REPORT OF PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

INQUIRY INTO CRIMES AMENDMENT (CHILD PROTECTION - EXCESSIVE PUNISHMENT) BILL

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At Sydney on Tuesday, 8 August 2000

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The Committee met at 2.00 pm

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PRESENT

The Hon. R. D. Dyer (Chair)

The Hon. P. J. Breen
The Hon. J. Hatzistergos
The Hon. J. F. Ryan
The Hon. Janelle Saffin

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JUDITH ANNE CASHMORE, Academic Research Consultant, Social Policy Research Centre, University of New South Wales, affirmed and examined:

CHAIR: In what capacity are you appearing before the Committee?

Dr CASHMORE: As a private person.

CHAIR: Did you receive a summons issued under my hand in accordance with the provisions of the Parliamentary Evidence Act 1901?

Dr CASHMORE: Yes.

CHAIR: Are you conversant with the terms of reference for this inquiry?

Dr CASHMORE: Yes.

CHAIR: Could you please briefly outline your qualifications and experience as they are relevant to the terms of reference for this inquiry?

Dr CASHMORE: I am a developmental psychologist with a PhD in child development. I have done considerable research in the area relating to children and the law. I am currently an honorary research associate at the University of New South Wales, Social Policy Research Centre, and I was involved in the review of the Children (Care and Protection) Act and am currently co-chair with Carmel Niland of the enact reference group involved with the implementation. I am also deputy convenor, and have been for several years, of the Child Death Review Team and I was one of the authors of the Commonwealth report in relation to the legal aspects of physical punishment of children.

CHAIR: Dr Cashmore, you have made a very detailed written submission to the Committee in regard to this reference. Is it your wish that that submission be included as part of your sworn evidence?

Dr CASHMORE: Yes, it is.

CHAIR: If you should consider at any stage during your evidence that in the public interest certain evidence or documents you may wish to present should be heard or seen only by the Committee, the Committee would be willing to accede to your request. I would now ask you to briefly make an oral statement to the Committee expounding the written submission that you have made.

Dr CASHMORE: Well, firstly, I speak in support of this Bill because I think it fills a gap in our current law and what is really necessary is to clarify the limits and the boundaries of what is acceptable in the physical punishment of children. This flows on from the earlier 1995 report and so a lot of the arguments are consistent with that and I can leave a copy of that report.

Basically it is about protecting children from harm and so it is more an issue of the right of children's protection from harm than it is about the rights of parents to do as they will with their children. It is not about preventing smacking, but it is about putting legal limits around that and clarifying to the judiciary and to the police, to the child protection area and also to the community what constitutes acceptable punishment and what does not.

I will not go into the details in terms of the law because there are others who will speak and have put in submissions in relation to that, but in terms of the work that we did in 1995 I think that it is still true that there is a lack of certainty and clarity about what "reasonable" means in terms of reasonable chastisement and that it depends on a number of things and, in particular, the

interpretation that a judge or a magistrate might bring to that definition in terms of their own experience, particularly in terms of their experience in private schooling where being caned at the time they went through was probably quite common. It would bring it into line with the Model Criminal Code and it would also bring some consistency into cross-settings.

Children are the only people who, in our society, can legally be hit. This puts some limits around that and it brings it into line with more modern views about parental responsibility rather than just an overall emphasis on parental rights. It also is more consistent and brings us into line with some of the international changes in this area, both in terms of the countries in Europe, the European courts and the UN Committee on the Rights of the Child. Interestingly, it has already been banned in nine European countries; it is in the process of going down that track in another four and in those where it has been changed for the longest, particularly Sweden, the long-term experience is that it has not led to the anarchy that some predicted, and I will come back to that a little later.

Basically I suppose it comes to the question: Is a change needed; what is wrong with the existing law? I think that that indicates that there is a need for change. There is also evidence, research evidence, particularly from the psychological literature, that supports the need for change. First of all, it is pretty clear that it is not a very effective way to discipline children; that it might lead to short-term compliance, that children who are hit stop doing what they were doing that caused them to be hit, but it does not mean that they internalise the values or take those on board. What it does mean is that they can sometimes be quite good at getting away with it, so the emphasis becomes more, not consequences for others but the consequences for myself and avoiding punishment.

We know from some of the research that physical punishment by itself or just reason by itself are amongst the least effective ways of disciplining children, so if you look at some of the research with quite young children, two to three year olds, you will find that they refrain from doing what they are not meant to be doing longest if it is explained to them what they should not be doing and there are non-physical means of punishment that accompany that.

The other primary reason and what I concentrated on in the submission are the harmful long-term effects and the adverse outcomes for children who are subjected to harsh physical punishment in particular and what this Bill is about is preventing harsh physical punishment of children. There are consistent findings, and in fact I think I sent a copy of The Lancet editorial - and I have also brought some extra copies - which expounds the consistent message coming through from research now about the relationship between the severity and frequency of physical punishment of children and the long-term outcomes, in particular the increase in aggressiveness and anti-social behaviour of children. So we know now that children who are hit more frequently and more severely are more likely to hit their parents, to hit their siblings and to hit peers at school and there are associations there with bullying. They are more likely to have behaviour problems, conduct disorder; they are more likely when they are older, as adolescents, to be involved in juvenile crime and have problems with substance abuse and when they are adults they are more likely to be both the victims and the perpetrators of domestic violence and also more likely to hit their own children and to physically abuse them. So I think the evidence is pretty clear now that there is a linear relationship between the frequency and severity of punishment and the long-term adverse outcomes for children.

What the research is also making clearer now I think with more sophisticated methods is that this is not just a matter of overall parental style. We know that parents who hit are also more likely to be verbally aggressive and to show less warmth to children in other ways. It does not mean that they necessarily always go together, but there is a correlation there. If you take that into account then the relationship between hitting children and the adverse outcomes weakens, but it does not disappear. What we do know is that the combination is worse, that if you combine little reasoning or explanation to children and low warmth and harsh discipline then you end up with the worst outcome for the children.

I do have here a summary of some figures to outline the relationships. What the two bottom graphs show - and you can see that the figures are taken from the tables in the article but I have turned them into graphic representations because I think that they make it clearer - along the bottom is the frequency of spanking or smacking (this is American research, so they tend to use American terminology). What you can see is that for pre-adolescents and adolescents, where there is minimal discussion with their parents about what they have done wrong and you combine that with the most frequent form of smacking, you end up with the most aggressiveness towards parents. I have pulled this out for parents, but it also applies to aggression to siblings and to peers. What those two graphs make very clear is that it is the combination in particular that is negative to children, and since we know that these things often go together, the more that we can decrease the frequency and severity of parents hitting children, the better.

The other thing that we know from the research is that there does tend to be an association between socio-economic status and the likelihood of parents hitting children, but the link between hitting and the adverse outcomes still persist after you take account of that, and the New Zealand research, which is closest to our own country, is probably the best in that area.

Some people have suggested that maybe the reason that there is a negative relationship, or there is a relationship between children being hit and adverse outcomes, is that children who have behaviour problems when they are young are also those who are most likely to go on and have behaviour problems when they are older and be involved with the juvenile crime, substance abuse, those sorts of adverse outcomes.

In fact, what the more recent longitudinal research shows is that it is not because the children provoke their punishment by their parents that causes the problem, it is the punishment actually predicts the later behaviour problems in children, and that is what that top graph is about. Below the line indicates a decrease in anti-social behaviour.

They looked at children's behaviour in 1998. This is the Straus, Sugarman and Giles-Sims' research in 1997. They looked at children's anti-social behaviour in 1988 and how much they were spanked, smacked, in the week before collecting the data and then they looked two years later, and they found that the children who had not been hit at all two years before had a decrease in their anti-social behaviour as they aged by two years, but the children who had been hit actually increased in their anti-social behaviour. That is probably the most marked indication of the relationship, but it is not the only one. There is also again the New Zealand research that points along those lines.

What this research also is quite useful in pointing out is what some of the mechanisms are: Why is it that children who are hit go on to have more adverse outcomes? To some extent one of the best explanations is modelling, that children learn to treat others in the way that they are treated, and that if they are taught that the way you get what you want or what you want others to do is by hitting them, then that is what they tend to do.

Parents sometimes are quite contradictory in what they do and what they say. They will hit a child for hitting a sibling or another and say do not hit the other child, whereas at the time they are doing it they are hitting and modelling the behaviour that they are trying to get them to refrain from. So it is not a particularly effective means of disciplining children who hit others.

There is also evidence now that what hitting children tends to do is induce in them more negative ways of looking at other people's behaviour, so that children who come from backgrounds where they are hit, when they go into child care and when they go into school, tend to see the benign behaviour of others as threatening and react in an aggressive way to that benign behaviour. That may also partly be as a result of the fact that their mothers tend to be fairly negative in the way they interpret their own children's behaviour. If they are more likely to hit, they are more likely to be negative in interpreting their children's behaviour. So that they might say, "He has wet his pants just

as I am walking out the door just to upset me". So they are putting on a negative interpretation, whereas this might be just a natural reaction of the child to some form of stress or that they just did not get to the toilet in time. They often have unrealistic expectations.

Lastly, just coming to the question of whether legal reform is the way to go, I think that the main aim of this legislation, and of the overseas legislation, is not about prosecuting parents. It is not there to punish parents for what they are doing, it has an educational function, and in fact we see very few of these cases ever coming near the courts, and particularly the criminal courts. If they fall under the label of child abuse, they will come through the child protection system. Particularly in Sweden, the experience there is that there have been very, very few prosecutions, and the most recent piece of research, which I did not refer to in the submission, which I should have or should include, is that far from being the chaotic consequences of stopping people from hitting their children, it looks as though, though it is not causal, that there are marked decreases in various social problems in relation to children. This is the research by Durant: Juvenile crime has reduced from 1975, 1979 through to the mid 1990s. So they have had going on 20 years of parents not being legally allowed to hit children. There has also been a reduction in drug and alcohol use and a reduction in suicide, and together with that a very marked decrease in the acceptability of hitting children. In the 60s, about 65 per cent of the public said that it was okay to hit children. Now that figure is down to less than 15 per cent.

We have also seen some decrease in acceptability here in terms of caning being seen as less acceptable than it used to be. I think this law or this Bill would be quite consistent with more modern community expectations. We do not have particularly good survey data here, but if we go by what the United Kingdom has, and their figures have been fairly similar before, in their research, and the research that the Committee has available to it, few parents agree with hitting children on the head – and only about 0.2 per cent – and that is part of this Bill, few agree with using canes or objects, and few agree that it is acceptable to leave a red mark or a bruise on a child for a few days.

Interestingly, it is also evident from that research that about 80 per cent of parents do not think it is particularly effective to hit children. This is what they say. But about 88 per cent of them say that they think it is sometimes necessary. What that tends to indicate is that they do not know what else to do, and that is a good reason for bringing education as part of the process, to back up the change of law as an educational process, with an educational campaign to complement it, and that is particularly important for several reasons.

We know that parents who use physical punishment, especially for very young children, may have unrealistic expectations about their children's behaviour, think that they can be toilet trained younger than they can, think that they can control their impulses younger than they can. We know that parents tend to hit because that is the way they were brought up and often they do not know what else to do, and in fact probably the most dangerous combination is a very permissive parent who does not know how to control their child's behaviour. They are the parents that tend to explode with rage and use verbal put-downs because they have been pushed to a point where they do not think they should do this but they do not know what else to do, they are totally frustrated. That is the danger of bringing in legislation that goes way beyond what the community will accept at the time, without any education to support it.

Education, I think, is quite a vital part of this and it needs to promote alternative ways of telling parents what else you can do, because it seems there are a number of parents not particularly skilled in knowing how else to discipline children, even if they go beyond the point of knowing how to control them without hitting.

One of the ways that that campaign could work would be to actually take the child's eye view. An early AYPIC (Association of Young People in Care) ad in terms of children in foster care showed a parent reacting to another child coming home with their child and saying that they were a foster child, and this child suddenly grew horns in front of this parent's eyes. You could do something

similar along these lines, 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 else in total control. These are the people that we rely on for love and caring who can also be very threatening, and the real danger for some of these children is their ambivalent attachment to their parents. That is the real danger for some of these children, that these are the people who they rely on for loving and caring but they are also the people who can bring them pain and hurt and sometimes that hurt goes beyond what the parent intended because they lose control themselves or the child moves in a way that was not expected and they hit them across the eye or the ear or whatever.

Basically this seems to be a good step in the right direction of providing some certainty around what the law means by "reasonable". It is a clear message to the community: You do not hit children around the head or the neck; you do not hit them with canes, sticks, objects and so on, and you do not hit them in such a way that you would leave a mark or you cause any injury or harm to the child. That seems an entirely reasonable and clear message to send to the community.

CHAIR: Dr Cashmore, your written submission and, in part, your oral remarks just now referred in passing to differing community standards on what is acceptable discipline. Might I refer in particular to the public opinion poll conducted by REARK Research in 1994 for the Federal Department of Human Services and Health which found that 41 percent of respondents agreed with the statement that "Parents have the right to discipline children in any way they see fit". The survey also found that that group of parents who responded in that fashion tended to be those with both lower education levels and lower socio-economic status than those who, in responding to the survey, favoured more restricted methods of discipline. Some people could say that a bill such as Mr Corbett's is an attempt to impose middle-class values on working-class parents. What would you have to say to that?

Dr CASHMORE: Well, I think the key issue here is not about imposing particular values but about looking at the long-term outcomes for children. Also the State has an interest in this and does put some boundaries. Even if 41 percent of people think that they can treat their children as they like, the State does not see it that way and we do have a community interest in ensuring that children are protected from harm and this is one way of doing that.

In terms of the multicultural aspect, we said through the Child Protection Council campaigns and so on: Culture is no excuse. I think the same thing applies here. Class is no excuse. The State has an interest. The whole community pays the cost, the long-term costs, in terms of adverse outcomes for children; in terms of the aggression, increased aggressiveness, the crime, substance abuse, all those sorts of internalised and externalised behaviours that are adverse. So I think the State has a right to say that there are some limits around what parents can and cannot do to their children.

CHAIR: Well, if we accept that surveys such as the one I have just mentioned have shown that harsher approaches to discipline are more strongly supported by those in lower socio-economic groups, do you believe that Mr Corbett's Bill, if enacted, should be supported with a public education campaign perhaps along the line of past initiatives in that regard such as the dangers of shaking young children and, if you do think that is desirable, how could such a campaign be most effectively targeted to the groups that I have in mind?

Dr CASHMORE: Well, yes, I think it is essential to have an educational campaign to go with it and obviously it should be based on good research and focus groups with those people to work out what are the behaviours and the attitudes that most need to be challenged. One of those is that view that "I can do as I like with my children". The other is that "I was hit as a child and it didn't do me any harm and maybe it did me some good". That is not restricted to lower-class people by the way, I have certainly heard members of the judiciary make comments along those lines.

The Hon. JANELLE SAFFIN: I was going to say that.

Dr CASHMORE: And one of the arguments might be: Well, are they necessarily the best judge? If you are in the throes of hitting your own child and saying "It didn't do me any harm", is that actually an indication that maybe it did because you see that as an acceptable way of treating your own child?

I think it does need to be quite carefully targeted and, as I said, I think it would be quite useful perhaps to try some methods starting from what it feels like to be the child in this situation, the child's eye-view of the way they are treated by adults. Also I think if you look at some of the UK research what it is focusing on is children over five and a lot of figures about what is and is not acceptable relate to children over five or over seven or under two, particularly I think since the most damaging punishments can be inflicted on quite young children, under five. That is where I think it needs to be targeted, but it might also be very useful to target adolescents because it is adolescents who are more likely to hit back. That is the dangerous time. If parents are hitting adolescents, then it can escalate because the children will hit back and then get hit back harder and children do get quite badly injured sometimes in those circumstances.

We know from the research that the two times when children are most likely to get hit by their parents is when they are toddlers and when they are adolescents, and that is because in both circumstances they are challenging the authority of their parents. So trying to get some messages across that toddlerhood is about trying to assert your independence and "No" being the favourite word is part of separating off. The same with adolescents. Telling your parents "You're losers", which is fairly common at the age of 13 or 14, is part of establishing your own identity and your own views. Although some people might see that as disrespectful, there might be ways of targeting some of this campaign to be useful along those lines.

CHAIR: I promised you in informal conversation before the hearing commenced that I would not ask you too many legal questions, but could I just put a couple of matters to you to which you are at liberty to respond in a sociological context, shall we say, rather than strictly a legal one.

The Committee, as you will be aware, is inquiring into Mr Corbett's Bill and that proposed legislation, as you will no doubt also be aware, has not actually stigmatised smacking as such. It does provide a defence to the common law doctrine of reasonable chastisement or at least it fills out what the meaning of that common law expression is. In proposed subsection (2) of Mr Corbett's Bill he provides that "The application of physical force is not reasonable if", and there are three categories set out, the first being if the force applied is by the use of a stick, belt or other object (other than an open hand) - I am shortening matters for convenience. The second category is if 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) and finally if 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.

For the sake of argument, if we were to take away from Mr Corbett's Bill the first and second of those categories, that is the use of the stick or belt or the force being applied to any part of the head or neck, so that we were only left with the third category, that is the force applied to any part of the body in such a way as to cause or threaten harm that lasts for more than a short period, could I put it to you for the sake of argument that arguably harm suffered is more important than the means by which the harm is inflicted, if you follow what I mean?

Dr CASHMORE: Yes, I do.

CHAIR: What would you think of that approach?

Dr CASHMORE: I think that the other two parts of it do actually serve a very useful

educative process, because the one about hitting children around the head and neck, I know that one of the reasons that the trivial one came in there is because of the concern about the flick under the ear, but I think that children should not be hit around the head or the neck under any circumstances. We have had quite a lot of success with the "Don't Shake the Baby" campaign for that reason.

I think both of them are actually quite in line with community standards, as we can see from the United Kingdom research. We do not have anything quite as specific as that here, but in both cases, the United Kingdom figures for hitting children in that way were under five percent who thought it was acceptable. I think they are quite in line with community expectations. They send a clear message of saying what might cause harm, because the way in which harm might be caused is in fact by hitting with an object or by hitting around the head or the neck, and the last one is really actual, to prevent all harm of any form from whatever process. In terms of seeing what people have hit children with, cattle prods, cricket bats, cricket stumps, belts, all sorts of things like that, I think there is decreasing acceptance in the community that that is an okay thing to do to children.

CHAIR: Suppose I put the drafting of the subsection around in an entirely different way. At the moment it is expressed negatively, the application of physical force is not reasonable in three specified circumstances. Suppose that rather the language of the subsection were expressed in positive terms.

Some parents or organisations approaching this Committee have argued that the Bill as drafted perhaps creates uncertainty for parents as to what physical punishment they are able to use and their authority is perhaps diminished. Supposing the Bill were drafted so that it was specified in positive terms that they are entitled to do such and such by way of disciplining children, for example, smacking a child with an open hand below the neck.

I know you have just said that you think the Bill as drafted in regard to the first two categories has an educative impact or value. What would you say if an entirely different approach were taken and the Bill said you cannot do anything apart from smack a child below the head or neck with an open hand, and forgot about belts and sticks and so on?

Dr CASHMORE: I am not quite sure about the logic of having a defence which says that you cannot be charged with assault if you do any of these things and turn that around and say you cannot be charged with assault if you only hit with an open hand or below the neck. I am not sure whether it creates any more certainty to do it that way than it does to leave it as it is. I suppose the other thing is that it is more like an exclusion; it says you cannot do these things and allows more moderate forms of punishment to be used. That is something I would actually like to give a bit more thought to in terms of the logic of the message.

CHAIR: Clearly if the Bill were to be drafted in that way, it would have to provide for only smacking that could not cause harm lasting for more than a very transitory, short period.

Dr CASHMORE: Because different people's views of what smacking is vary too. For some people, they might still class it as smacking where, as in the case of one that we saw, there was a hand print left through a jumper on the child's back for days afterwards. That could still be classed as smacking.

CHAIR: In regard to sticks, belts or other objects, some people who have approached this Committee appear to have some reverence for wooden spoons. I am not sure why that is.

Dr CASHMORE: They were probably hit with them themselves as a child.

CHAIR: Perhaps so, or perhaps it is the nearest available wooden object in a kitchen where children may misbehave perhaps. However, what do you think about this wooden spoon argument? Is

the use of a wooden spoon any more benign than a belt or other objects, such as a stick?

Dr CASHMORE: In a sense it is a matter of this is where the harm aspect might be most useful. Some parents - and I have had this view expressed to me, I can see some logic in it - they say, "If I have to go and get the wooden spoon, it allows me a little bit of time to cool down", so there is a little bit of distance in the process. There is some logic in that, and I know that for some people it is also getting out the wooden spoon and saying, "This is what you will get if you do not do the right thing", so it is used as a threat to control behaviour, without actually having to carry it through.

I do not feel as strongly about that one, as long again as it does not cause any harm. The only problem with that, I think, is how do you write it to say you can use a wooden spoon. I do not think it looks good. I do not think it sends a good message. I think there is some inconsistency. I think it is much clearer to say you cannot hit with anything, any object.

CHAIR: Finally for my part for the moment, I want to put a short quote to you from the written submission of a witness who is expected to be appearing before the Committee later this afternoon, and I would like you to substitute for the word "smacking" in this quote, perhaps "the use of an object" prohibited by Mr Corbett's Bill. The quote is:

> *Sweden, which has criminalised smacking of children has nearly six times our violent crime rate - 6600 violent crimes per one million population compared with our 1230 in the mid-1990s. The claim that smacking is violence and hence breeds violence is clearly of doubtful validity.*

I cannot vouch for the veracity or the accuracy of those statistics.

Dr CASHMORE: I would actually want to see the source, and what is labelled as violent crime, how it is defined, because that does not ring true with everything else I have seen coming out of Sweden, particularly in terms of that Durant article and others. So I would question that. I would want to see the source material.

CHAIR: Leaving aside the actual quote and any reference to precise statistics, what is your understanding of contemporary trends in Sweden or other Scandinavian countries where corporal punishment may possibly have been prohibited?

Dr CASHMORE: The evidence that I have seen is exactly the opposite. What we also know from all the research that I cited is that there is a very clear link between children being hit or harsh physical punishment for children and long-term adverse outcomes and increased aggression, both when they are adolescents and when they are adults. So to me that does not fit with any of that research where we know what the links are, and I think they have been quite well explained.

The Hon. J. HATZISTERGOS: Just following on from that if I could, in his research, Mr Maley has pointed out that in the Australian population of 19 million there are 17,000 children in care away from their families, and in Sweden there is 15,000 people in care away from their families, and that is notwithstanding the fact that Sweden has had laws prohibiting corporal punishment since 1979.

Dr CASHMORE: Again, I would want to see the source material because that does not ring true with the other data I have seen, and it might be a matter of how you define "out of home care", because here, certainly on a State basis, we include children living with their parents on an order as being "out of home care". How they define it there is another aspect to that.

The Hon. J. HATZISTERGOS: If it were true, would it cause you to question the hypothesis that -

Dr CASHMORE: I would want to look at it more closely, but the other thing I think we need to look at is population -

The Hon. J. HATZISTERGOS: Sorry, when you say you would want to look at it more closely, your hypothesis or -

Dr CASHMORE: No, I would want to look more closely at how the things might be related, because it might not be a simple explanation of how things fit together and how the "out of home care" system works there, for example, and the other data that I do have more faith in is that 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. I am not quite sure what the population of New South Wales. I think it is around five or six, but even here we have a much higher rate of children dying as a result of non-accidental injury than they do in Sweden and, as I said, that research points to different results.

The Hon. J. HATZISTERGOS: Looking at section 61AA(2)(c) of the proposed Bill, which is a section that says 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 lasting more than a short period --

Dr CASHMORE: Yes.

The Hon. J. HATZISTERGOS: I am interested in what you think about the use of the words "or threaten to cause". It appears that that section requires force to be applied and then you have to look at the nature of the force to know whether it actually causes or potentially, I suppose, could cause harm to the child that lasts for more than a short period.

Dr CASHMORE: I do not really see the need for that to be there. I do not see what it means in particular and why it needs to be there.

CHAIR: Well, could I just interpose for a moment: I think I am correct in saying that your written submission relies fairly heavily on psychological harm being caused to a child. Might that be a possible reference, that is threatening to cause harm to a child, to something that might have psychological consequences rather than physical ones?

Dr CASHMORE: I suppose I see this more in terms of direct physical punishment whereas I think if you wanted to get to that area you could rely on the Children and Young Persons (Care and Protection) Act to provide the protection that is needed.

The Hon. J. HATZISTERGOS: I am not sure that "threatens to cause" necessarily encapsulates psychological harm in any event.

Dr CASHMORE: No, I am not sure exactly what that means.

The Hon. J. HATZISTERGOS: It looks at the consequences of the harm. "The force is applied to any part of the body in such a way as to cause", that could be physical or psychological. "Threaten to cause" focuses on the nature of the force, the consequences of the force rather than the actual act of the individual. Is that right?

Dr CASHMORE: Well, as I said, I am not entirely sure what exactly it means.

CHAIR: "Threaten to cause" - I am speculating - might be a reference to some medical condition that matures into a condition after a lapse of time.

Dr CASHMORE: Possibly, yes.

CHAIR: I am not sure what it means.

Dr CASHMORE: No, you would have to ask Mr Corbett. My understanding is that that was not necessarily intended.

The Hon. J. HATZISTERGOS: If I could just focus on persons who are able to rely on defences as parents or persons acting as parents, "parent" is not defined except in section 61AA(5). A person acting as parent is separately defined and includes persons who may be in a relationship that we legally term as in loco parentis, but that person has to be expressly authorised by the parent of the child to use physical force to discipline, manage or control the child. Do you see any need for some distinction in relation to parents and persons in a situation akin to parents - and I envisage in that a person acting for a parent - in terms of being able to rely on the defence?

Dr CASHMORE: I do not particularly care how it is written as long as it is clear, but basically I think it is important to define who can rely on it, and that being a parent or someone who is acting in the role of parent or expressly with the authority of the parent in relation to that. I know that there is a question about step-parents. I suppose one of the issues there is that it can be very useful in making it clear and causing it to be the subject of discussion between partners as to who has the authority to discipline child because they are not biologically their own children and that is often quite a source of tension in step-families. For example, from that point of view, as long as it covers those situations, I am not particularly fussed. I am not a lawyer, but as long as it is very clear to those who are intended to understand that.

The Hon. J. HATZISTERGOS: I am just wondering whether you regard that as particularly clear. Parents are defined in the section not by biology or however, they are defined by nature of relationship. Then you have the other subsection, a person acting on behalf of a parent, which includes people who at first blush might be covered by the parent definition because their relationship might be such that they fall within the definition of parent.

Dr CASHMORE: Yes. I am not sure why.

The Hon. J. HATZISTERGOS: I am just wondering whether that is confusing to you in terms of defining what the rights and responsibilities of individuals are?

Dr CASHMORE: I do not necessarily see the need for 5(a)(1). The other part I think is more important and I suppose the aim there is to actually cover or to exclude people who are babysitters, et cetera. It is only members of the family in particular who are carrying out parental roles so, yes, in one sense (a)(1) - but a lawyer may interpret it somewhat differently - is covered under the first part of 5.

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

Dr CASHMORE: Maybe what might be more useful is if it is the defacto who comes under (a)(1) and the step-parent is taken out because if they are actually married and are taking up parental responsibility I think the idea of them having to have express - no, I will take that back. If they are a step-parent or a defacto 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 defacto spouses. They need to have some form, but it needs to be something that is discussed and is not just assumed, particularly by the defacto or the step-parent involved.

The Hon. JANELLE SAFFIN: I have another question which is a two-part question and it starts off with the absence of recent case law in relation to lawful correction, and particularly in New South Wales. The Committee understands that the most recent was probably 1891, so we see that as an absence of case law in the matter.

Dr CASHMORE: Yes.

The Hon. JANELLE SAFFIN: In view of your experience, including with the Child Death Review Team, do you have a view on the incidence of harm caused to children by inappropriate punishment discipline, and you have really touched on that a lot, but the next part is: If the incidence of such harm is so high, why are there so few cases coming before the courts in which the defence of lawful correction is raised?

Dr CASHMORE: Because I think that most of those cases are dealt with through the child protection law or the system.

The Hon. JANELLE SAFFIN: Why, when it is clearly assault?

Dr CASHMORE: Because I think it comes back to some of the assumptions, that people assume they have a right to hit children and the police tend to be very reluctant to take assault charges in relation to children. They are generally not seen in that way. I suppose the other reason might be that if children are being hit in this way there are probably other things going on in the family as well that should be looked at and in terms of the increased emphasis under the new Act, the emphasis there is, rather than just on forensic investigation of the incident, about looking at the overall circumstances of the child and whether or not they are safe, what the impact is in relation to their safety, welfare and well-being, but yes, there is an extraordinary lack of use of this. The parents are not being charged. We do not know how many even go through the court system. My understanding is that we do not even know from the statistics how many cases. Don Weatherburn's data may provide something there, but the problem with the data is that it does not usually tell you anything about the victim, as I know in terms of the research I have done for child sexual assault. In order to find out how old the victim is you have to actually trawl through every case because the system does not actually provide that information, so we would have no way as far as I know of knowing how many of these cases, and then they would have to rely on the defence in order for it to be known and then it would have to be a reported case.

The Hon. JANELLE SAFFIN: In your view, is there any inconsistency in how we respond or deal with this issue of hitting or assaulting children and responsibilities that we would have under the UN Convention in relation to the child, always acting in the best interests of the child?

Dr CASHMORE: Well, I think the message has been pretty clearly given by the UN Committee that countries that still permit children to be hit as a form of physical punishment need to look at their law and their practice because they could well be in breach of the Convention. That message has gone home very clearly to the UK particularly in terms of the European court as well, but

I think that the same message is likely to come to Australia when we put in our next report if the law remains as it is and 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.

The Hon. J. HATZISTERGOS: What impact do you think it would have on reporting?

Dr CASHMORE: Reporting to the Department of Community Services or --?

The Hon. J. HATZISTERGOS: Well, to any of the authorities. If you are defining the defence by reference to the severity of the harm and its duration and you go through this educative process so that parents are aware of what the consequences may be, is there a potential that parents, for example, who may have children who are the subject of moderate disability or harm as a consequence of being chastised, would resist taking the child to medical treatment or any other authority where they could get some help as a consequence of this legislation?

Dr CASHMORE: I do not see that there is any more consequence from that than there is from the child protection legislation. That was an argument that was made about that legislation as well. I do not think there is any evidence from the European countries - I do not think you can measure the effectiveness in terms of the reporting rate, for example, and the prosecutions in particular. That is not a good way to evaluate whether this legislation has worked. The way to evaluate it is more in terms of the acceptability of hitting children and the long-term outcomes for children, so that the reporting rate is not the issue. I know what you are saying is a concern --

The Hon. J. HATZISTERGOS: Who would you expect to report it - the neighbours or someone who might have been there as a visitor at the home or how does it get notified to the authorities?

Dr CASHMORE: Well, it gets notified in the same way as it would through the child protection system I think.

The Hon. J. HATZISTERGOS: We are talking of something much more serious in this, are we not?

Dr CASHMORE: I am not sure that we are actually. I think that it is a different response to similar sort of behaviours. What this is doing is sending - I think this is an educative process. I do not see this as a prosecutorial process at all or that that is where its value lies. Certainly in Sweden there have been virtually no prosecutions around this and I would not expect that there would be here and that that would not be the measure of success. It is about educating the community to say it is no longer acceptable to hit children around the head, around the neck, with an implement or in any way that causes any lasting pain or injury.

(The witness withdrew)

PATRICK NEWPORT PARKINSON, Professor of Law, University of Sydney, New South Wales, 2006, affirmed and examined:

CHAIR: In what capacity are you appearing before the Committee?

Professor PARKINSON: I am appearing as a private individual.

CHAIR: Did you receive a summons issued under my hand in accordance with the provisions of the Parliamentary Evidence Act 1901?

Professor PARKINSON: I did, thank you.

CHAIR: Are you conversant with the terms of reference of this inquiry?

Professor PARKINSON: I am, thank you.

CHAIR: Could you please briefly outline your qualifications and experience as they are relevant to the terms of reference of this inquiry?

Professor PARKINSON: As I have indicated, I am a professor of law and a specialist in family law and child protection law and I have seen this Bill in many previous manifestations, as Alan Corbett has consulted me concerning it.

CHAIR: You have kindly made a written submission to the Committee, for which we are very grateful. Is it your wish that that submission be included as part of your sworn evidence?

Professor PARKINSON: Yes.

CHAIR: Professor Parkinson, I would invite you now to make a brief oral statement to the Committee in support of your submission.

Professor PARKINSON: Thank you. A few years ago my wife and I were fostering a child, a five year old girl who was just with us for the weekend, and we had a very happy day, playing princesses. Fairy dust was all over the place and other little girls came over. She seemed to us to be a well adjusted child, well looked after, until bath time. It was at bath time that my wife called me in and showed me some marks on this child's body. She was five years old, she was a pint-sized little girl, and all over her thigh and the back of her legs there were welt marks. We have no idea what they were caused by. It could have been an electrical cord or some other instrument of that kind. There were marks on her lower back as well. When we asked her, very gently, how these marks had arisen, she said, "My little brother did it". Her brother was two years old and clearly it was not the little brother. It was somebody who loved her, somebody who cared for her, and really I think it is cases like that that this Bill is all about.

In that case we had to notify, we did notify the Department of Community Services, but what this Bill is about, in my view, is prevention. It is about sending a very clear message, a message which needs to be as simple as possible, about what the boundaries of discipline are. There is no question in that case that if the police had wanted to prosecute, they could have found the culprit. They could have done so. This was not going to be lawful correction; it was not going to be reasonable chastisement. But it is about education, in my view, it is about sending messages in advance and saying there are certain things we should not do to children. Smacking may be okay, but we should not be hitting children with electrical cords and belts, because the reality is that some parents do not know their own strength.

I support this Bill, complex as it may be in its drafting, because essentially I believe it is the duty of Parliament to make sure that the law is clear and the common law of reasonable chastisement is not clear. It is equivalent to saying to members of the public that they can drive with alcohol in their blood stream as long as the amount is reasonable, or they can drive along a road as long as their speed is reasonable. We cannot have vague laws on issues which affect people in their daily lives. We need to make it as clear as possible.

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.

CHAIR: Professor Parkinson, as you well know, largely during the time I was Minister for Community Services you were engaged on the Review of the then Children (Care and Protection) Act. Could you briefly tell the Committee of your work during that review, with particular reference to the extent to which the physical punishment of children was considered during the course of that review?

Professor PARKINSON: Certainly. As you may be aware, I was the chairperson of the Review of the Children (Care and Protection) Act 1987, and it was a very wide-ranging review, covering all aspects of the work of the Department of Community Services, intervening to remove children. Corporal punishment therefore was a very small part of a bigger picture, and generally the child protection authorities are concerned with much more serious abuse than hitting children with sticks. The department is going to be involved where there is serious injury which has occurred. It is in that context I need to explain that the child protection legislation deals with a different set of issues.

However, we did raise the question of what is reasonable punishment as part of the discussion paper on the review, and we essentially floated the Scottish proposals, which were that smacking would be okay but one should not hit with a stick or belt or cord or cause harm which lasts for more than even a short time, which is something like the proposals which which are now in the Bill here.

CHAIR: What would your response be to someone who perhaps were to say that we do not in fact need Mr Corbett's Bill because the child protection legislation on which you worked so assiduously really deals adequately with the subject matter that we are dealing with in Mr Corbett's Bill?

Professor PARKINSON: 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 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 ground 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.

CHAIR: You just made reference to the defence of lawful correction. It appears to the

Committee, according to the information in our possession, that there perhaps is no reported case of a prosecution in this State regarding an assault on a child since 1891. Can you account for the comparative lack of decided cases in this area? Do they in fact occur? Are we dealing with a subject matter that needs attention?

Professor PARKINSON: I think we are dealing with a subject matter which needs attention. The explanation for the lack of prosecutions is, I think, that where the police are motivated to prosecute and the DPP considers it necessary to press charges, these are cases where the defence of lawful correction could not possibly be raised. They are cases where there has been serious injury to a child where we are talking about grievous bodily harm and even death, and for a parent to invoke the defence of lawful correction in such circumstances would be ludicrous.

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.

The Hon. P. J. BREEN: Did you not say earlier though that for the more serious cases the child protection legislation is adequate and therefore from that it would follow that this would be used for more trivial offences?

Professor PARKINSON: I think in the child protection legislation, criminal law always is an alternative for any case. If there is a case of sexual abuse of a child, then DOCS may intervene to remove the child through the child protection legislation and the police may prosecute, and indeed either or both of them could happen at the same time.

The criminal law is sufficient as it stands, if the only issue is prosecuting parents for serious injury to their children. It is about the messages for less serious cases that we are concerned with.

The Hon. P. J. BREEN: Could there be a whole rush of cases as a result of this legislation?

Professor PARKINSON: I really think it is most unlikely to occur. Indeed, this Bill if it were passed would be successful if there were almost no cases. It would be successful, it would have worked.

The Hon. J. HATZISTERGOS: Why could those messages not be transmitted through the existing legislation?

Professor PARKINSON: The existing legislation, which really relies on the common law of lawful correction, is hopelessly vague. It refers to reasonable chastisement, it does not indicate to us what reasonable is, and that is the problem.

The Hon. J. HATZISTERGOS: It gives a few examples of things that are not reasonable. It still leaves a lot open to interpretation as to what is and what is not reasonable.

Professor PARKINSON: I think the key thing to recognise is that the discretion which is most important is the prosecutor's role in this. Police are far too busy to waste their time in courts with trivial cases, so long before it gets to court discretion is going to be exercised. In my view it is clear

enough in its basic messages, which is do not hit kids around the head.

The Hon. J. HATZISTERGOS: That is not an answer to the question I put to you. A moment ago you said that the word "reasonable" was not clear and that this Act sought to make it clear. What I am saying to you is that this Act does not make it clear, because it still leaves it open to interpretation as to what reasonable is or is not, except for a few examples.

Professor PARKINSON: I think that is so.

The Hon. J. HATZISTERGOS: Which, I might add, are difficult to interpret.

Professor PARKINSON: We may disagree on whether they are difficult to interpret. I think the provision of those examples is very helpful and I do not think in law one can always pin down every detail. What one must do is give sufficient indication --

The Hon. J. HATZISTERGOS: Well, let me take you through them. Subsection 61AA(2) says that the application of physical force is not reasonable if, so we have still not got a definition of what is reasonable. We have a definition of what supposedly is not reasonable and it is not reasonable if the force is applied by the use of a stick, belt or other object (other than the hands) - we have another negative coming in, other than an open hand or in another manner that could reasonably be regarded - another reasonable - as trivial or negligible in all the circumstances. Then you get to the next one: The force is applied to any part of the head or neck of the child (other than in a manner that could be considered trivial or negligible in the circumstances) and (c), which I am finding very difficult to understand: 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 a child that lasts for more than a short period. How do you intend to get Mr and Mrs Australia to understand that with all the negatives that are incorporated in it?

The Hon. JANELLE SAFFIN: I think the same way as every other Act. I do not see them poring over laws.

The Hon. J. HATZISTERGOS: No, other Acts may serve a different purpose. I am told that the purpose of this Bill is to be educative, to send a message across to the community, and this is the message that we are asking the community to absorb.

Professor PARKINSON: Well, with respect, it is not. I think that the message would be: Don't hit kids around the head or with belts.

The Hon. J. HATZISTERGOS: Well, it does not say that, does it?

Professor PARKINSON: It does not say that. Let me agree with you and disagree with you, if I may. I think this is more complex than I would like. 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.

The Hon. JANELLE SAFFIN: It has been redrafted more than any other piece of legislation I have seen in five years.

Professor PARKINSON: That is my point and 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.

CHAIR: Could I put a matter to you, Professor Parkinson, that I put to a previous witness,

Dr Cashmore, and that, in a way, relates to what Mr Hatzistergos has been putting to you. If I could direct your attention to the proposed subsection (2), supposing we deleted (a) and (b), that is the parts of the subsection dealing with the use of a stick, belt or other object and the reference to force being applied to any part of the head or neck of the child, that would leave (c), which would mean that only the physical harm caused by the force could be considered. Could I put it to you whether possibly the harm suffered is more important than the means by which the punishment is delivered, and I will tell you what in essence Dr Cashmore said: She said this is intended to have an educative function. That is essentially I think what she said. However, as a lawyer, what would your view be if we were to delete (a) and (b) and rely on what is said in (c)?

Professor PARKINSON: I would much rather that you deleted (c) and kept (a) and (b), and the reason is, as I have said before, we want to avoid seeing the head injuries at the Children's Hospital and the best way is to tell people that that is not reasonable. The present law is sufficient if all we want to do is prosecute after the event for harm which has been caused.

CHAIR: Could I put another matter to you in terms of drafting this provision that I also put to Dr Cashmore: Is there any value in expressing the terms of the subsection in positive rather than negative terms? You will see that it is provided at the moment that the application of physical force is not reasonable if certain things occur. Supposing we twisted it around the other way and an expression were to be made in positive terms stating what parents are permitted to do in disciplining children. For example, they can smack a child with an open hand below the neck provided it does not cause very much harm or harm for other than a fleeting period. What would be the merit of that approach as opposed to the way it is cast here?

Professor PARKINSON: I think either approach would be entirely acceptable from both a legal point of view and a policy point of view, as long as the draft is clear. It really does not matter too much what this says as long as it is suitable legally because the message which will be understood will be the message on the front page of the newspapers, not the wording in the legislation.

CHAIR: I put this to Dr Cashmore as well: Some people who have contacted the Committee appear to have quite an attachment to a wooden spoon. Do you regard a wooden spoon as having any particular legitimacy as a means of correction? Presumably you would strike it down as you would a stick or a ruler or a belt or other similar object, but can you understand sociologically why perhaps people are referring us to a wooden spoon?

Professor PARKINSON: I am not an expert on the infliction of physical pain on children. I have no view on whether a wooden spoon is worse than a stick or a belt. I am aware of what you are saying. From a legal point of view, can I be clear that in my view, when it says the force is applied with the use of a stick, belt or other object, that other object would include a wooden spoon and would therefore be prohibited by this Bill. Having said that, I would not expect a prosecution if no harm had occurred.

CHAIR: The final matter I would like to put to you at this stage relates to a section of your written submission dealing with corporal punishment and the Christian faith. You refer to the well-known saying from the Book of Proverbs: Spare the rod and spoil the child. My parliamentary colleague, the Reverend Fred Nile, places some reliance on that saying from time to time. Could you give the Committee your understanding of the true meaning of that expression and its application?

Professor PARKINSON: May I preface my response by saying that I have read carefully the words of Reverend Fred Nile in the parliamentary debates on the Second Reading Speech and it appears that he and I would share very, very similar views. Just that I would support the Bill; it appears he would oppose it. He would say that, from a Christian point of view, physical force is a last resort and so would I. What is clear though is that the term "spare the rod and spoil the child" is taken from the Book of Proverbs and the Book of Proverbs is full of metaphors and imaginative sayings.

There are many, such as: Better to live on the roof of the house than to live in the house with a nagging wife. It is not meant to be taken literally. It is not suggesting people should pitch their tent on the roof. The Book of Proverbs is a wonderful work of literature in the metaphoric expressions which it uses and I think the passages about the roles are to be taken in that context. One really looks at the New Testament for the more detailed teaching on how Christians live and behave and there is nothing there about how one should discipline a child and what there is is an emphasis on the importance of discipline, which none of us would disagree with.

CHAIR: The main reason I ask you the question is that next Monday afternoon we are hearing from four witnesses from various religious organisations, namely the Salvation Army, the Presbyterian Women's Association, the Christian Community Schools Limited and the Federation of Parents and Friends Associations of Catholic Schools in the Archdiocese of Sydney. Now they may between themselves have different perspectives. However, it appears to me, although I have not heard from any of those witnesses at this stage, that some conservative evangelicals, or some people would say fundamentalist Christians - without meaning to be pejorative about the matter - do have highly developed sensitivities regarding Mr Corbett's Bill or anything that approaches that. Given the interpretation you are placing on "spare the rod and spoil the child", why is it that those substantial sensitivities appear to exist particularly in that section of the Christian community?

Professor PARKINSON: Well, let me be clear - it was in my submission - I am a conservative evangelical Christian myself, I do believe in the Bible as inspired by God, so I have a similar faith base to those who might be critics.

I think there are two reasons why people may be concerned. The first one, which I suspect is the minority, is that there are some Christians who believe that it is good and important to use the rod, whatever form the rod may take, be it a cane or some other physical implement. I do not think they have any support from the scripture for that view, but it is a view that they sincerely hold.

The second concern, which I suspect is perhaps much more widely held and may go to the heart of sensitivity is the feeling that the State should not get involved in regular family life. It may not be articulated in exactly those terms, and I suspect that is a real concern, concern about the intervention of social workers and do-gooders and all these other various people who might go around telling us how we should live our lives. I do not think this Bill should be seen as a threat in that sense. We already outlaw domestic violence, we do regulate force within the home, and so we should, but I think that is at the heart of their concerns.

The Hon. J. HATZISTERGOS: I am curious about the comments you made before. Correct me if I am quoting you incorrectly, but I think you stated that you thought this Bill law was a bit more complex than you would like it, that it was a bit too technical. That does not sit well with what you said in your submission when you said, "Mr Corbett's Bill makes the law much clearer. It is very carefully drafted to meet all the objections which Honourable Members have previously raised." What is the view that you adhere to, is it that this Bill is not well drafted and should be reworked because the message is not getting through as clearly as it ought to, or is it that this is fine --

Professor PARKINSON: There are a thousand things hidden within the words I used in my submission. It has dealt with all the concerns the Honourable Members have raised, of which there were a large number, and it has been very carefully drafted. I would prefer it to be simpler, but I think it does represent a good compromise, and it is clear enough. I think that is what I said in this submission, it is much clearer than the common law.

The Hon. J. HATZISTERGOS: You also said "it translates into a clear enough message"?

Professor PARKINSON: Clear enough message.

The Hon. J. HATZISTERGOS: Let us just look at part of the message. We have a defence which can be raised by parents and that is defined in subsection (5) according to the relationship, the relationship between the child and the parent. It does not talk about the biological parent or any legal relationship. It just talks about the nature of the relationship. And then you have subsection (5)(a) and (b) in relation to a person acting for a parent. A person acting for a parent is a person above the age of 18 who is a step-parent, a de facto spouse of a parent of the child as expressly authorised.

Can a person who falls within subparagraph (i) of subparagraph (a) of section (5), that is a person who is a step-person 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, also fall within the definition of parent?

Professor PARKINSON: Yes.

The Hon. J. HATZISTERGOS: And if they do, do they require permission from someone else who is in a relationship with the parent? What section do they fall under to know what their entitlements or rights or responsibilities may or may not be?

Professor PARKINSON: Again, I say it has been very carefully drafted and the definition of "parent" is based on that of the Family Law Act. Under the Family Law Act, both biological parents of a child have all the duties and powers and responsiblities and authority which by law parents have. The definition is identical.

What that means is that if what used to be called custody and now we call parental responsibility is given by the Family Court to a step-parent, that may be through a consent order, it does not have to be through a trial, then they would be a parent within the meaning of the definition. It is only if they are not a parent who has lawful parental responsibility by court order or otherwise, that they are a person acting for the parent.

The Hon. J. HATZISTERGOS: I am not sure about that, because "parent" does not seem to be defined by reference to any order of the Family Law Court.

Professor PARKINSON: No.

The Hon. J. HATZISTERGOS: It may be the same definition, but it is not for the purposes of this Act. It is not dependent upon any declaration by any court. It is simply a definition by reference to a particular relationship that the child has with the adult which gives the adult powers, responsibilities and authority. That could include a series of different relationships, could it not?

Professor PARKINSON: The definition arises from the effect of section 109 of the Constitution. Essentially the definition of "parent" in Australian law is a Federal definition. It is one which is made under the Family Law Act whether or not there is a Family Court order. The Family Law Act section 61B defines what a parent is and defines it in these terms. In an intact family, I as a parent have powers and responsibilities defined for me by the Family Law Act, and that is the starting point for this legislation.

The Hon. J. HATZISTERGOS: Does a step-parent of a child fit within that definition of a parent?

Professor PARKINSON: Step-parent does not intrinsically, because a step-parent is not a biological parent. Biological parents together have parental responsibility under the law. A step-parent will come within the definition if a court order is made in their favour. That is where the court order fits in.

The Hon. J. HATZISTERGOS: It does not say that.

Professor PARKINSON: I do not think it needs to. As a matter of law, a parent is whoever the Family Law Act says a parent is.

The Hon. J. HATZISTERGOS: So that is a reference to a definition in the Family Law Act?

Professor PARKINSON: It is essentially so, yes.

The Hon. J. HATZISTERGOS: So if you are either a biological parent or you have got an order of the Family Court that says you are a parent, you fit within the definition of "parent"?

Professor PARKINSON: If you are a biological parent or you have an order of the Family Court conferring parental responsibility upon you, to be precise, you are a parent.

The Hon. J. HATZISTERGOS: And then you do not fit within the definition of a person acting for a parent.

Professor PARKINSON: Exactly so.

The Hon. J. HATZISTERGOS: A person acting for a parent, is that defined in the Family Law Act?

Professor PARKINSON: No. It will be defined here.

The Hon. J. HATZISTERGOS: What is the rationale for persons who are, for example, step-parents or de facto spouses, who might be in a situation of loco parentis, not under a formal Family Court order, making them persons who have parental responsibility because they have a strong common law relationship with the child? What is the rationale for people in that position being required to obtain express authorisation and what is the nature of the express authorisation?

Professor PARKINSON: I do not think this is very different from the common law. A person who is lawfully a parent can under the common law authorise somebody else to exercise discipline on their behalf. What this Bill is doing is to specify who that person can be, and again, I think that is quite helpful for clarity, but I do not think it is a major shift from the common law in any sense.

What is the rationale for express authorisation? I think in this day and age that it is a wise provision to have, because one can make all sorts of assumptions about what parents will want and do not want, which can be totally mistaken. To take an example, we were discussing in my own church issues about toileting of young children. Is it okay for somebody who is staffing a Sunday school to take a child out and take them to the toilet? Why should parents have an issue about that? They may say, "No, we would rather you go and get us and we will take the child to the toilet". So we cannot rely on assumptions which in my generation were the norm.

The Hon. J. HATZISTERGOS: I can understand the word "relative". What I am asking about is a step-parent or de facto spouse who may have an ongoing relationship with a child on a day-to-day basis. The child might even refer to the parent as "Mum" or "Dad" or whatever. What is the rationale for putting a person in that position in the situation that they need to obtain express authorisation of the other parent?

Professor PARKINSON: I think that step-parent relationships in Australian society are varied. There are some step-parents who---

The Hon. J. HATZISTERGOS: So are parental relationships.

Professor PARKINSON: That might be so, but the point with step-parent relationships is that step-parents may become step-parents when the child is six months or when the child is 13 or 14, and there are children who do not accept the right of step-parents to discipline them. They say, "You aren't my father". I think the alternative to what we have here is some sort of blanket authorisation to step-parents to exercise parental discipline and I think that would be an unwise provision.

The Hon. P. J. BREEN: What about the child who says, "You can't hit me. I will tell my Daddy" or "I will tell my Mummy", and yet you as the step-parent are authorised by the child's parent to do it. Is that permitted under this legislation?

Professor PARKINSON: It will be if they are expressly authorised. This is why I think this is a sensible proposal and a safeguard. Step-parents ought to know exactly where their boundaries are to avoid any doubt or uncertainty and to avoid the sort of problems that you are raising.

The Hon. Janelle SAFFIN: Age would become a factor in that, would it not, age of the child, as well?

Professor PARKINSON: It could be.

The Hon. Janelle SAFFIN: It could be at some point.

CHAIR: Could I ask you one question regarding this question of de facto spouses. I think it is commonly understood and accepted that there is a higher incidence of child abuse on the part of male de facto spouses as opposed to natural parents of children, biological parents. Would you regard the inclusion of "de facto spouse" in subsection (5)(a)(i) as being desirable, shall we say in child protection terms?

Professor PARKINSON: I think we have to be clear about what the purpose of this legislation is. The reference to step-parents and de factos is to bring them within the meaning of lawful correction. If they were excluded, then they would not have the defence of lawful correction, which would seem to me to be a surprising result, because some step-parents do engage in discipline of the child. But it does emphasise the importance of the educative value of this. It is true that there is a much higher incidence of child abuse by step-parents and clarifying what the boundaries of discipline are seems to me to be very important.

The Hon. P. BREEN: I want to be clear about the difference between an evangelical Christian and another Christian. It seems to me that all Christians believe that the Bible is inspired by God.

Professor PARKINSON: I wish they did.

The Hon. P. BREEN: Is there not some question about it being directly written rather than inspired? Is that not the difference?

Professor PARKINSON: Conservative evangelical Christians would define themselves by saying that they regard the Bible as inspired by God for teaching, correction and so on, that is that one can get from the Bible proper instruction for life and Christian living. That contrasts with much more liberal interpretations of the scriptures which do not place a particularly high importance on the text of the Bible compared to conservative evangelicals and it compares also to those who rely on the tradition of the church as a major source of faith. The Catholic church in particular would use both the Bible and tradition as sources of authority.

The Hon. P. BREEN: Is it true though that all Christians say that the Bible is inspired by God?

Professor PARKINSON: Well, one has to unpack what they mean when they say that it is inspired by God. I think it is true that that is a view which would get concurrence, but there are very, very different interpretations of what that inspiration is and how far it went.

CHAIR: I am just wondering how directly this relates to the terms of reference.

The Hon. P. BREEN: I am actually getting to that because the Honourable Fred Nile and you seem to agree on the philosophy behind the Bill but you disagree on the outcome and the Honourable Fred Nile, it seems to me, expresses concerns which are perhaps more secular. He says he is concerned about what the Telegraph is going to say about the Bill.

Professor PARKINSON: So am I.

The Hon. P. BREEN: And how that reflects on the Parliament. He is concerned about that and I wonder if that is also a concern of yours. I mean does it really matter at the end of the day what the Telegraph says? Is it not more important that we have laws which are comprehensible?

Professor PARKINSON: Yes, it is important that the Bill does send as clear a message as is possible and that there are not rogue interpretations of the Bill. For example, anybody who argues that this Bill would prohibit smacking would, in my view, not be giving a fair interpretation of the Bill and it is important that we are all clear on what it says and what it does not say so that there is less room for misinterpretation by the press.

The Hon. J. HATZISTERGOS: Could I ask a question about express authorisation in sub-paragraph (5), I think it is, the definition of a person acting for a parent requiring express authorisation. How do you envisage that express authorisation to be demonstrated?

Professor PARKINSON: I think we are dealing with a defence to a prosecution - one must always remember that - and a simple way of achieving that would be for the other spouse to give evidence on behalf of the person who was being accused that they had expressly authorised the use of physical punishment.

The Hon. J. HATZISTERGOS: So it is an oral consent?

Professor PARKINSON: Yes. I cannot --

The Hon. P. BREEN: "You can hit my kid" and "You can't hit my kid".

Professor PARKINSON: Yes.

CHAIR: It would be a matter of evidence in the particular circumstances of the case, would it not?

Professor PARKINSON: If there was a prosecution, and I emphasise again that I think there will only be a prosecution if there is actual injury. We do not have a track record of prosecuting minor incidents, so parental lawful correction does not ever come into play around trivial corporal punishment.

The Hon. P. BREEN: In the example you gave about the child who was beaten and whom you had in your care, who appeared to have been beaten with an electrical cord, if the child says, "Well, my two year old brother did it", are we not in the same difficulty? You cannot actually prove it

and therefore there is not sufficient evidence to sustain a prosecution, regardless of whether you have the Bill in place or not?

Professor PARKINSON: Well, that is right, there is not only prosecutorial discretion that comes into play but also whether there is enough evidence to prosecute, but that is so with any crime of any kind, it does not stop us from having a Crimes Act just because in some cases we do not have the evidence.

The Hon. P. BREEN: Would the case that you mentioned also be a case that could be referred under the child protection legislation?

Professor PARKINSON: Most certainly, yes.

The Hon. P. BREEN: Would we be better off as a result of this Bill in that situation than we are at present where we have only got the child protection legislation?

Professor PARKINSON: To go back to an earlier answer, they are complementary. If there is a need for the department to intervene and possibly to remove the children then that would happen under the child protection legislation, but sometimes a prosecution under criminal law can actually be a much more low key intervention than going to the Children's Court. One may, for example, put the parent on a good behaviour bond or a nominal fine which sends a very clear message that this is not acceptable. It does not say this parent is not fit to have the children any more and those low key interventions are actually quite important in the child protection system.

(The witness withdrew)

LUCY GRAHAM SULLIVAN, Research Fellow in Social Sciences, 11 Pitt Street, Windsor, and

BARRY RUSSELL MALEY, Senior Fellow and Director of Research Program, Centre for Independent Studies, 13 The Citadel, Castlecrag, affirmed and examined:

CHAIR: Dr Sullivan, did you receive a summons issued under my hand in accordance with the provisions of the Parliamentary Evidence Act 1901?

Dr SULLIVAN: Yes.

CHAIR: Are you conversant with the terms of reference for this inquiry?

Dr SULLIVAN: I think so, yes.

CHAIR: Could you please briefly outline your qualifications and experience as they are relevant to the terms of reference, please?

Dr SULLIVAN: Well, first, I have a doctorate in psychology, but I have had a long involvement with matters associated with parenting dating back to 1972 when I was involved with Parents Centres Australia, covering the whole range of things affecting parents, and the issue of smacking and so on was something that was very important at that time. More latterly, since I have been at the Centre for Independent Studies I have been writing and working on matters to do with the welfare of the family and more generally.

CHAIR: You have made a written submission to the Committee. Is it your wish that that submission be included as part of your sworn evidence?

Dr SULLIVAN: Yes.

CHAIR: Mr Maley, did you receive a summons issued under my hand in accordance with the provisions of the Parliamentary Evidence Act 1901?

Mr MALEY: I did.

CHAIR: Are you conversant with the terms of reference for this inquiry?

Mr MALEY: I am.

CHAIR: Could you please briefly outline your qualifications and experience as they are relevant to the terms of reference for this inquiry?

Mr MALEY: I have a first, honours degree in anthropology and psychology from the University of Sydney; and a second, master of arts degree from the Australian National University; I was, for seventeen years, a senior lecturer in behavioural sciences at the University of New South Wales and following that I have been with the Centre for Independent Studies for the past eleven years or so directing a research programme concerned with questions of family and child welfare.

CHAIR: Mr Maley, you have made a written submission. Is it your wish that that submission be included as part of your sworn evidence?

Mr MALEY: Yes.

CHAIR: If either of you should consider at any stage during your evidence that in the public interest certain evidence or documents you may wish to present should be heard or seen only by the

Committee, the Committee would be willing to accede to your request.

Mr Maley, I understand you would now wish to make a brief oral statement to the Committee?

Mr MALEY: Yes, mainly as an approach to the central issues. I am taking my submission as read, of course, but I believe that the main issue at stake here is the abuse of children and the maltreatment of children and whether the Bill is likely to reduce it. There are several thousand substantiated cases of various forms of abuse each year and it seems to me that the Crimes Act already covers common assault and battery and the Children and Young Persons (Care and Protection) Act also deals fairly extensively with abuse and maltreatment of children.

In short, I believe the law is comprehensive and the burden of this amending law is said to be the urgent need to add certainty for the courts and parents about what level of punishment and what instruments can be administered in the course of lawful correction without generating a charge of assault. It is said that there is much doubt on what constitutes an assault on a child and, as I have heard from evidence already being given here, there is virtually no information on actual cases or circumstances where the police or the courts have had difficulties, or indeed where the defence of lawful correction has been used, so I infer from that that the central problem is serious abuse or injury or harm to children.

However, leaving that aside, it seems to me that the amending Bill is seriously deficient and some of the reasons for that I know have already been suggested. The attempt to achieve a degree of certainty through the terms of this Bill, as those terms stand at the moment, may achieve the opposite of what is intended while at the same time undermining the common law virtue of flexibility. The amendments are riddled with uncertain terms and requirements for courts to make subjective judgments. For example, "excessive" physical force. What is "excessive"? Reasonable force, as has been said before. What is "reasonable"? What do we mean by "trivial" or "negligible", any "object" or a "short period"? All of these terms are quite uncertain and no less uncertain than the common law as it stands at the present time.

Now it may be that this is in the nature of things, that perhaps where questions of degree and motive are so important, as they are here indefiniteness and subjectivity are unavoidable. There is, of course, little uncertainty about terms like a "stick" or a "belt" or a "head" or a "neck", but the conjunction of the uncertain terms with the more definite ones in actual circumstances would, I think, lead to puzzles arising which the courts will have to wrestle with without any improvement in certainty and certainly no clear educative message for the general public or for parents. Indeed, guidance of parents is offered as one of the virtues of the Bill but, as the claim for certainty drifts away, with it, it seems to me, goes the supposed guidance for parents. In any case, I am not sure that responsible parents need guidance and irresponsible or vicious parents will ignore it anyway.

It is also said in the briefing documents sent to me that there is some confusion and fear in the community about what constitutes lawful correction, but the only evidence given for that was somewhat anecdotal. There was some mention of the United Nations Convention on the Rights of the Child but if there is confusion it would be confusion, I suspect, about what the legislators are going to do or what they want to do. In other words, where is the law heading? In that context, having studied the UN Convention in some detail, I think it is a very confusing and uncertain document, so that if we are depending upon it for a clear message I think that is quite futile.

So I conclude that there is very little confusion in the minds of the overwhelming majority of parents, certainly the ones that I speak to, about what constitutes unacceptable punishment, and the surveys included in the briefing papers I think tend to support that.

It is also said that the definitions in the Bill will reduce the risk of injury when children are

being punished. I have suggested that there are some uncertainties in the Bill that throw doubt on that, and in any case, that claim assumes that caring and responsible adults may unintentionally injure children when punishing them. I again find it difficult to believe that unintentional injury sufficient to justify a charge of assault would come from a rational, caring adult or parent, and I think that suggestion is remote and to some extent a red herring. And as for stupid or malicious people, they will not be reformed or deterred by definitions in a Bill that they will never read. There are so many ways in which children can be abused, but quite remote from the attempt to give definitions in the Bill.

I was reading a case the other day in one of the State's child protection documents about a single mother, who in punishing her seven year old daughter, shaved her head and shaved her eyebrows. To do that would require a razor or a cutting instrument of some sort, not mentioned in the Bill, indirectly or uncertainly. Is that a trivial offence? I do not believe it is. I think it is a humiliating form of abuse. But is it conceivable that this Bill would not cover it? And if the Bill is not intended to cover those cases, if its major function is educative, I begin to wonder whether there is much point in the Bill when we already have so much else on the statute books.

I think that the overall situation hinges about the motives of adults and parents in relation to children, and I think the multiplication of definitions will not in itself make the prevention of injury or harm or abusive acts of any kind any easier to prevent. Abuse, in short, arises from the intentions of predators and those who for various reasons, some of which I have hinted at in my submission resent or hate or despise children. They will express that hate or resentment no matter what we do, and the burden of the Parliament and all of us is to stop that happening to the best of our ability. In that regard, the Bill begins to lose a great deal of its relevance.

Finally, on the question of reporting abuse of such evidence, it is said that the definitions will help those with a professional responsibility to report harm or abuse. They, it seems to me, will be reporting harm or abuse after the event and will therefore be depending upon the physical and oral evidence presented by the child itself or eye witness reports of the event itself, and that, I should think, would be the most relevant evidence for a court to take account of, not information about the object or instrument used, which can be almost limitless in its character.

What happens in the absence? Let us say there has been a report by a concerned adult that the child has been hit with a stick. There is no manifest harm to the child nor any reliable reports of its presence at some stage. What will professionals do if told by an adult that he or she saw the alleged perpetrator use a belt or a stick or even an open hand in a forceful way? And if a charge is laid in a court in those circumstances, is the court more likely to reach a just decision because of the terms of this Bill, or because this Bill has been enacted, or on the other hand, would we be likely to see more and more cases brought before the courts on uncertain and perhaps sometimes mischievous grounds? And I fear that this could be the case, and if it happens this would carry a powerful message to conscientious, non-abusive families to be very careful because of potential family and personal damage and financial cost of being arrested or charged in any way could be very substantial.

We must therefore ask ourselves: Would this lead to hesitation by responsible parents to apply non-harmful punishments in circumstances where it is called for, and over time lead to more frustration and internal unhappiness in families and less effectively socialised and instructed children, and there is evidence, as you may have seen in my submission, that this may have happened in Sweden since it banned all corporal punishment in 1979. Indeed, it is ironic that at the same time as we are moving to reduce the confidence of non-abusive families in their own judgment in disciplinary matters, some of our legislatures are moving towards making parents responsible for the damaging acts of their undisciplined children. In other words, parents are to be held responsible for acts in relation to whose prevention they will lack appropriate authority or confidence.

I do not believe that we can devise any statutory definition or formula governing corporal punishment in the interests of lawful non-abusive correction that will accommodate an infinite

variety of circumstances, that will be compatible with the responsibilities of parents and the rights of parents and children and that will be superior to or more certain than the law as it stands at the present time. And to do so would mean a break in a very long tradition and at least some case law on the subject which, again, will add to the confusion and uncertainty.

CHAIR: Thank you, Mr Maley. In commencing the questioning period, could I indicate that any question, even if it is in its own terms directed to one or other of you, may be responded to by both of you should you so wish.

Mr Maley, during the latter part of your oral address to the Committee, you made reference to an incident of some form of cutting instrument being used to shave the head and eyebrows of a particular child, I took it to mean.

Mr MALEY: Yes, a seven year old girl.

CHAIR: Could I put it to you that this Bill relates, or is intended to deal, with the raising of the defence of lawful correction, or reasonable chastisement to use another expression, in the event that a prosecution arises out of what could be considered to be circumstances involving the chastisement of a child. Could I put it to you that an incident such as you described, using a cutting instrument, could not in any way be regarded as reasonable chastisement and would be regarded as a serious assault?

Mr MALEY: I would certainly think so, yes, certainly a deeply humiliating thing to do and I would regard that as abuse.

CHAIR: That being the case, is it not legitimate to include, for example, a prohibition against striking with a wooden or other object, which could, if used to excess or with undue force or frequency or for an extended period of time, also amount to a serious assault?

Mr MALEY: Of course it could, but the central issue there, it seems to me, is that we have noticeable injury or harm to the child, and to some extent the instrument that caused it is not relevant. It is the harm that gives us cause, it is the effect upon the child that we are concerned about.

CHAIR: You say in the latter part of your written submission:

> *If the Bill were to be passed as it stands it would create a licence for interference with families and perhaps the creation of unnecessary and counter-productive frustration and anger which would serve nobody's interests, including the children's.*

Do you believe that is a justified statement, given that the Bill does only raise a defence to a prosecution arising out of what might otherwise be considered to be lawful correction? To add to what I am saying, it appears to be the case that there is no reported decision in the New South Wales courts since 1891 of this defence having been raised. So it would appear that prosecutions are uncommon in any event. To what extent is it realistic to say there would be a licence for interference with families?

Mr MALEY: I do not know to what extent the existence of that common law defence, or rather the co-existence of that common law defence with the Children and Young Person's Protection Act, has taken from the common law cases and charges that are being laid under the Children and Young Persons's Protection Act. I can't quote the numbers, but they must be relatively significant judging from the figures on substantiated cases of abuse collated by the Australian Institute of Health and Welfare.

The other thing, I suppose, is that I come back to this question of manifest harm, which is the

key marker of harm or injury, it is the key marker of maltreatment, undue punishment or abuse. The fact that we have now for the first time mentioned the use of particular instruments, I think would make it more likely that anybody who reports the use of one of those instruments to an official of some kind, that the instance is more likely to be noticed and more likely to be pursued than under the present circumstances, so that we may get, as I suggested, more mischievous interference than we have at the present time.

CHAIR: Dr Sullivan, near the end of your written submission you say:

> *Sweden, which has criminalised smacking of children, has nearly six times our violent crime rate, 6,600 violent crimes per one million population compared with our 1,230 in the mid 1990s. The claim that smacking is violence and hence it breeds violence is clearly of doubtful validity.*

You give no source or reference for that statement regarding the crime rate in Sweden. Can you tell us upon what you base it?

Dr SULLIVAN: Yes. It is from a report from WHO on drug use in various countries, and as well as reporting drug use statistics, it also reported public crime rates and violent crimes rates.

CHAIR: Well, accepting for the sake of argument at the moment that your figures are correct, how do you claim that there is a causal relationship, if any, between the criminalising of smacking children and the violent crime rate in Sweden?

Dr SULLIVAN: No, I did not claim that. I claim that there is no evidence for the opposite effect.

Mr MALEY: If I could add to that, I did give some figures from sources in journals, in my submission, about the increase in rates of assaults following the Swedish Act. Again, this correlation is not evidence of causal connection, but again Dr Sullivan's remarks apply to those submissions as well.

CHAIR: Mr Maley, in your written submission you refer to the Swedish population being somewhat less than half of the Australian population and you say that the number of children in care in Sweden, which you say is 15,000, is disproportionate in relation to the Australian figure, which you say was 17,811 as at June 30 last year. You rely there on the Australian Institute of Health and Welfare figures in the publication issued for 1998-99 at page 28 and you say: This may signify one of two things or a mixture of both. The abolition of corporal punishment has had consequences contrary to those intended by increasing the amount of abuse requiring that children be put into care. Pausing there, how does that follow? Might not there be all sorts of other reasons, such as drug abuse and alcohol abuse?

Mr MALEY: Of course, that is why I said "may". It is simply a correlation from which no firm deductions can be made, but it does indicate, or suggest at least, that the abolition of corporal punishment has not reduced these offences as those who introduced or enacted the legislation seem to have hoped.

CHAIR: The actual incidence of the offences of violence to which you refer, though, may arise out of causes other than the abolition of corporal punishment.

Mr MALEY: That is so.

CHAIR: You go on to say that the legal duty to search out parental breaches of corporal punishment and care of children laws is leading to intense inspection and investigation of families

and the placing of extensive power in the hands of officials. We do, of course, have child protection legislation in this State and that does, in some cases, lead to intervention in families and, in the most serious cases, the removal of children from their families. Is it not legitimate to separate that, though, from what we are considering here which is, in the event that a prosecution is mounted for assault of one degree or another involving punishment of a child, that the statutory defence of lawful correction is defined or attempted to be defined? How do you link the child protection laws and what we are considering here?

Mr MALEY: Well, I am most certainly not an authority on the child protection laws, but it seems to me in the briefing papers and the description given there of the child protection laws that they are pretty comprehensive in covering questions of abuse and maltreatment of children. As I understand the common law defence at the moment, it applies to questions of assault or battery, is that correct, or charges of assault or battery and you can raise a defence that it was in the course of lawful correction?

CHAIR: Well, in my opinion, the usual prosecution which would give rise to the raising of the defence of lawful correction would be some form of charge of assault.

Mr MALEY: Yes, and it seems to me that the courts have sufficient power to make a judgment in any cases that may be brought before them under the existing law.

CHAIR: Well, could I put it to you they may well have sufficient power at the moment if one characterises the matter as one of power or authority. However, what Mr Corbett's Bill is aimed at seems to me to be a statutory definition of the circumstances in which the defence of lawful correction may be raised. He is saying, for example, that it may be raised in certain circumstances but not others, and the circumstances in which it may not be raised would include striking a child on the head or using a belt or a wooden stick, to give some examples.

Mr MALEY: Well, the justification for that was to introduce a degree of certainty but, as I suggested at the beginning, that certainty is certainly not achieved, I believe, in the existing terms of the amending Bill, so that that objective, I suggest, will not be achieved and so far as a court hearing a case is concerned it will be little better off, particularly if the question of harm or injury to a child becomes a key issue and that key issue can arise just as readily under the present common law as under this Bill.

CHAIR: Dr Sullivan, you say near the commencement of your written submission that the Bill is badly framed and injurious to the successful raising of children in our society on two counts, the first of which you specify as it doing nothing to clarify the current uncertainty surrounding the legal limits of parental disciplining of children, and you go on to say that it will increase parental uncertainty and alienation. How can that be given that, whether it is a perfect treatment of the subject or an imperfect one, it does attempt some definition of the circumstances in which the correction can occur? How can you say justifiably it will increase parental uncertainty and alienation?

Dr SULLIVAN: Well, maybe I could go back to the example of the mother who shaved her daughter's head. There is nothing in the Bill that would give that mother any clue that that was unacceptable. It may well be that, because there was this talk about it being wrong to smack and so on, that is what induced her. She is not sure what she can do, so she finds something else, and it then can go to court and a judge will talk about what is reasonable in terms of the age of the child or health and various things and she is caught.

Now I think, as I said in my submission, that we have a very simple way of handling this and it is quite clear that our society does not believe that you should harm children and I do not see why that cannot be the principle. Using implements or hands and so on - in each case it can be quite harmless or it can be very harmful and I think you are just confusing parents and once you put in

something that sounds certain and afterwards you follow it up with saying a judge will make some assessment of whether it was reasonable, you are just throwing the parents out of that certainty immediately.

CHAIR: Do you seriously suggest to the Committee that the shaving of a child's head - particularly a female child's head - could be in any way regarded as part of the law relating to lawful correction?

Dr SULLIVAN: No, what I am saying is that the Bill does not help that parent who may have actually taken that role because our established ways of doing things were being challenged, thrown into question. People cannot think out all of these things themselves. In parenting we have to rely on what we learn, on what the whole society has somehow, by trial and error, found as reasonable. I think the Bill really does not respect our society's approach to raising children; I think it throws all those things into doubt and once you have done that parents are in a bad way.

I do not know if you are going to ask me this written question, but it would be appropriate to bring it up now, about using implements in moments of frustration and so on.

CHAIR: Well, just carry on and say what you wish to say.

Dr SULLIVAN: Well, I just want to use this as an example of what I am talking about. You say that if the parent becomes enraged, furious and behaves irrationally, it is dangerous, they may do more harm, a blow to the face, but I think the whole point of what is going wrong in the way that this Bill has been framed is that it is holding parents off until they are going to explode. What we need is parents to have confidence in what they are doing, what they have inherited, so that they will intervene before they are angry. That is just one side of it.

The other side is: What is the function of the stick and the strap? Yes, they may do no harm whatsoever and they can be a fearful implement. Obviously most parents in our society will do no harm with them, but they have another value which is they define a punishment situation. If you are wondering about parents exploding with rage, when the parent says, "I will get the stick", or the strap, that is defining that this is not a parent suddenly getting angry, it is saying: You have done something wrong; we have a recognised version of punishment in this family. It creates a gap between the action and the parent doing something and I think in those circumstances the parent is much more likely to be restrained. It also means that it can be used as a threat as well. You can signal that the child has overstepped the mark: I will get the stick. If you just left it: I can't stand this any longer, I'm going to hit you now, I think that is when things go wrong.

CHAIR: Would you accept that your reference on the first page of your submission to the light slap on the face could in fact accidentally involve an injury to the child's eye, for example?

Dr SULLIVAN: If the child suddenly turned its head?

CHAIR: Yes.

Dr SULLIVAN: Yes.

CHAIR: Something of that sort may occur during the course of what one might loosely call an altercation and unintentional harm might ensue. Do you think that might possibly be an argument for the Bill's intended prohibition on striking the child on the head?

Dr SULLIVAN: It is possible, but I think both parents have very strong inhibitions against hitting their children hard, so if their child does move, particularly if it is anywhere near the head, they are going to be very careful, but I think this sort of thinking that you can pin down every

eventuality is simply not going to work. Anyway you have not tried to pin down most of them, you have just sort of done this one little selection.

CHAIR: Although you refer to a parent as being careful, it is not unknown for a parent to be quite angry in given circumstances involving a child.

Dr SULLIVAN: Yes.

CHAIR: Perhaps justifiably so in some cases. Is there not at least the possibility, if there is a striking about the head, that it might get out of hand?

Dr SULLIVAN: I think you are assuming that we do not have these in-built traditions. People do not slap two year olds on the face for insolence. That would be a teenager. I mean people working within our normal tradition. People do know these things. We know little children are much more fragile. We do not act in the same way with them as we do with older children. One of the difficulties coping with this, of course - and the talk of sticks and so on - is that generally we would feel that they are inappropriate for children under five, and yet under five tends to be the period in which corporal punishment is relied on more because children are not so readily adept at how to get messages across and possibly sticks and what-not will do less harm to an older child, but ideally we are moving away from corporal punishment at that period. I think parents understand this. I just keep feeling this is heavy-handed.

CHAIR: The final question I would like to ask at this stage is you say it, meaning presumably the Bill, is sociologically naive, both failing to understand its own culture and presuming the possibility of simplistically substituting foreign means for the complexities of a native tradition. Could you tell the Committee what you mean by that?

Dr SULLIVAN: I will give you an example: I was travelling on the train and a man and a little boy, quite well dressed, came and sat beside me and there was absolutely no interaction between this adult and this child. The child was, say, three or four. He sat beside the man and the man totally ignored him. The little boy sat there. Now this is very unusual in our culture because normally you see a lot of interaction and parents talking about things and this went on through several stations and I was getting a bit concerned, I was thinking: What is going on here? Then the train pulled into a station, the man got up, he did not glance at his child and he walked out. The little boy got himself up and followed - again very bizarre. Someone in our culture would be saying, "We're going to get off now" and making sure the child follows. I was getting quite distressed about this. I interpreted this as a child who must be at extreme risk, he had such a non-communicative father and so on, and I was thinking should I speak to him or do something? Then the thought arrived in my mind: Maybe he is French. That behaviour would be reasonably normal in French culture. You travel on French trains and parents do not speak to their children. There is that sort of coldness.

I think that the open flow between parents and children in our culture creates certain sorts of freedom of behaviour which we value. The other side of it is that the way children behave can get out of hand and we need the quick way of pulling back. I think that is where the slap fits into our culture. I do not think it is an evil thing. Obviously the French are trying it, but it does not appeal to us. We would not want to be behaving to our children like that. What it also demonstrates is, when people say we are going to educate parents to not snap, as if you can just suddenly do new behaviours when the child does something wrong. These things start from infancy. The French obviously take this approach of suppressing behaviour.

CHAIR: You appreciate that the Bill does not stigmatise smacking, though, do you not?

Dr SULLIVAN: Yes, I know, but I was just trying to say that all these things are much more complicated. They like deep in the roots of our socialisation with our children and I think most

Australians are doing okay. I know we have problems in certain areas, but I think it can be better addressed by just talking about harm.

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.

The Hon. J. F. RYAN: On what basis do you make the claim that most of our culture has an understanding in which children are unharmed? There are thousands of examples where people living in our city and in our State do harm their children.

Dr SULLIVAN: Yes, and we all know that that culture is breaking down. We have no doubt that that is unacceptable in our culture.

The Hon. J. F. RYAN: Some would argue that that is our culture unreformed, that in fact part of our culture has been a culture of violence. It is only something that has occurred in the latter twentieth century that we have understood - for example, it was part of our culture, I understood there used to be plenty of surveys done which said that one in five men believed that it was perfectly all right to hit your spouse. That was considered part of our culture. I am not sure that the same survey would produce the same result. In what way do you mean that it is in our culture and people understand that it is not appropriate to hurt children? On what basis do you make that claim?

Dr SULLIVAN: I guess I am a member of the culture and I base it partly on that basis. I have lived here a long time and I have talked to a lot of people. I think I am justified in having an opinion about my culture. Also in terms of saying they have a right to hit their wives, do they really think they have a right to harm their wives? I think people think they have a right to hit their children, but they do not think they have a right to harm their children.

The Hon. J. F. RYAN: Is that not somewhat irrelevant? Would you not be accept that for a man to hit a woman, that that is a crime regardless?

Dr SULLIVAN: Can we just talk about children?

The Hon. J. F. RYAN: What I am talking about is our culture, and it is our culture within our living memory that it has been perfectly acceptable, 20 percent of our culture believe that it is perfectly all right for a man to hit his wife, and you said they might believe it is all right to hit their wife but not harm them. Do you see any difference in that?

Dr SULLIVAN: Yes, of course, it is different, but at the same time I do not accept it. I do not accept that it is okay because we have attitudes about respecting adults and adults' responsibility to themselves, which is different from what applies to children.

The Hon. J. F. RYAN: You are a person with a PhD. You would understand the need to verify generalised statements like "our culture generally believes that it is not appropriate to harm children". You would need some sort of objective evidence from studies to demonstrate a comment

like that, would you not?

Dr SULLIVAN: You do need it, but have you got it? What are you going to rely on? In fact, I think you quoted from a study - what is his name?

Mr MALEY: Griffiths.

Dr SULLIVAN: Griffiths. He says, I think, that 99 or 95 percent of people believe that you should not harm children.

The Hon. J. F. RYAN: What if a significant number of our culture still believed that it was appropriate to hit a child with a stick and leave a bruise. Do you believe that the law should say something about that?

Dr SULLIVAN: I think we do have to have a deference to a culture, but I do not that that is a problem.

The Hon. J. F. RYAN: What about people, as you said, who do not understand our culture and are new? You define Anglo Saxons, but would you consider indigenous people to be part of our culture?

Dr SULLIVAN: The Bill is trying to exclude them and allow them to do things which you say our culture - you are talking about respect for tradition, and yet no respect for tradition is being accorded to us.

The Hon. J. F. RYAN: I am just wondering how do we communicate what you say is part of our culture to the 60 percent of people who live in Sydney that do not come from a culture which you have defined as "our culture"? How do we communicate what our culture is, if it is not through the law?

Dr SULLIVAN: We do have a law, and it does define these things. In terms of reading that report, which talks about common assault and the move to aggravated assault or something like that, it seemed to me that that is where we have got a problem in what is appropriate for children. It would be inappropriate to sue the parent for making a gesture or attempting to punish a child, but we do not want to go as far as aggravated assault before we stop what parents do to children. You need to stop them, but I do not think that this is a helpful way to go about it.

The Hon. J. F. RYAN: I accept that you are entitled to an opinion on that, but what we need to know is how you justify that. You have referred to a couple of instances where parents might say, "I will get the strap" or "I will get the stick" or something or other like that. If the law was that if force is applied to any part of the body, as long as it is not applied to a child in a way that causes harm for a short period, or that it could reasonably be considered to be trivial or negligible in all the circumstances, it is easy to argue that saying, "I will get the strap" is trivial or negligible, isn't it?

Dr SULLIVAN: Do you want a parent to make empty threats?

The Hon. J. F. RYAN: But you said that parents are making empty threats.

Dr SULLIVAN: No, it is not necessarily empty if the child then changes for that reason.

The Hon. J. F. RYAN: Do you think that the law should then not interfere, that if a parent then delivers on the empty threat and bruises the child with the stick, the law should have no opinion on that?

Dr SULLIVAN: No, I think it is absolutely clear that we do not go as far as bruising a child. Bruising is harm.

The Hon. J. F. RYAN: You would accept that bruising is harm?

Dr SULLIVAN: Yes.

The Hon. J. F. RYAN: But there is nowhere in the law other than in this Bill which would indicate to someone that bruising was even an issue, is there?

Dr SULLIVAN: I do not think the Bill even covers bruising. That is the sort of thing I would like to see go into the Bill if it is going to make a very clear distinction between pain - I mean what is corporal punishment but pain - and harm, and that you absolutely draw a line at any harm, which is bruises, battering. That is saying we accept harm that lasts for a short time. I do not think we should accept harm that lasts for a short time. I think we should accept no harm.

The Hon. J. F. RYAN: Do you accept that there are possibly two questions before the Committee: One whether we should have some definition at all to provide clarity; and, secondly, what that definition should do? I ask you to address yourself to the first part. Do you think that it is useful if the law provides a definition which would clarify something for parents to make it clearer for them?

Dr SULLIVAN: Yes, I think it is, but I do not this Bill does it.

The Hon. J. F. RYAN: Do you think the current law does that adequately?

Dr SULLIVAN: I think it does it better than this Bill, but I think it could be done better if you just gave a simple definition of no harm which parents can understand and apply, it could be simply applied in any circumstances.

The Hon. J. F. RYAN: You say you would have a simple line that says there is not a defence if you harm the child?

Dr SULLIVAN: Yes.

The Hon. J. F. RYAN: Would you not agree with me that to some extent that definition is possibly just as difficult to understand in a manner that could reasonably be considered trivial or negligible in the circumstances?

Dr SULLIVAN: No, I think it could be done quite clearly.

The Hon. P. J. BREEN: Would we not just be back to where we are now, just have lawful correction, if we just had a line in the Bill that said "no harm"? It is really no different.

The Hon. J. F. RYAN: The definition simply "no harm", some people might say, "I only bruised him. I did him no harm".

Dr SULLIVAN: No, I think you define what harm is and harm is any physical damage. A bruise is physical damage, breaking the skin is physical damage, yet I do not think you could say a reddening of the skin for ten minutes is physical damage. I think it is a fairly simple distinction to make.

The Hon. J. F. RYAN: Mr Maley, part of your submission I am not sure that I quite understand. It is on page 3. You said:

Compared to family types in the Australian population, a relatively high proportion of substantiations...

I imagine you mean substantiation of child abuse?

Mr MALEY: Yes.

The Hon. J. F. RYAN:

... involve children living in female-headed one-parent families and in two-parent step or blended families, whereas a relatively low proportion of substantiations involved children living in two-parent natural families. For example, in Queensland 42% of substantiations involved children from female one-parent families, 24% involved children from two-parent step or blended families, while 22% involved children from two-parent natural families.

Would you consider 22 per cent a significantly lower figure than 24 per cent in comparing the two different types of two member families?

Mr MALEY: In relation to the populations, the numbers of people in those categories, yes.

The Hon. J. F. RYAN: I am not sure I understand you.

Mr MALEY: 74 per cent of families are two-parent families, and they are responsible for 22 per cent of substantiated cases. Female one-parent families represent about 17 or 18 per cent, and yet they are responsible for 42 per cent. So that what I am suggesting there is that there is a significant disproportion between family types in the incidence of abuse.

One of the other interesting things about these figures on abuse is that marriage makes a difference to the figures in overseas countries. For example, in Britain, or is it Canada, in either Britain or Canada, I would have to check my sources, in either Britain or Canada, the question whether or not a natural two-parent family is a married couple makes a very significant difference to the incidence of abuse. So in order to see whether that was the case in this country or in this State, I rang the Children's Commission and asked them whether in collecting their statistics on abuse they made a distinction between married couple families and blended couple families or de facto couple families, and in fact they do. When I asked them whether there was any evidence of New South Wales following the overseas pattern, they said that they could not release that information. I do not know what the reason for that was. I think it is important information, because in understanding abuse and its causes, it is obvious that family type is a significant variable.

The Hon. J. F. RYAN: You say that that is the case. It might be that -

Mr MALEY: At least on the statistics.

The Hon. J. F. RYAN: Could not there be some other factor involved in those statistics that might explain the substantiations? For example, a one-parent family does not have a lot of contact with other people and would have a great deal more difficulty in defending themselves because there is no other adult to defend their actions, whereas perhaps in a two-parent family, particularly one where the couple were married to each other, their capacity to substantiate each other's stories that abuse did not occur would make it very difficult to investigate abuse in a family of that nature. That might account for a difference in the figures more than the incidence.

Mr MALEY: It might, but the differences are so large that I think that we must pay attention to them and begin to speculate about the reasons, and you have suggested some possible reasons. How valid they are is impossible to say.

The Hon. J. F. RYAN: That paragraph, which quotes some statistics, appears to be a fairly important part of what is behind your comments that increasing abuse is in large part a consequence of continuing family breakdown and a demonstration of the validity of the widely held view that people most trustworthy in looking after children are two natural parents living together. To some extent that statement is based on your particular interpretation of those figures from Queensland.

Mr MALEY: If the Committee is interested, I have got quite a number of instances from overseas countries which if anything are more dramatic than the Australian figures, and all I am suggesting is that it is a reasonable inference on the statistics that we have that there is a significant influence on the frequency of abuse in terms of family type and whether or not you are dealing with the natural parents and whether or not they are married.

Two parents together monitor each other's behaviour to a degree, they monitor acceptable behaviour in relation to a child. Single parent families, or at least a significant proportion of them, lack that support or monitoring. They more frequently, it seems reasonable to suggest, are exposed to desperately frustrating situations with children in the absence of support, and we know that their socio-economic situation is also more difficult, the problems that they face are more common and it would seem reasonable to infer that those problems spill over into affecting their relationships with their children and the management of them. That is all I am suggesting.

The Hon. J. F. RYAN: You said earlier in your oral evidence two remarks, and I wrote them down. I hope I have got them right. You said rational parents do not need the instruction of the Bill, speaking of the standard provided by the Bill, "Rational parents do not need it. Stupid parents will not read it", and later on you said "only predators abuse children".

Mr MALEY: No, no, I did not say only predators. I said predators and those who for various reasons may resent or despise or hate the child. Getting back to the previous point, it is apparent that the most dangerous person in a family is the boyfriend of a sole parent mother.

The Hon. J. F. RYAN: They might not necessarily be predators. They might just be someone who is -

Mr MALEY: If you look at the behaviour they perpetrate, I cannot think of a better term for a large part of it.

The Hon. J. F. RYAN: That would be a sweeping statement that might need some research.

Mr MALEY: Yes, if the Committee would like me to, I can provide the evidence on that.

CHAIR: I hesitate to interrupt. I know you are responding to questions but we are inquiring into the terms of the Bill, rather than the general sociology of all other aspects of child protection.

The Hon. J. F. RYAN: If the Bill were passed, would you have a view on a definition of a person acting as a parent of a child in one of the subsections of the Bill which includes de facto parents or step-parents? In your submission you refer to abuse increasing as a result of increased family breakdown. Do you think it appropriate that a de facto parent should be authorised to administer physical punishment to a child whom they are not related to by blood? There is some research to the effect that abuse is more frequently perpetrated by step-parents, particularly male.

Mr MALEY: You cannot on the grounds of the statistics alone assume that every de facto parent, man or woman, is an abuser. You must make the law fair to all.

The Hon. J. F. RYAN: This Bill also refers to parents having the capacity to chastise their

children or having access to this defence. Could it not be argued that this Bill actually strengthens the authority of parents because it has the effect of restricting the use of the defence of reasonable chastisement to parents and those acting with their express authorisation, whereas in common law that defence is available to a much wider range of people?

Mr MALEY: If it is a common law position, I would prefer that present common law position. I would assume, in the absence of evidence to the contrary, that any parent is fit to authorise any other adult to take lawful charge of their child or children. In other words, I begin with the assumption that parents know what they are doing when they put children in the charge of somebody else, no matter whether it is a de facto parent, a school teacher, a bus driver or a child carer. I do not know what the law is on this, Mr Chairman, but if it can be shown that a parent acted negligently in putting a child in the charge of a particular person, presumably there would be some penalty applying to that, and if that is so, that would seem to me to be sufficient to cover the situation.

The Hon. J. F. RYAN: Speaking of the argument you said earlier, which I have referred to, that rational parents do not need the law, stupid parents will not read it, is not that to some extent reducing the whole argument to the absurd, that we might not need laws at all?

Mr MALEY: No.

The Hon. J. F. RYAN: Because criminals do not generally read law books either.

Mr MALEY: No, we have two sources of protection. We have got the existing common law and we also have the stigma of the community and the monitoring of the community of those who are behaving badly. Incidentally, I do not want to come back to ground that we have already gone over, but I think it is significant that, in the absence of bills of this kind, the overall trend in our culture, whatever that might be, and indeed in western culture generally has been towards less harsh and severe punishment of children and indeed Professor Cashmore's 1995 report to the Federal Government on these matters quotes evidence to that effect, that there has been a general trend, let us say, in western countries, including Australia, in the direction of more moderate punishment and treatment of children and the same is true of the treatment of women. Now this has arisen as one of the silent tides of understanding and progress, if you like. It has occurred more or less spontaneously within western society.

The Hon. P. BREEN: Could that not be attributable to legislation like the Sex Discrimination Act, the anti-discrimination legislation and the development of human rights law?

Mr MALEY: Yes, that is true, and those developments, of course, do reflect the cultural change. It crystallised the cultural change that was already taking place. You could say: Are we not dealing with the same situation here, have we not reached such a point of crystallisation? I do not believe we have and I think that indeed it is more retrogressive than progressive. That is why it is creating much more, I think, debate and concern than we ever had about the laws that liberated women. There was no contest there really; it was a walk-over.

CHAIR: It took a while to effect a walk-over.

Dr SULLIVAN: I thought it was remarkably quick.
In about ten years we had a total change.

The Hon. J. F. RYAN: Some would argue that the change still has not finished.

The Hon. P. BREEN: There seems to be general agreement though that legislation of this kind would be a positive development in terms of the protection of children. I think I understood that from what you said. The only question is how we describe it, what words we use, and you would like

to see words in the context of harm and the effect on the children, rather than focus in terms of the implements being used. Would that be a fair assessment of the situation?

Dr SULLIVAN: Yes. Now that you have brought up the matter of women, really in the period in which women are supposed to have been liberated by law in terms of violence against women it has got far worse down the line. There is much more rape and physical violence against women than there was under the old tradition. In fact far fewer men were hitting women than are hitting them now.

The Hon. P. BREEN: Can we prove that though or is that just an observation?

Dr SULLIVAN: No, that is in the crime statistics.

The Hon. J. F. RYAN: Is it not a fact that one of the reasons why the figures were less twenty years ago was because people did not report it? They would have felt a stigma about it.

Dr SULLIVAN: I do not think there is any reason to believe that. A very high proportion of women were cruelly abused.

The Hon. J. F. RYAN: You do not think there is any truth to the generally held --

Dr SULLIVAN: I think there is a real increase and I think that is why we started noticing it, because it is happening. It is not that it had always been, I just think things generally were better and then they got worse.

The Hon. P. BREEN: So what you are suggesting is that legislation, for example, to protect women is actually not working?

Dr SULLIVAN: Well, it was other changes and the law seems to be able to do nothing about it.

The Hon. J. HATZISTERGOS: Reading your submission you seem, on the first page, to suggest that the Bill will confuse, not guide parents. I find what you have to say there quite confused in this sense: You talk about the Bill actually prohibiting certain conduct. The Bill actually does not prohibit anything. What it does is limit a defence at law. The prohibition is actually contained in the Crimes Act and section 61 of the Crimes Act talks about common assault and what this Bill does rather than creating a defence is actually limit a defence which might otherwise exist at law to that criminal offence, so it is wrong, with the greatest respect, to refer to this Bill as prohibiting anything. What it does is limit a defence which might be in existence. Bearing that in mind --

Dr SULLIVAN: That does seem to be a bit of sophistry to me. I cannot really follow at all.

The Hon. J. HATZISTERGOS: It comes down to this, if you have a look at subsection (1) - it is not sophistry at all. If you have a look at subsection (1) we are talking about physical force used by a parent; the application of physical force was reasonable. Leaving aside subsection (2) for the moment, subsections (a) and (b) largely reflect the law at the moment, the law on the defence of lawful correction, do they not? I mean a parent does have the right to use physical force that is reasonable and that is what the law of lawful correction is, is it not?

Dr SULLIVAN: But that is what I think is so impossible as a guide. How do they know what is going to be considered reasonable? We can only refer to our tradition, which is fairly straightforward.

The Hon. J. HATZISTERGOS: Is that not a statement in broad terms of what the law of lawful correction is? That is the defence which exists now. You do not have to have this Act. You

have a defence there for lawful correction which is embodied in subsection (1). You might say that the existing common law is wrong, but what I am saying is: Do you not accept that subsection (1) is a restatement of what is in effect, in broad terms, the common law position on the law of lawful correction? Yes or no; do you accept it or not?

Dr SULLIVAN: But do you not then add to it this prohibition against different things within that?

The Hon. J. HATZISTERGOS: Just leave that aside for the moment, I am just talking about subsection (1).

Dr SULLIVAN: So it restates that?

The Hon. J. HATZISTERGOS: Does that restate what is the common law position as to the defence of lawful correction in broad terms?

Dr SULLIVAN: Well, you bring that in as a sort of contradiction to what you are leading with in this - I know what you say. You are leading with a new proposition to this Bill which is that we are not going to allow people to use any implement or to hit above the shoulders.

The Hon. J. HATZISTERGOS: Just focus your attention for the moment on subsection (1). Does subsection (1) state what, in broad terms, the common law --

Dr SULLIVAN: No, you are asking me to look at two things, are you not - the existing law and this one - and I only have one in front of me.

The Hon. J. HATZISTERGOS: Well, you have subsection (1). Subsection (1) says that it is a defence in criminal proceedings if physical force is used by a parent or a person acting on behalf of a parent and the application of that physical force was reasonable having regard to all those factors. Is that or is that not, as it stands, a broad restatement of the existing common law situation as to parents' rights?

Mr MALEY: Yes.

Dr SULLIVAN: Well, I will say yes, but was not the whole point of what Senator Walsh was saying that we have got that already, but parents are in a state of confusion about what they can do and cannot do because they do not know what the law is starting to say to them, because it has been fairly stable for a long while, but now the law is starting to say that maybe some of the things we always did are not reasonable having regard to the age or maturity and other characteristics of the child. So how is it a step forward, which this Bill is meant to be, to just restate that and then have one specific prohibition that cuts across so much of what is the statistical evidence available?

The Hon. J. HATZISTERGOS: Just take it one step at a time if that is okay.

Dr SULLIVAN: I think that is a bit slow. I think you need to put three steps together.

The Hon. J. HATZISTERGOS: We will get to the three steps. We have got to the first step. You accept subsection (1) is a broad exposition of the existing common law position?

Dr SULLIVAN: Yes, which we had agreed was wider than this, which this Bill says is not adequate.

The Hon. J. HATZISTERGOS: That in itself involves the use of the word "reasonable" and making a determination of what is reasonable or not.

Dr SULLIVAN: Yes.

The Hon. J. HATZISTERGOS: Subsection (2), it might be argued, simply specifies circumstances where it would be regarded as not being reasonable, in other words it cuts away from that common law position.

Dr SULLIVAN: Yes.

The Hon. J. HATZISTERGOS: Does that not provide some level of clarity? You might argue about the wording of it not being the way it should.

Dr SULLIVAN: I do not know. This takes me back to very early in psychology. It is very much harder to define things using negative instances than using positive instances and this is a classic case of using negative instances and it leaves a whole lot of areas uncertain because you are going to and forth.

The Hon. J. HATZISTERGOS: Dr Sullivan, a whole lot of areas that you are referring to are there already and they are undefined.

Dr SULLIVAN: Yes.

The Hon. J. HATZISTERGOS: I am just trying to work out if this is a step forward or not. The uncertainty is already there, because subsection (1) restates the common law defence of reasonable chastisement. Subsection (2) simply states some circumstances which will not be regarded as reasonable. It provides some level of clarity. The uncertainty is there at the moment. It is going to continue to exist. This is providing a level of certainty and clarity. Is that right or not?

Dr SULLIVAN: Well, because it is not really an appropriate sort of clarification because it is so indefinite. I think you are saying you are concerned that nothing harms children. What you have outlined is not really helping in those terms. It is outlawing things that may cause no harm whatsoever which may disrupt parental behaviour, and then it is allowing things which may cause harm.

The Hon. J. F. RYAN: Can you think of any circumstances in which a closed hand, applied to a child with force, would ever not cause harm to a child?

Dr SULLIVAN: But who is wanting parents to use closed hands -

The Hon. J. F. RYAN: The Bill simply says that you can hit with your hand provided it is open. Can you think of any circumstance in which you hit with your hand with a punch -

Dr SULLIVAN: Of course.

The Hon. J. F. RYAN: Do you think it would be already to punch a child?

Dr SULLIVAN: Did not hurt me.

The Hon. J. F. RYAN: But you did not hit.

Dr SULLIVAN: I did.

The Hon. J. F. RYAN: No, you did not.

Dr SULLIVAN: Most of what parents do is gesture, body language, symbolic behaviour. Can you remember when you were hit as a child? You do not even remember if you were hurt. What you remember is this loving parent suddenly -

The Hon. J. F. RYAN: Do you think there is ever a circumstance in which could you strike a child with a closed fist, in any other circumstances than trivial, and not be regarded as harming the child?

Dr SULLIVAN: Can you think of circumstances in which you can hit a child with an open hand and it causes harm?

The Hon. J. F. RYAN: Yes, I could but I cannot think of any in which I would do it with a closed fist.

Dr SULLIVAN: It is all a matter of force exerted and truly whether it causes harm or not.

The Hon. P. J. BREEN: What you are saying is that it does not clarify it enough, it does not use language which is clear, and by taking a few selective examples, it actually makes the situation more complicated?

Dr SULLIVAN: Yes, that is right.

The Hon. J. HATZISTERGOS: If subsection (2) is broader and more expansive and perhaps uses different terminology, you would be happier with it?

Dr SULLIVAN: No, I think it should be reduced to the absolutely simple of saying "no harm".

CHAIR: I will just ask one final question. Would it be more reasonable from your point of view if in relation to the proposed subsection (2), (a) and (b) were left out, so it would then read:

> *The application of physical force is not reasonable if the force is applied to any part of the body of a child in such a way as to cause or threaten to cause harm to the child that lasts for more than a short period.*

In other words, the harm suffered would be more from the force than the means by which the punishment was delivered?

Dr SULLIVAN: That is one of the things that I think should be struck out.

The Hon. P. J. BREEN: You would take out the words "short period"?

Dr SULLIVAN: "No harm", it must not cause any harm. Harm for a short period is unacceptable. How long is a short period?

The Hon. J. F. RYAN: That might in fact be a stronger definition that you have in mind. Harm can be defined as a bruise for 30 seconds.

Dr SULLIVAN: Yes. Well, no, there is no bruise that lasts for 30 seconds.

The Hon. J. F. RYAN: A lawyer might say that that is harm.

Dr SULLIVAN: No. A bruise means breaking of the blood vessels and it will not last 30 seconds. A reddening of the skin means a flow of blood.

The Hon. J. F. RYAN: That might be regarded as harm.

Dr SULLIVAN: I am suggesting that that is a fairly easy place in which to put it.

(The witnesses withdrew)

(The Committee adjourned at 5.08 p.m.)
