection laws currently existing are sufficient to make this Bill unnecessary; child protection laws do not set clear standards for *all* parents on physical discipline.

The Committee believes the Bill does define current community standards, so far as this is possible in a diverse state such as NSW. Only one witness attempted to support a blow to the face as acceptable or appropriate; no-one defended the use of a belt and the only support for use of objects in discipline came from those who argued for the “wooden spoon”. For very many parents the Bill will make no difference at all, because it reflects their current standards. For a minority of parents this legislative standard may force them to consider modification of their methods of physical discipline.

The purpose of the Bill is to set a standard, not be the source of prosecutions. Cases of serious abuse will continue to be pursued through child protection legislation. A certain level of trust is required in the common sense of police and child protection authorities in the exercise of their discretion. The Committee is encouraged that the Bill is supported by both the Law Society and the Bar Association, bodies not noted for excessive trust in the use of prosecutorial discretion.

The Committee does not see this Bill as a stepping stone to the banning of all physical punishment. The Committee expresses no view whatsoever on smacking because this Bill does not require examination of this issue.

The Committee recommends the Bill be supported with three minor modifications: removing a drafting error in s 61AA (2) (c); permitting siblings aged under 18 to be able to use the defence of lawful correction; and ensuring that the rights of teachers and child care workers to use physical restraint, in the interests of management or control as distinct from discipline, are not affected by the Bill.

A community education campaign should precede the operation of the Bill. Without the Bill a community education campaign to reduce excessive punishment may be moderately helpful, but may be ignored by many as only an expression of opinion. The Bill provides a message: these are the standards which have been determined by Parliament as acceptable within this State, going beyond this is excessive punishment and is a criminal assault. The Committee believes the Parliament has the opportunity to send a message to the community that excessive physical punishment is no longer acceptable in New South Wales in the year 2000.

Summary of Recommendations

Recommendation 1 51

The Committee recommends that the Legislative Council support the passage of the Crimes Amendment (Child Protection – Excessive Punishment) Bill, subject to the minor amendments contained in Recommendations Two, Three and Four.

Recommendation 2 51

The Committee recommends the words “or threaten to cause” be deleted from s 61 AA (2)(c) of the Bill.

Recommendation 3 52

The Committee recommends the words “management or control” be deleted from s61 AA (1) and s61 AA (5) (a) (ii), and that s61 AA (4) be replaced with the words “Nothing in this section alters the common law concerning the management, control or restraint of a child by means of physical contact or force for purposes other than punishment.”

The Committee also recommends the words “or other persons to whom the parent has entrusted the care and management of the child” be added after the words “parent of the child” in s61 AA (5) (a) (i).

Recommendation 4 53

The Committee recommends that the words “of or above the age of 18” be removed from s61AA (5).

Recommendation 5 54

The Committee recommends that the NSW Government launch a major community education campaign prior to the Bill commencing, and that this campaign continue to be an ongoing program afterwards. The campaign should inform parents of the standards of what is acceptable and what is not acceptable punishment, and suggest alternative discipline strategies. The campaign should be regularly evaluated for its success in delivering its message.

Chapter 1 Introduction

Reference from the Legislative Council

- 1.1** The Crimes Amendment (Child Protection – Excessive Punishment) Bill 2000 was introduced into the Legislative Council by the Hon Alan Corbett MLC on 5 May 2000. A copy of the Bill is reproduced as Appendix One. The second reading debate on the Bill resumed on 26 May 2000, during which 14 members spoke on the Bill.²
- 1.2** Prior to a vote being taken on the second reading of the Bill, on 2 June 2000 the Legislative Council referred the Crimes Amendment (Child Protection – Excessive Punishment) Bill 2000 to the Standing Committee on Law and Justice. The terms of reference were:

That the Standing Committee on Law and Justice inquire into and report on:

- 1) The Crimes Amendment (Child Protection – Excessive Punishment) Bill; and
- 2) The Committee report within 5 months.³

Conduct of this inquiry

- 1.3** The Committee placed advertisements in newspapers on 10 June 2000 calling for written submissions. The Committee Chair also wrote directly to more than 60 individuals or organisations advising them of the inquiry and inviting them to make submissions. These individuals and organisations included a number that had been suggested by either the Hon Alan Corbett MLC, or Rev the Hon Fred Nile MLC (who had spoken against the Bill during the second reading debate). The Committee received 40 submissions. A list of the individuals and organisations which made submissions is reproduced as Appendix Two. The Committee also received a number of letters about the Bill (in virtually identical terms) which also appear in Appendix Two.
- 1.4** In response to a request from the Committee Chair, the Parliamentary Library Research Service prepared a briefing paper on the Bill. This was published in July 2000.⁴ The briefing paper provided a commentary on the Bill and sought to place the Bill in the context of its relevant legal background.
- 1.5** The Committee held four days of public hearings on 8, 14, 21 and 24 August 2000, at which 20 witnesses gave evidence in relation to the Bill. A list of witnesses is reproduced as Appendix Three.

² 11 Members spoke in support of the Bill and three spoke against it. *NSWPD (LC)* 5 May 2000; 26 May 2000; 2 June 2000.

³ Minutes of the Proceedings of the Legislative Council, 2 June 2000, p 489.

⁴ G Griffith, *Crimes Amendment (Child Protection – Excessive Punishment) Bill 2000: Background and Commentary*, NSW Parliamentary library Research Service Briefing Paper no 9/2000, July 2000

- 1.6** During the course of the hearings, the Committee sought additional written advice from one of the witnesses who had appeared before the Committee, Professor Patrick Parkinson of the Faculty of Law at the University of Sydney. Professor Parkinson's advice, which is discussed in Chapter Seven, is reproduced as Appendix Four. Appendix Five contains statistics on physical abuse and neglect of children from the Child Protection Unit of Westmead Children's Hospital during 1998/99.
- 1.7** The Chair's draft report was prepared during September and was circulated to the Committee for consideration at a deliberative meeting on Friday 13 October. Relevant Minutes of Proceedings of the Committee are reproduced as Appendix Six.

Structure of this report

- 1.8** This report is divided into three parts. Part One, consisting of Chapters One, Two and Three contains background information in relation to the Crimes Amendment (Child Protection – Excessive Punishment) Bill 2000. **Chapter Two** discusses the nature of the common law defence of "lawful correction" or "reasonable chastisement", including its definition, evidence of its use and recent reform proposals. **Chapter Three** presents a clause by clause explanation of the Bill itself.
- 1.9** Part Two, consisting of Chapters Four, Five and Six, summarises the evidence received by the Committee. **Chapter Four** sets out the arguments in support of the Bill as expressed by witnesses and in submissions. **Chapter Five** sets out the arguments against the Bill as expressed by witnesses and in submissions. **Chapter Six** deals with other views on the Bill, and addresses various legal and technical issues raised by witnesses and in submissions.
- 1.10** Part Three consists of a single chapter, **Chapter Seven**, which outlines the Committee's conclusions and views on the key issues arising during the inquiry.

Chapter 2 The Bill in context

2.1 The long title of the Crimes Amendment (Child Protection – Excessive Punishment) Bill 2000 is:

A Bill for an Act to amend the Crimes Act 1900 to limit the use of excessive physical force to discipline, manage or control children.

2.2 The Bill seeks to achieve this purpose by inserting into the *Crimes Act 1900* a new section which would codify the common law defence of “lawful correction”. An understanding of the common law defence of “lawful correction” and its operation is therefore essential background to the Bill.

The common law defence of “lawful correction”

2.3 Broadly speaking an assault involves the application of force against another person (or the threatening of another person with force) without the other person’s consent, or without some other lawful justification. The NSW *Crimes Act 1900* includes the following criminal assault offences: common assault (not occasioning bodily harm); assault occasioning bodily harm; and malicious wounding or infliction of grievous bodily harm.⁵ Lawful justifications for conduct that would otherwise be an assault include a range of formal “defences” which have been developed within the common law. The “defences” to a criminal assault charge include: insanity; duress; self defence; and “lawful correction”.⁶

2.4 The defence of “lawful correction” provides that a parent or a person acting for a parent “can administer corporal punishment to a child provided the parent etc acts reasonably in doing this.”⁷

Lawful correction is a defence against a charge that a parent or a person in the place of a parent has assaulted a child. In broad terms, at common law, the defence says that a parent or a person acting in a parental role can administer corporal punishment to the child if that course is reasonable in all the circumstances.⁸

2.5 The common law defence of “lawful correction”, or “reasonable chastisement” as it has also been known⁹, has developed over a period of at least 200 years, during which the standard as to what is regarded as “reasonable” has shifted to reflect changing community

⁵ See sections 61, 59, 35.

⁶ For a full discussion of the common law and statutory definitions of assault, and the operation of the various defences, see P Gillies, *Criminal Law*, 4th edition, LBC information Services, 1997.

⁷ *Ibid*, p 331.

⁸ G Griffith, *op cit*, p 6.

⁹ The two terms are synonymous and refer to the same defence.

standards.¹⁰ Some of the factors considered by the courts in determining whether or not the use of physical force was reasonable include; the nature and extent of the punishment, its duration, its physical and mental effects, and the age, sex and state of health of the child.¹¹ In order for the defence to be successful the use of force must be both subjectively and objectively reasonable. To be subjectively reasonable, the person relying upon the defence must have acted in the belief that it was reasonable to resort to physical punishment and that the degree of force used was reasonable. To be objectively reasonable, a reasonable person must not regard the use of physical force as unreasonable.¹²

2.6 Once a defendant raises the defence of “lawful correction” the onus is on the prosecution to prove beyond reasonable doubt that the use of physical force was not reasonable.

2.7 The defence of “lawful correction” exists at common law in NSW, Victoria, South Australia, the ACT and in a number of other countries including the United Kingdom. The defence has been codified in Queensland, Western Australia, Tasmania and the Northern Territory.

Recent use of the defence of “lawful correction”

2.8 The only reported case involving the use of the defence of “lawful correction” in NSW dates from 1891.¹³ Few cases involving assault of children in the context of physical punishment come before the courts, and there is no statistical information available about the incidence of such prosecutions as they are dealt with before lower courts.¹⁴

2.9 That is not say that such cases never occur. In evidence before the Committee, the President of the Law Society of NSW, Mr John North, said that during his 18 years in practice he had acted in a number of criminal matters in which the defence of “lawful correction” had been raised.¹⁵ The submission received from the NSW Teachers Federation referred to and quoted from the judgements in two recent unreported cases

¹⁰ For an outline of the development of the common law defence of “lawful correction” see Griffith, *op cit*, pp 2-8.

¹¹ The most recent formulation of the factors to be considered by the courts in determining whether the use of physical force against a child is reasonable is found in *A v the United Kingdom* [1998] EHRLR 82. For a fuller discussion of the elements of the defence of “lawful correction” see J Cashmore & N de Haas, *Legal and Social Aspects of the physical Punishment of Children*, Discussion Paper for the Commonwealth Department of Human Services and Health, May 1995, pp 19-42.

¹² P Gillies, *op cit*, pp 331-332.

¹³ *R v Hamilton* (1891) 12 LR (NSW) 111; 8 WN 9 (NSW Sup Ct, FC).

¹⁴ G Griffith, *op cit*, p 13.

¹⁵ *Evidence*, 14/8/00, p 18.

heard before the Local Court in which the defence of “lawful correction” was determinative.¹⁶

- 2.10** The Committee’s attention has been drawn to a number of recently reported cases in other jurisdictions. The submission from the Law Society of NSW referred to the 1992 Tasmanian case of *Bresenham v R*¹⁷ and the 1998 Western Australian case of *Cramer v R*.¹⁸ In subsequent correspondence, the Law Society also drew the Committee’s attention to two 1997 cases from the Queensland Court of Appeal¹⁹ and a 1991 case from the South Australian Supreme Court.²⁰
- 2.11** In addition to these examples of the use of the defence of “lawful correction” in Australia, there have been two recent cases where the defence has been raised in the United Kingdom which have attracted considerable public attention.
- 2.12** In 1998 the European Court of Human Rights found that the defence of “lawful correction” in United Kingdom law had failed to protect a child, who had been beaten with a garden cane by his stepfather, from inhuman or degrading treatment.²¹ Briefly, the case arose from the fact that the stepfather was acquitted in 1994 of a charge of assaulting the child, on the basis of the defence of “lawful correction”. As a result of an application from the child there was a full hearing before the European Court of Human Rights. The Court held that, although the United Kingdom was not responsible for the actions of the stepfather, the application of the defence of “lawful correction” meant that the United Kingdom’s law had failed to protect the child. As States were required to take measures to protect children from such treatment the United Kingdom was in breach of article 3 of the European Convention on Human Rights. Because the United Kingdom had undertaken to abide by the judgements of the European Court of Human Rights in cases to which it is a party, the Court’s decision in *A v the United Kingdom* required a change to the law in the United Kingdom. The United Kingdom Department of Health has consequently issued a consultative document as a first step in the process of reforming the defence of “lawful correction”.²²
- 2.13** In May 1999 a Scottish teacher was convicted of assaulting his daughter, after repeatedly smacking her on the buttocks in the waiting room of a dentist’s surgery. The defendant’s reliance on the defence of “lawful correction” was unsuccessful in this case. Following his

¹⁶ *Submission*, 18/8/00.

¹⁷ (1992) 1 Tas R 234.

¹⁸ [1998] WASCA 3000 (28 October 1998).

¹⁹ *R v Griffin* [1997] QCA 115 (13 May 1997); *King & Kordick v Styles* [1997] QCA 278 (12 September 1997).

²⁰ *Temby v Schulze* [1991] SASC 3082 (24 October 1991).

²¹ [1998] EHRLR 82. Under article 3 of the European Convention on Human Rights “no one shall be subjected to torture or to inhuman or degrading treatment.”

²² UK Department of Health, *Protecting Children, Supporting Parents: A Consultation Document on the Physical Punishment of Children*, 18 January 2000.

conviction, in May 2000 the teacher had his registration as a teacher cancelled. It is understood that this decision is the subject of an appeal to the Scottish High Court.²³

Reform Proposals

2.14 The Crimes Amendment (Child Protection – Excessive Punishment) Bill 2000 is not the first attempt to reform the defence of “lawful correction”. As mentioned in paragraph 2.7 above, the defence has been codified in the statutory criminal codes in Queensland, Western Australia, Tasmania and the Northern Territory.

2.15 The Scottish Law Commission considered the defence of “lawful correction” and recommended its reform in 1992.²⁴ The Commission recommended that:

a) in any proceedings (whether criminal or civil) against a person for striking a child, it should not be a defence that the person struck the child in the purported exercise of any parental right if he or she struck the child:

i) with a stick, belt or other object; or

ii) in such a way as to cause, or risk injury; or

iii) in such a way as to cause, or risk causing, pain or discomfort lasting more than a very short time.

2.16 However, the recommendations of the Scottish Law Commission were not implemented by inclusion in the *Children (Scotland) Act 1995*, where other recommendations from the same report were implemented. The Scottish Executive has recently commenced a consultative process in relation to reform of the defence of “lawful correction”, along the lines of the consultative process being undertaken by the UK Department of Health, referred to in paragraph 2.12 above.²⁵

2.17 In 1995 the Commonwealth Department of Human Services and Health, under the auspices of the National Child Protection Council, published a discussion paper on *Legal and Social Aspects of the Physical Punishment of Children*. Whilst not advocating a particular policy response, the discussion paper argued that:

The law regarding “lawful correction” of children is “unsatisfactory and out of date”... Many of the uncertainties in the elements of the defence stem from the case-by-case development of the law over many years, and the variability of decisions because “reasonableness” depends on the circumstances of each individual case. Even where there are clear and unambiguous statements from the courts, these decisions may not be sufficiently well known to parents in general to

²³ For further details about this case see G Griffith, *op cit*, p 17; p & S Spink, “What is reasonable chastisement?”, (June 1999) 44 *Journal of the Law Society of Scotland* 26.

²⁴ Scottish Law Commission, *Report on Family Law*, 1992.

²⁵ The Scottish Executive Justice Department, *The Physical Punishment of Children in Scotland: A Consultation*, February 2000.

have any substantive educative consequences... The case law regarding the defence of lawful correction currently does not provide clear guidance as to the legal limits of physical punishment.²⁶

2.18 In 1998 the Model Criminal Code Officers Committee addressed the defence of “lawful correction” in its report on *Non Fatal Offences Against the Person*. The report notes that “this is an emotional issue over which there are keenly felt opposing positions” and, having briefly reviewed previous attempts to codify (or recodify) the defence, stated that the Committee had decided to support at least the position of the Scottish Law Commission. The Committee recommended that the following provision be included in the Model Criminal Code:

Conduct can amount to reasonable correction of a child only if it is reasonable in the circumstances for the purposes of the discipline, management or control of the child. The following conduct does not amount to reasonable correction of a child:

- a) causing or threatening to cause harm to a child that lasts for more than a short period; or
- b) causing harm to a child by use of a stick, belt or other object (other than by an open hand).²⁷

2.19 In June 1997 the Hon Alan Corbett MLC introduced the Crimes Amendment (Child Punishment) Bill 2000 into the NSW Legislative Council. The Bill sought to limit the use of physical force to discipline, manage or control a child. The Bill would have effectively codified the defence of “lawful correction” in NSW, with the major change to the common law defence being that the application of physical force would not be reasonable if:

- a) the force is applied to any part of the body above the shoulders of the child; or
- b) the force is applied by any means other than an open hand; or
- c) the force inflicts actual bodily harm.²⁸

2.20 The Crimes Amendment (Child Protection) Bill 1997 was the subject of a second reading debate. During the course of the debate both the Government and Opposition announced that they would vote against the Bill. A vote was not taken on the second reading of the Bill prior to the end of the 51st Parliament.²⁹

²⁶ J Cashmore & N de Haas, *op cit*, p 42.

²⁷ Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 5 – Non Fatal Offences Against the Person – Report*, September 1998, pp 130-137.

²⁸ For an outline of the differences between the Crimes Amendment (Child Punishment) Bill 1997 and the Crimes Amendment (Child Protection – Excessive punishment) Bill 2000 see G Griffith, *op cit*, pp 21-22.

²⁹ NSWPD (LC) 19/6/97, 13/11/97, 29/10/98.

Chapter 3 The Bill

- 3.1** This chapter provides a brief outline of the provisions of the Crimes Amendment (Child Protection – Excessive Punishment) Bill 2000.
- 3.2** The Bill would insert a new section 61AA into the *Crimes Act 1900*. This would place the new section within Part 3 of the *Crimes Act* which deals with offences against the person. Section 61 deals with common assault. The proposed new section 61AA includes a number of subsections. Each of these are discussed in turn below.

61AA (1) – restatement of the common law defence

s61AA Defence of lawful correction

- (1) *In criminal proceedings brought against a person arising out of the application of physical force to a child, it is a defence that the force was applied for the purpose of the discipline, management or control of the child, but only if:*
- (a) *the physical force was applied by the parent of the child or by a person acting for a parent of the child, and*
- (b) *the application of that physical force was reasonable having regard to the age, health, maturity or other characteristics of the child, the nature of the alleged misbehaviour or other circumstances.*

- 3.3** Proposed subsection 61AA (1) is a restatement, or codification, of the common law defence of “lawful correction”.³⁰
- 3.4** Proposed subsection 61AA (1) retains the common law position that the use of physical force be “reasonable” in order for the defence to apply. Criticism of the Bill’s reference to “reasonableness”, such as that raised during the second reading debate on the Bill, appears to be based on a misunderstanding of the current position at common law.³¹ The use of the words “discipline, management or control of the child” reflects the terminology recommended by the Model Criminal Code Officers Committee in 1998.³² The list of factors to be considered by the courts in assessing the “reasonableness” of the use of physical force, reflects the most recent judicial formulation of the factors to be considered in this regard.³³

³⁰ See second reading speech of the Hon A Corbett MLC, *NSWPD (LC)*, 5/5/00, p 4; G Griffiths, *op cit*, p 24.

³¹ G Griffiths, *op cit*, p 24.

³² MCCOC, *op cit*, p 130.

³³ *A v the United Kingdom* [1998] EHRLR 82.

Proposed subsection 61AA (2) – definition of where the use of physical force is not reasonable

(2) *The application of physical force is not reasonable if:*

- (a) *the force is applied by the use of a stick, belt or other object (other than an open hand or other than in a manner that could reasonably be considered trivial or negligible in all the circumstances), or*
- (b) *the force is applied to any part of the head or neck of the child (other than in a manner that could reasonably be considered trivial or negligible in all the circumstances), or*
- (c) *the force is applied to any part of the body of the child in such a way as to cause, or threaten to cause, harm to the child that lasts for more than a short period.*

3.5 Proposed subsection 61AA (2) is the most important part of the Bill. It seeks to alter the common law defence, and provide greater certainty and guidance, by defining some areas in which the use of physical force is not reasonable.

New subsection 61AA (2) makes clear to parents, courts, police, child protection workers, health professionals and others involved in the care and protection of children that where a charge of assaulting a child has been judicially considered, the defence of lawful correction is not available when the child being disciplined, managed or controlled was subject to the three elements contained in the Bill.³⁴

3.6 Subsection 61AA (2)(a) defines what is unreasonable in terms of what is used in the course of physical punishment. Subsection 61AA (2)(b) defines what is unreasonable in terms of where the physical force is applied. Subsection 61AA (2)(c) defines what is unreasonable in terms of the degree or quantum of physical force.

The wording of proposed subsection 61AA (2) can be seen as drawing upon the recommendations of the Scottish Law Commission and the Model Criminal Code Officers Committee, referred to in paragraphs 2.18 and 2.19 above. However, the Bill adds a number of qualifications to these recommendations.

3.7 Despite the complexity of the drafting of subsection 61AA (2), Professor Parkinson submitted that the “technical language” of the Bill “translates into a clear enough message”:

Smacking with an open hand is reasonable discipline. Punching a child, kicking a child, or using a weapon on a child, such as a stick or belt, is not acceptable. Belting children around the head or neck is not acceptable. If you engage in unreasonable discipline there is a risk you will be prosecuted, but not if the breach is trivial.

The purpose of the law can readily be explained to people. It is to prevent serious injury to children because sometimes parents injure their children through using excessive force. Parliament has a moral duty to ensure that the law is clear and

³⁴ Second reading speech of the Hon A Corbett MLC, *NSWPD*, 7/6/00, p 4.

reasonable. In my view, this Bill is as clear as it can be in the circumstances and is entirely reasonable...

I have read the comments of various Honourable Members in the debate on this Bill. I offer the following observations:

The law is absolutely clear: the Bill treats smacking as lawful and reasonable chastisement. There is no possibility that a parent could be prosecuted for smacking a child. There is no possibility that a parent could be prosecuted for threatening to smack a child. A parent would be very unlikely to be prosecuted for hitting a child with a wooden spoon if no lasting injury results, however a wooden spoon is a stick or other object within the meaning of subsection (2)(a).³⁵

3.8 Subsection 61AA (2) was the focus of many of the submissions and much of the evidence received by the Committee. Chapters Four and Five discuss the arguments for and against the Bill, including those arguments which relate to subsection 61AA (2). Chapter Six includes a discussion of technical, drafting issues raised in evidence, including in relation to subsection 61AA (2).

Subsections 61AA (3) and (4)

(3): *Subsection (2) does not limit the circumstances in which the application of physical force is not reasonable.*

(4): *This section does not derogate from or affect any defence at common law (other than the defence of lawful correction).*

3.9 Subsection 61AA (3) simply states that subsection 61AA (2) does not limit the circumstances in which the use of physical force may be unreasonable.

3.10 Subsection 61AA (4) provides that the proposed new section 61AA does not derogate from or affect any defence at common law (other than the defence of 'lawful correction'). As outlined in paragraph 2.3 above, some of the other common law defences to an assault charge, which are not affected by the Bill, include: insanity; duress; and self defence.

Subsection 61AA (5) definitions, including person acting for a parent

(5): *In this section:*

Child means a person under 18 years of age.

de facto spouse means one of two adult persons:

- (a) *who live together as a couple, and*
- (b) *who are not married to one another or related by family.*

parent of a child means a person having all the duties, powers, responsibilities and authority in respect of the child which, by law, parents have in relation to their children.

³⁵ *Submission, 28/6/00, p 2.*

person acting for a parent of a child means a person of or above the age of 18:

- (a) *who:*
 - (i) *is a step-parent of the child, a de facto spouse of a parent of the child or a relative (by blood or marriage) of a parent of the child, and*
 - (ii) *is expressly authorised by a parent of the child to use physical force to discipline, manage or control the child, or*
- (b) *who, in the case of a child who is an Aboriginal or Torres Strait Islander (within the meaning of the Children and Young Persons (Care and Protection) Act 1998) is recognised by the Aboriginal or Torres Strait Islander community to which the child belongs as being an appropriate person to exercise special responsibilities in relation to the child.*

3.11 Subsection 61AA (5) defines a number of terms used in the Bill. A child is defined as a person under the age of 18. This means that the defence of “lawful correction”, as provided for in the Bill, can be relied upon in relation to the use of physical force against a child between the ages of 0-17. Suggestions that the scope of the defence should be restricted so as to absolutely prohibit the use of physical force in relation of children of a certain age (such as babies below the age of one year, or juveniles over the age of 16) are discussed in Chapter Six.

3.12 The definition of a parent is based upon that in the *Family Law Act 1975 (Cth)*. Effectively, the definition covers those who are biological parents and those who have an order of the Family Court conferring parental responsibility upon them.³⁶

3.13 The most substantive definition is that of a “person acting for a parent”. Under the common law defence of “lawful correction” there is an implied delegation from parents to those with lawful charge of children to apply moderate and reasonable physical punishment.³⁷ The definition of person acting for a parent in the Bill is more restrictive than the common law. Firstly, paragraph (a) (i) limits the range of persons who may rely on the defence of “lawful correction” to family members. Non family members, including neighbours, friends, baby sitters, school bus drivers, child care workers and teachers, are excluded. Secondly, paragraph (a) (ii) requires that a family member be expressly authorised by a parent to use physical force to discipline, manage or control a child before they can rely on the defence. The definition also requires that a person acting for a parent be of or above the age of 18.

3.14 The rationale for the restrictive definition of a person acting for a parent was enunciated in the second reading speech:

The Bill intentionally limits the defence to parents and people acting in place of parents to restrict the circumstances in which physical punishment of children is used. The provision discourages neighbours, friends and babysitters from using physical force to discipline a child. Another reason for this restriction is to give authority only to those who would normally have the closest emotional ties with the child and parent and who would therefore be in a better position to

³⁶ *Evidence*, 8/8/00, pp 19-20.

³⁷ G Griffiths, *op cit*, p 32.

understand the child's temperament, likes and dislikes, medical and personal history and so on. The emphasis is on protecting the child.³⁸

- 3.15** Paragraph (b) of the definition of a person acting for a parent provides a wider definition in relation to Aboriginal or Torres Strait Islander communities. In the case of a child who is an Aboriginal or Torres Strait Islander, a person who is recognised by the Aboriginal or Torres Strait Islander community to which the child belongs as being an appropriate person to exercise special responsibilities in relation to the child may rely upon the defence of "lawful correction". This definition was included in the Bill on the advice of the Sydney Regional Aboriginal Corporation Legal Service in recognition of the sharing of parenting responsibilities amongst extended families in Aboriginal and Torres Strait Islander communities.³⁹
- 3.16** The definition of a person acting for a parent was one of the key issues to emerge in evidence before the Committee. This issue is discussed in detail in Chapter Six.

Remaining provisions of the Bill, including delayed commencement

- (6) *This section does not apply to proceedings arising out of an application of physical force to a child if the application of that force occurred before the commencement of this section.*

- 3.17** Subsection 61AA (6) provides that the legislation has no retrospective effect. The second schedule to the Bill provides that proposed new section 61AA will apply to all offences and courts.
- 3.18** Clause 2 of the Bill provides that the proposed Act will commence 12 months after the date of assent. The rationale for this delayed commencement was explained in the second reading speech:

During the intervening time, the Commission for Children and Young People has agreed to assist with community education about this legislation, under the Commissioner's role to conduct and promote public awareness activities on matters affecting children. Another reason for the delay of commencement for 12 months is to allow appropriate time for relevant government departments that will be affected by the provisions of the Bill to adjust, if necessary, their policies and procedures and to appropriately train staff.⁴⁰

- 3.19** Chapter Seven includes reference to evidence received by the Committee in relation to the public awareness campaign foreshadowed by Mr Corbett.

³⁸ Second reading speech of the Hon A Corbett MLC, *NSWPD* (LC) 7/6/00, p 4.

³⁹ Second reading speech of the Hon A Corbett MLC, *NSWPD*, (LC), 7/6/00, p 5.

⁴⁰ *Ibid*, p 6.

Chapter 4 Arguments Supporting the Bill

Introduction

4.1 The Committee received 23 submissions, and heard evidence from 12 witnesses supporting the Bill. Also, some submissions raised legal or other technical issues independent of support or opposition to the aims of the Bill. These issues are examined in depth in Chapter 6 as “Other Views on the Bill”. Submissions supporting the Bill came primarily from legal, medical and child protection experts, and community organisations working in child welfare. Supporters included:

- Professor Kim Oates, Chief Executive, New Children’s Hospital, Westmead
- Professor Graham Vimpani, Head of Paediatrics and Child Health, University of Newcastle
- Dr Judy Cashmore, former co-convenor Child Death Review Team
- Ms Gillian Calvert, Commissioner for Children and Young People
- Professor Patrick Parkinson, Law School, University of Sydney
- Council of Social Service of New South Wales, and Association of Child Welfare Agencies
- Parenting and Family Support Centre, University of Queensland, NAPCAN and parenting author Dr Peter Downey
- Paediatrics and Child Health Division, Royal Australian College of Physicians
- The Federation of Parents and Friends Associations of Catholic Schools, Archdiocese of Sydney
- Aboriginal Justice Advisory Council, and NSW Aboriginal and Torres Strait Islander Commission
- Dr Alice Tay, President, Human Rights and Equal Opportunity Commission

4.2 Prior to the Bill being introduced into the Legislative Council the Hon Alan Corbett MLC also obtained letters of support for the Bill from 20 peak organisations. Apart from those who later made submissions to this inquiry, the organisations expressing support included:

- The Federation of Parents and Citizens Associations of New South Wales
- The Community Services Commission

- The Ethnic Communities Council of New South Wales, the Australian Federation of Islamic Councils
- The Australian Medical Association and the NSW Faculty of the Royal Australian College of General Practitioners

4.3 The arguments in favour of the Bill are outlined in detail below. The main arguments focus on the potential of the Bill to reduce current injuries suffered by children by clarifying acceptable and non-acceptable forms of physical discipline. Supporters argue that the Bill will have an educative effect by making it clear that forceful blows to the head of a child, or any forceful blows with objects, are unacceptable as a means of parental discipline. They argue that the Bill reflects current community standards and will help to continue the shift towards reduced use of physical punishment in parental discipline. The Bill's supporters believe it is a pragmatic measure which provides sufficient safeguards to protect ordinary parents from trivial or vexatious prosecutions; and the Bill does nothing to restrict ordinary smacking. Supporters argue that overseas experience demonstrates the significant improvements in child protection that can be made by legislation backed by community education campaigns. The Bill is also said to provide a step forward in implementation of human rights undertakings.

Injuries Can be Prevented

4.4 Every witness or submission writer from a medical background supported the Bill. Professor Kim Oates and Professor Graham Vimpani spoke of the very serious, sometimes fatal injuries suffered by children hit by parents. Asked about the extent of injuries caused by hitting children above the neck, Professor Vimpani said:

we need to recognise that there are several injuries that are likely to result from a significant blow to the head. One is superficial bruising from the blow itself. But the other consequence is that the head is highly mobile on the neck. The head actually moves faster than the internal brain material. What happens is that the brain comes into collision with the bony lining, the bony structure, the skeleton of the head and, as a result of that, the brain itself can be bruised. As well as that, there may also be what are called shearing effects where nerve fibres can be sheared. We see an extreme example of what happens with repeated blows to the head in boxers, who may suffer concussion in the immediate event but often years down the track sustain other brain disorders.

The other thing, of course, is that the immediate shearing in a young adult can cause bleeding around the brain. We see examples of this kind of thing in the shaken baby syndrome, which is where there is sustained movement of the head backwards and forwards. One severe strike to a child's head, if given with sufficient force, would certainly be enough to cause bruising on that part of the brain that came in contact with the bone as a result of the brain not moving as fast as the rest of the head at the time of the injury.⁴¹

⁴¹ Vimpani *Evidence* 14/08/00 p4

4.5 Similarly Professor Oates stated:

There are certainly medical injuries that can occur from the use of an open hand. We see children with bruising on their face—fingerprint bruising, the ruptured eardrum by a hard slap over the ear that I have already mentioned, and split lips. Those things really depend on the degree of force but I cannot see how one could legislate in relation to a degree of force so it seems to me more logical to legislate that certain parts of the body where the most fragile organs are kept should be areas that are out of bounds for any sort of hitting.⁴²

4.6 While both suggested there was a lack of data on use of implements in punishment⁴³ neither supported their use:

Certainly, a wooden spoon it can be dangerous if used with significant force, and it is hard to legislate against the amount of force. When people hit, and I am certainly not advocating hitting, with an open hand the person feels some pain as well. When someone hits with an object the person does not feel any pain, so the person is not aware of how much damage he or she is likely to be doing.⁴⁴

4.7 Appendix Five provides a summary of the injuries suffered by children in one year at one Sydney hospital, the New Children's Hospital at Westmead. During the inquiry Professor Oates was asked to what extent these injuries could be attributable to excessive discipline, and therefore to what extent this was a problem in NSW. His answer was that most physical abuse was an attempt to discipline a child that goes wrong or out of control:

I think I can best answer that by saying that the majority of physical abuse that we see is a result of parents losing control at a time when they are angry with a child, usually about the child's behaviour, and hitting the child in the way that they often did not intend to in terms of severity. The recipe for physical abuse is a very simple one: You need a child; you need a parent; and you need some precipitating event. The precipitating event is usually something that the child does that upsets the parent. Most of that abuse is not premeditated. It is the parent injuring the child as a result of something that the child does and that certainly can be regarded as discipline.⁴⁵

4.8 Supporters from a medical background argue that the Bill will prevent serious injuries to young children which currently result from discipline which goes out of control. Prescribing the limits of what is acceptable "normal" discipline for parents will make it less likely they will be in the habit of using these methods.

⁴² Oates *Evidence* 24/08/00 p3

⁴³ Vimpani *Evidence* 14/08/00 p3

⁴⁴ Oates *Evidence* 24/08/00 p5

⁴⁵ Oates *Evidence* 24/08/00 p2

Bill has an Educative Role

- 4.9** For the Bill to prevent injuries it must act as a community standard of acceptable discipline. The message that hitting a child with a strap is illegal sends a strong message which a community education campaign on desirable/undesirable discipline on its own cannot:

I do not think it is a question of Parliament making its intentions known versus a community education campaign. I think you need both if the measure is to be successful. If one were to undertake a community education campaign without clearly setting out what Parliament provides is or is not acceptable behaviour, then that would not be as effective because most of our time would be spent debating again what is reasonable versus what is not reasonable. Certainly, from my point of view, I think both parts are required: Parliament to make its intentions known, and a community education campaign to let parents know about Parliament's intentions.⁴⁶

- 4.10** Professor Parkinson argued the message of the Bill can be very simply expressed:

It may be that people will say this Bill is not clear, that it uses complex language, and so it does, but people do not read statutes, much as we may like to think that they do. The importance of legislation of this kind is in the educational messages which it can be translated into, plain English which can result from a Bill of this kind, and I believe it is simply as clear as possible to say smacking is okay but do not beat kids around the head, do not beat kids around the neck and do not beat them with belts and electrical cords, and it is for that reason that I support the Bill.⁴⁷

- 4.11** In his submission to the inquiry Professor Parkinson argued that Parliament had a moral duty to make laws which regulate the ordinary lives of citizens as clear as possible, and that at present the common law defence of lawful correction did not meet this criterion.⁴⁸

- 4.12** The message of the Bill is partly in the examples of unacceptable methods of discipline specifically referred to in s61 AA (2) (a), (b) and (c). Supporters of the Bill did not agree with suggestions of leaving out (a) and (b) because both these sections give concrete practical examples of what was meant by excessive punishment.⁴⁹

- 4.13** Supporters of the Bill also argued that the message of the Bill was one that could be simply expressed in the media, with little risk of distortion:

I believe the media understood that this was a bill that was reasonable in that it recognised parents' obligations but also moved to protect children. The use of the words "child protection—excessive punishment" in the title certainly goes some

⁴⁶ Calvert *Evidence* 21/08/00 p23

⁴⁷ Parkinson *Evidence* 8/08/00 p14

⁴⁸ Parkinson *Submission* 28/06/00 p2

⁴⁹ eg Calvert *Evidence* 21/08/00 p25-26

way to explaining the intent of the bill and therefore helping the media to understand. I believe also the support of such a wide range of community leaders goes a significant way to assisting the media to understand. Certainly, if Parliament could reach consensus on the bill, that would also go a significant way to helping and reassuring the community that this was a reasonable and sensible bill. I believe the media have greater understanding and knowledge of the issues than perhaps they had five years ago. I believe also that is being reflected in the reporting we are seeing.⁵⁰

Parents will not be Prosecuted for Trivial Offences

- 4.14** The Bill only arises when an accused is being prosecuted for the criminal charge of assault. Supporters of the Bill argue ordinary caring parents will not be prosecuted for assault under this Bill any more than is currently the case. Rather, those who seriously injure their child are denied a defence if they have used implements or blows to the head to discipline their child. In his support for the Bill Professor Parkinson argued its benefits would be in the injuries it prevented, not in its use for prosecutions:

Why do we need the Bill then? It comes back to education. We want to prevent the grievous bodily harm, we want to prevent the deaths, and the best way of doing that is to send clear messages to people about what is and is not lawful in the first place. It is too late once a child is brain damaged to prosecute the parents for grievous bodily harm. What we need to do is try to ensure that children are not brain damaged. I think the issue is not could the police prosecute parents for minor infringements of this legislation, nor is it about locking parents up in gaol for hitting their kids with a cane, because the reality is that there have been almost no prosecutions, and there would not be unless it was a serious case. It is about sending messages, saying what is acceptable and what is not.⁵¹

- 4.15** He stressed that the use of prosecutorial discretion would mean that trivial offences would not be taken to the courts. A similar view was taken by the Commissioner for Children and Young People Gillian Calvert:

There is the threshold of being charged with assault. The police have discretion on what they will charge with assault and what they will not. The police may have regard to a wide range of factors in laying a charge. The police, if they do get over the threshold, then have access to the legal process. I do not think it will result in the criminalisation of a whole range of parents whom otherwise we would not want to criminalise—because, first of all, of having to get over the threshold of assault.⁵²

⁵⁰ Calvert *Evidence* 21/08/00 p25

⁵¹ Parkinson *Evidence* 8/08/00 p15

⁵² Calvert *Evidence* 21/08/00 p22

- 4.16** The Law Society and Bar Association did not hold fears of any significant increase in prosecutions of parents as a result of the narrowing of the defence.⁵³ In fact the Law Society argued for the complete abolition of the defence of lawful correction.⁵⁴
- 4.17** Supporters of the Bill also point to the qualifications of “trivial and negligible in all the circumstances” which appear in (2) (a) and (b) as another safeguard against trivial prosecutions. Many advocates argued that this qualification was unnecessary but at least spelt out, if there could be any doubt, that parents could not be prosecuted for something as trivial as a light tap on the leg with a ruler.⁵⁵

Current Laws are Inadequate

- 4.18** Supporters of the Bill argue that current laws regarding parental discipline are inadequate for several reasons:
- child protection laws do not provide guidance to the majority of parents
 - there is uncertainty at present as to what is lawful correction
 - the defence of lawful correction is little known and hard to understand
- 4.19** Professor Parkinson chaired the recent review of the NSW child protection regime; Gillian Calvert is the Commissioner responsible for the safety and protection of children; and Dr Judy Cashmore is co-chair of the implementation body for the new child protection legislation. All argue the Excessive Punishment Bill meets a gap which is not addressed in child protection legislation:

I think the two pieces of legislation are entirely complementary and do not overlap. The reason I say that is that the 1998 child protection legislation concerns when Parliament should intervene. We are not going to be removing children from their parents because they hit children with a stick. If there was much more serious injury, then removal might be a possibility, but it is not going to be for that, and we do not want people notifying to the department every time they are aware of a child who has been hit with a stick. The child protection intervention is around more serious abuse. The criminal law, on the other hand, needs to clarify the boundaries of lawful correction, and in the child protection legislation one of the grounds for notification is that the child has been likely to be physically abused or ill treated. That picks up whatever the definitions are in criminal law. So they are complementary, they are not overlapping.⁵⁶

⁵³ although the Bar Association raised concerns about the impact on “persons acting for a parent”, discussed in Chapter Six.

⁵⁴ *Submission 28/08/00* p4

⁵⁵ Parkinson *Evidence 8/08/00* p16

⁵⁶ Parkinson *Evidence 8/08/00* p14

However, I think the Excessive Punishment Bill gives clarification for those parents who are uncertain as to what is reasonable chastisement and what is not, and gives them the opportunity to understand that they are in fact not engaging in the same behaviours as those at the more extreme end of the spectrum. At the moment, in a sense, it is either seen as child abuse or it is not. I think this bill defines that middle ground to clarify when parents are using excessive punishment and when they are not, and it gives them an opportunity to correct their behaviour, so that they do not continue down the slippery slide towards child abuse, which would be captured by the *Children and Young Persons (Care and Protection) Act*.⁵⁷

4.20 Supporters of the Bill argue that because there has been very little reported case law on the defence of lawful correction⁵⁸ most parents would be unaware of its existence in the common law. This creates confusion as to what standards do apply:

....the case by case development of the common law in respect of this defence, the differing interpretations of the common law given by different jurisdictions, and the inability of most parents to follow and understand the developments in the common law have led to many people in the community lacking certainty about the legal limits and boundaries that apply to the physical punishment of children.⁵⁹

4.21 In evidence Law Society President John North said that, in his experience, the defence was raised primarily in disputes over contact (previously access) visits, where the mother or father complains to the police about discipline during the visit. He argued that the Bill will help simplify these cases because the clear guideline of no implements/no hitting above the neck:

If the public know that they do not use objects, the non-custodial parent will know that he or she is not to use objects during contact visits. Unless the child goes home to mother or father and says "whilst on this visit an object was used" it is unlikely that they will be able to make a complaint.⁶⁰

The Bill Reflects Current Community Standards

4.22 Advocates for the Bill argue that it reflects standards currently supported by the large majority of parents. They argue only a small minority of parents in New South Wales would believe it was acceptable as part of discipline to cause lasting harm during punishment (s(2) (c)); strike a child with force to the head or neck (s(2) (b)); or hit a child with a belt or stick (s(2) (a)). Excessive physical punishment is analogous to domestic violence: society has moved on from considering it acceptable.

⁵⁷ Calvert *Evidence* 21/08/00 p22

⁵⁸ see Chapter Two

⁵⁹ Legal Aid Commission *Submission* 26/07/00 p1

⁶⁰ North *Evidence* 14/08/00 p21

4.23 The submission from the Commissioner for Children and Young People examined various surveys of community attitudes on parental discipline undertaken in Australia and New Zealand in recent years. A Department of Human Services and Health survey in 1994 found:

- 80% of respondents agreed that reasoning with a child was preferable to physical punishment
- 85% disagreed with the statement that “parents who are under stress can be excused if they get too rough with physical discipline”
- 46% disagreed with the statement that parents had the right to discipline children in any way they see fit (41% agreed with the statement)⁶¹

4.24 The submission from the Commissioner for Children and Young People also examined popularly used parenting manuals and concluded that they had increasingly moved away from recommending the use of physical punishment as a form of discipline.⁶² A writer of parenting manuals, author Dr Peter Downey, stated in a submission to the inquiry:

It is my belief that community attitudes strongly support the concept of parental discipline, including physical measures. However, it is also my belief that while most parents view “open-handed smacks” with a degree of acceptance, the use of a stick, belt, spoon or other object is generally considered outmoded and excessive.⁶³

4.25 Dr Judy Cashmore said that it seemed incongruous that legislation now prohibits violence being inflicted against anyone except against children:

I think there is an argument about why it is that children – we have got rid of hitting apprentices, people in the Navy, you cannot hit dogs, you cannot hit anyone else in our society except children.⁶⁴

Overseas Experience shows Legislation can Influence Parental Discipline

4.26 Supporters of the Bill argued that legislation limiting physical discipline has proved very successful overseas. Legislation has led to changes in attitudes to discipline, modification of parental behaviour and reduction in injuries to children. All physical punishment, including spanking, is illegal in Sweden, Finland, Norway, Denmark, Austria, Cyprus, Latvia and Croatia.⁶⁵ Because the ban has been in place in Sweden since 1979, more than a generation, it is the example most commonly cited.

⁶¹ Calvert *Submission* 24/07/00 p17

⁶² Calvert *Submission* 24/07/00 p21

⁶³ Downey *Submission* 25/07/00 p3

⁶⁴ Cashmore *Evidence* 8/08/00 p11

⁶⁵ Calvert *Submission* 24/07/00 p14

4.27 In evidence, Professor Vimpani explained the outcomes of the Swedish experience:

On the basis of the experience of countries like Sweden, which have gone much further than what this bill proposes, in banning corporal punishment completely by parents, the experience from that country, where the introduction of their legislation was accompanied by a major educational program, is that attitudes to corporal punishment amongst Swedish parents and within the Swedish community generally have declined significantly. Whereas they once started off at the same level in terms of attitudes as parents in the United States of America, attitudes towards the use of corporal punishment have shifted significantly in Sweden. For example, in 1965 in Sweden public support for corporal punishment was 53 per cent. According to this article⁶⁶.... that has now declined to 11 per cent.⁶⁷

4.28 Professor Vimpani also cited in his submission to the inquiry a study based upon Swedish parents' self reporting of the methods of discipline they used. This found that one year after the legislation was introduced Swedish parents reported half as much physical punishment as their American counterparts, although they admitted to the same level as the American parents prior to the ban. Fifteen years later a new study found that parental discipline was even less harsh.⁶⁸

4.29 Professor Oates explained that the success in reducing child abuse in Sweden was that the legislation was aimed at educating rather than punishing parents, as is the intention of the current Bill:

When the legislation [in Sweden] banning physical hitting of children altogether was introduced, it was introduced with the view that it would have nothing to do with punishing parents but rather it was all to do with having a generation of children grow up learning that there are alternative forms of discipline. They took the long-range view that things may be different a generation from now, but within a couple of years physical abuse statistics had fallen largely because of the education program for families that was introduced at the time of the change in legislation. the Swedish experience is that with an educational program and legislation aimed at education rather than punishment we may get change perhaps even quicker than was anticipated.⁶⁹

4.30 In a submission to the inquiry Dr Judy Cashmore argued that the Scandinavian experience suggests that enforcement and prosecution are not necessary for the law to be effective. There have been very few prosecutions of parents but very marked changes in the acceptability of the hitting of children, particularly among young people who will be the

⁶⁶ Durrant J, "Evaluating the Success of Sweden's Corporal Punishment Ban" *Child Abuse and Neglect* Vol 23 No5 p435-448, 1999

⁶⁷ Vimpani *Evidence* 14/08/00 p2

⁶⁸ Vimpani *Submission* 21/07/00 p1, quoting Palmerus "Self-Reported Discipline among Swedish Parents of Preschool Children" *Infant and Child Development* (1999) 8:155-171

⁶⁹ Oates *Evidence* 24/08/00 p6

next generation of parents.⁷⁰ Significantly, there have been very few child deaths as a result of abuse since the ban on physical punishment was introduced:

....in Sweden in the last 20 years or so there have been very few child deaths at the hands of their parents. That is not the experience here, even in a State with a population of around four or five million people.... even here we have a much higher rate of children dying as a result of non-accidental injury than they do in Sweden.⁷¹

Australia's Human Rights Obligations would be Advanced by the Bill

4.31 Several organisations argued in submissions that the Excessive Punishment Bill would represent a significant progression in the implementation of the United Nations Convention on the Rights of the Child, ratified by Australia in 1990. By doing this the Commonwealth government and its state counterparts, who were consulted prior to ratification, undertook to implement the provisions of the convention through legislation. The guiding principle of the convention is the "best interests of the child" (Article 3.1). Among the other relevant provisions is article 37(a), which states:

No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

4.32 The Director of the National Children's and Youth Law Centre Mr Louis Schetzer argued in evidence that the punishments prohibited in the Excessive Punishment Bill involve treatment which is cruel, degrading and inconsistent with the child's dignity.⁷² Professor Tay, President of the Human Rights and Equal Opportunity Commission argued that the reliance in Australia on the common law defence of "reasonable chastisement" has left the line between reasonable discipline and physical abuse "dangerously unclear".⁷³ There is a need for legislation to provide guidance on the legal limits of physical punishment for Australia to be able to claim that it has implemented the Convention. The Law Society stated that the European Court of Human Rights in *A v The United Kingdom*⁷⁴ found that the common law in the UK (which is similar to that in NSW) fails to provide adequate protection of the human rights of children.

The Bill will Reduce Psychological Harm

4.33 Many supporters of the Bill argued that the Bill reduces the use of harsh physical punishments which have been shown empirically to be psychologically and socially harmful to children. In her submission Dr Judy Cashmore summarises the view:

⁷⁰ Cashmore *Submission* 21/07/00 p9-10

⁷¹ Cashmore *Evidence* 8/08/00 p8

⁷² Schetzer *Evidence* 21/08/00 p8

⁷³ Tay *Evidence* 21/08/00 p3

⁷⁴ [1998] EHRLR 82 in Law Society *Submission* 28/07/00 p2

Overall then, the consensus from recent research, which builds on and extends earlier research, summarised in a special forum published in 1996 in *Paediatrics* is that “in general, the harsher the punishment the more frequent its use, and the longer duration it is continued (as into adolescence), the more likely the child will display aggressive and anti-social behaviour as a teenager and adult”.⁷⁵

4.34 In evidence Professor Kim Oates argued:

A lot of adults seem to think that to discipline means hitting, but there are a whole lot of other ways to discipline children. There is no question that children need discipline but discipline has its origin in the word "teaching". Ways to discipline children include role modelling, teaching and disciplining by example, rewarding good behaviour, ignoring bad behaviour, time out. A whole variety of disciplinary measures are effective for children. Physical punishment, in my clinical experience, sometimes reinforces bad behaviour. If physical punishment is available, I believe it is much better at the bottom of the hierarchy rather than at the top. The difficulty is that many generations of people have been raised realizing from their own experience, from their own parents, that the first, second, third and fourth types of discipline mean hitting, and they are not aware of any other form.⁷⁶

4.35 Both Professor Vimpani⁷⁷ and the Commissioner for Children and Young People⁷⁸ agree that the weight of evidence holds that harsh physical punishment is detrimental to child development. Both also argue that there is little evidence that physical punishment is as effective as alternative forms of discipline:

The evidence is strong to indicate that corporal punishment of children is not a particularly effective means of discipline. It may have immediate effects as a result of the shock that a young child experiences on being disciplined, but in fact it does not necessarily promote desirable or effective behaviours, and using it as a strategy to eliminate undesirable behaviour without at the same time having a strategy to stimulate more desirable behaviour is generally considered to be not very effective. The most critical part of discipline involves helping children learn behaviours that meet parental expectations, are effective in promoting positive social relationships and help them to develop a sense of self discipline that leads to positive self esteem.⁷⁹

4.36 The Commissioner for Children and Young People discusses (primarily overseas) research on the attitudes of children themselves, arguing that children surveyed generally perceived physical punishment as more negative and less effective than other forms of discipline.⁸⁰

⁷⁵ Cashmore *Submission* 21/07/00 p6

⁷⁶ Oates *Evidence* 24/08/00 p2

⁷⁷ *Evidence* 14/08/00 p2-3

⁷⁸ *Submission* 24/07/00 p20

⁷⁹ Vimpani *Evidence* 14/08/00 p2

⁸⁰ Calvert *Submission* 24/07/00 p16

Finally, Dr Judy Cashmore argued the child's perspective should be considered when considering the impact of discipline:

One of the ways that [a community education] campaign could work would be to actually take the child's eye view.....showing what it feels like to be two years old and having a big person who is about to hit you and how it would feel in that situation, because I think that as adults we often forget what it feels like to have somebody in total control.⁸¹

⁸¹ *Evidence 8/08/00 p4*

Chapter 5 Arguments Against the Bill

Introduction

5.1 The Committee received 14 submissions, and heard evidence from eight witnesses opposing the Bill outright.⁸² Submissions opposing the Bill came primarily from groups emphasizing the rights of parents, and from religious organisations. Opponents included:

- Rev Fred Nile, Christian Democratic Party
- The NSW Council of Churches
- The Social Issues Committee of the Presbyterian Women's Association in NSW
- The Christian Community Schools Ltd
- Dr Lucy Sullivan and Mr Barry Maley, Centre for Independent Studies
- Eight other individuals

5.2 In addition, 37 letters were received (see Appendix Two). Most of these opposed the Bill because they believed it banned smacking and/or that it banned the use of the "wooden spoon" in parental discipline.

5.3 The arguments against the Bill are outlined in detail below. The main concerns focus on the Bill being an inappropriate interference in the family unit and in particular in the rights of parents to discipline their children. They fear the Bill could be used as a stepping stone to the banning of all physical punishment. At worst the Bill is seen as potentially criminalizing ordinary parents, and at best as creating uncertainty or undermining the confidence of parents. Opponents of the Bill share the concerns of supporters to prevent abusive discipline but believe child protection laws rather than the criminal law should be the means by which abuse is deterred.

Existing Laws are Adequate

5.4 Many opponents of the Bill argue that it is unnecessary. If there is no evidence of a problem with the current defence, why is there a need to modify it? There are no recent reported examples of the defence of lawful correction being successfully used in New South Wales to avoid a charge of assault against a child in over 100 years.⁸³

⁸² Some submissions were also received which raised legal or other technical issues independent of support or opposition to the aims of the Bill. Their submissions and evidence will be examined in depth in Chapter 6 as "Other Views on the Bill". With the exception of the Public Defenders, these submissions support the Bill subject to legal issues raised being addressed.

⁸³ Griffith *op cit* p13; Public Defenders *Submission 20/07/00* p1

5.5 Current child protection laws are said to be adequate to ensure that the minority of parents who cross the line between corporal punishment and abuse are prosecuted. In his submission the Hon Fred Nile MLC refers to the definition of “abuse” in the *Children (Care and Protection) Act 1987*, which includes assault, ill treatment and psychological harm.⁸⁴ The new *Children and Young Persons (Care and Protection) Act 1998*, under s227, creates a criminal offence for “intentionally” taking an “action that has resulted in or appears likely to result in the physical injury ... of a child or young person.”

5.6 In evidence the Hon Fred Nile argued:

We have strong child protection laws in this state. Mr Corbett has argued the need for this Bill by quoting a father bashing his child with a baseball bat. Clearly, such child abuse is against the law under our strong current child protection laws.⁸⁵

5.7 Major Lynette Middleton of the Salvation Army said:

The New South Wales Council of Churches believes that the flexibility contained in the current legislation adequately secures the protection of our children while demanding accountability of parents and all others in positions of responsibility over them.⁸⁶

5.8 Essentially the argument is that child protection is best addressed by targeting the small minority of abusers through specific legislation rather than through legislation aimed at all parents.

Bill will Criminalise Ordinary Parents

5.9 A related argument is that the Bill has the potential to criminalise ordinary parents. Caring parents who choose to use, for instance, a wooden spoon, in discipline will be liable for prosecution for assault. Previously the availability of the defence of lawful correction would have meant that no action would be taken in most circumstances; now even minor use of implements may lead to criminal charges being laid against otherwise “ordinary parents:”

The problem with this approach [the Bill] is that this new test by its very design makes certain applications of force a serious criminal offence even though that force might be universally accepted as reasonable in the circumstances. Under the proposed changes merely smacking a child’s leg with a ruler, even though perfectly reasonable in the circumstances, will found a criminal prosecution if the force was more than negligible or trivial. The public may feel some disquiet about the practical effects of this once the inevitable prosecutions begin. It is sometimes suggested that the prosecuting authorities could be trusted to benignly administer the law by a judicious exercise of their discretion to prosecute thus avoiding the

⁸⁴ Nile *Submission 20/07/00* pp 2-3

⁸⁵ Nile *Evidence 21/08/00* p28

⁸⁶ Middleton *Evidence 14/08/00* p27

difficulties referred to in the previous paragraph. Sadly bitter experience teaches that this is not so.⁸⁷

5.10 Several letters from individuals raised this fear of prosecutions of parents:

Will we see some children deprived of good, loving parents because the parents are in gaol or have had their children taken from their care? That may seem an alarmist question but it would be the inevitable outcome for parents who could not in conscience behave in ways which to them were abdicating their responsibilities towards their children. Such parents would become repeat offenders if they felt sufficiently strongly that their children's interests were above those of the law of the land.⁸⁸

The effects of such a law are fairly predictable. The parents who fall foul of it will be the unlucky few who get caught. Their lives will be made a misery while a host of lawyers and social workers will delude themselves that something has been done to protect children.⁸⁹

5.11 The Hon Fred Nile argued:

Good parents should not be harassed by a draconian law; neither should they have to defend themselves in court or to pay for expensive legal representation. This defence provision is no defence for good responsible parents who do not confuse loving discipline with child abuse.⁹⁰

5.12 Opponents of the Bill cite the example of a Scottish school teacher who faced criminal charges and loss of his job because of smacking his eight year old daughter in a dental waiting room.⁹¹ They argue that the Excessive Punishment Bill risks similar unintended outcomes.

Interference of State with Families

5.13 The fear of prosecutions of non abusive parents reflects a wider objection to the Bill, that is that it represents an inappropriate interference by the State in parenting:

Our concern is also that even though no such Bill exists at present, many parents already fear the reprisals of "Big Brother" (Govt Departments) and society has witnessed an upward spiral of child rebellion.⁹²

⁸⁷ Public Defenders *Submission* 6/09/00 p3

⁸⁸ Morrison *Submission* 27/06/00 p1

⁸⁹ Rev Barnes *Submission* 10/07/00 p1

⁹⁰ Nile *Evidence* 21/08/00 p29

⁹¹ Nile *Submission* 20/07/00 p4; Community Christian Schools *Submission* 20/07/00 p3. It should be noted that the case proceeded under the common law, not as a result of any new legislation, see discussion of this in Griffith *op cit* pp17-18.

⁹² Pastors Westman *Submission* 7/07/00 p1

....the proposed legislation embodied in the Crimes Amendment (Child Punishment) Bill 1997 moves from a general protection stance for the care of children to ideological statements over the forms of discipline and we feel this is not the role of the state.⁹³

In some cases bureaucracy is sensible but not so in others. For example, teachers have a lot of pressure on them under the mandatory reporting of physical or sexual abuse of a child. If this Bill were passed that would be another protocol for the responsibility of teachers to report cases of children being smacked excessively, or other ill treatment. Teachers may feel that they have the responsibility to find out what happened and would thus set in motion the laws which often, in my opinion, will hurt good parents.⁹⁴

- 5.14** The view put is that the Bill is unnecessarily prescriptive. The common law defence does not define how parents should apply discipline: each case is considered upon its individual circumstances. In its place the State, through this Bill, would impose standards of acceptable physical punishment on all parents in all circumstances. In his submission Mr Barry Maley argued this was a move towards the model of countries such as Sweden. He quoted a Swedish lawyer, Mrs Siv Westerberg, who represents Swedish parents on assault and neglect charges. Mrs Westerberg argues that the restrictions on corporal punishment, force ordinary families in Sweden to live under real threat of removal of their children:

I, and other Swedish lawyers who specialise in helping parents against the social authorities in child-care cases, have estimated that it is only in about ten percent of cases that the parents have problems with alcohol, drugs or mental illness. The remaining ninety percent are quite ordinary families who never had any such problems.⁹⁵

- 5.15** Mr Maley concludes that if the Bill were passed this would create a licence for interference with families and create much unnecessary and counterproductive frustration. He also argues that the laws in Sweden lead to increased supervision of families:

In a Swedish population which is less than half the Australian population (8 million and 19 million respectively) the number of children in care in Sweden (15,000) is disproportionate in relation to an Australian figure of 17,811 as at June 30, 1999 (AIHW, Child Protection Australia 1998-99, p28), and a British figure of 40,000 in a population of 58 million (Westerburg, June 1999). This may signify one of two things or a mixture of both; but each is worrying. First, as already suggested, that abolition of corporal punishment has had consequences contrary to those intended by increasing the amount of abuse requiring that children be put into care. The second is that the legal duty to search out parental breaches of the corporal punishment and care of children laws is leading to intense inspection and investigation of families and the placing of extensive power in the hand of officials.⁹⁶

⁹³ NSW Council of Churches *Submission* 15/07/00 p2

⁹⁴ Nile *Evidence* 21/08/00 p34

⁹⁵ quoted in Maley *Submission* 16/07/00 p9

⁹⁶ Maley *Submission* 16/07/00 p8

Cultural Issues

5.16 Several of the arguments against the Bill are based upon it not being consistent with cultural values in certain communities. These cultural differences were not generally raised in relation to non English speaking background communities: no submissions were received from representatives of these groups.⁹⁷ Rather they were raised in relation to either traditional “Anglo-Australian” values⁹⁸ and/or in relation to religious values⁹⁹ involving the parental right to discipline.

5.17 Dr Sullivan argued in her submission that:

[the Bill] is sociologically naive, both failing to understand its own culture and presuming the possibility of simplistically substituting foreign mores for the complexities of a native tradition.¹⁰⁰

5.18 She explained this further in evidence:

The Hon. J. F. RYAN: What did you mean by the term "our culture"?

Dr SULLIVAN: Well, I guess I mean British-Australian culture.

The Hon. J. F. RYAN: Anglo-Saxon culture?

Dr SULLIVAN: Yes, and I think that is why this has come up because other cultures are coming in and doing things that are not in the British tradition and we are worrying about them. Now I know that is very politically incorrect to say, but I think that is what it is, and that I think is the only thing that does in a way justify it. Now you will notice that I did not entirely dismiss it and I think it is because of that fear. The Australian culture up to 1950 knew that we do not harm children, but we worry that other cultures may be taken in which will accept harm to children as well as pain.¹⁰¹

5.19 Religious groups who opposed the Bill argued that the legislation was an interference with biblically sanctioned methods of parental discipline:

The Bible supports the use of corporal punishment as one, albeit valuable, strategy for parents to use. It insists that in the nurturing of a child discipline must be administered in a way that is helpful to the child and not harmful.¹⁰²

⁹⁷ The Hon Alan Corbett MLC has received letters of support for his Bill from the Ethnic Communities Council and the Australian Federation of Islamic Councils.

⁹⁸ Sullivan *Evidence* 8/08/00 p31-32

⁹⁹ eg Pollard *Evidence* 14/08/00 , p32

¹⁰⁰ Sullivan *Submission* 17/07/00 p1

¹⁰¹ Sullivan *Evidence* 8/08/00 p31-32

¹⁰² Christian Community Schools *Submission* 20/07/00 p2

The Bible, however, does not specifically stop parents using appropriate corporal discipline on their children. So I would not like this afternoon for us to decide that sparing the rod is allegorical and we leave saying that. The Bible gives parents the responsibility of training and instruction, as I read from Ephesians 6:4. That does not preclude the use of corporal discipline.¹⁰³

- 5.20** Most of the religious opponents of the Bill, however, argued the Bill was inappropriate to parents generally, not only those from a Christian background:

Spanking is a universal method of correction and not a fabrication of Western Judeo/Christian beliefs. Even those cultures which reject the Bible consider chastisement necessary for correction. Even nature itself teaches that there is a place for chastisement. All higher animals will strike their offspring at times to curb unwanted behaviour.¹⁰⁴

Bill Confuses Pain with Harm

- 5.21** Dr Lucy Sullivan from the Centre for Independent Studies argues that the Bill focuses inappropriately on preventing use of certain methods of discipline rather than preventing harm. This was based upon a misguided view that inflicting pain on a child was undesirable:

The essence of our culture's approach to physical punishment is that it should cause pain but not harm. As every student of animal behaviour knows, pain is nature's teacher, but under natural conditions harm frequently accompanies pain. The role of the parent is to pre-empt nature and provide pain which teaches avoidance without the accompanying danger of harm. Thus the mother who smacks a toddler for repeatedly reaching up to objects on the stove is protecting him from the harm, as well as the pain, which will occur if nature is allowed to take its course. When punishment is inflicted for social misdemeanours, it is harm to others which the parent prevents.¹⁰⁵

- 5.22** She argues that the Bill should state that any punishment which causes physical harm, such as bruising or breaking the skin, should be illegal:

This distinction can be readily made clear to any parent of normal intelligence, and it obviates the need for specifically banning the use of particular implements or the touching of particular parts of the body. Obviously the force exerted must be moderated according to the "implement" and the part of the body at which is directed, with the fragility of the sense organs located in the head imposing special constraints.¹⁰⁶

¹⁰³ Pollard *Evidence* 14/08/00 p32

¹⁰⁴ Nile *Submission* 20/07/00 p4

¹⁰⁵ Sullivan *Submission* 17/07/00 p2

¹⁰⁶ Sullivan *Submission* 17/07/00 p2

- 5.23** She further specifies that the pain inflicted should be brief and discrete, rather than recurring, should only punish an action which is within the child's rational control, and should not be random or causing fear of the parent.

Bill will contribute to Decline in Discipline

- 5.24** Opponents of the Bill argue that by removing some currently used forms of physical punishment, while creating doubts about parents rights to smack their child, will contribute to a reduction in effective parental discipline. Several letters and submissions use the analogy of the abolition of corporal punishment in schools; that this has led to less discipline within schools and declining community standards in general:

It is lack of discipline which causes this.....many children I know have no respect for adults because they are allowed to do as they like. There is a lack of discipline in schools, such as was the case of a high school, reported in the Telegraph recently, where children wish to act as they like.¹⁰⁷

I do not believe every teacher should be able to do it, but I do not see why someone who makes a cool decision that a child needs to be taught a lesson cannot give him a cut. The fact that someone is able to do that is sometimes a restraining factor on some of the young people getting out of hand. It has a deterrent effect as well. When young people, particularly bullies, know that nobody can touch them, they just say "So what? Nobody can touch me".¹⁰⁸

Creation of Uncertainty

- 5.25** Opponents of the Bill argue it will undermine parental discipline because it creates new, uncertain standards. Under the common law parents knew they were permitted to use physical punishment, and child protection legislation was sufficient to cover the minority of abusive parents who improperly used physical punishment. The new Bill, with limits on what punishments can be administered, creates many uncertainties. Can a parent tweak a child's ear? Is a light tap with a ruler sufficiently "trivial or negligible" to be permissible? How does a parent know what "harm to a child that lasts for more than a short period" means if they smack their child?¹⁰⁹ Until any cases are decided there will be doubts as to how the provisions of the Bill will be interpreted:

Parents will not know what the law means by a "short period". Will the child have pain that lasts for more than a minute? If it lasts more than a minute, will the parent be brought before a court, sentenced and put in Long Bay goal? If it lasts for 50 seconds the parent will be all right.¹¹⁰

¹⁰⁷ Davey *Submission* 26/06/00 p1

¹⁰⁸ Smith *Evidence* 14/08/00 p42

¹⁰⁹ The phrase "threaten to cause" in s61AA (2) (c) was also raised, but as the Hon Alan Corbett MLC has argued this is a drafting error it is not raised here: see Chapter Six.

¹¹⁰ Nile *Evidence* 21/08/00 p38

- 5.26** Witnesses such as the Hon Fred Nile MLC argue that this uncertainty will be increased by potential media distortion of the Bill, that it will be reported as “an Anti-Smacking Bill”.¹¹¹ The ultimate effect of the uncertainty is to undermine parent’s confidence in discipline generally.

Stepping Stone to Banning Smacking

- 5.27** Substantial material was provided to the Committee arguing the merits of spanking/smacking as a form of discipline¹¹² and also arguing against its use.¹¹³ The Committee believes the debate is not relevant to the Bill: the effect of the Bill is to preserve smacking with an open hand below the neck as a permissible form of discipline. For that reason the Committee does not canvas the arguments for and against physical punishment in this report.

- 5.28** However one argument raised by opponents is that the Bill is intended as a stepping stone to banning smacking and all physical punishment. The Hon Alan Corbett MLC is a supporter of moves toward abolition of physical punishment, as are some of the other child protection and medical experts who support the Bill. Opponents argue that s61 AA (2) (c), which prevents any force being applied in such a way as to cause “harm to the child that lasts for more than a short period”, provides a means to restrict smacking:

I believe the application of the Bill equals a no-smacking Bill. The Bill clearly states that a number of actions now taken by some parents are to be totally prohibited. The Bill uses the code words “application of force” – that is, smacking.¹¹⁴

- 5.29** Opponents of the Bill argue that, even if this is not the case initially, it will be the means to progress towards banning smacking in the future.

Community Education Campaign is Better

- 5.30** Several opponents agree with the Hon Alan Corbett MLC’s aim of minimising the use of physical discipline in the community but reject the Bill as a means to achieve this aim. For instance the Hon Fred Nile MLC stated in the debate in Parliament on the Bill that physical punishment should be a last resort, should rarely be used and for many children may never need to be used.¹¹⁵ Opponents of the Bill argue that a community education campaign is a more effective tool than using the criminal law to change the discipline practises of parents:

¹¹¹ Nile *Evidence* 21/08/00 p39

¹¹² see Nile *Submission* 20/07/00

¹¹³ Calvert *Submission* 24/07/00

¹¹⁴ Nile *Submission* 20/07/00

¹¹⁵ NSWPD 26/05/2000 p20

...there has been a steady, unforced change in parental disciplinary practises in the direction of less appeal to harsh methods of punishment. This has come about through better parental understanding promoted, in the main, by non-governmental and community education via the media, churches, associations, word of mouth, and so on. We should allow these private and spontaneous processes to continue doing their work.¹¹⁶

5.31 The Hon Fred Nile MLC argued that a community education campaign did not require legislative backing to be effective:

I see nothing wrong with having an education campaign to point out to parents, “We are not saying you cannot smack your children, but we warn you, as we do with the no shaking issue, never to hit your child around the head,” or whatever way that should be termed—the head, the neck, the face or so on.

CHAIR: Mr Corbett's bill provides that that is not reasonable if that happens.

Reverend the Hon. F. J. NILE: I know that. That is what I am getting at: I do not think you need legislation to do that. It can be done with education. That is my point – education, not legislation.¹¹⁷

¹¹⁶ Maley *Submission* 16/07/00 p10

¹¹⁷ Nile *Evidence* 21/08/00 p41

Chapter 6 Other Views on the Bill: Legal And Technical Issues

Introduction

6.1 During this inquiry the Committee has thoroughly examined each section of the Bill. It is important that the wording of the Bill does not have unintended consequences. In inviting submissions and seeking evidence the Committee has distributed a discussion paper prepared by Dr Gareth Griffith of the NSW Parliamentary Library Research Service, *Crimes Amendment (Child Protection – Excessive Punishment) Bill 2000: Background and Commentary*.¹¹⁸ This paper included a section by section consideration of the Bill and raised issues for further consideration. As was hoped, submissions from legal experts carefully examined these technical matters. Submissions and evidence which expressed views on the wording of the Bill came from:

- The Law Society of NSW
- The NSW Bar Association
- The Legal Aid Commission of NSW
- The Public Defenders Office
- The National Children’s and Youth Law Centre
- The Association of Child Care Centres of NSW
- The NSW Teachers Federation
- The Labor Council of NSW

6.2 Apart from the Public Defenders, all other submissions supported the Bill, subject to resolution of the issue/s they raised.¹¹⁹

6.3 The issues raised are mainly concerned with the narrowing the class of persons to whom the defence of lawful correction is available. Concern was expressed as to how the current wording of “person acting for a parent” would affect child care workers, teachers, babysitters and siblings aged under 18 (s 61 AA (5)). Lesser concerns raised included the definition of “harm for more than a short period”, the use of the words “threaten to cause” (both in s61 AA (2) (c), the usefulness of the words “trivial or negligible in all the

¹¹⁸ Briefing Paper No9/2000, NSW Parliamentary Library

¹¹⁹ The Teachers Federation and The Labor Council expressed no direct view on the Bill as a whole, but the intention of their submissions appears to be amendment rather than withdrawal of the Bill.

circumstances” (s 61 AA (2) (a) and (b)); and whether the common law defence was correctly restated (s61 AA (1)). The Committee itself raised the issue of age of the child to which physical discipline could be applied.

- 6.4** As will be seen in Chapter Seven, the Committee believes only the issues relating to “persons acting for a parent” and the “threaten to cause” are significant concerns. Both are able to be remedied by alterations to the Bill. The discussion which follows concerns improvements to the Bill not arguments against it; most of those raising these issues supported the Bill.

Restatement of the Common Law in s 61 AA (1)

- 6.5** Section 61 AA (1) of the Bill restates the common law defence of lawful correction. The Public Defenders in their submission¹²⁰ queried whether the section shifts the onus of proof onto the accused:

In proceedings brought against a person arising out of the application of physical force to a child, the proposed section 61 AA (1) makes it a “defence” if the force applied meets certain pre-conditions. As the section stands it is not clear whether the defence is a defence in the sense that self-defence is a defence, ie something that the prosecution must negative beyond a reasonable doubt if evidence of its existence is raised during the trial. Or is it a defence, the existence of which must be established by the accused on the balance of probabilities once there is evidence by the prosecution of the application of force.¹²¹

- 6.6** The effect of the latter interpretation would be that any parent who used physical force in discipline would be prima facie guilty of an offence, with the parent then being forced to prove their innocence. Mr Stephen Odgers, representing the Bar Association, suggested this was an unlikely interpretation:

I would not expect that a court would interpret it as imposing a burden on the defendant. I would expect that in accordance with well-established principles of statutory interpretation in respect of criminal matters that the usual situation would follow, that the prosecution has the burden of rebutting the defence. As a matter of policy that would be something I would strongly support and if there is any possibility realistically that this defence would impose a burden on the defendant, we would most strenuously oppose it. We would have thought that the present words, notwithstanding Mr Nicholson's concerns, would not be interpreted in the way he fears. However, if that is a possibility we would support either his suggested modification¹²² or, perhaps better, some appropriate reference in the second reading speech if and when the bill is enacted, making it clear that

¹²⁰ *Submission 20/07/00* p3

¹²¹ Public Defenders *Submission 20/07/00* p4

¹²² Senior Public Defender Mr Nicholson QC had suggested in evidence that the words “ a defence” in s61 AA (1) be replaced with “lawful” – Nicholson *Evidence 24/08/00* p11

there is no intention to shift the burden of proof from where it presently resides at common law.¹²³

Uncertainty caused by “trivial or negligible in all the circumstances”

6.7 Some comment was made during the inquiry that the adding of the phrase “trivial or negligible in all the circumstances” to qualify the prohibitions in s61AA (2) (a) and (b) creates some confusion. Section 61 AA (1) already states that lawful correction is permitted provided it satisfies a test of reasonableness having regard to all the circumstances of the use of force. This is narrowed in s 61 AA (2) to exclude use of objects and blows to the neck and head; this is then qualified by the words “other than in a manner that could be reasonably considered trivial or negligible in all the circumstances”. This is a different test to the reasonableness test in s 61 AA (1). The Legal Aid Commission considered this unnecessarily confusing:

The terms “trivial or negligible” will have different meanings in different communities and therefore will not be able to serve as a clear or consistent bar past which the use of implements is prohibited. For example, given the past acceptance of the wooden spoon and the belt as appropriate implements with which to hit children.....it is possible that their use will continue to be seen by the adults sitting as today’s judiciary as “trivial or negligible”, despite the fact that these implements can often cause serious physical injuries to children.¹²⁴

6.8 Similarly, the Public Defenders argued:

The community, under the laws as they presently stand, is presumed to understand and accept the concept of reasonableness in their dealings and that same concept may well continue to be applicable as the standard that they adopt in assessing whether the chastisement of a child is appropriate in the circumstances. specified standards and definitions themselves contain other standards that perhaps will be equally unclear to a member of the community as the standard of reasonableness, if it is in fact unclear.¹²⁵

6.9 The Legal Aid Commission and Stephen Odgers both provided re-drafts to address this issue,¹²⁶ while the Commissioner for Children and Young People sought a removal of the words altogether:

One of the strengths of the bill is that it clearly defines, for parents, what is considered excessive punishment in very concrete, practical terms that they can apply in everyday settings. That is something that parents have really wanted. The introduction of the words "could reasonably be considered trivial or negligible" introduces a subjective element. What some people consider reasonable chastisement, other people consider excessive punishment. We have slipped back

¹²³ Odgers *Evidence* 24/08/00

¹²⁴ Legal Aid Commission *Submission* 26/07/00 p2

¹²⁵ Pearsall *Evidence* 24/08/00 p15

¹²⁶ although the Odgers redraft retains the use of “trivial and negligible”

a bit by the insertion of those words to a subjective element that earlier drafts did not contain.

.....if the punishment is trivial or negligible it is highly unlikely that police would lay charges of assault. Of course, that would have to happen before that defence could be activated. Police would have already exercised discretion and, if you like, excluded trivial or negligible matters so that it is unnecessary to have it in the bill, particularly when it muddies the water in what was previously a very clear set of guidelines for parents is to what they could or could not do and therefore have protection under the law.¹²⁷

6.10 Professor Parkinson supported the current wording, partly on the grounds that it was reassuring to legislators to have the qualification present:

I am very much in favour of clear, simple legislation. Having said that, I know that this Bill has been the result of an enormous number of compromises, not least with the members of your party - both parties, I might say. I think that people have wanted to try to nail down every issue rather than realising that this is about prosecutorial discretion and that that is the most important issue, the commonsense of the police, the DPP and the public. So I think it is more complex than I would like to see and it could be much more simply drafted if there was common cause amongst all parties in the House to achieve that.¹²⁸

Meaning of “Threaten to Cause”

6.11 Concern was expressed in several submissions about the meaning of the words “or threaten to cause” in s 61 AA (2) (c).¹²⁹ However during a hearing of the inquiry the author of the Bill the Hon Alan Corbett MLC stated that the insertion of the phrase was a drafting error. It was taken without modification from the Model Criminal Code Officers Committee recommendation.¹³⁰ Parliamentary Counsel had advised Mr Corbett that the phrase should be removed when the Bill is returned to Parliament for debate.¹³¹

“Harm to the child that lasts for more than a short period”

6.12 In the previous chapter reference was made to concerns from opponents of the Bill about the potential of the phrase “harm to the child that lasts for more than a short period” to cause confusion to parents. The Legal Aid Commission, in their submission, argued that the term “harm” is extremely vague, because it is not clear whether it includes emotional or

¹²⁷ Calvert *Evidence* 21/08/00 p17

¹²⁸ Parkinson *Evidence* 8/08/00 p16

¹²⁹ The matter was also discussed in the paper produced by the Parliamentary Library Research Service: Griffith *op cit* p28-29

¹³⁰ see Chapter Two of this report

¹³¹ Corbett *Evidence* 21/08/00 p26

behavioural harm as well as physical.¹³² The Law Society, however, did not consider that this was a significant problem, because preventing mental harm was equally desirable.¹³³

6.13 The Legal Aid Commission argues that the addition of the qualifying phrase “for more than a short period” adds to this confusion because it is open to wide interpretation and would require case law to clarify its meaning.¹³⁴ The Public Defenders in their submission also suggests guidance is needed as to what is a “short” time.¹³⁵

6.14 The phrasing in s61AA (2)(c) was originally modified by Mr Corbett from the Model Criminal Code Officers Committee.¹³⁶ The attempt to define the harm by its duration appears to have caused problems to legislators in other jurisdictions who have attempted to avoid a subjective element.¹³⁷ During this inquiry the only suggestions to overcome this involved rewriting s 61AA (2) (c) to define the injury by the extent of the injury rather than the duration of the harm: for instance the Legal Aid Commission suggested:

(2) the application of physical force is not reasonable if it causes or creates a risk of causing physical impairment to any part of the body of the child

(2a) In this section, physical impairment means an observable physical injury or an injury that impairs the use or function of any part of the body¹³⁸

6.15 Stephen Odgers prepared a redraft of the subsection in the following terms:

(c) in such a way as to be likely to cause harm to the child that last for more than a short time

6.16 He conceded that this only differed from the original Bill in the use of “likely to cause”, which introduces an element of foreseeability. He argued this was important because assault is a criminal offence, so the defence should only be lost if the harm suffered could have been anticipated or foreseen. Aside from this, he argued that some uncertainty was perhaps unavoidable:

I struggled with this myself and tried to think of a more precise, more clear, more certain way of expressing it. I could not do so. I actually replaced the word "period" with "time". I do not think that means much. It was a minor change in the formulation but it does not make a substantive difference. No, I have to concede that the proposal does have some uncertainty attached to it. For that reason I think incorporating the words "likely to" does provide some protection

¹³² *Submission 26/07/00 p3*

¹³³ *North Evidence 14/08/00 p20*

¹³⁴ *Legal Aid Commission Submission 26/07/00 p4*

¹³⁵ *Submission 20/07/00 p4*

¹³⁶ see Griffith *op cit* p29-30

¹³⁷ *Ibid* p30

¹³⁸ *Submission 26/07/00 p4-5*

for parents because it means that they will not lose the defence unless it is in fact likely that the force they used, which by definition cannot be a force of the sort referred to in (a) or (b), will cause harm which will last for more than a short time. Frankly, I cannot say much more than I have.But no, the bottom line is that the bill, as it stands, is not as certain as one would wish but it is a hell of a lot better, with respect, than the common law and that is why the Bar Association supports it.¹³⁹

Age of child

6.17 During hearings the Committee asked several witnesses whether the restrictions on the use of the defence of lawful correction in s61AA (2) should include limits on physical punishment being inflicted either below a certain age, such as 18 months, or above a certain age, such as 16. This received a mixed response from those who otherwise supported the Bill. For instance Professor Vimpani supported such a provision:

I would certainly support the view of the American Academy of Paediatrics that 18 months is probably a more reasonable lower limit below which it should not be permissible for a parent to administer physical punishment. The irony is that for children over school age, school staff are prohibited from using physical punishment on their pupils. It would be somewhat ironic if parents were permitted to do something that is not allowed within the school system. I go back to my point that, from the evidence, it is not to a demonstrably effective form of disciplining children.

There is strong data—unfortunately retrospective data from adults—pointing towards the fact that over 50 per cent of adults with a history of depression, suicide or alcohol abuse report being subjected to corporal punishment as adolescents. The use of corporal punishment in adolescence is totally inappropriate. If reasonable chastisement is to be used at all on children it should only be within the age limits from 18 months to 10 or 11 years. As I said, I would question its effectiveness even within those age bands.¹⁴⁰

6.18 Professor Kim Oates also supported a limit on physical punishment directed to very young children:

I can see some merit in the argument that children who died as a result of physical abuse—often as a result of punishment attempts which go wrong—are often children in the first two years of life, so there would certainly be some advantage in saying that children under a certain age—two years or one and a half—cannot be hit at all. I would certainly support that view.¹⁴¹

¹³⁹ Odgers *Evidence* 24/08/00 p37

¹⁴⁰ Vimpani *Evidence* 14/08/00 p4

¹⁴¹ Oates *Evidence* 24/08/00 p3

6.19 However he was less supportive of an upper age limit:

The upper age limit is probably less important only because, as children get bigger, parents tend to use less physical discipline. That is the whole difficulty in parenting. If parents use physical punishment as their only form of discipline, by the time the child is 15 or 16, the child is usually bigger than the parent and then the parents have no form of discipline if that is the only measure that they ever had. I could certainly see some advantage in providing legislation to protect very young children and that seems to be in line with community expectations.¹⁴²

6.20 In contrast to medical and child protection experts, witnesses from a legal background were generally not supportive of use of specific age limits. Law Society President John North thought that different developmental stages of children could make for complications:

I believe the Law Society feels that you would be moving into dangerous territory if you start doing that in this case and that you should leave it to the operation of the section as a whole and to the behaviour of people in regard to children, no matter what age they are. As soon as you start applying arbitrary limits, you will always get the case that makes those arbitrary limits look silly.¹⁴³

6.21 Mr Stephen Odgers representing the Bar Association also had reservations about such a provision:

It is a little outside my sphere of expertise because ultimately, it seems to me, it turns on questions about child development and, for example, what the risks are of particular kinds of applications of force on, say, a child of 15 months—it seems to me there are certain kinds of applications of force that even with a 17-month-old child should not be criminalised. The other aspect is whether there are reasons why parents should be permitted to exercise relatively trivial force against children of that age. I am just nervous, as a criminal lawyer and primarily as a defence lawyer, about legislation that says under no circumstances can you use force of any kind against someone. I can imagine circumstances in which a parent uses trivial force against a child who is old enough to know that what he or she is doing is wrong and where the use of that force will serve some short-term, medium-term or long-term benefit within the family. I hesitate to say that no such circumstances could exist, so I am therefore hesitant to say that there should be a complete ban.¹⁴⁴

Person Acting for a Parent – Child Care Workers and Teachers

6.22 The provision of the Bill which has led to most discussion during the inquiry is that part of s61AA (5) (a) which defines a “person acting for a parent”. The section greatly narrows the classes of people able to use the defence of lawful correction. The only people able to

¹⁴² Oates *Evidence* 24/08/00 p3

¹⁴³ North *Evidence* 14/08/00 p24

¹⁴⁴ Odgers *Evidence* 24/08/00 p39

use the defence, other than parents, are step-parents, de-facto spouses, or a relative (by blood or marriage) of a parent. The main objections to this provision have come from some of those who were previously able to use the common law defence but are now excluded: teachers and child care workers. The Association of Child Care Centres of NSW,¹⁴⁵ the NSW Teachers Federation¹⁴⁶ and the Labor Council of NSW¹⁴⁷ all raised a similar problem, while not objecting to the intent of the Bill overall.

6.23 Essentially the objection is that the Bill uses the words “physical force” in earlier subsections as if it were the same as “physical punishment”. For instance s61 AA (1) refers to the “application of physical force” for the “purpose of discipline, management or control”; there is no real distinction made between the concepts of punishment and restraint. Child care workers and teachers are already prohibited from using physical punishment, but they do sometimes use physical force to manage and control difficult situations, particularly if a child is placing themselves or other children in danger. At present when this force is used the defence of reasonable correction is available if there is any allegation of assault raised. However subsection 5 of the Bill, which defines those able to use the defence of reasonable correction, does not contemplate child care workers or teachers as part of the group able to be authorised as “acting for a parent”.

6.24 Both the Association and the Federation argue that there is no other defence available to them once lawful correction is removed. The situation appears to be most acute for child care workers. The *Children and Young Persons (Care and Protection) Act 1998* does provide, at s157 and s158, a definition of “lawful restraint” but this is only available to out of home carers. The Commissioner for Children and Young People confirmed that child care workers are not intended to be covered under these provisions.¹⁴⁸ There are no other statutory protections available under child care legislation and regulations. The President of the Association of Child Care Centres stressed that child care workers were not seeking power to impose physical punishment:

I fully, absolutely, completely and utterly support the concept of no corporal punishment—none—whether it be with a stick or an open hand.Where we are coming from, we believe there was an attempt by the writers to include us in the exception in that we can use a degree of physical force to gain control and protect a child, perhaps from himself, and other children from him, but I think we may have slipped through the rails.¹⁴⁹

¹⁴⁵ *Submission 21/07/00*

¹⁴⁶ *Submission 18/08/00*. The Committee also received a late submission (after the closing date for acceptance of submissions) from the NSW/ACT Independent Education Union, which took a similar view.

¹⁴⁷ *Submission 18/08/00*

¹⁴⁸ Calvert *Evidence 21/08/00* p18

¹⁴⁹ Bardetta *Evidence 14/08/00* p11

- 6.25** Teachers have slightly more statutory protection, but only for civil offences. Under section s3(1) of the *Education Act 1990* NSW the definition of corporal punishment¹⁵⁰ specifically excludes the application of force by a teacher to prevent a student causing injury to a person or damage to property. However the Teachers Federation argue that this provides no assistance for criminal charges of assault as a result of the use of force in restraining a student. Here teachers needed to rely upon the common law defence. The transcripts of two recent Local Court cases where teachers were charged with common assault were cited in the Federation's submission. In the first a student had alleged that the teacher had lifted the student by her shirt from her chair and physically removed her from the classroom after swearing, constant misbehaviour and throwing of objects by the student. In the second a teacher had grabbed a student by the collar and lifted him out of his chair after repeated provocation, which included pretending to urinate at the back of the classroom.
- 6.26** Because force was used, even though no corporal punishment was involved, the only protection to criminal assault was the common law defence of lawful correction. This was successfully pleaded in the first case and was implied in the second by the magistrates statement that the teacher's role acting "in loco parentis" means that they are entitled to exercise control that may mean appropriate physical control when it is warranted.¹⁵¹
- 6.27** The Federation points out that following the cases each teacher would have faced a disciplinary investigation by the Department and could have faced civil charges under s83 of the *Teaching Services Act* if the behaviour was considered inappropriate or constituting misconduct, even though the teachers had been acquitted of criminal charges. In addition the Ombudsman would have to be notified by the Department under s25C of the *Ombudsman Amendment (Child Protection and Community Services) Act 1998*, which could lead to a further investigation. The teachers would also, as of 3 July 2000, have their name recorded in the database of the Commission for Children and Young People as a person who must be screened if they were to leave the Department to seek other child-related employment. The Federation argues:
- This level of scrutiny provides a sound base to protect children from assault and child abuse. To deny teachers the right to a defence of lawful correction could result in a situation where teachers may feel that they cannot take any physical action to take control of situations where students are acting in a provocative and abusive manner and threaten or actually assault other students or teachers. This would be extremely detrimental to both the teaching and learning environment and adversely affect the majority of students.¹⁵²
- 6.28** In a response to questions taken on notice the Commissioner for Children and Young People suggested the Bill did not need to be amended and did not effect the common law rights of teachers or child care workers to use force to restrain children under their care.¹⁵³ However Stephen Odgers from the Bar Association disagreed in the strongest terms:

¹⁵⁰ prohibited under s35 and s 47(f) of the Act

¹⁵¹ Teachers Federation *Submission* 18/08/00 p8

¹⁵² Teachers Federation *Submission* 18/08/00 p10

¹⁵³ Calvert, letter 28/08/00 re questions on notice from hearing 21/08/00p3-4

....we are talking about the criminal law here. We are not talking about imposing disciplinary requirements on teachers for example, or making people simply liable to civil action, or consequences of that sort. The point is that we are dealing with situations where people may be charged with criminal charges with the possibility of imprisonment; and, even if there is no imprisonment, with other severe penalties; and, even if none of those follow, consequences for their good name and their future livelihoods.

.....As I have said we strongly believe that the present definition of the person acting for a parent is completely unacceptable—and I want to stress that this is not, from the point of view of the Bar Association, a minor matter. The fact of the matter is, as I have said, we are talking about criminal liability. We are not talking about, taking the example of teachers, whether or not they are liable to disciplinary consequences, or whether a school will be registered, or indeed whether civil liability is applicable—although this may have implications for that. We are talking about criminal charges. As a matter of fundamental principle it is our view that it is wrong that a person who has the care and management of a child with the consent of the parent should not have the very same protections available to the parent in respect of criminal charges of assault.¹⁵⁴

6.29 The Committee queried whether teachers and child care workers could be protected by amending legislation specific to their professions. Stephen Odgers suggested this would lead to further anomalies being uncovered, and preferred amending the Bill itself:

CHAIR: ...Is it any less satisfactory if the matter were dealt with in legislation specific to teachers, the *Teaching Services Act*, or alternatively in the case of childcare workers the *Children and Young Persons (Care and Protection) Act 1998*? You are not entirely confident the legislature will get around to doing that?

Mr ODGERS: No, that is not the reason. There are three reasons: One, it should not be limited to protecting teachers and childcare workers. It should extend to all persons who have, with the consent of the parent, management and control of a child—at least where they have the consent or reasonably believe they have the consent for the use of some degree of force in appropriate circumstances. Any person in that situation should have a defence in the same way that a parent would have a defence. I am making the point of principle that we should not limit the definition to teachers and childcare workers. There is no reason why any protections for them should be greater than other people in like circumstances. That is the first point I would make.

The second point I would make is that our proposal for extending the definition of "a person acting for a parent" would meet the concerns you have particularly raised. When I say that it should be in the bill, I am really saying that the bill should make the definitional change we have proposed, which would have the effect of providing the protection that you mentioned but would not be as narrow as the effect of changes to the teaching or similar legislation. As I said a moment ago, the definition should not be so narrow. It should ensure that people who, with the consent of a parent, are acting essentially in place of the parent have no lesser rights or protection than the parent. That is bearing in mind that the effect of the bill would be that parental rights have been substantially reduced to reflect community concerns about the use of force.

¹⁵⁴ Odgers *Evidence* 24/08/00

In New South Wales a teacher in a disciplinary matter—that is, a non-criminal law matter—is not permitted to use force in any circumstances, at least for the purposes of correction. That does not mean that it is necessarily a good idea that a teacher has no defence whatsoever to a criminal charge. I stress that, to the extent that we are talking about structuring defences to criminal charges in this context, teachers and childcare workers should be properly protected within that legislation.¹⁵⁵

6.30 Stephen Odgers suggested a redrafting of the subsection in the following terms:

“person acting for a parent” should be defined as follows:

a person who

- (a) has taken responsibility for the care and management of the child with the consent of a parent of the child; and
- (b) reasonably believes that the parent of the child consented to the application of the force applied to the child

6.31 Following Stephen Odgers’ evidence the Committee wrote to Professor Parkinson seeking his views. A copy of his response appears as Appendix Four. Professor Parkinson agreed that an anomaly did exist which left teachers and others without a defence in cases of momentary physical restraint used against a child. He supported extending the category of persons able to be authorised to act as a parent to include the words “or other persons to whom the parent has entrusted the care and management of the child”.

6.32 Professor Parkinson also suggested the difference between physical force for the purpose of restraint needed to be clearly separated from physical force for the purposes of punishment. He argued this could be achieved by removing the words “management or control” from s 61AA (1), so that it only refers to the use of the defence in “discipline”. To ensure there is no doubt, this could be re-inforced by amending s 61 AA (4) to make it clear that the Bill does not alter the common law regarding the management, control or restraint of a child other than for purpose of punishment.

Person Acting for a Parent – Express Authorisation

6.33 The phrase “reasonably believes that the parent of the child consented” in the above Odgers redraft replaces the requirement that the person be “expressly authorised by the parent” in the current Bill. This express authorisation was raised as a concern by the representatives of the Public Defenders:

Mr PEARSALL: The concern is the introduction of the requirement of express authorisation by the parent. In many cases the parties would see the authorisation as unspoken. If there were concerns by the parent they might be expected to be voiced by the parent when the child was being left in the other person’s custody. People may become criminals merely because of the failure to

¹⁵⁵ Odgers *Evidence* 24/08/00 p34

secure an express grant of authority in a situation where both parties recognise a longstanding implicit grant of authority.....

Mr NICHOLSON: Let us take the case of the babysitter who has come over to look after the young children and who is told, "Now you can do whatever is necessary to keep these children quiet", the parent believing that that was no more than watch the TV, give them food and do distracting things. The babysitter, on the other hand, may have taken the view that it was an express grant to smack the children.¹⁵⁶

- 6.34** The consent provision drawn up by Stephen Odgers differs from the original Bill in that authorisation can be on the basis of reasonable belief, it does not have to be expressly authorised. He explained this in detail:

There is the question of whether or not a person has authority to look after the child. That is one thing. Then there is the more precise question of whether a person has or believes he or she has authority to use a particular kind of force in exercising the function. The proposal we have adopted is that it should be established that there was consent for the care and management from the parent. It would not be enough that a person believed that he or she had consent. A person would have to show that there was consent for managing or caring for the child. That would not normally be a matter in contention. Assuming a person has the responsibility, when it comes to the actual application of the particular force in question, our view is that it should not be necessary that the person has expressed authorisation for that force nor should it be necessary to have expressed authorisation for any force. Rather a person should have circumstances where he or she believes that what he or she is doing is authorised, the force is authorised, and that that belief is a reasonable one in all the circumstances.¹⁵⁷

- 6.35** The suggested amendment by Stephen Odgers therefore has the effect of widening the class of persons able to use the defence of lawful correction in two ways: by not limiting the use of the defence to immediate family members; and by permitting authorisation on the basis of reasonable belief rather than only on express authorisation. This does not in any way alter the prohibition of certain forms of correction which is the main purpose of the Bill.

- 6.36** Professor Parkinson, in his letter to the Committee regarding s61 AA (5), agreed that the class of person able to use the defence while acting as a parent needed to be widened. However he did not support removing the requirement of express authorisation:

Many parents regard it as entirely proper to smack their children, and that is an entirely legitimate position which this Bill in no way challenges. Yet even many of these parents might think twice about authorising a volunteer in a creche to do so, or a volunteer football coach whom they scarcely know or a team leader at a children's residential camp.....The express consent provision would ensure that everyone knows where they stand. It is also simply administered. If an organisation which provides care for children on behalf of a parent holds to the

¹⁵⁶ Evidence 24/08/00 p23

¹⁵⁷ Odgers Evidence 24/08/00 p34

view that there are circumstances when it thinks it appropriate to use physical discipline (within the law) then it can ask parents to sign a consent form.¹⁵⁸

6.37 The rationale for the inclusion in the definition of a person acting for a parent of the requirement for express authorisation, was discussed by Dr Judy Cashmore in evidence before the Committee:

The Hon. JANELLE SAFFIN: I would like to ask you a question about the inclusion of de facto spouses (male) because it is the Committee's information that there is a recorded higher incidence of child abuse on the part of male de facto spouses and to include them in this Bill in the range of persons who may act as a carer - is that desirable?

Dr CASHMORE: ... If they are a step-parent or a de facto I think the risk of severe punishment, of physical abuse and so on, is higher, so having thought about that a little bit more I think it is actually about the combination with the express authority. In other words, it has to be something that is discussed within the family as to whether or not they have the authority to hit.

The Hon. JANELLE SAFFIN: So that is desirable?

Dr CASHMORE: I think that is desirable because I think that actually sends a message. It is not about prosecuting, it is about sending a message to the community that you need to have clear views about this within the family as to who can hit and who cannot and who has the authority to discipline, and probably it might be wise if it was not just around hitting but in terms of other means of discipline as well. You certainly would not want to take away all forms of discipline from people who are step-parents or de facto spouses. They need to have some form, but it needs to be something that is discussed and is not just assumed, particularly by the de facto or the step-parent involved.¹⁵⁹

Person Acting for a Parent - Siblings

6.38 The Public Defenders in their submission¹⁶⁰ and the National Children's and Youth Law Centre raised in evidence the difficulty created by the s61 AA (5) definition of "person acting for a parent" including the words "of or above the age of 18". An older sibling given permission by their parent to discipline younger siblings would be liable for assault without access to the defence of lawful correction if aged under 18, whereas if they were aged over 18 they could use the defence. The Centre opposed this on the basis that it discriminated against young people:

The Hon. P. J. BREEN: Are you suggesting that people under 18 years of age who are siblings ought to have the power to discipline children?

¹⁵⁸ Parkinson letter 30/08/00 p4-5

¹⁵⁹ *Evidence*, 8/8/00, p10.

¹⁶⁰ *Submission* 20/07/00 p5

Mr SCHETZER: We are saying that there is an anomaly in the wording of that defence; that it provides a protection for adults over the age of 18 in that situation but not children and young people. That would contravene the principles of diversion and minimisation of contact with the criminal justice system for children and young people. There are weighing issues, issues that need to be balanced, and we say that what is clearly a lawful defence for anyone over the age of 18 should be a lawful defence also for anyone under the age of 18 in that position.

The Hon. P. J. BREEN: It may be that the intention of the bill was not to allow siblings under 18 to have the authority to chastise children.

Mr SCHETZER: The intention of that bill would then have what we would suggest is a discriminatory effect on children and young people in another aspect also. It is trying to work out that balance also of setting up a disciplinary regime that seeks to protect children and young people but also a criminal code that would not be channelling children and young people into the criminal justice system. So, we would seek an expansion of that definition of person acting for a parent or child to include children and young people. That would be an appropriate balance in that situation.¹⁶¹

- 6.39** Stephen Odgers of the Bar Association said that this outcome of the current wording of the Bill was “extraordinary”, and placed an elder brother at risk of a crime of assault when he pushes his brother, unless in self-defence.¹⁶²
- 6.40** In response to questions on this issue the Commissioner for Children and Young People supported the current wording of the Bill because it was undesirable to encourage young siblings to have responsibility for physical discipline.¹⁶³

Person Acting for a Parent - Indigenous communities

- 6.41** Section 61 AA (5) (b) provides a wider definition of “person acting for a parent” for Aboriginal and Torres Strait Islander persons than for other groups. It allows a person to act as a parent if they are recognised by the Aboriginal and Torres Strait Islander community as “being an appropriate person to exercise special responsibilities in relation to the child”. This recognises the more complex family and kinship relationships which exist in many Indigenous communities. The NSW Aboriginal and Torres Strait Islander Commission supported the provision in their submission.¹⁶⁴ The Aboriginal Justice Advisory Council initially queried whether the wording was too wide¹⁶⁵ but after further consultation with Aboriginal communities gave its support.

¹⁶¹ Schetzer *Evidence* 21/08/00 p8

¹⁶² Odgers *Evidence* 24/08/00 p37

¹⁶³ letter 28 /08/00 in response to questions on notice from hearing 21/08/00

¹⁶⁴ *Submission* 21/07/00

¹⁶⁵ *Submission* 21/07/00

- 6.42** The Public Defenders raised the question about a person who “reasonably expects that he would be recognised by his community as an appropriate person to exercise special responsibilities, but, in fact, is not so regarded by the community”.¹⁶⁶ The Commissioner for Children and Young People suggested the current wording could also allow a non-indigenous person, for instance a youth worker, to use physical discipline on Aboriginal children if the youth worker could show that they were recognised by the community as having special responsibilities for a child.¹⁶⁷ To remedy this the Commissioner suggested replacing the words “is recognised by the ATSI community to which the child belongs” with “who is a member of the ATSI community to which the child belongs and is recognised by that community”.
- 6.43** On a minor point the Public Defenders were also critical of s61 AA (5) containing cross references to other Acts to define “Aboriginal”, and suggested the definition from the other statute should be incorporated in the wording of the provision.¹⁶⁸

¹⁶⁶ *Submission 20/07/00 p6*

¹⁶⁷ *Submission 24/07/00 p26*

¹⁶⁸ *Submission 20/07/00 p6*

Chapter 7 The Committee's View

Reasons for Supporting the Bill

- 7.1** There are many arguments supporting or opposing the Crimes Amendment (Child Protection-Excessive Punishment) Bill. The Committee has attempted to present these fairly in the previous chapters. However the Committee has come to a definite view. It supports the Bill, with only minor amendments, and recommends the Legislative Council do likewise. The balance of this chapter explains how the Committee has come to this view.
- 7.2** Opponents and supporters of the Bill do agree on some issues. All are concerned about the unacceptable abuse perpetrated on children by adults. All agree on the importance of discipline even if they disagree on how this discipline should be undertaken. All agree on the importance of a community education campaign to assist parents understand acceptable and unacceptable discipline and alternatives to physical punishment. Some opponents and supporters of the Bill are substantially in agreement in their views on acceptable and non-acceptable physical punishment¹⁶⁹ even if they disagree on how or if this should be legislated. In previous chapters the differences between both groups are emphasized but there is some consensus on parental discipline.
- 7.3** The groups who have participated in the inquiry can be divided into three groups: medical and child protection professionals who support the Bill because it will reduce injuries to children; legal experts, most of whom support the Bill (with some technical modifications) because it will improve the current common law; and groups representing parents and religious organisations who oppose the Bill because of its impact on the rights and responsibilities of parents.
- 7.4** The Committee is persuaded by the strength of the arguments from those best placed to understand the way in which abuse and injuries occur. Evidence from experts such as Professor Kim Oates, of the New Children's Hospital, Professor Graham Vimpani, Dr Judy Cashmore and Professor Patrick Parkinson, who developed the current NSW child protection legislation, all argued in different ways that abuse was a continuum. There are a very small minority of sociopathic parents who will abuse children under any conditions. Apart from this group there is no clear cut-off where excessive punishment ends and abuse begins. Professor Oates was very definitely of the view that most of the very serious injuries seen by his hospital's child protection unit come as a result of physical discipline gone wrong rather than premeditated or systematic abuse.
- 7.5** The value of the legislation is that it provides parents with a guide to what is acceptable, normal discipline. Under this Bill smacking with an open hand is acceptable; striking a child above the neck, or with objects such as sticks or belts is unacceptable. For very many parents such a Bill will make no difference at all, because it reflects their current standards. For a minority of parents this legislative standard may force them to consider modification of their methods of physical discipline.

¹⁶⁹ eg Parkinson *Submission 28/06/00* p2, Nile *Evidence 21/08/00*

- 7.6** The Committee strongly supports the educative value of the Bill. For that reason it does not support some “plain language” redrafts suggested during the inquiry which sought to, for instance, simplify s61AA(2)(a) by removing reference to specific objects, or replacing (a)–(c) with an all embracing definition of excessive punishment. Section 61AA (a)–(c) gives specific examples of what is unacceptable. Despite all the detailed examination of the wording of the Bill in this report the Committee believes the main message of the Bill is simple. Anyone can find ambiguity and uncertainty in any legislation if they try sufficiently hard. Few pieces of legislation of the brevity of this Bill have had the level of scrutiny to which it has been subjected.
- 7.7** On a similar issue, removing the phrase “trivial and negligible” from s61AA (a) and (b) would create greater certainty and clarity in the legislation. However to leave it in does send out a message that parents need not concern themselves about taps with rulers, tweaking ears: that this Bill is not a means of attacking parents but rather reducing excessive punishment and injury to children. The Committee understands the concerns of witnesses who support the Bill that the “trivial and negligible” qualification allows a “back door” to justify some forms of physical discipline such as the wooden spoon. However the value of this legislation is that it sets a standard, not that it will be frequently used. The qualifications in the wording do not detract from the main messages of the Bill.
- 7.8** The Bill is an advance on the common law, which at present gives no guidance to parents on acceptable/non-acceptable physical discipline. The Committee does not accept the arguments that the child protection laws currently existing are sufficient to make this Bill unnecessary. The child protection laws are perfectly adequate to use when needed against the very small minority of abusive parents, but that is not the purpose of this Bill. What the child protection laws do not do is set clear standards for all parents on physical discipline.
- 7.9** The Committee believes the Bill does define current community standards, so far as this is possible in a diverse state such as NSW. Only one witness attempted to support a blow (a moderate slap) to the face as acceptable or appropriate; no-one defended the use of a belt and the only support for use of objects in discipline came from those who argued for the right to use a “wooden spoon”. No-one appeared to argue that physical punishment should result in harm that lasts for more than a short period, despite debate about what was meant by “short period”. The Committee realizes that there are some in the community who do not share the values expressed in this Bill. However if a choice has to be made between protecting children from serious injury and offending the values of a small section of society then the Committee believes the safety of children should come first.
- 7.10** It is tempting to argue that attitudes are changing gradually in the direction of the Bill and are best left without interference. However legislation itself can accelerate the direction of this change, by giving a message to those reluctant to change.
- 7.11** The Committee does understand the concerns of the opponents of the Bill, such as the Public Defenders and the Hon Fred Nile MLC, that the Bill has the potential to criminalise ordinary parents. The purpose of the Bill is to set a standard, not be the source of prosecutions. Cases of serious abuse will continue to be pursued through child protection legislation. A certain level of trust is required in the common sense of police and child protection authorities in the exercise of their discretion. The issue of the defence of lawful

correction only arises when a parent is charged with a criminal assault. The Committee is encouraged that the Bill is supported by both the Law Society and the Bar Association, bodies not noted for excessive trust in the use of prosecutorial discretion.

- 7.12** The Committee has presented the arguments from overseas experience, particularly from Sweden, in Chapters Four and Five. However it does not believe this provides significant assistance to NSW legislators in reaching a decision on this Bill. The Committee does not see this Bill as a stepping stone to the banning of all physical punishment. The Committee expresses no view whatsoever on the practise of “smacking” or “spanking” because this Bill does not require examination of this issue. The Bill clearly permits smacking with an open hand, below the head and neck. Section 61 AA (2) (c) does not, to the Committee, appear to refer to ordinary smacking but rather something causing prolonged harm, more in the nature of a “beating” or “belting”.
- 7.13** For all the reasons above the Committee recommends the Legislative Council support the Bill when the debate resumes following the tabling of this report.

Recommendation 1

The Committee recommends that the Legislative Council support the passage of the Crimes Amendment (Child Protection – Excessive Punishment) Bill, subject to the minor amendments contained in Recommendations Two, Three and Four.

Recommended Amendments to the Bill

- 7.14** The first amendment was suggested by the author of the Bill, the Hon Alan Corbett MLC. As discussed in Chapter Six, the use of the words “or threaten to cause” in s61AA (2) (c) appears to be a drafting error. The phrase serves no useful purpose in the current Bill and the Committee shares Mr Corbett’s view that it should be deleted.

Recommendation 2

The Committee recommends the words “or threaten to cause” be deleted from s 61 AA (2)(c) of the Bill.

- 7.15** The next amendment is more substantial. Chapter Six discussed the concerns regarding the narrowing of the class of persons able to be defined as “person acting for a parent” in s61AA (5), and the differing views as to how the problem could be rectified. The Committee believes to leave the section unchanged exposes those who work with children, such as teachers and child care workers, to unnecessary risk. Neither the Committee nor teachers and child care groups contributing to the inquiry believe these groups should be able to administer physical punishment. However both Stephen Odgers and Professor Patrick Parkinson advise that the Bill at present would mean that teachers, child care workers and others using any physical force, including physical restraint, could be left with no defence to a charge of criminal assault.

- 7.16** Both Professor Parkinson and Stephen Odgers have suggested solutions to the problem. While both would protect the groups currently exposed, the Committee's preference is for Professor Parkinson's revision, which is to remove reference to "management and control" in s 61AA (1) and (5) (a) (ii) and state in s61 AA (4) that the Bill does not alter the common law regarding the use of physical contact or force other than in punishment. This addresses the concerns of teachers, child care workers and others about their ability to use physical *force*. Because of concerns about leaving non-family members who are "acting as a parent" with no defence to a criminal charge, the words "other persons to whom the parent has entrusted the care and management of the child" need to be added to s61 AA (5) (a). However the Committee agrees with Professor Parkinson that requirement of express authorisation to be given for those imposing physical punishment on children should be preserved: this would be lost in the Odgers amendment. The Committee believes the Odgers amendment could be supported without losing the main benefits of the Bill, but of the two the Parkinson amendment is preferred.

Recommendation 3

The Committee recommends the words "management or control" be deleted from s61 AA (1) and s61 AA (5) (a) (ii), and that s61 AA (4) be replaced with the words "Nothing in this section alters the common law concerning the management, control or restraint of a child by means of physical contact or force for purposes other than punishment."

The Committee also recommends the words "or other persons to whom the parent has entrusted the care and management of the child" be added after the words "parent of the child" in s61 AA (5) (a) (i).

-
- 7.17** The Committee does not support any amendment to the definition of "person acting for a parent" s61AA (5) (b) relating to indigenous communities. Although minor improvements have been suggested to the Committee the current wording is supported by both NSW ATSIC and the Aboriginal Justice Advisory Council and accordingly the Committee sees no need to make further alteration.

- 7.18** There is one issue left untouched by the Parkinson amendment: that of a sibling aged under 18 who uses physical discipline. In evidence Professor Oates¹⁷⁰ said he was not aware of his unit seeing abuse caused by siblings. Sometimes injuries claimed to be inflicted by siblings in fact turns out to be inflicted by the parent or their partner. Stephen Odgers for the Bar Association argued the unfairness of leaving a sibling with no possible defence for the use of the most minor force against another sibling. Although Recommendation Three removes most of this problem it remains the case that a child who exercises physical punishment on a sibling, with or without the parents' permission, would have no defence to a charge of assault. The Commissioner for Children and Young People argued that it is undesirable to give young people the right to use physical discipline on their siblings. The committee agrees, but on balance it appears discriminatory to not permit siblings to be expressly authorised to act as a parent for the purposes of discipline. The incidence of physical abuse on children by defacto partners is disproportionately high: they can be

¹⁷⁰ Oates *Evidence* 24/08/00 p8

expressly authorised to act as a parent yet siblings, who have negligible involvement in recorded abuse, are left without a defence. For that reason the committee believes the words “of or above the age of 18” should be removed from s61AA (5).

Recommendation 4

The Committee recommends that the words “of or above the age of 18” be removed from s61AA (5).

7.19 As discussed in Chapter Six the Committee believes there may be some justification for narrowing the defence of reasonable chastisement further to prohibit physical punishment below the age of, say 18 months and above, say, 16 years. However the Committee notes the reservations that legal experts who otherwise supported the Bill and does not support an addition to the Bill of this nature. This is an issue which requires further examination but it need not form part of the consideration of this Bill.

Community Education Campaign

7.20 Before concluding its review of the Bill the Committee believes some comment should be made regarding the community education campaign which should accompany the Bill. A community education campaign is essential. Without it this Bill will achieve little of its aims.

7.21 In saying this however the Committee does not support the view that a community education on its own would be sufficient. Without the Bill a community education campaign may be moderately helpful, but could be regarded by many as only an expression of opinion. The Bill provides a message: these are the standards which have been determined by Parliament as acceptable within this State, going beyond this is excessive punishment and is a criminal assault. Education campaigns can be easily ignored. The Bill is not intended to be used for prosecutions, but the sanction it provides gives strength to the education campaign it would otherwise not have.

7.22 The community education campaign should precede the operation of the Bill. The Bill provides that it be commenced 12 months after the date of assent so that this community education campaign can take place. During the inquiry various witnesses with experience in community education programs, including Dr Judy Cashmore, Professors Vimpani and Oates and Ms Gillian Calvert, gave evidence on how the community education campaign could be delivered. Some of the suggestions made during the inquiry include:

- the campaign should not be a one-off: it needs to be ongoing, repeated over a number of years
- the message should be delivered in different ways to different sectors of the community, targeting groups of particular risk. The success in reaching different groups needs to be evaluated

- the campaign should present alternative methods of discipline to physical punishment. Parents should be told of strategies they can use, not just what is prohibited
- effective use of the media to convey the clear message of the Bill
- building the campaign upon current government initiatives such as the Families First program, and the work of the Office of Children and Young People. Child care centres and early childhood nurses could also be means of delivering education programs
- making use of media or sports stars, and also using scripts of popular soap operas as a means of conveying the message of the campaign

Recommendation 5

The Committee recommends that the NSW Government launch a major community education campaign prior to the Bill commencing, and that this campaign continue to be an ongoing program afterwards. The campaign should inform parents of the standards of what is acceptable and what is not acceptable punishment, and suggest alternative discipline strategies. The campaign should be regularly evaluated for its success in delivering its message.

7.23

The Committee has welcomed the opportunity to thoroughly examine this Bill. It is an important piece of legislation. It affects every parent and child in this state, as well as relatives and professionals who work with children. The Committee believes that it is an advance in the protection of children. The common law does not provide guidance to parents. This Bill sets a standard for acceptable physical discipline, and discourages methods of discipline which have been shown to have most risk of causing serious injuries to children. The Committee believes the Parliament has the opportunity to send a message to the community that excessive physical punishment is no longer acceptable in New South Wales in the year 2000. As stated by Professor Vimpani:

It is one thing to argue that a Bill like this should not have been necessary; it is another to argue in debate that, having been tabled, it should be rejected. That would give a very dangerous message to the community and because of likely media reaction to the Bill's failure..... imperil the safety of the most vulnerable children in our community.¹⁷¹

¹⁷¹ *Submission 21/07/00 p1*

Appendix 1

Crimes Amendment (Child Protection - Excessive Punishment) Bill 2000

Appendix 2

Submissions Received

Letters Received

Submissions Received

No	Author
1	Professor Kim Oates, the New Children's Hospital, Westmead
2	Professor Patrick Parkinson, Faculty of Law, University of Sydney
3	Ms Carol O'Donnell
4	Mr David Morrison
5	Mr Allan Davey
6	Rev Dr Peter Barnes, Bankstown Presbyterian Church
7	Mr Lee Thurlow
8	Dr Lucy Sullivan, Centre for Independent Studies
9	Mrs K Tikerpae
10	Ms Kathy Mill
11	Pastors Peter and Gaye Westman, Narrabri Christian Fellowship Inc
12	Mr Chris Sidoti, Human Rights Commissioner
13	NSW Council of Churches
14	Mr Barry Maley
15	National Children's and Youth Law Centre
16	Mr Bob and Judy Grasby
17	Rev the Hon Fred Nile MLC
18	NCOSS
19	The Federation of Parents and Friends Associations of Catholic Schools Archdiocese of Sydney
20	Christian Community Schools Limited
21	Presbyterian Women's Association
22	Community Legal Services for Western NSW Inc
23	Dr Judy Cashmore
24	Parenting and Family Support Centre, The University of Queensland
25	NAPCAN Australia
26	Association of Child Care Centres of NSW
27	Aboriginal Justice Advisory Council
28	Mr John Nicholson SC, Senior Public Defender
29	Dr Graham Vimpani, University of Newcastle
30	SDN Children's Services
31	ATSIC NSW
32	The NSW Bar Association
33	Ms Gillian Calvert, Commissioner for Children and Young People
34	Dr Peter Downey

35	Legal Aid Commission of NSW
36	Association of Childrens Welfare Agencies
37	The Law Society of NSW
38	Dr Ion Alexander, Paediatrics and Child Health Division, Royal Australasian College of Physicians
39	NSW Teachers Federation
40	The Labor Council of NSW

Letters Received

No	Author
1.	Mr B McGregor
2.	Mrs R Brown
3.	Mrs A Dean
4.	Mr J Santamaria
5.	Mrs T Nicholls
6.	Mrs S Cox
7.	Mrs N Flanigan
8.	Mrs M Knowles
9.	Mr K M Matthews
10.	Mr A Crooks
11.	Ms J Hunt
12.	Mr & Mrs Birch
13.	Mr I Lyons
14.	Ms R Sahin
15.	Mr R Gibbins
16.	Mr R Rutter
17.	Mrs C Craig
18.	Mrs I Muir
19.	Mrs M McSanders
20.	Mr M Spencer
21.	Mr R Doran
22.	Mr J Killey
23.	Ms E Parker
24.	Mrs B Barrett
25.	Mrs J Moore
26.	Pastor G Higgins

-
27. Mrs J Gorton
 28. Mr J Cover
 29. Mr & Mrs E McCartin
 30. Ms A Booth
 31. Mr B Miller
 32. Mr I Rose
 33. Ms J Baker
 34. Mrs J Baker
 35. Mrs J Miller
 36. Mrs T Rose
 37. Mr D L Burgess
-

Appendix 3

Witnesses at Hearings

Witnesses at Hearings

8 August 2000

Dr Judy Cashmore Academic Research Consultant
Social Policy Research Centre
University of New South Wales

8 August 2000

Professor Patrick Parkinson Professor of Law
University of Sydney

8 August 2000

Dr Lucy Sullivan Research Fellow in Social Sciences
Centre for Independent Studies

8 August 2000

Mr Barry Maley Senior Fellow and Director of Research Program
Centre for Independent Studies

14 August 2000

Professor Graham Vimpani Professor of Paediatrics and Child Health
University of Newcastle
John Hunter Children's Hospital

14 August 2000

Mrs Frances Bardetta President
Association of Child Care Centres of NSW

14 August 2000

Mr Ian Weston Advisor
Association of Child Care Centres of NSW

14 August 2000

Mr John North President
The Law Society of NSW

14 August 2000

Mrs Marion Smith Convenor
Social Issues Committee, Presbyterian Women's Association

14 August 2000

Mr Stephen Longhurst Vice President
Federation of Parents and Friends Association of Catholic Schools
Archdiocese of Sydney

14 August 2000

Ms Lynette Middleton Executive Member
New South Wales Council of Churches

14 August 2000

Mr Neville Pollard State Director, Christian Community Schools Ltd

21 August 2000

Professor Alice Tay

President
Human Rights and Equal Opportunity Commission

21 August 2000

Mr David Robinson

Senior Policy Adviser
Human Rights and Equal Opportunity Commission

21 August 2000

Mr Louis Schetzer

Director and Principal Solicitor
National Children's and Youth Law Centre

21 August 2000

Ms Gillian Calvert

Commissioner
NSW Commission for Children and Young People

21 August 2000

Rev the Hon Fred Nile MLC

Member
Legislative Council, NSW Parliament

24 August 2000

Professor Kim Oates

Chief Executive Officer
New Children's Hospital, Westmead

24 August 2000

Mr John Nicholson

Senior Public Defender
Public Defender's Office

24 August 2000

Mr Peter Pearsall

Public Defender
Public Defender's Office

24 August 2000

Mr Stephen Odgers

Member
Bar Association of New South Wales

Appendix 4

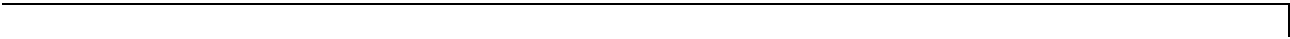
Advice from Professor Patrick Parkinson

Appendix 5

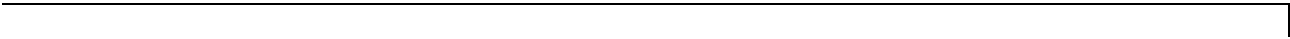
Child Physical Abuse Statistics – New Children's Hospital, Westmead

Appendix 6

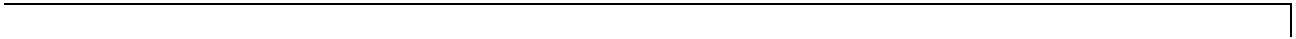
Minutes of the Proceedings



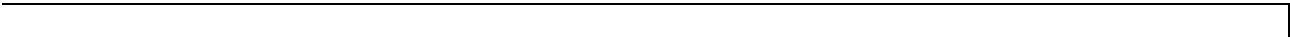
: -



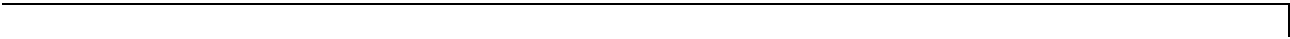
: -



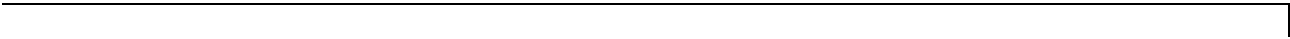
: -



: -



: -



: -

