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 Thursday 24 August 2000

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The Committee met at 10.00 a.m.

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PRESENT

The Hon. R. D. Dyer (Chair)

The Hon. P. J. Breen
The Hon. J. F. Ryan

RONALD KIM OATES, Chief Executive Officer, New Children's Hospital, Westmead, sworn and examined:

CHAIR: Professor Oates, in what capacity are you appearing before the Committee?

Professor OATES: I am here as a paediatrician who has a particular interest in child abuse and also as the Chief Executive Officer of the New Children's Hospital. My child abuse experience has been over 25 years in a variety of national and international capacities.

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

Professor OATES: Yes, I did.

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

Professor OATES: Yes.

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

Professor OATES: I have been a consultant paediatrician for 25 years. I was previously the head of the Child Protection Unit at the Children's Hospital. I was the inaugural chair of the New South Wales Child Death Review Team and I have been a president of the International Society for the Prevention of Child Abuse and Neglect. I directed the Kempe National Centre for the Prevention of Child Abuse and Neglect in the United States Of America throughout 1993, I chaired the Federal Government's National Council for the Prevention of Child Abuse and I have written more than 150 articles, books and chapters in this area.

CHAIR: You kindly made a written submission to the Committee in relation to the terms of reference we are inquiring into. Is it your wish that that submission be included as part of your sworn evidence?

Professor OATES: Yes, it is.

CHAIR: You have the right, if you wish, to make a brief oral opening statement. You have said that you would prefer to go straight into questions, is that correct?

Professor OATES: Yes, I would.

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 will be willing to accede to your request. Recently, the Paediatrics Division of the Royal Australasian College of Physicians wrote to me making a short submission in relation to this inquiry into the Hon. A. G. Corbett's bill. In summary, the Division of Paediatrics opposed any form of hitting of a child. You would be aware that the Hon. A. G. Corbett's bill does not go that far. It preserves the right of parents as part of lawful correction to smack a child on the bottom, so to speak. Do you have any view to express about the division's opinion as to striking a child?

Professor OATES: I support the division's view. In fact, I think I was one of the people who helped the division draft that policy. While seeing the ultimate position as one of children not being hit with objects and in vulnerable parts of the body is an important step along the way to achieving that, as I will elaborate later.

CHAIR: I note that you state in your written submission "While my own view is that children should not be hit, I still support the legislation."

Professor OATES: Yes.

CHAIR: Some people would say that legislation such as that proposed by the Hon. A. G. Corbett represents some sort of interference with parents' rights. How would you respond to that type of view?

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

CHAIR: The Committee has received evidence in past weeks from, among others, Professor Patrick Parkinson of the University of Sydney Law School. Professor Parkinson has expressed the view that the main value of the bill is probably its educational function. He does not see the bill as necessarily a means to prosecuting abusive parents. Clearly, that can be done under the Crimes Act as it stands. However, he believes that the bill could prevent many injuries that children sustain by defining the limits of acceptable physical punishment. Do you agree with Professor Parkinson's approach?

Professor OATES: Yes, I strongly agree. It seems to me the educative part of the bill is the most important thing and it should be sending a very clear message to parents that children are vulnerable, that certain parts of their body are particularly fragile, particularly around the head—where obviously the eyes, the brain and the ears are—and that children can be damaged seriously if they are hit with an object. Often the parent is not aware of the amount of force or damage an object can do. In my job as a paediatrician advising parents about child rearing it would be helpful to me, and I believe to other paediatricians, to be able to say when talking to parents about discipline that this is what the law says—they have to be careful about disciplining children and children are not to be hit with objects or in vulnerable parts of the body. That is an important message for government to give.

CHAIR: The Committee believes that statistics are kept by the child protection unit of the New Children's Hospital of which you are the chief executive. Those statistics deal with the number of children's seen and the extent of injuries suffered as a result of physical abuse. Is any assessment made of the proportion of those injuries that are attributable to excessive discipline? If that is not the case, what evidence is there that excessive or misguided punishment may be a problem in New South Wales?

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

Examples are the shaken babies that we see who get brain damage from parents who are trying to stop them from crying and the children we see who have their buttocks scalded in hot water because their parents are trying to "discipline" them or punish them for toilet-training errors. The children we see with bruises on their face are a typical example of an injury from a parent striking the child on the head just with an open hand. If the child is struck with reasonable force over the eardrum, that may well rupture the eardrum and impair hearing. I guess the answer is that most of the physical abuse we see is a result of an attempt that goes wrong by a parent to discipline the child.

CHAIR: Another previous witness before this inquiry was Professor Graham Vimpani of the University of Newcastle who, no doubt, is well-known to you as a paediatrician. One of the things he said when he gave evidence to the Committee is that possibly there ought to be some consideration given to upper and lower age limits beyond which physical punishment should be prohibited. When he was pressed during questioning he tended to the view that, for example, a child under the age of 18 months ought not to be struck for any reason. Is it your view that there is any value in setting an absolute community standard by way of Hon. A. G. Corbett's legislation or otherwise—that no child under a defined age should be physically punished and, arguably, that there ought to be an upper limit so that no child, say, over 16, should be physically punished?

Professor OATES: I can see some merit in that argument as children who die as a result of physical abuse—often as a result of punishment attempts which go wrong—are often children in the first two years of life, so there would certainly be some advantage in saying that children under a certain age—two years or one and a half—cannot be hit at all. I would certainly support that view. I was interested to see in the notes I was given that the 1998 Office for National Statistics survey in fact showed that people tend to believe that anyhow. The survey showed that only one per cent of parents agreed that children over two should be hit with an object and only 13 per cent of the population believe that parents should smack a child under two years of age. So I think there is that feeling already in the community, but I would be supportive of some legislation that might tighten that up.

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

CHAIR: Is there anything known medically about the seriousness or incidence of injuries caused by the use of an open hand to the neck or face? Why should there be a prohibition on the application of force to the head or neck as you argue in your submission? Why should there be an absolute prohibition?

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

CHAIR: I asked you why the prohibition on the application of force to the neck or head should be made absolute.

Professor OATES: I think I have answered that.

CHAIR: In effect, you have answered that. In your submission you state:

> There would be considerable advantages if the passage of this Bill was accompanied by a range of measures to help parents to understand and use the whole range of disciplinary measures so that physical punishment would fall to the bottom of their hierarchy of disciplines.

You have adverted to this briefly in response to an earlier question from me this morning. However, can you briefly outline some examples of what appropriate alternative disciplinary measures might be?

Professor OATES: Yes, and then I might go on to talk about the education side of things as well.

CHAIR: Yes, by all means.

Professor OATES: Alternative discipline measures include ignoring bad behaviour. The typical example is the child who is having a temper tantrum. Parents learn that if you ignore a temper tantrum, it will stop fairly quickly and it is less likely to be repeated. On the other hand, we see children whose parents say, "He's disobedient. I keep hitting him. He doesn't even seem to feel it." That is because, for some children, any attention is some form of gratification, even bad quality attention. Some children who are craving attention, who are often difficult to get on with, do things just to make their parents notice them and interact with them, even if it is in a physically violent way.

Ignoring bad behaviour is clearly better than reinforcing bad behaviour. Rewarding good behaviour is the other side of that so that the child learns that good behaviour gets rewarded and bad behaviour gets ignored. Time out is well established if properly used as a way of teaching a child and disciplining a child for undesirable behaviour. Of course, role modelling by the parents must be included. Parents who hit their children all the time sometimes come to us as paediatricians and complain about the fact that their children are hitting other children all the time. So we say to them, "Well, where do you think they learned that behaviour?" Role modelling that children get from their parents is very important and that is obviously role modelling that carries on into the next generation, which is why many parents believe that the only method of disciplining is hitting because it is the only method of discipline that they have understood themselves.

As far as public education goes, I think that the legislation would be an initial part of public education. It would be a stand by the Government saying, "Children are vulnerable. They should not be hit in fragile places and they should not be hit with objects because objects can damage the child." That can be accompanied by some advertising. I think it would be really helpful to have some spokespersons who are admired by the public—media or, perhaps, sports stars who support the legislation and are part of an education advertising campaign. Early childhood nurses are a crucial group in terms of educating families and mothers particularly of young children so they would be a very important link in the education program.

The other thing that has been tried quite successfully in New Zealand in terms of providing family values and good quality child care is using the scripts of soapies—popular television soap operas or serials. If you look at what the majority of the population watches, it is those sorts of programs. Those programs could, as part of those scripts in real-life situations, get that sort of message across. I think that would be a very powerful way of educating the public—a much more powerful way than just telling everybody what to do.

CHAIR: You no doubt will be aware that in the drafting of Hon. A. G. Corbett's bill, he has provided that the application of physical force is not reasonable in certain circumstances, one of which is that the force is applied by the use of a stick, belt or other object. Some opponents of the bill have expressed concern that it would effectively prevent the use in discipline of what is described as the wooden spoon. Earlier in the week, our parliamentary colleague the Reverend the Hon. F. J. Nile gave evidence to the Committee. Summarising what he was saying in this regard, he in effect said that the wooden spoon perhaps is the modern equivalent of a twig or stick in biblical times. Admittedly, a wooden spoon is a fairly light object. However, could you express a view as to whether any legitimacy does attach in your view to the use a wooden spoon? In your experience, have you noticed any injuries that might have ensued as a result of a wooden spoon or similar object being wielded?

Professor OATES: I think the answer to that question is that a wooden spoon can be extremely dangerous if used with extreme force and it is very difficult to legislate against force. In a similar way, a closed first can be extremely dangerous, depending on the amount of force. That is why I favour the recommendation that no object be used at all for physical discipline of children. Of course, the reason why mothers—generally mothers—rely on the wooden spoon is because that is what they learnt from their own mothers. It is the only disciplinary measure they know. I think it would be a major error if the bill took away from people the only disciplinary measure they have without replacing it with other disciplinary measures that are more effective.

That is why I think that a public education campaign about alternative and more effective disciplinary measures must go hand in hand with this bill, otherwise it is doomed to failure because we take away from people the only thing they have and we do not replace it with anything more effective. Certainly, a wooden spoon it can be dangerous if used with significant force, and it is hard to legislate against the amount of force. When people hit, and I am certainly not advocating hitting,

with an open hand the person feels some pain as well. When someone hits with an object the person does not feel any pain, so the person is not aware of how much damage he or she is likely to be doing.

The Hon. P. J. BREEN: Other witnesses before the Committee have said that an open hand, and I think Reverend the Hon. F. J. Nile used the expression a "callused working-person's open hand", could cause quite considerable damage to all child. Would you agree with that?

Professor OATES: Yes. And it depends on amount of force. A person can be killed with an open hand, which is basically why I am not in favour of children being hit at all. The thing I would like to see, and that is why the education program is so important, is not to get across the message that you can hit children as much as you like with your open hand, but that there are a whole range of methods of disciplining children, and hitting should be near the bottom, if there at all.

The Hon. P. J. BREEN: Someone else suggested that we ought to include a provision that identifies, as a restriction on using the open hand, a situation where a mark was made that was left on the child for more than a short period. Do you think that would be a reasonable benchmark?

Professor OATES: It would be reasonable, but it would be very hard to measure only because the mark, if it is there for a short period, would by seen by nobody other than the person who did it and by the child. Certainly, the greater the force the more likely one is to leave a mark. But I am not sure how it could be incorporated into something workable.

The Hon. P. J. BREEN: The bill includes a provision that recognises that there may be a special case, or a child may be in a special situation with regard to Aboriginal and Torres Strait Islander people. That exception is found in proposed new section 61 AA (5) (b) in the definition of a person acting for a parent. Do you have a view about incorporating other exclusions into that the proposed new section in the case of other cultural groups, apart from Aboriginal and Torres Strait Island people. For example, it might be suggested that a particular ethnic group has a cultural way of dealing with children that might not necessarily be legal under the legislation, but would nonetheless be regarded as a reasonable exception in the case of a person acting for a parent. Do you have a view about that?

Professor OATES: I am in favour of proposed new subsection (5) (b) because of the extended family relationship within Aboriginal families, and it is accepted that other Aboriginal persons may well act as parent or parent figures. I guess I would be reluctant about extending it to a whole variety of other groups, just because there are so many other groups and it becomes so complicated; whereas this is a well-recognised situation in Aboriginal communities and we have a particular responsibility to those people.

The Hon. P. J. BREEN: Professor Alice Tay, from the Human Rights and Equal Opportunity Commission, made the point that we know more about the mores in relation to Aboriginal groups than we do about other groups, and that reason alone would be sufficient to limit it to Aboriginal groups. Would you agree with that?

Professor OATES: Yes.

The Hon. P. J. BREEN: There is a question in relation to the number of people who think that smacking children in a physical way is legitimate. A survey carried out by REARC research in 1994 for the Federal Department of Human Services found that 41 per cent of people agreed with the statement that parents had the right to discipline children in any way that they see fit. The survey found that this group of parents tended to be those with lower education levels and lower socioeconomic status and those favouring more restrictive methods of discipline. This carries over into many of the other findings regarding attitudes to discipline. Could it not be said that this bill is an attempt to impose middle-class values on working-class parents?

Professor OATES: The first thing to say about that survey is that it is six years ago, and the community may have moved on since then; it may have shifted opinion. It is somewhat different from the survey in the background and commentary to the bill that gives a lower proportion of families feeling that it was appropriate to hit children, particularly young children. If it is looked at from the child's point of view, then from the child's point of view generally it is not good to be hit. It can be

damaging, and it teaches the child to become a hitting person, so far as discipline goes, in the next generation. I feel it is not really about imposing one set of values on another set of people, and I believe the overriding thing is that parents need guidance about alternative and effective forms of discipline.

The Hon. P. J. BREEN: I grew up in Campbelltown from the time I was about 10, and I have to say that the environment in which I grew up and the people with whom I associated took physical discipline very much for granted. It is quite a difficult enterprise to change the view of people who have, for generations, regarded physical discipline as an appropriate way to keep a child in check. Do you have any experience from the education programs in relation, for example, to shaking children and the effectiveness of those campaigns? Are there any lessons to be learned from that campaign that we could use to explain to people in lower socioeconomic and less well-educated groups about the dangers to children of physical discipline?

Professor OATES: Yes. In fact, I grew up in Padstow, which was an early working-class, housing commission suburb as well.

The Hon. P. J. BREEN: Indeed it was, yes.

Professor OATES: I am very familiar with that. I see this exercise as something that is not going to change things in the short term, but rather being part of an education program that may well take a generation. But one of the side effects of it will be that child abuse will fall, and that is because of the experience in Sweden. When the legislation banning physical hitting of children altogether was introduced, it was introduced with the view that it would have nothing to do with punishing parents but rather it was all to do with having a generation of children grow up learning that there are alternative forms of discipline. They took the long-range view that things may be different a generation from now, but within a couple of years physical abuse statistics had fallen largely because of the education program for families that was introduced at the time of the change in legislation. The shaking baby education programs have been helpful to some extent, but we still see shaken babies, and that is quite a simple, discrete area to try to reduce. But the Swedish experience is that with an educational program and legislation aimed at education rather than punishment we may get change perhaps even quicker than was anticipated.

The Hon. P. J. BREEN: Is the Swedish experience that the change to the law in itself becomes the focus for an education program, as was our experience here with the racial discrimination legislation? When the law changes people are forced, simply by the change of the law, to think about the issue and to act in a way that complies with the law. One of the best means available to the police, for example, to direct people about what they can and cannot do is to say, "If you do this it is against the law and you will be arrested." Was that the experience in Sweden? Were the Swedish proposals limited to education, or did they include legislative changes as well?

Professor OATES: There was a legislative change accompanied by an education program, much as I had hoped to see here. It would be terrible if this were a law aimed at arresting and punishing parents. In my view this should be a very firm statement by government about the value of children and the importance of protecting them, accompanied by a method of helping parents to comply with that.

The Hon. P. J. BREEN: I was thinking particularly about lower socioeconomic groups who might not understand or be affected by a poster, or even a television promotion, but who are affected by policemen saying, "This is against the law." In that sense it does bring about changed behaviour, or can bring about changed behaviour.

Professor OATES: The law is the backup that stands behind all that.

The Hon. P. J. BREEN: Is there any way of judging or assessing the impact of these kinds of changes in relation to children? I know that other legislation has been passed for the benefit of children. My experience is that it is not always possible to know whether it is effective. Do you have any way of being able to advise the Committee on how we might be able to make this bill and its accompanying education program effective, and for there to be some means of assessing that effectiveness?

Professor OATES: There is no easy way, but I can think of two ways that would give some indication, and one would be to look at child physical abuse statistics. If this is effective we should see physical abuse statistics falling over the next couple of years. That, of course, will depend on the definitions not changing in that intervening period so that a valid before and after comparison can be made. The other way is the attitude surveys: the survey that is in the background and the commentary, and the REARC survey. It may well be helpful to have a poll of attitudes before and one six months, 12 months or two years down the track to see if parental attitudes have changed. If the power behind the legislation and accompanying education programs are effective we should see an attitude change.

The Hon. P. J. BREEN: The Committee understands that New South Wales Health has guidelines that identify what forms of child punishment are either appropriate or inappropriate. Could you outline the content of those guidelines and how they are used within the health system?

Professor OATES: I am afraid I could not. When I saw that question, because I had never heard of them, I rang the Department of Health paediatric adviser and said, "What are these guidelines?" And she said that she was not aware of them either. She said she would try to find them and let me know, but I have not heard. I am not aware that there are any.

The Hon. P. J. BREEN: It is something that appeared in one of the speeches in Parliament in support of the bill, but it has to be said that parliamentarians do not always get their facts right and maybe on this occasion someone thought that guidelines were available which, in fact, do not exist.

Professor OATES: The person may well have been referring to interagency guidelines. There are guidelines for police, health and the Department of Community Services to do with physical abuse and sexual abuse of children, and an agreed position there. They were the only guidelines I could think of that related to this.

CHAIR: We put the same question as the Hon. P. J. Breen has put to you to Professor Vimpani, and he has no knowledge of any such guidelines either. I am not quite sure where the Hon. A. G. Corbett's information comes from. However, as you say, it may well be that his understanding relates mistakenly, perhaps, or in accurately to the interagency guidelines to which you have just referred.

Professor OATES: I think that may well be the case. In fact, my contact in the Department of Health, when I called to say, "What on earth are these guidelines about?" said, "It's strange you should ask. Professor Vimpani asked that question a few days ago."

The Hon. P. J. BREEN: Proposed new section 61 AA (2) under the defence of lawful correction says:

> (2) The application of physical force is not reasonable if:
>
> (a) the force is applied by the use of a sticker, built or other object (other than an open hand or other than in a manner that could reasonably be considered trivial or negligible in all the circumstances), or
>
> (b) the force is applied to any part of the head or neck of the child (other than in a manner that could reasonably be considered trivial or negligible in all the circumstances),
>
> (c) the force is applied to any part of the body of the child in such a way as to cause, or threaten to cause, harm to the child that lasts for more than a short period.

There is some controversy about the provision in (c). It appears that the words "threaten to cause" are inappropriate. The Committee has come to a view, I think, that the words "threaten to cause" are inappropriate. But there is some difficulty with even the words "the force is applied to any part of the body of the child in such a way as to cause ... harm to the child that lasts for more than a short period." Would you see any way of modifying that provision, or would you think it is even better to strike it out, in the sense that it would act in some way to qualify provisions (a) and (b)? Do you have any fears about the provisions of (c) as you read it?

Professor OATES: It would be very difficult to quantify the measure. That is probably one of the major difficulties. How does one measure harm that lasts for more than a short period? I have no idea how it could be done. It seems to me not a particularly important part of the bill.

The Hon. P. J. BREEN: Some witnesses have suggested to the Committee that (2) (c) ought to remain and that (a) and (b) should be struck out. Do you have a view about that? Would you think that was a retrograde step?

Professor OATES: If that happened, it then becomes pretty much an anti-smacking sort of bill and, as I said in my submission, I doubt that our society is ready yet to accept an anti-smacking bill. This is basically my gut feeling, but I think if (a) and (b) went and (c) stayed the bill might not get up, whereas it may well get up with (a) and (b) and not (c).

CHAIR: Professor Oates, if I might revert for a moment to the question of whether New South Wales Health has any particular guidelines. You have told the Committee that you are not aware of any. Professor Vimpani gave a similar response when he was asked. I have been handed a copy of an answer to a question on notice addressed by Mr Corbett to the Minister for Community Services. In the answer to that question is a reference to the New South Wales Health Family Help Kit. Does that help to clarify the matter? Does that kit contain any such guidelines?

Professor OATES: I am afraid it does not clarify the matter. I have not seen it.

CHAIR: Earlier in the week the Committee received evidence from Mr Schetzer of the National Children's and Youth Law Centre. He made what I thought, coming from that body, was a somewhat surprising submission. The Hon. P. Breen has been putting matters relating to (5) (b) regarding Aboriginal and Torres Strait Islander children. However, I might direct your attention to the provision in (a) which forms part of the definition of "person acting for a parent". Mr Schetzer put to the Committee that it ought to consider extending that definition, which, as you will see, is specified as meaning "a person of or above the age of 18" among other matters. Mr Schetzer advocated extending that definition to a sibling of a child. He instanced the situation where, shall we say, a 16-year-old brother or sister babysitter of a younger brother or sister might commonly administer some correction to the younger sibling. Do you think there is any merit in that suggestion, or do you think perhaps it conveys some dangers?

Professor OATES: Thinking from the point of view of how this would work in practice, I am not sure whether it would make very much difference. I would not be surprised if 16-year-olds babysitting children occasionally smacked them anyhow. It seems to me that the legislation is designed to get across to the community, and to children as well through the way their parents behave, the message that children should not be hit in these dangerous ways. My inclination would be to leave things as they are, but it is a little out of my area of expertise.

CHAIR: Can I put the question in a somewhat different way? In your undoubtedly extensive experience as a paediatrician in regard to child protection matters have you often or at all encountered injuries that are said to have been sustained by a child as a result of some form of abuse or assault by a sibling?

Professor OATES: It is unusual, certainly in my experience, to see physical abuse caused by siblings. Parents sometimes blame siblings but often at the end of the investigation one finds it was the parent after all. It occasionally occurs from siblings, but not often. At times we hear of sexual abuse from siblings, but I guess that is a separate matter. The whole area becomes difficult because some of the most severe physical abuse and some deaths occur in the step-parent/de facto situation. I guess that is because the person is one step removed from the child. But, to answer the question precisely, we have not had reported to us very much significant physical abuse from siblings.

CHAIR: In regard to the response that you have just given, I would take it that you will be aware that within the definition of "person acting for a parent" is a “step-parent of the child”, also a "de facto spouse of a parent of the child", as well as a "relative (by blood or marriage) of a parent of the child". Do you have any criticisms to make regarding the drafting of that provision?

Professor OATES: No. I think those things have to stay in. I guess I should clarify the point I made by saying that clearly the vast majority of de facto partners and step-parents do a great job in that parenting role. It is just that in our experience—and the statistics of others bear it out too— the risk is slightly higher to a child that is in an abusive situation if that person is not a blood relative or parent.

The Hon. P. J. BREEN: Professor, on the question of lowering the age from 18 to 16 years, if that were decided as an appropriate way to go—and I realise this may be out of your area of expertise—what if we simply deleted the words "of or above the age of 18", so that it simply provided "***person acting for a parent*** of a child means a person" (a), (b) et cetera? The objection seems to be that it discriminates against children. Advocates of the interests of children say they should not be discriminated against in that way. The other view, of course, is that children are not able to properly supervise children until they are 18 years of age—just as they are not able to vote, and just as they are not able to purchase liquor and cigarettes. It is a difficult question. Do you have a view about it that would assist?

Professor OATES: It is an area that is somewhat out of my expertise, so it comes down to a personal view more than a professional view, but I would not see a problem in deleting it. It certainly would make things look simpler, from my point of view.

CHAIR: Did you wish to add anything that we might not have asked you about already?

Professor OATES: I will check my notes, but I do not think so. No, most of the things that I wanted to cover have been covered.

(**The witness withdrew**)

JOHN CECIL NICHOLSON, Senior Public Defender of New South Wales, 175 Liverpool Street Sydney, and

PETER JOHN PEARSALL, Public Defender, Public Defender's Office, 175 Liverpool Street Sydney, sworn and examined:

CHAIR: Mr Nicholson, in what capacity are you appearing before the Committee?

Mr NICHOLSON: Senior Public Defender of New South Wales.

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

Mr NICHOLSON: I did.

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

Mr NICHOLSON: I am indeed.

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

Mr NICHOLSON: The qualifications and experience that I would bring to your inquiry, Mr Chairman, are that I have been in my earlier life a schoolteacher, in the past 22 years a lawyer practising in crime, since 1984 a public defender in New South Wales, and since 1999 the Senior Public Defender of New South Wales.

CHAIR: Is it your wish that the written submission made to the Committee in connection with the current inquiry be included as part of your sworn evidence?

Mr NICHOLSON: It is indeed.

CHAIR: Mr Pearsall, what is your occupation?

Mr PEARSALL: I am a barrister and an acting public defender.

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

Mr PEARSALL: As an acting public defender.

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

Mr PEARSALL: Yes.

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

Mr PEARSALL: Yes.

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

Mr PEARSALL: I was a solicitor practising in private practice in New South Wales from 1980 to 1990, essentially in the area of crime. From 1990 until 1999 I was at the New South Wales private Bar, again practising essentially in the area of criminal law. Since 1999 I have been an Acting Public Defender.

CHAIR: You will be aware that a written submission has been made to the Committee in regard to this current inquiry. Is it your wish that that written submission be included as part of your sworn evidence?

Mr PEARSALL: 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 will be willing to accede to your request.

Mr NICHOLSON: I am indebted to you for that.

CHAIR: I understand, Mr Nicholson, that you would like to make a brief oral statement.

Mr NICHOLSON: Yes. If I may commend this course to the Committee, that I would make a brief oral submission for your consideration. I have asked Mr Pearsall to give detailed consideration to the issues, of which we have been advised that you would like to address during the inquiry and I would invite you, Mr Chairman, to address most of your inquiries in respect of those issues to him. I would be pleased to supplement his answers from time to time, but he is more au fait with that material than I.

The Public Defenders are pleased to be asked to contribute to the inquiry into the Crimes Amendment (Child Protection—Excessive Punishment) Bill. If we may say so, with respect, we are of a view that, at least in so far as existing statute law and common law defences are concerned, the proposed bill is unnecessary, although the Public Defenders recognise that there may be other valid reasons—such as education of the public or drawing matters to the attention of law enforcement officers and judicial officers—that may well justify Parliament giving attention to the bill at the end of the day.

One of our concerns with the bill is that it is, we would submit, too prescriptive, seeking to cater for every conceivable possibility. A bill that would be turned into an Act that had those characteristics can often be unworkable and can create avenues of injustice, in our submission. Having stated our general view as to the bill, we rely of course upon what we have put in the written submissions as to our attitude, but what we do now is seek to assist the Committee as best we can with the bill in the form in which it is, and draw our concerns to the Committee's attention.

There are some drafting matters to which I draw your attention. In proposed section 61AA the word "defence" appears—"it is a defence that the force was applied for the purpose of discipline". If I might be bold enough to indicate to you that in the normal course of events the word "defence" in the criminal law frequently connotes an intention to place a burden of proof upon the defence—for example, the defence of mental illness and the partial defence of substantial abnormality. Self-defence is really is a misnomer for a justified act or, more importantly, for a lawful act. Self-defence does not require proof by the defence because what is asserted in the use of the word "self-defence" is a justified act or, more importantly, a lawful act.

An assault must always be unlawful. That is one of the essential elements of an assault. The use of the word "defence" may suggest to triers of fact, until at least the law be settled, that there is a burden placed upon the defence. We would commend for your consideration that in lieu of the word "defence" it may well be that you would achieve the same objective by saying that it shall not be a lawful act if the physical force were applied, so that it would be in keeping with the traditional view of assault being an unlawful act.

The other aspect of the drafting to which we would draw your attention is this: proposed section 61AA(1)(b) is structured so that considerations which may impact upon the assessment of reasonableness are listed thus: "age, health" and then, bracketed together, "maturity or other characteristics" and "the nature of the alleged misbehaviour or other circumstances". The effect, in our submission, of bracketing together "maturity or other characteristics" is to make them an either/or situation. We just invite the consideration of the Committee to determine whether it would be the intention of Parliament to bracket "maturity or other characteristics" so that one or the other can be considered but not both.

The other aspect of making a list, when it comes to an interpretation of a statute, is that there can be a problem of interpretation as to whether the list is meant to cover the field or not. Your list has as its end "other circumstances" which may or may not be read as relating only to the child because all the other matters listed in the bill relate to the child; or it may be given a wider meaning. Parliament will have to consider what its intention is in respect of that as each of the items in that list relates to the child, as we read it, even the last one—for instance, the nature of the alleged misbehaviour relates to the child.

Proposed section 61AA appears to limit the defence to three circumstances where it applies to discipline, management and control of children in circumstances where the discipline, the management and the control of circumstances is done by parents. We can conceive of a situation where management or control may be done by others, for instance, at a concert, where you may have force applied for the purposes of management of children or for the control of children not done by parents or people who we would see in the position of parents—security officers and the like.

If that were so, as we read the section, they would be denied any benefit of the section. They may well be able to look to other sections or to the criminal law, I have not explored that possibility yet, but certainly so far as reliance upon this section is concerned they may be in some difficulty. The making of a section such as this, one has to appreciate, will impact upon prosecution authorities, who, as we say, in the normal course of events one would expect to exercise sensible discretion in the laying of charges. But I do not know whether the Committee has given sufficient consideration to the changing nature of litigation worldwide—and, to a lesser but a growing extent, in this country—that is, that much litigation is initiated privately.

Criminal prosecutions, particularly in the Magistrate's Court, are allowed to be brought privately. Take my example of the child at the concert. If that child comes home aggrieved, rightly or wrongly, his parents can bring a prosecution against the security officer, the police officer or whoever. When one is designing a bill like this, one has to understand its impact in respect of not just the prosecuting authorities but the greater growth of litigation, particularly criminal litigation at the hands of private litigants in the Magistrates Court.

The Hon. P. J. BREEN: I was curious about whether you think that this bill excludes other defences of lawful correction that might be available to other people in the common law.

CHAIR: I will add to that question. The Hon. P. J. Breen has in mind, I would imagine, people such as teachers in secondary and primary education and also child carers or teachers in preschool education.

The Hon. P. J. BREEN: And the people who run the concerts—the people to whom you specifically referred.

Mr NICHOLSON: Certainly proposed subsection (2) would exclude other defences of reasonableness if it does not reflect the common law. So far as proposed subsection (1) is concerned, I think that probably other defences might be available.

CHAIR: A difficulty has arisen in the minds of members of the Teachers Federation and the Association of Child Care Centres, and both bodies have made submissions to the Committee. You would be aware that corporal punishment has been abolished in every sector of education at whatever level. Leaving aside the question of the correction of a child as a result of misbehaviour in a classroom or playground, as the case may be, if a child in any sector of education is behaving in such a way as to threaten to cause injury to another child, the teachers are anxious to have the right to intervene to the extent of preventing that result ensuing, in other words, just by placing a hand on a child or pushing him or her away—something of that sort. If the Corbett bill were to become the law, they are anxious that they are not prevented from doing that.

Mr NICHOLSON: The issue seems to me to be a question of whether what is being asserted in the defence is a punishment, a restraint or a chastisement. If it is a punishment or a chastisement, in our submission what is here is the code. If it is a restraint, it may be that other defences are available. This bill appears to us to be dealing with a question of chastisement and punishment.

CHAIR: Yes. In that regard, I draw your attention to proposed subsection (4), which provides:

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

Mr NICHOLSON: Yes, which in a sense I think I picked up in the last answer I gave to the Hon. P. J. Breen and to you.

CHAIR: In regard to what you have just said you would regard that proposed provision as being helpful?

Mr NICHOLSON: Yes.

CHAIR: Before we proceed further with questioning I indicate that any question I or my colleague the Hon. P. J. Breen asks may be responded to by either or both of you if you so choose.

Mr NICHOLSON: I will do one final thing before I hand over to my colleague. When we received notice of the requirement for us to attend, we were sent a series of issues that the Committee was going to seek to have addressed by various people who attended these hearings. I have asked Mr Pearsall to give those issues his attention. He has prepared a supplementary submission, which we seek to have incorporated into our sworn evidence and which I will make available now.

CHAIR: Thank you very much. We will treat that as a tendered document. I intend to ask some generalised questions arising out of your written submission. I anticipate that the Hon. P. J. Breen will ask you some more formal questions arising from a document that has been circulated to you previously.

Mr NICHOLSON: Thank you.

CHAIR: I do not want you to take offence at this first question, but I will ask it nonetheless. Do you think I would be justified in making the assumption that your submission arises from a perspective of your experience of defending people accused of assault of children, rather than arising from a child protection perspective?

Mr NICHOLSON: The short answer is no. I do not consider that. The reason that I do not consider that is that in the totality of my experience at the bar which, as I say, is since 1977, I cannot recall an occasion when I have had to defend any person for overvigorous correction of a child. By contrast, sexual assault of children has taken much more of my time. That, I think, reinforces the proposition that we put in our submission that this was not a matter such as drugs or paedophilia that appears to us to be crying out for the attention of the law enforcement authorities or any need for parliamentary intervention.

Mr PEARSALL: It may be thought, I suppose, that because of our occupation and the fact that we are associated daily with persons who are charged with criminal offences we might tend to see things from their point of view. We are certainly aware of the concerns that the community has generally and that we have specifically for the welfare of children. Our concerns are that the aims of the bill be met, but our concerns are balanced by thoughts about how clear and successful the bill will be in its present terms. So we have both those concerns, although I certainly understand the question.

CHAIR: There is quite a stark contrast between your submission and one made to us by the New South Wales Bar Association, whose witness will be appearing before the Committee this afternoon. I instance in that regard that, at the very beginning of your submission, you say "A change is possibly not necessary." The Bar Association submission, among many other things, states:

> It may be accepted that the present common law relating to the defence of "lawful correction" for offences involving the application of force to a child fails to provide clarity regarding the lawful limits of such force.

The Bar Association cites in support of that contention a decision in the case known as *A v United Kingdom*, which is a decision of the European Court of Human Rights given on 23 September 1998.

Would you like to comment on the different perspective that you have and the perspective that the Bar Association has?

Mr PEARSALL: Our concerns are these: Whilst understanding and applauding the aims of the bill, it must be remembered that one of the primary aims of the bill, which is to reduce child assault, may not necessarily be met by a change in the law in this way. What we do not seem to have in New South Wales—and I note that there is no suggestion that there is an equivalent A case in New South Wales—is a situation where people are committing offences against children because they do not understand the law. People do not seem to be saying, "Well, I struck the child because I was unsure of the limits. I was unsure of what the standard was. I did not really know what 'reasonable in the circumstances' meant."

Generally, in my experience, it is unusual to have these sorts of cases coming before the court. It is unusual for us to appear for people who strike children. I am not saying that these offences are not widespread, but it is fairly unusual to come before the court in this way. People usually claim that they did not commit the offence or, if they did commit the offence, that they were subject to some stress. We do not seem to have a situation where the law, as it stands, is failing us. We do not have a situation as applies in the case of *A v the United Kingdom*, where the law is applied properly but it does not provide the appropriate protection.

As I understand it, in the case of A, quite clearly to any reasonable person there was an application of excess force in the circumstances. As I understand it, the accused ran the defence of a belief that he was acting reasonably. The jury—if the report is to be believed—accepted that defence. There may be some significance in the fact that only one case in England—one would assume that if this was a problem it would be widespread—is referred to in the Bar Association's submission. It may have been that there were peculiar dynamics with the jury in that case and that it gave the accused the benefit of the doubt, which it perhaps should not have done. But in our own domestic situation in New South Wales I have not heard of any cases.

Certainly no cases have been raised in the material that I have seen where the law has failed in the sense that the test has been properly applied and a person has been permitted to escape the appropriate consequences of his actions by relying on a defence of reasonableness when, to a right-thinking person, that defence should not have been available to him. In some ways, our thoughts might be along these lines. People get murdered frequently. The law is not failing victims because there is no doubt that murder is an offence. The taking of a life is an offence. In the same way people generally know that striking a child or causing harm to a child is an offence.

Generally, there is no material to suggest that it needs to be spelled out to them in painstaking detail. Our concern is that it is not so much that people misunderstand the law that is causing the difficulty. People are breaching the law. That is a certain difficulty. The references to and the concern about a lack of clarity in the common law seem to be resting on the fact that the standard is one of reasonableness in all the circumstances. That really frequently cannot be made any more effective or any more clear without an analysis of the appropriate circumstances which are under consideration. The standard of reasonableness is widely understood in the community. Members of the community are entrusted to apply that standard in their day-to-day activities. More to the point, they are entrusted to apply that standard in court cases in this State every day. In fact, the standard of proof for a criminal conviction is that a jury must be satisfied beyond a reasonable doubt and the jury is entrusted to know what that standard is. In fact, under the law in this State a jury is not told and cannot be told with any detail or given any other further explanation of what that standard means.

CHAIR: My question was in no way directed to the standard of proof. It is a matter of the clarity or otherwise of the particular offence involved, with particular reference to the circumstances in which parents are entitled, under the doctrine of reasonable chastisement, to hit a child which in any other circumstance would be an assault. If a man hits a woman, that causes an outcry, and rightly so.

Mr PEARSALL: Certainly.

CHAIR: The only situation in which an assault is lawful in our society, to the best of my knowledge, is the disciplining of a child. That is what we are dealing with here and I would prefer that

you not proceed with addressing the Committee about the standard of proof. It is the question of whether parents know where they stand in regard to the correction of a child.

Mr PEARSALL: The only reason I raised that was in this sense: That the standard currently is that the activity is assessed on what is reasonable in all the circumstances. Reasonableness is the test. What I was saying in my last answer is that the standard of reasonableness is one which is entrusted to the community in other areas, specifically and foremost being the standard of proof, and that is the relevance of it. The community, under the laws as they presently stand, is presumed to understand and accept the concept of reasonableness in their dealings and that same concept may well continue to be applicable as the standard that they adopt in assessing whether the chastisement of a child is appropriate in the circumstances.

The other difficulty in seeking clarification—and again that is to be applauded—by the introduction of specified standards and definitions is that those specified standards and definitions themselves contain other standards that perhaps will be equally unclear to a member of the community as the standard of reasonableness, if it is in fact unclear. To give an example: If it is to be said to the community, "Well, the application of force to the head is not reasonable unless it is no more than negligible or trivial", then we have to question what is negligible and trivial. The pursuit of clarification sometimes involves in-built limitations by the new standards that are adopted and that is the problem.

CHAIR: My colleague and I have many questions so I ask that you keep your responses as concise as may be reasonable. I note at the beginning of the written submission that there is a reference to your view that prosecutions for assault of this type arising out of interaction between a parent and a child are, in your view, rare. Quite recently the Committee heard evidence from Mr John North, the current President of the Law Society of New South Wales. I think it is a fair summary of his evidence to say that he told the Committee that he has quite commonly practised in the area of children's law. Further, although Mr North certainly did not say that these prosecutions are common, he did say that they do occur from time to time. Therefore, on the basis of what he told the Committee, I question whether it is a justified use of language to say that these prosecutions are rare.

Mr PEARSALL: You will see that we accept that children are assaulted.

Mr NICHOLSON: In circumstances of non-discipline.

Mr PEARSALL: Yes, the distinction is between circumstances in which a child is assaulted because a parent is angry with them and hits them, which is quite common, and situations where it is asserted that there has been some kind of rational attempt at discipline that has overstepped the mark and that is not so common. That is the distinction.

CHAIR: On page 2 of your statement you say, "Responsible people agree that there must be limits to chastisement". I put it to you that not all parents are responsible. You may or may not be aware that I am a former Minister for Community Services and I can assure you from the files that I have read—and many of them—that there are parents out there in society who quite frankly, in my view, do not deserve to have children because of the appalling way they treat them. What you have to say about that? I do not believe that the Hon. A. G. Corbett in his bill is seeking to deal with reasonable, responsible parents. He is seeking to deal with people who go over the edge, beyond the limit. What do you have to say to me regarding what I am putting to you?

Mr NICHOLSON: The existing law picks up very rightly and very quickly those people who, in your time as the Minister for Community Services, would have come to your attention, such as people who use cigarettes and burn their children in some claim of lawful chastisement. Such a proposition to any judicial officer or any person in the street is unreasonable and they could not possibly hope to defend a charge of lawful chastisement by saying, "That is the reason I burnt my child with a cigarette."

CHAIR: I accept what you say there but take the case that is not so bizarre and cruel but would otherwise be considered to be lawful chastisement of using a stick, belt or other object, which the Hon. A. G. Corbett seeks to remove from lawful correction, leaving the child with severe bruising, welts or perhaps broken skin. Is that not an example in which the Legislature has to consider

whether the law regarding reasonable correction or lawful chastisement, as it is alternatively known, needs perhaps definition and restriction?

Mr NICHOLSON: The immediate response I have is that community standards have changed. Tribunals of fact recognise that and I will give an example. I am thinking particularly of the Catholic school system where the strap was used quite frequently by brothers and nuns and in the 1950s, 1960s and 1970s often that approach to discipline was lauded by parents. Standards have changed now and that would no longer be regarded as reasonable. If reasonableness is not prescribed, there is a greater capacity for the tribunal of fact to adapt to modern circumstances. If the standards of reasonableness are prescribed, that inhibits the ability and the discretion of the tribunal of fact in coming to a view about reasonableness.

The Hon. P. J. BREEN: The Committee heard evidence from the Commissioner for Children and Young People, Gillian Calvert, who said on that question about what was reasonable:

> There are cases where blows to the head or face and the boxing or pulling of a child's ears have been held to be reasonable chastisement. There have also been cases where kicking or punching a child have been accepted as reasonable.

That kind of evidence would suggest that what the court suggests is reasonable is not consistent with what the community thinks.

Mr NICHOLSON: I would like to know the dates of those cases. I cannot imagine in the year 2000 or even in the years 1999 or 1998 any of those examples being regarded by a tribunal of fact as reasonable.

The Hon. P. J. BREEN: I quote the commissioner again: "There are cases in which the use of a stockwhip has been held to be reasonable but a cudgel or a baseball bat has been held to be unreasonable."

Mr PEARSALL: If that were in any way recent I would be greatly surprised. Before putting a lot of weight on those observations I would certainly be interested in seeing the actual raw material to which the reference is made.

Mr NICHOLSON: The very fact that you have illustrated that shows the height of unreasonableness. It is impossible to imagine that in the year 2000 a judge or a judicial officer could possibly hold the use of a stockwhip as being reasonable.

The Hon. P. J. BREEN: All I can say is that this is the evidence the Committee has been given.

CHAIR: It may well be, though, that even in contemporary times there are judicial officers who, due to their age or background or for some other reason, take a different view of child punishment from others. To put it bluntly, there may be some judicial officers who are much more conservative than others.

Mr NICHOLSON: I accept that, but there is also an appeal system now open even at the summary level to appeals by prosecutions in the event of an outrageous decision on reasonableness.

CHAIR: I note that at page 2 of your submission you say:

> Inherently the use of objects to strike children is potentially dangerous. The Bill, however, does not seek to outlaw the use of objects, it simply introduces another standard to be applied i.e., whether the use of the object could reasonably be considered trivial or negligible in the circumstances.

I put it to you that in regard to the defence of lawful correction the bill of the Hon. A. G. Corbett provides, among other matters, that the application of physical force is not reasonable if the force is applied by the use of a stick, belt or other object other than an open hand or other than a manner that could reasonably be considered trivial or negligible in all the circumstances. In regard to what you have been saying about community standards changing and the fact that Christian Brothers in former years may have belted the daylights out of children—and I am not trying to be sectarian about this—I

put it to you that research is available to the Committee that would indicate that the view of parents varies according to the socioeconomic circumstances and level of education of the parents in question.

Those of lower socio-economic orientation and those of lower educational attainment tend to regard the disciplining of a child as their business and virtually take a harsh view of what is permissible. Against that background—although we may have moved forward in some respects from what you put earlier about harsher forms of discipline—do you think that it may be helpful if the legislation were accompanied by an educational campaign explaining to parents that they can smack the child on the bottom but they may not hit a child around the head or neck, nor may they hit a child using a stick, belt or other object? Leaving aside what I put to you earlier about the differing view of the Bar Association, what do you have to say about this from a sociological point of view that parents can be discouraged and the opportunity to go over the edge, so to speak, can be removed if the use of a stick, belt or other object is not permitted?

Mr NICHOLSON: My submission for your consideration would be, firstly, that parents can be discouraged now with the existing law. Secondly, the group of parents to whom you would most seek to address an education program would be the group of parents who would be most likely not to receive it or fully comprehend it and not to give it much credence in any event. They are two factors that the Committee ought to consider: that it is still available to put the propositions that you seek to put in the light of the existing law, and the people whom you would want to address are less likely to receive it. Thirdly, it would not be an ongoing education campaign. The effect of any education campaign will last only four to five months beyond the campaign finishing, but parenting will continue through the community forever.

CHAIR: I am not sure that is so. To give you an example, when I was Minister for Community Services there was and subsequently has been from time to time a campaign on the danger of shaking a baby. To shake a baby is highly dangerous and, in the worst case, can cause irreparable harm and serious consequences, such as brain damage. I would offer the opinion that as a result of the educational campaigns mounted by the State of New South Wales about the inherent dangers of shaking a baby, there is a good appreciation in the community that it is a highly hazardous and irresponsible thing to do. I put it to you that if a similar campaign were run about forms of child punishment—although the consequences may not be as potentially devastating as the illustration I have given—there may be a lasting impact on and improved understanding in society as to the danger that might ensue to a child if certain forms of punishment are adopted?

Mr NICHOLSON: I accept what you say. If I could come back to my earlier proposition, the campaign would need to be continuous. As I understand, the baby shaking campaign has been not only a very strong hit but one that has continued. You probably started it, Mr Chairman, if memory serves me correctly, and it has continued on so that new parents of new babies now understand the danger because they are told of it very early in the child's life. It also illustrates the question of reasonableness. As you well know, there have been a number of prosecutions of people for manslaughter and for murder who have damaged their babies. Of those matters, very few defence cases have succeeded on the basis that the chastisement was reasonable. The defence cases that have succeeded have been reliant on other defences.

Mr PEARSALL: To support what you are saying, Mr Chairman, you would take comfort from the experience in this State and other jurisdictions with the introduction of random breath testing and the substantial publicity and education campaign that accompanied it. Education campaigns about cot death and, particularly, drink-driving, have changed people's behaviour. They have not merely alerted them to dangers but have changed behaviour that was frequently thought acceptable. Of course, it has been of great benefit. I certainly see the power of your argument.

CHAIR: Some witnesses before the Committee, such as Professor Patrick Parkinson of the University of Sydney for School and Dr Judy Cashmore, have openly and vigorously advocated before the Committee that the Corbett bill, if enacted, would go only a short way to changing anything. The effect of what they said is that the bill would be next to useless, except if it were to be accompanied by an extensive and continuing education campaign.

Mr NICHOLSON: I made reference to that in my opening remarks. As an educational tool it may have some benefit.

The Hon. P. J. BREEN: To follow up on the example that you gave about random breath testing, would you agree that the important inroads that made in the road toll were attributable to the legislation itself? In other words, it became illegal for people to drive intoxicated. Previously, drivers would assert their right to drive on the road without any intervention by police or other authorities, and there was a certain period when people simply did not accept the law. Gradually, the results clearly showed a reduction in the road toll. Similarly, people resisted to the death the wearing of seat belts because they regarded it as an infringement of their liberties. When the evidence came in and people became accustomed to the laws, they were satisfied. I put it to you that this law to protect children would have a similar effect. Many people, who do not read posters and do not listen to advice from social workers, understand if a particular activity is against the law. Simply on the basis that it is against the law alone they will perhaps change their behaviour and become educated in a way that could not otherwise be achievable. Do you think that is an appropriate analogy for this bill?

Mr PEARSALL: To a degree. I suppose the difference between this bill and the random breath testing legislation is that random breath testing had an obvious public presence. Police officers were on the side of the road waving drivers down and drivers found out quickly that there was a standard in place. It could be determined with scientific accuracy whether a driver had reached the standard. It is probably slightly different because there was a physical presence of the law in the sense that police officers were waving drivers down. The drivers knew that there was a new law, that it had consequences and that it could be tested. Whether a driver had breached the law could immediately be tested by blowing into the appropriate apparatus. Assaults on children or over-discipline are different, because they are usually done behind closed doors and are not so easily attractive of reliable assessments. However, I certainly understand what you are saying.

The Hon. P. J. BREEN: I suggest to you that the equivalent of the random breath testing, the police officer on the side of the road, would be the police officer in the household at Claymore or Whalan or one of those socioeconomically-deprived areas where a number of people treat their children in a way that is unacceptable in this day and age and where child protection workers do not get the benefit of having the police on the scene. I think you mentioned in your evidence that the police act in a certain way based on the law. If the law were changed, police would have more opportunity to intervene in situations where currently they are not able to do so because parents say "I was just correcting the child. I was just doing what I am entitled to do."

Mr NICHOLSON: We accept that the passage of this type of bill can send a message to police officers in terms of areas that they understand Parliament is interested in having policed. The random breath test analogy, with respect, is not a good one in our submission because, if you recall the history, the drink-driving laws were in place and not a great deal of attention was being paid to them. The random breath test simply brought to the public attention the real risk of detection. Research will show that the only real deterrence to crime is whether a person is likely to be detected. Therefore, it was a bill about detecting crime. This bill is not about detecting crime. Your second analogy was in relation to seat belts. I draw this to your attention. So often, at least in my experience, the driver and his wife or partner are buckled in and the two children in the back are bouncing around all over the place not buckled in. If there is a sign "Police are focusing on seat belts in this area", then you might see them belted.

The Hon. P. J. BREEN: I do not agree with you about the second point. It is a long time since I have seen a child in the back seat of a car who is not buckled in.

Mr NICHOLSON: I accept that we differ on that point, because I have seen it. Certainly it is something that annoys me and perhaps the reason I notice it.

The Hon. P. J. BREEN: On your first point you say that the bill is not about detecting crime. I put to you that there is crime going on all the time in numerous households across the State where children are being assaulted by their parents. The effect of this bill would be exactly the same as the random breath testing legislation, that is, people would be aware that if you inflict certain punishment on children they would be in breach of the criminal law. I would suggest this bill would be a serious deterrent.

Mr NICHOLSON: I have given the question of detection some consideration. It seems to me it would be most likely useful not with children below school age but rather with children in primary school and secondary school who will have the provisions of the bill brought to their attention through an education program. I could then see some of them going to their school counsellors and saying "In my house this is what happens". I accept that it does have, at least at one level, the possibility for a greater revelation of domestic violence within the house. But it is very unlikely, for instance, that neighbours or others, other than in extreme cases such as the Chair experienced in his earlier portfolio, are going to ring the police and say, "There's child abuse going on next door."

The Hon. P. J. BREEN: Under the present law, the example that you gave earlier of a child being burnt with a cigarette would be clearly a case where the child protection legislation would come into play and appropriate child workers or social workers would become involved.

Mr NICHOLSON: Should become, not necessarily would become, involved.

The Hon. P. J. BREEN: But in an ideal world, they would be involved and the existing law would cover that situation. The evidence that the Committee has heard is that there are other examples of cruelty to children and punishment of children causing damage to them which are not being picked up or which are not covered by the existing law. Professor Parkinson gave an example of a child that he had under foster care who had welt marks across its back and behind that were obviously made by an electrical cord. In the absence of any kind of evidence as to how it happened, it becomes difficult for the child workers and social workers to become involved.

The evidence that we are hearing is that if common assault were something that was clearly demonstrated in the legislation as being inappropriate for children, the police could be involved in those kinds of actions where there were obviously injuries involved like that. The police would have the effect of simply acting as a deterrent to prevent what the Child Protection Authority described to us as the slippery slope—that is, punishment that is inappropriate and damaging to the child at one end of the slippery slope down to a situation where the child might have to be taken away. If the parents were subjected to criminal law, that would act as a brake and protect the children in a way that the law does not presently contemplate. Would you have any comments to make about that?

Mr NICHOLSON: It seems to me that one of the problems with prosecuting parents without removing the child is that the child may well face further punishment for the prosecution. The Chair would be well aware that one of the answers, and perhaps the best answer, to these sorts of things is supplying resources to the families who do not treat their children well. The first thing that springs to my mind is that this may be the wrong tool for frequent abuse within the family.

The Hon. P. J. BREEN: It would certainly have some effect, though. It would make the public more aware of the problem that is otherwise undetected, if I can use that word.

Mr NICHOLSON: I accept that the threat of criminal sanction can be very, very useful. I am more cautious about the application of criminal sanction in families where the child is going to remain.

The Hon. P. J. BREEN: Yes.

Mr PEARSALL: Just to pick up that point very briefly, I am not really sure what would prevent the police from making appropriate inquiries in a situation where they are presented with a child with welt marks across its back. Under the present law, one would be amazed if the police did not make inquiries and speak to the parents. If a parent admitted doing that—causing that sort of injury—even though they claimed it was pursuant to some kind of disciplinary exercise, they would be prosecuted and, on my expectation, convicted.

The Hon. P. J. BREEN: All I can say is what I said before. There have been occasions when people have used a whip and there have been occasions of kicking and punching that we are hearing about. The whip case, for example, has been brought to my attention since I mentioned it earlier. It is the case of *Bresnehan v R* (1992) 1 Tas R 234. In that case, four children had made allegations against their parents of ill treat by punishment, including whipping. The father was convicted in relation to one count of assault against the youngest child only and served a sentence of 10 weeks imprisonment.

Mr PEARSALL: Do we know the nature of the defence he conducted?

The Hon. P. J. BREEN: Lawful correction.

Mr NICHOLSON: We can look it up and we can make a submission in respect of that.

CHAIR: It is an illustration, though, contrary to what you seemed to be suggesting to the Committee earlier, that is hardly a case from the Victorian era. It is 1992 in Tasmania.

Mr NICHOLSON: That is right. That is why I say to you, Chair and Hon. P. J. Breen, that it bears investigation. The excuse cannot be that it is in Tasmania. There must be some other excuse.

CHAIR: Well, I do not think there is an excuse, wherever it occurs.

The Hon. P. J. BREEN: There are other cases and the other evidence—I keep coming back to it, I know—is that there are cases in which kicking and punching a child were accepted as reasonable. Boxing and pulling ears also have been accepted as reasonable chastisement. The current position is, from someone who grew up in western Sydney where it all happens, that it is your child and you treat it as you please or as you think appropriate.

Mr NICHOLSON: It is your property.

The Hon. P. J. BREEN: That is right—it is your property and while assault might apply to the rest of the community, there is no such thing as assault in the family. The police are very reluctant to get involved because they do not want to be involved in a prosecution that is not going to come to anything. They are also no doubt aware of the problem you alluded to—further punishment of the child in the event that they try to intervene. But if there was a publicity campaign, changes to the law along the lines we are suggesting where it becomes abundantly clear that people cannot do these things to children and legislation that sets out the guidelines and the force that can be used, then I put to you that it would be a more helpful situation than the one we have at the moment. You do not have to agree with me, obviously.

Mr NICHOLSON: No.

Mr PEARSALL: I notice that in Mr Griffith's background commentary notes at page 13, all examples of over chastisement seemed to be drawn from outside New South Wales. I think it is not just our view that that is the case. If you go to the texts on the matter, at least one of which I read recently by Gillies or the Fifth edition of Howard's Criminal Law, make reference to the authorities in this area being fairly rare. But certainly, we will take into account the comments and examples you have raised.

The Hon. P. J. BREEN: One logical conclusion from the fact that the cases are outside New South Wales is that if it is the case that we are all an amorphous group of people across Australia, it may be that the authorities in New South Wales are less inclined to take action than are authorities elsewhere, but the action itself, I put it to you, is probably no different across Australia.

Mr NICHOLSON: That may or may not be right. There would be areas of isolation—I am thinking particularly about the Tasmanian situation and I am trying to understand it—or of greater isolation that we would have in New South Wales. There may be some under-reporting in New South Wales that may account for a lack of cases; I recognise that. But it may also be that the results of prosecutions in New South Wales have been such that one does not get a resolution of the problem that appears bizarre, such as the Tasmanian case you just cited. In other words, our judicial officers, when required to deal with these prosecutions, and our juries, where the prosecutions become indictable, because of the way in which they are directed by judicial officers, have a much clearer understanding of what is reasonable and what is not.

The Hon. P. J. BREEN: Do you think there is a gap in the law between the example you gave of the child being burned with cigarettes and all the other kinds of lesser assaults, if you like, that might be inflicted on a child?

Mr NICHOLSON: No.

The Hon. P. J. BREEN: You do not?

Mr NICHOLSON: No. You see, the law provides for the charging of assault—assault occasioning actual bodily harm, assault occasioning grievous bodily harm, and assault with intent to do grievous bodily harm.

The Hon. P. J. BREEN: All of which have available to them the defence of reasonable correction in the case of a child.

Mr NICHOLSON: Reasonable correction, reasonable chastisement.

The Hon. P. J. BREEN: Reasonable chastisement and lawful correction.

Mr NICHOLSON: Yes. But my experience, limited as it is to baby-shaking cases and cigarette-burning cases that have gone to the superior courts—and where quite frequently the course is to plead guilty in any event because it is recognised that no jury is going to regard burning a child as reasonable—is that the judicial officers who are required to determine the matter have a sense of what reasonable is.

The Hon. P. J. BREEN: Can I ask you another question about the drafting of the bill itself. On page 4 subsection (5) in relation to a person acting for a parent of a child, you have made the point in your submission at page 5—and it is quite a good point, too—that a 17-year-old sister might be in a position where she is smacking an errant younger child, a younger brother, and could therefore fall foul of the bill. The Committee has heard other evidence along the lines and the same kind of evidence—that the bill does discriminate against younger people who are otherwise mature enough to look after children and correct them. Would you have any suggestions to the Committee in relation to amending that provision either by lowering the age to 18 or perhaps even by striking out altogether the words "of or above the age of 18" so that it simply refers to a person.

Mr PEARSALL: Do you mean lowering the age to 16?

The Hon. P. J. BREEN: That is one suggestion.

Mr PEARSALL: No, I am sorry, you said 18.

The Hon. P. J. BREEN: I meant to say 16. I meant lowering the age from 18 to 16. Do you have a view about that?

Mr PEARSALL: Yes. Certainly lowering the age to 16 would assist because it would enable persons who are of age to do other things and adopt responsible roles to have a role in the supervision and disciplining of their siblings in the immediate example. We would say that would be of assistance. Of course, it would be for the parents to assess the suitability of extending the authority to the other sibling in any event. Again, if the age was to be lowered to some even younger age or deleted competently, there would still be a protection for the child in question because it would be up to a responsible parent to consider whether they should be extending the authority to any particular person in the first place. That assessment role could be done by the parent. But as it stands, our concern was that 18 would cause these anomalies.

The Hon. P. J. BREEN: So you would like to see that provision either struck out or reduced to 16?

Mr NICHOLSON: Struck out would be our preference, particularly if you bear in mind subsection (5) (a) (ii). I would commend you to take out the word "expressly" in any event. It seems to me that if authorisation is not express, I do not know what "expressly" would add to the word "authorisation".

The Hon. P. J. BREEN: Does it not change the burden of proof if you use the word "expressly"?

Mr NICHOLSON: It probably does.

CHAIR: Do you think it is entirely reasonable or appropriate in child protection terms to extend the category of person within the definition of "a person acting for a parent" to include an older sibling of a child? I say that because we put the same question to some other witnesses, including as recently as this morning Professor Kim Oates, who is the chief executive of the New Children's Hospital at Westmead. He certainly responded that he did not favour extending the category of persons who are entitled to impose discipline.

Mr NICHOLSON: Quite often you have sibling rivalry which is the cause of the chastisement.

CHAIR: That is the danger.

Mr NICHOLSON: And that is the danger, yes. I would not advocate that the categories be expanded.

The Hon. P. J. BREEN: Professor Oates made the point that there are very few cases of assault by one sibling on another. He said certainly sexual offences are more common, but assault, in his view, is uncommon. Is that consistent with your experience?

Mr NICHOLSON: The chastisement aspect, perhaps, that may be right. There may be other reasons.

The Hon. P. J. BREEN: I come from a large family, and I was a bit surprised by that evidence. Proposed new section 61 AA (5) (b) relating to person acting for a parent states:

> (b) who, in the case of a child who is an Aboriginal or Torres Strait Islander, within the meaning of the Children and Young Persons (Care and Protection) Act …

You canvassed the disadvantages of referring to other legislation in deciding exactly what constituted an Aboriginal and Torres Strait Islander person, and you indicated that certainty was important. I put to you that given the parity between this legislation and the Children and Young Persons (Care and Protection) Act it is not such a hard task to refer to a definition in the other legislation in this case.

Mr NICHOLSON: We commend to you that you just take the definition out of the Act and put it in this one.

The Hon. P. J. BREEN: Include it in both?

Mr NICHOLSON: Yes. Put it in both.

The Hon. P. J. BREEN: Put it in both?

Mr NICHOLSON: I am sorry, yes. Using the definition in the other one, incorporate it into here rather than having the lawyers or the judicial officer having to call for that Act.

The Hon. P. J. BREEN: I understand that point, and it is a good point.

CHAIR: I would like to ask you a couple of questions arising out of the written questions we circulated to you. You have given us a document headed "Supplementary Submissions by Public Defender to the Standing Committee on Law And Justice".

Mr PEARSALL: We did not deal with the last six. That was an oversight because of the way the document was presented. But there is probably nothing substantial in them.

CHAIR: I do not believe that is a problem in this instance. I wanted to raise with you the proposed definition of "child". That topic is dealt with in our question 20 to you where we asked

whether the bill should include upper and lower age limits beyond which physical punishment should be prohibited. We went on to ask whether there was value in setting an absolute community standard that no child under a certain specified age—whether it is one, 18 months, two or whatever—should be hit with a belt, stick or other object, or that no child over 16 should be physically punished. We have put the same question to, in the main, child protection-type witnesses. Professor Vimpani, for example, from the University of Newcastle, who is an eminent paediatrician, took the view that no child under the age of 18 months should be hit for any reason. I note that you have responded to our question 20. Would you like to read it on to the record, or would you otherwise like to deal with the matter?

Mr PEARSALL: Reading question 20, it would make sense to set a lower limit. If, as seems likely, very young children are unable to understand the concept of chastisement then there does not seem to be any worthwhile point in permitting it. A complete prohibition in relation to infants would have the virtues of clarity and the outlawing of behaviour which has a patent capacity to be dangerous to the most vulnerable members of the community. To that I would add that another virtue of setting a limit is that it may be that no parent, because of a lack of medical knowledge, can be trusted to assess what would be a reasonable chastisement in relation to a person of tender years. I suppose the immediate example is baby shaking. It may have been the case that a lot of people thought it was not dangerous and not inappropriate, but it is both of those things. We agree that a lower limit would have to be said for a variety of reasons.

Mr NICHOLSON: But we would say that we are not the people to ask as to what that limit should be because that obviously requires expertise of a kind we do not have.

CHAIR: Yes, I understand that.

Mr NICHOLSON: Clearly, anybody under 12 months certainly should not be. Whether 18 months or whether two years would depend upon the child's development. If one is brandishing a wooden spoon around as a punishment implement, then it may be that—

CHAIR: Another matter I wanted to ask you relates to our question 23, and that in turn relates to the provisions in the Hon. A. G. Corbett's bill, which provides that in relation to a person acting for a parent of the child that person be expressly authorised by a parent to use physical force to discipline, manage or control the child. Our question was in the form that we asked you whether it could be argued that this paragraph strengthens the authority of parents because no one may rely upon the defence unless they have been expressly authorised by a parent. I invite you to read on to the record the response you have given to question 23.

Mr PEARSALL: Strengthening the position of the parents is not really a problem. The concern is the introduction of the requirement of express authorisation by the parent. In many cases the parties would see the authorisation as unspoken. If there were concerns by the parent they might be expected to be voiced by the parent when the child was being left in the other person's custody. People may become criminals merely because of the failure to secure an express grant of authority in a situation where both parties recognise a longstanding implicit grant of authority. The bulk of that question, I suppose, went on to an area that the question itself did not attract, but we would see nothing wrong with the provision that could be seen as giving parents more authority over their children. There does not seem to be anything inherently wrong with that. The concern we had was with the need for the express grant.

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

CHAIR: In regard to the matter I am raising I note that in question 24 we draw to your attention the fact that a number of submissions to the Committee have raised concerns about the requirement for express authorisation. We ask whether there is any alternative to this wording that could achieve the same effect, to which you give the response, with which I would agree, that there is probably no halfway point between express and implied authority. However, I have some hesitation

about not requiring express authority, given that we are dealing with the welfare in a given case of children of very tender years. If adverse consequences ensue as a result of someone looking after a child of a young age, perhaps serious injury, is it unreasonable to expect that the parents did give express authority?

Mr NICHOLSON: If there were serious injury that may be one thing, but if the prosecution is brought in cases where the injury is not serious and the life of the babysitter or whoever is thereby ruined because a conviction may well mean that employment opportunities are closed, that is another.

CHAIR: I am getting rather bored asking this question, if you will pardon me for saying so, because I ask virtually every witness. Some people who have approached the Committee or expressed views to it have a particular reverence for the use of a wooden spoon that is commonly found in kitchens. Do you think there is any reason to sever, as it were, a wooden spoon from a belt, a stick or any other piece of wood in disciplining a child? Or, to put the question another way, in your experience as public defenders have you noticed any adverse outcomes as a result of the use of a wooden spoon?

Mr NICHOLSON: What question number was that in the series of questions asked?

CHAIR: I am told vaguely No. 10. No, it is more than vague. We draw to your attention the fact that a number of opponents of the bill have expressed concern that it would effectively prohibit the use of the wooden spoon in discipline, and that this is said to undermine the authority of parents, particularly mothers who rely on the wooden spoon in disciplining their children. We ask you would it be possible or desirable to provide another exception for the use of the wooden spoon. Finally we ask whether anything is known medically about the seriousness or incidence of injuries caused by the use of the wooden spoon. We will not put the latter part of it to you, although we did this morning to Professor Oates.

Mr NICHOLSON: It is much more appropriate that the question be asked of medical people. We have answered the first part of that question in this way, the wooden spoon may well be meant as the metaphorical generality employed to represent any harmless readily available household item commonly used in corporal discipline. Any non-patently harmful item would serve the same purpose. However, the problem remains that it may be more how an item is used rather than whether an item falls under a particular classification. Putting that shortly, we do not think the legislation should make any reference to a wooden spoon.

CHAIR: Thank you very much for your attendance. We particularly appreciate the care and attention you have given to responding in writing to the Committee's questions. I express our profound thanks to you for the care, trouble, time and attention you have devoted to this exercise.

Mr NICHOLSON: We are pleased to do that because, quite clearly, the Committee is giving a great deal of care, attention and trouble to the exercise.

(The witnesses withdrew.)

(Luncheon adjournment)

STEPHEN JAMES ODGERS, Bar Association of New South Wales, Forbes Chambers, 185 Elizabeth Street Sydney, sworn and examined:

CHAIR: Mr Odgers, what is your occupation?

Mr ODGERS: I am a barrister.

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

Mr ODGERS: I am representing the New South Wales Bar Association.

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

Mr ODGERS: I did.

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

Mr ODGERS: I am.

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

Mr ODGERS: I am a barrister and a member of the Bar Council of New South Wales, and for some years I have been involved in commenting on proposed legislation in New South Wales.

CHAIR: The Bar Association has made a 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?

Mr ODGERS: Yes.

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 will be willing to accede to your request.

Mr ODGERS: Thank you.

CHAIR: Could I now invite you to make a brief opening statement to the Committee?

Mr ODGERS: To facilitate that, I provide a one-page document that I have prepared. Essentially, it suggests some drafting changes to the bill. I provide five copies of that document.

CHAIR: Please continue.

Mr ODGERS: In essence, the Bar Association does not oppose the bill; indeed, in essence, it supports the bill. What I mean by that is that we recognise that notwithstanding the fact that the common law in the area is appropriate, it lacks sufficient clarity for members of the public in their use of force in relation to children, and there would be public interest benefits from providing more precision in respect of what conduct is acceptable and what is not.

In general, we support the approach of adopting the common law formulation, which refers to whether or not the application of physical force is reasonable in all the circumstances. We also accept that it is appropriate to provide in subsection (2) of proposed section 61AA that certain kinds of force should be defined to be not reasonable for the purposes of the application of force. We really have only two matters that we want to bring to the attention of the Committee. The first is a substantive one, and that relates to the definition of "person acting for a parent" in the bill. We strongly believe that the present definition is much too narrow and should be expanded. I will elaborate on that in a moment.

The other point we wish to make—and it is, in a sense, less important because it is not really a substantive matter but rather a drafting matter—is that I have attempted to produce a draft of subsection (2) of 61AA which might be seen to provide greater clarity and serve the function which ultimately is the purpose of this legislation, which is to allow people who have the care of children to know, as precisely as can reasonably be achieved, what conduct is not permissible. I will deal with the latter matter first. The Committee will see that I have suggested a redrafted version of subsection (2). It makes some changes, which I will note just briefly.

The first change is that after the words "physical force" at the beginning of subsection (2) it says "to a child". That is not a substantive change, but it seemed appropriate to add those words. Paragraph (a) makes what I regard as some non-substantive changes. It avoids the confusion over the meaning of the word "object". The Committee will appreciate that one difficulty with the present formulation is that "object" is intended to include a hand or other part of a person's anatomy. That is not necessarily something that would be immediately apparent to some people. The proposal that I have advanced avoids that difficulty, but it does suffer from the disadvantage, which I concede, that it does not specifically refer to sticks and belts and things of that sort, and therefore it might be regarded by some people as being insufficiently precise or insufficiently clear as to what they cannot do. So I appreciate that that is a counter argument to what I have proposed.

Paragraph (b) does not make any substantive changes. Paragraph (c) does make some changes, and indeed substantive ones. There are two important changes that have been made in paragraph (c). The first is to delete the words "cause harm to the child", and the second is to replace the words "threaten to cause harm to the child" with the words "likely to cause harm to the child". In respect of the second, my reading of the material suggests that there has been some confusion about precisely what it was that the words "threaten to cause harm to the child" were intended to convey. My view and that of the Bar Association is that they should be read objectively and not in any way to import some mental element relating to the state of mind of the person applying the force. Accordingly, the word "likely" is a preferable formulation. We thought a less demanding test, like "as to create the risk of causing harm", would be too broad and therefore we chose the word "likely".

In respect of the first matter I have mentioned, removing the words "cause harm", I think the view we took it is that that should not actually be incorporated because the critical issue is the conduct of the person at the time applying the force, not really what happens thereafter—except if it was something foreseen or reasonably foreseeable or something that should have been anticipated, which is what the words "likely to cause" convey. So the critical thing is what is reasonably anticipated, rather than what actually happens. So we propose that provision should be redrafted in the way suggested.

The last important aspect of this redrafting is that the final qualifying words "unless the force applied could reasonably be considered trivial or negligible in all the circumstances", while the same formulation as applied to paragraphs (a) and (b) of subsection (2) of the original bill, be extended to (c). I will quickly concede that it is rather difficult to think of any circumstances where the application of physical force that is likely to cause harm that lasts more than a short time will, at the very same time, be such as to be reasonably considered trivial or negligible. Nevertheless, whilst I cannot think of a particularly good example, there is no reason in principle, so far as we can see, why that qualification at the end should not apply to (c).

There is one general observation I would make about all of this—and it is one that really needs to be emphasised. It is that we are talking about the criminal law here. We are not talking about imposing disciplinary requirements on teachers for example, or making people simply liable to civil action, or consequences of that sort.

The point is that we are dealing with situations where people may be charged with criminal charges with the possibility of imprisonment; and, even if there is no imprisonment, with other severe penalties; and, even if none of those follow, consequences for their good name and their future livelihoods. In those circumstances considerable care needs to be exercised to ensure that a defence to assault is not so narrowly circumscribed as to result in situations where people are liable to being convicted of criminal offences when, in fact, the conduct they have engaged in can be considered

trivial or negligible. It is really for that reason, fundamentally a point of principle, that we favour the view that the trivial or negligible safeguards should apply generally.

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

While I appreciate that an argument can be advanced and probably has been advanced that parents are in a better position to judge what is an appropriate amount of force in all the circumstances, it is our view that, given the terms of subsection (2) and the extent to which they significantly circumscribe what is permissible in the way of the application of force, there is really no good reason whatsoever for defining a person acting for a parent in the extremely narrow way that it presently stands. It is narrow in two important respects: one, it only applies to essentially the relative of a parent and therefore automatically excludes a whole range of other persons—teachers, child carers, bus drivers and the list goes on. Secondly, it will also exclude even relatives who have consent, albeit not express , but in fact have the consent of the parent for the force used. If it is not expressed they are not protected. In our view if they reasonably believed that they had the consent of the parent to the application of the force applied, they should be put in the same position as the parent.

I would observe that the draft that I have advanced is in fact slightly narrower in one respect than the present bill because it requires a reasonable belief of consent of the parent to the application of force actually applied, whereas the present bill refers to express authorisation to use physical force generally. But that is not a major difference, I guess. We oppose both the limitations to relatives and to express authorisation. We propose a much broader definition. We emphasise again that the issue here is one of the scope of the criminal law and whether or not persons who have the responsibility for the care of the child with the consent of the parent, and reasonable belief that the parent consents to the force applied, should have available to them the defences that would be available to a parent in the same position—again, bearing in mind that the other changes to the bill will ensure that any kind of physical force that is adopted by this person acting for a parent will be deemed to be unreasonable unless it clearly falls outside the terms of subsection (2).

CHAIR: Thank you, Mr Odgers and thank you for the draft and for the attention that has been given to the bill by the Bar Association. You used the plural a number of times, "It is our view", to take an example. Does that mean that this matter has been discussed with Bar Council?

Mr ODGERS: The written submission went to Bar Council and was approved by Bar Council. The one-page document you have received has not been to Bar Council. To the extent that I have gone beyond the terms of the written submission, that is essentially my view or my interpretation of the written submission.

The Hon. J. F. RYAN: Have you discussed this draft with anyone else?

Mr ODGERS: I discussed it an hour ago with the Chairman of the Criminal Law subcommittee of the Bar Association whose office is next door to mine in Chambers. But, no, this drafting has not been discussed on any formal basis.

CHAIR: Nevertheless, I must say that the Committee is grateful for the drafting attention that you have given to the matter. I refer you first to a rather minor aspect. In proposed subsection (2) you have said that you insert the words "to a child"—that is, "the application of physical force to a child is not reasonable" in the circumstances that are enumerated. You said that you decided to insert those words. I ask you to comment on whether you believe that is warranted or necessary, given that in proposed subsection (1) of the Hon. A. G. Corbett's bill there is reference, as you will see, to the application of physical force to a child.

Mr ODGERS: I fully accept that it is not necessary that those words be in there. I put them in there because it seemed that it was the appropriate thing to do and it provided greater clarity.

CHAIR: Could I also offer the view that I am, speaking for myself, quite attracted to your use of the word "likely" in subsection (2) (c) That seems to be better than "threaten to cause". I would also say that the Hon. A. G. Corbett has mentioned to the Committee that in his view the use of the words "threaten to cause" is a drafting oversight. The Committee has formed the impression that he does not intend to proceed with that in any event.

Mr ODGERS: We would oppose removing the concept entirely. We favour making that concept clearer and deleting the other aspect in (c). Subsection (c) is in the alternative: if the force is applied to any part of the body of the child in such a way as to cause harm to the child that lasts more than a short period, that will be deemed to be unreasonable. Alternatively, if the force is applied to any part of the body of a child in such a way as to threaten to cause harm to the child that lasts more than a short period, that will also be unreasonable. The fact of the matter is that subsection (c) contains two situations in which the force is deemed to be unreasonable. We oppose the first, where it causes harm that lasts for a short period. In our view the important thing is not what actually happens, because that may have been unforeseen; it may have been reasonably unforeseeable; it may certainly be something that was not likely to have occurred. In our view it is wrong to say that a person loses their defence to a charge of assault because of what happens which is unforeseeable or not reasonably foreseeable, or indeed something which is not likely to have occurred.

CHAIR: I am to some extent now troubled by what you are saying because the Committee has to view the Hon. A. G. Corbett's legislation from two standpoints and we have to try to reconcile them if we can. The first is that we have to, as you say, give attention to the drafting of this provision, given that it is a provision of the Crimes Act. We are dealing after all with the criminal law so a defendant's rights have to be taken into account. On the other hand, the Committee, as an arm of the Legislature so to speak, has to give attention to the fact that as a matter of public policy governments of any persuasion have to be concerned about questions of child protection.

Given that that is the case, the drafter of the bill, the Hon. A. G. Corbett, and the Committee cannot easily overlook the fact that some permanent or semipermanent harm may ensue to a child, although it might not perhaps have been entirely foreseeable. To take a fact situation, supposing the parent, endeavouring to administer the discipline, is in an angered state and waving around some stick or other object and that stick or other object, in the course of the child seeking to evade being struck by this object, happens to hit the child's eye—

Mr ODGERS: Plainly enough—I apologise for interrupting you—the defence is lost by reason of the operation of subsections (a) or (b).

CHAIR: Yes, except if the open hand is being used.

Mr ODGERS: Yes, precisely, if we take that example of the open hand which is being used, and it is not to the head or neck. As the bill presently stands the parent will lose the defence in circumstances where the use of the hand causes harm that lasts for more than a short period, even though that harm was unforeseeable, unforeseen and unlikely to occur. In those circumstances we would say that it is wrong that that person should lose the defence.

CHAIR: In the drafting of proposed subsection (2) that you have placed before the Committee, you refer in paragraph (a) to "by any means other than an open hand", which obviously omits reference to matters at present in the Hon. A. G. Corbett's bill, namely, a stick, belt or other object.

Mr ODGERS: Yes.

CHAIR: You may feel that it is not entirely within your province to comment on this but I leave it to you. Some witnesses who have appeared before the Committee, such as child protection experts and paediatricians, have laid considerable stress on the fact that the bill is intended to be an educational tool as much as a drafted provision of the criminal law, if you know what I mean?

Mr ODGERS: I do.

CHAIR: That being the case, what would you have to say to the argument that a specific reference to a stick, belt or other object is omitted and there is simply reference to anything other than an open hand—in other words, if the provision is generalised in that sense?

Mr ODGERS: My view—and I am not an expert—would be that it would still be an expert educational formulation. The message that would go out in clear and unambiguous terms would be—and absent trivial or negligible circumstances—you cannot use any force other than an open hand. I think that would clearly convey to members of the community that, if they have a stick or a belt in their hand, that is something other than an open hand. I suppose a counter argument might be put. They might think that they cannot use their fists but they can use a stick or a belt. I think that is an implausible scenario and it would be easy to ensure that people were not confused by it. Having said that, I appreciate the point. I put that provision in there more to keep it as short and as sharp as possible. It may be that the view is taken that the benefits are not outweighed by the disadvantages of not containing the reference to belts and sticks. It is not something about which I would have a firm view.

CHAIR: Some witnesses who have been critical of the bill have made reference to the wooden spoon. They have argued to a greater or lesser extent that perhaps the right to use a wooden spoon ought to be preserved, given that it is a light object. It is not necessarily a view with which I agree. However, it seems to me that both in the present drafting of the bill, given that it refers to "a stick, belt or other object", and in your own drafting which refers to "by any means other than an open hand", the wooden spoon clearly would be excluded?

Mr ODGERS: Yes, that is correct.

The Hon. J. F. RYAN: One of the only two questions that arises for me is the fact that so many witnesses have said that they were attracted to the fact that the bill attempted to be practical in its instruction. One of the things that your drafting has over the other version of the bill is that is has fewer words. It is clearer and more concise, if nothing else. There are advantages in the way in which the current bill is drafted. The intention of the bill is that you are basically in the clear if you use an open hand, provided you do not strike a child on the head or the neck. Your bill makes that fairly clear. But you are in a different realm again if you do this by using any other means, including the use of a stick, belt or any other object.

Is there some way in which you could reconfigure your draft to include that concept as there seems to be some educative value in that provision? One of the things that people could say about your draft is essentially all that the bill would let you do is strike a child with an open hand. In other words, by not making any reference at all to the fact that it is legitimate to use the wooden spoon, your bill could be misconstrued. I accept that it could be misconstrued but we, as politicians, have to deal with the perception of things in addition to the way that things are. One of the advantages of referring to the stick, belt or other object is that at least it alerts people to the fact that there are circumstances in which it might be considered legitimate to do so and, therefore, the legislation covered reasonably clearly the so-called wooden spoon type discipline.

Mr ODGERS: I have one question. I misunderstood the last part of your question. Under both the present bill and the suggestion that is advanced today, as the Chairman pointed out a wooden spoon would never be permissible.

The Hon. J. F. RYAN: Under the draft bill of the Hon. A. G. Corbett a wooden spoon would be permissible, provided its use was negligible or trivial in all the circumstances.

Mr ODGERS: Apart from that qualification.

The Hon. J. F. RYAN: And that appears to be clear. I accept that your bill covers the field in the same way. But by not making any reference at all to this fact people who might want to misconstrue this bill might think that all that the bill really lets you do is use your open hand and, therefore, the commonly used wooden spoon type discipline is outlawed. Frankly, I am more worried about a scare campaign that would result in a negative reaction to the bill because it made no reference to the stick.

Mr ODGERS: Proposed paragraph (a) could be redrafted to read very much as it presently reads—"by the use of a stick, belt or other object (other than an open hand …)".

The Hon. J. F. RYAN: Would you insert that provision in proposed paragraph (a)?

Mr ODGERS: You would do it in a positive way and include the words, "by the use of a stick, belt or other object (other than an open hand …)". The only change that you would be making then would be to take out the additional words in paragraph (a), put them down the bottom and they would apply generally to paragraphs (a), (b) and (c). The Bar Association, in its written submission, has not opposed the present draft of proposed subsection (2). The suggestion I put before you today, which is coming from me, is simply designed to produce the shortest, sharpest and most precise version possible. I appreciate the concern that has been raised.

The Hon. J. F. RYAN: I ask about the words "likely to". You have obviously included the words "likely to" as something that is better than "threatened to cause"?

Mr ODGERS: Correct.

The Hon. J. F. RYAN: The words "likely to" could be deleted altogether. Whilst I accept that it would not necessarily accord with the requirements of the submission from the Law Society, could it be argued that a matter in court is simply limited to circumstances when harm was actually caused as opposed to when harm was actually a threat? The Hon. A. G. Corbett has indicated that he would be prepared to delete the words "or threatened to cause" in his draft bill. That means that his bill would be narrowed in its focus as to when harm actually occurred and there would be no room for the hypothetical. Would that not be a more narrow confinement and perhaps exclude matters which might be regarded as more controversial? It could be argued that someone threatened to cause harm but did not actually do it?

Mr ODGERS: I make two comments. First, I have already strongly opposed a formulation which removes the defence simply because harm of a particular type was caused. From the point of view of the criminal law and determining whether or not a person should have a defence, the important thing is not what happens; rather whether it was something that was either foreseen or it should have been foreseen. You can have situations in which something unforeseen, unforeseeable and quite unlikely to occur happens and a person should not lose his or her defence simply because that unforeseeable thing happens. He or she should lose a defence only when he or she should have anticipated that consequence.

The Hon. J. F. RYAN: Is that foreseeableness something which the criminal law already anticipates in every respect, or is it limited?

Mr ODGERS: No. An offence of assault occasioning actual bodily harm, for example, is an offence where there is no mental element. You do not have to foresee it and it does not have to have been something that was likely or foreseeable. In any statutory legislative exercise one has to make judgments about whether or not a provision should be drafted in a way which imports either a subjective foresight element or an objective reasonable foreseeability element, or none of those. The present bill has the effect that the defence is lost even if it was unforeseen and unforeseeable. We are making a strong submission that it is wrong that a defence should be lost. Take, for example, when a parent smacks a child on the leg, which is not caught by paragraphs (a) and (b) but it causes harm that lasts for more than a short time, let us say, in circumstances where the child has a particular susceptibility which was unknown to the parent and it so happens that, as a result, there has been long-lasting harm. Should that parent lose the defence? We say no, unless it was something that should have been foreseen.

The Hon. P. J. BREEN: What about in the rest of the law? Say an adult is charged with the common assault of another adult and causes actual bodily harm, as you suggested? The defence would not be available in those circumstances would it? So in other words it is not foreseeable.

Mr ODGERS: Yes, but we are talking about a different situation. We are talking about whether or not a person has a defence based on what he or she did rather than on the question of whether he or she is liable for a particular consequence. The formulation of an offence of assault occasioning actual bodily harm means that you will be held criminally responsible for the consequences of your actions, assuming you do not have any defences available to you. Under the common law, if it was a parent who assaulted

occasioning actual bodily harm, he or she would presently have a defence to that charge if the acts which occasioned actual bodily harm were done within the terms of the present defence.

So the issue is not the formulation of the offence or the criminal responsibility for the consequences; rather it is whether or not a person has a defence open to him or her. So the choice is between saying in the example I have given of a parent who slaps the child on the leg: Where there is an unforeseen and an unforeseeable consequence, should he or she lose the defence? That is the question. My answer to you is that he or she should not.

The Hon. P. J. BREEN: Other witnesses to this Committee would say that they should lose the defence. We have, in fact, taken evidence from the Law Society. The Law Society is currently reviewing this question. I will put the same question to you if I may. What if we were to delete from proposed paragraph (c) the words "in such a way as to cause, or threaten to cause, harm", et cetera and replace those words with "the forces applied to any part of the body of the child, so as to constitute an assault of the child"?

Mr ODGERS: I am in a state of amazement, with all due respect. That would seem to me to mean that the entire defence is abolished, as far as I can see, at least for an assault. I may be missing something here.

CHAIR: It is a very circular way of approaching the matter, is it not?

Mr ODGERS: If it is redrafted in the way proposed, where you assault a person—and assault is the application of physical force—you do not have a defence. Answer: You do not have a defence. The redraft that is suggested seems to me to mean that no person would ever have a defence in circumstances of what has traditionally been called lawful correction.

The Hon. P. J. BREEN: The thinking behind that amendment would be that it is not lawful to assault people generally, therefore particularly children's rights advocates argue it should not be lawful to assault children.

Mr ODGERS: With respect, the assumption is misconceived. The law, as it presently stands, is that it is lawful to assault a person if you are doing it in the exercise of lawful correction. The whole point of this exercise is not, as I understood it, to completely abolish that defence. The effect is that you are not guilty of an offence. If you have a defence you are not guilty. You are not committing an assault. As I understood it, the purpose of this legislative exercise was not to abolish that defence and, indeed, I think Mr Corbett realised two years ago that there was no community support for such an abolition and I do not think he even proposed to abolish it then. The effect of the proposed change would abolish it. With respect, that is completely wrong. I am being blunt.

CHAIR: I wish to ask further questions with respect to drafting of the bill. In proposed subsection (1) there is reference to management or control of a child as well as the use of the term "discipline". Could you advise the Committee, if you are in a position to, whether the words "management or control" appear in any common law formulations of the defence of lawful correction. If not, what would be the effect of their inclusion in proposed subsection (1), which is intended to be, as I understand it, a restatement of the common law defence?

Mr ODGERS: In answer to the first part of the question, I am not aware of any traditional formulations of the common law defence that use those words. However, I would expect, given the flexibility of the common law, that if circumstances arose in which the application of force could properly be described as management or control and that those terms were more appropriate than the traditional words of "correct", I would have no doubt whatsoever that under the common law the defence would be available.

With respect to the second part of the question, it would be my firm view that the words should be retained, bearing in mind that they add an additional requirement to the requirement of the reasonableness of the application of the force. In effect, the drafting of subsection (1) imposes three requirements before the defence is available. The first requirement is that the force is applied by a particular person, that is, a parent or a person acting for a parent. The second requirement is that the

force is reasonable in the circumstances and the third requirement is that the force was applied for a particular purpose, that is, one of those three things: discipline, management or control.

With respect, there is no good reason whatsoever why the purposes should be narrowly circumscribed. If indeed it was for the purposes of management or control, they are legitimate purposes. The goal of that limitation is to achieve a result that a person who is simply inflicting force for some desire of revenge or to obtain some sadistic pleasure from it would not have the defence, but if they are doing it for the purposes of discipline, management or control, that would be legitimate.

CHAIR: Another matter I would like to raise in connection with the present drafting of subsection (1) is that this morning we took evidence from Mr John Nicholson, Senior Public Defender, who made reference to the use of the words "a defence", which you will see in the drafting of proposed subsection (1). He advocated replacing the words "a defence" with the word "lawful" so the provision would then read "it is lawful that the force was applied for the purpose of …", and so on. He argued that the use of the word "defence" implies that an accused would have the onus of proving the defence. He argued that it was preferable to put the onus on the prosecution to prove that the force applied was unlawful. Do you agree that the current words in the subsection require the accused to prove that the correction or discipline was lawful and is that desirable?

Mr ODGERS: I would not expect that a court would interpret it as imposing a burden on the defendant. I would expect that in accordance with well-established principles of statutory interpretation in respect of criminal matters that the usual situation would follow, that the prosecution has the burden of rebutting the defence. As a matter of policy that would be something I would strongly support and if there is any possibility realistically that this defence would impose a burden on the defendant, we would most strenuously oppose it. We would have thought that the present words, notwithstanding Mr Nicholson's concerns, would not be interpreted in the way he fears. However, if that is a possibility we would support either his suggested modification or, perhaps better, some appropriate reference in the second reading speech if and when the bill is enacted, making it clear that there is no intention to shift the burden of proof from where it presently resides at common law.

CHAIR: I turn to your own redraft, in particular to proposed subsection (2) (c). I note that you do retain reference to "harm that lasts for more than a short time". Thereafter you also make some reference to force that could be considered trivial or negligible in all the circumstances. Will you comment on criticism or concern raised with the Committee by some previous witnesses to the effect that these terms are unclear and would lead to a greater level of uncertainty. I think Reverend the Hon. F. J. Nile might be of that view, for example.

Mr ODGERS: I struggled with this myself and tried to think of a more precise, more clear, more certain way of expressing it. I could not do so. I actually replaced the word "period" with "time". I do not think that means much. It was a minor change in the formulation but it does not make a substantive difference. No, I have to concede that the proposal does have some uncertainty attached to it. For that reason I think incorporating the words "likely to" does provide some protection for parents because it means that they will not lose the defence unless it is in fact likely that the force they used, which by definition cannot be a force of the sort referred to in (a) or (b), will cause harm which will last for more than a short time. Frankly, I cannot say much more than I have.

As for the other aspect, you pointed out the fact that the limitation of force that is trivial or negligible would apply to (c). As I said in my introductory remarks, that is different from the present draft. We considered that there was no reason in principle why that limitation should not apply to (c). It does provide an additional protection and may also meet some of the concerns of those persons who are worried about the uncertainty of (c). But no, the bottom line is that the bill, as it stands, is not as certain as one would wish but it is a hell of a lot better, with respect, than the common law and that is why the Bar Association supports it.

CHAIR: I turn to both the draft of the Hon. A. G. Corbett and your own, in particular that part of subsection (5) dealing with the term "person acting for a parent". I notice that in your redraft you appear to have replaced the term "is expressly authorised by a parent" with the word "consent". I think I am correct in saying that.

Mr ODGERS: No. The concept of expressed authorisation is replaced by (b). Instead of having to be expressly authorised to apply force, it is sufficient that you reasonably believe. If you were to replace my draft with the words "reasonably believes that the parent of the child authorised", or simply replaced the word "consented" in (b) with the word "authorised" so that it would read: "reasonably believes that the parent of the child authorised the application of the force applied to the child", that is a drafting change; it is not a change of substance. No, there is no important distinction between authorisation and consent. The important distinction is that you do not need express authorisation.

CHAIR: I mentioned to you in an informal conversation before the hearing that the Committee has received approaches from the Teachers Federation on behalf of the teaching profession and on behalf of the Association of Child Care Centres and Private Child Care Centres. They express concern to the Committee that under the drafting of the Hon. A. G. Corbett's bill and, in particular, with reference to the definition of person acting for a parent, teachers and childcare workers might have existing common law protections removed from them. If I correctly interpret the Bar Association's submission, you would probably agree with that contention.

Mr ODGERS: I would not agree with it because it is not a question of "might have their rights taken away", it would take away their defences. There is no possibility of a defence of correction or management or control for a person who is a teacher or a child care worker or anyone like that under this bill.

CHAIR: That being the case, if the Committee were of the view that teachers and child-care workers need some legal protection in situations where they are not administering lawful correction—given that corporal punishment has been abolished in secondary and primary education and is not available in child care either—but in circumstances where they have to physically restrain a child who might be about to do harm to himself, herself or another child, I assume it is your view that the Legislature has to give some attention to this matter?

Mr ODGERS: Yes.

CHAIR: Given that you respond in the affirmative, although it is a matter for the executive and legislative arms of governments, would it be your recommendation that that matter should be attended to in this legislation or alternatively via the legislation governing the private child care centres and the teachers?

Mr ODGERS: I will say three things. One, it should be in this legislation. Two, the proposed redraft of "a person acting for a parent" that we have advanced will ensure that the persons you have described will have appropriate protections under the Act. Three, no doubt there will be situations in which teachers and childcare workers breach their obligations under the legislation you referred to and use physical force for the purposes of correction. They would be subject to appropriate disciplinary consequences as a result. However, the submission we make it is that they should not necessarily be in a worse position than a parent vis-a-vis the criminal law. For example, a teacher at a private school knows that he or she has the consent of a parent to use force but appreciates that it should not be used as a matter of discipline and is prohibited. It is wrong in principle that the teacher should lose any defence that the parent would have.

I appreciate that is a matter of public policy and a view may be taken that if the teacher was breaching the Act in terms of discipline that he or she should not have a defence to a criminal charge of assault. The view of the Bar Association is that if the parent would have a defence so should the teacher in those circumstances. That is really only the third argument. The first two points we have made are: ensuring protections for teachers, childcare workers, nannies and people of that sort in the circumstances that you have referred to; and it should be in the bill. The proposed broader definition of "person acting for a parent" that we have proposed would meet that goal. With respect, there is no good reason why there should be such a narrow definition of "person acting for a parent".

CHAIR: In response to what you have just said, I would imagine that the child protection community is anxious to limit the categories of persons who are entitled to administer corporal punishment.

Mr ODGERS: My response would be that the type of corporal punishment that could be administered under the terms of subsection (2) of section 61AA would be either innocuous or minimal. A lot of things that one might be concerned about, such as the use of straps or of any kind of sticks, would be prohibited. Any use of force to the head or neck of a child and any use of force that is likely to cause more than short-term harm would be prohibited. The question is whether there should be a total ban on the use of force by persons other than the narrow category we have been discussing. The view of the Bar Association is that the community would not support that in terms of the criminal law at this stage.

CHAIR: A short time ago in responding to a question I asked as to where an amendment should be placed to deal with the situation in which teachers or childcare workers might find themselves. The first part of your answer was to the effect that you believed it should be located in this bill.

Mr ODGERS: Yes.

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

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

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

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

The Hon. J. F. RYAN: I wish to ask a question that focuses on your draft of "a person acting for a parent". In your earlier remarks you said that you have limited paragraph (b) to a situation where the person applying a force has a reasonable belief that he or she has consent to apply force.

Mr ODGERS: To apply the force.

The Hon. J. F. RYAN: Is it important to narrow the consent to that level or would it be sufficient to limit it to a person who reasonably believed he or she had consent to take responsibility for the care and management of the child? In other words, the option would then be that a person either had authority or had a reasonable belief that he or she had authority for the care and management of the child.

Mr ODGERS: There are four aspects to it. There is the question of whether or not a person has authority to look after the child. That is one thing. Then there is the more precise question of

whether a person has or believes he or she has authority to use a particular kind of force in exercising the function. The proposal we have adopted is that it should be established that there was consent for the care and management from the parent. It would not be enough that a person believed that he or she had consent. A person would have to show that there was consent for managing or caring for the child. That would not normally be a matter in contention. Assuming a person has the responsibility, when it comes to the actual application of the particular force in question, our view is that it should not be necessary that the person has expressed authorisation for that force nor should it be necessary to have expressed authorisation for any force.

Rather a person should have circumstances where he or she believes that what he or she is doing is authorised, the force is authorised, and that that belief is a reasonable one in all the circumstances. The draft I have advanced is very much based on what was contained in the Model Criminal Code Officers Committee [MCCOC] proposal upon which the present bill is substantially based. However, it has moved away in the area of the people who can take advantage of the defence. It has substantially moved away from the MCCOC proposal. I would support the view that the MCCOC proposal should be retained.

The Hon. J. F. RYAN: I will take you through some common examples of people who may have care and responsibility for a child and ask you whether you consider your subsection (3) (a) applies. Would a babysitter have access to a defence of subsection (3) (a)?

Mr ODGERS: Yes.

The Hon. J. F. RYAN: Would a de facto spouse of a child's parent have access to subsection (3) (a)?

Mr ODGERS: Yes.

The Hon. J. F. RYAN: In all circumstances?

Mr ODGERS: Yes. Of course, it is not (3) (a) or (3) (b); it is (3) (a) and (3) (b). All it does is put the person in the same position as the parent to the extent that the parent would have a defence. If the parent would not have a defence for the force that was used the carer would not have a defence.

The Hon. J. F. RYAN: It has been argued that people who are not the natural parents of the child are sometimes more likely to be responsible for child abuse—for example, a parent's partner where the relationship is either casual or what might be considered to be temporary.

Mr ODGERS: I have no doubt that is correct.

The Hon. J. F. RYAN: You would take the view then that the de facto of any parent would probably be in the position to access the defence in subsection 3 (a)?

Mr ODGERS: Yes.

The Hon. J. F. RYAN: If the spouse said "Look after him for the next hour."

Mr ODGERS: Absolutely. I want to make something very clear. There is no way that a defence could operate in a case of child abuse in any meaningful sense. Given the critical scope of subsection (2), if a de facto is charged with an assault where he smacks the bottom of the child that he is minding, can he have the defence? That is the question here, not whether he has a defence if he bashes the child up or hits the child with a hockey stick. What we are talking about is the kind of parental conduct that we think it is wrong to criminalise. We are saying "We do not think that parents should be criminalised for that conduct but any other person will be criminalised." That is what we should be addressing here, with respect. I am not saying that you would not address it. But when you put it in those terms, the issue is should the de facto who slapped the bottom of the child who is playing up have no possibility of claiming the defence? Should he simply be precluded from having the defence, which means he must be convicted of assault? It seems wrong.

The Hon. J. F. RYAN: On the Corbett version of the bill, they would be in that position, or very close to it.

Mr ODGERS: De facto partners are problematic under the Corbett version but it is not problematic in respect of teachers, nannies, child care workers, bus drivers and a whole range of other people whom one could imagine.

The Hon. J. F. RYAN: The final category which is of some importance to the Committee is extended members of the family as might occur particularly in Aboriginal relationships where sometimes even extended members of the family are not necessarily blood relatives. Would that person, provided he or she is given responsibility by someone or takes responsibility—the issue is that they take responsibility, not that they are given responsibility, is it not?

Mr ODGERS: No, it is with the consent of a parent, so it is both. The person has taken responsibility but the parent has consented to their taking responsibility.

The Hon. J. F. RYAN: So in the case of a nine-year-old Aboriginal boy who turns up at the home of the person he understands to be his auntie, whose mum does not know and was not intended by him to know that he is there and who lives with the auntie for a period when the auntie disciplines that child by corporal punishment, would the auntie be protected by 3 (a)?

Mr ODGERS: Probably not.

The Hon. J. F. RYAN: But possibly by 3 (b).

Mr ODGERS: No. Both are required.

The Hon. J. F. RYAN: So, they would have no defence.

Mr ODGERS: Probably not. They certainly would not have under Corbett bill, as I understand it. You would appreciate that my concern is that the present bill is much too narrow. I was trying to produce something which was not perceived to be too wide. The effect of 3 (a) is that you have to have consent from the parent or a the person having care and management and, as I said before, it would not be enough that you reasonably believed you have the consent. It may be appropriate for me to redraft it to say " ... has taken responsibility for the care and management of the child with the reasonable belief that the parent of the child consents". That is a drafting suggestion but under the present draft that I have advanced, the person who did not have consent to taking charge of the child would not, could not, have the defence.

The Hon. J. F. RYAN: One of the other clauses of the Corbett bill includes a special clause for indigenous people. It states in item [1] (5) (b):

> … in the case of a child who is an Aboriginal or Torres Strait Islander (within the meaning of the *Children and Young Persons (Care and Protection) Act* …), is recognised by the Aboriginal or Torres Strait Islander community to which the child belongs as being an appropriate person to exercise special responsibilities in relation to the child.

Hon. A. G. Corbett includes that as part of his definition of a parent. That clause would still be necessary, even with your redraft. Your redraft it is not sufficiently wide to cover those circumstances.

Mr ODGERS: It would depend, I guess, on how broadly the words " … consent of the parent of the child" were read. It could well be that a court or a jury would accept that in an Aboriginal community, for example, the parent consented to any member of the wider Aboriginal community having the care and management of the child if that child should happen to drop in. It would be a factual issue as to whether or not the parent consented in a loose sense to another adult having the care and management of the child. On the example you gave me, it may well be that the auntie, for example, would be protected. But if it was felt that that is not sufficient protection, then I think it would probably be that the concern would be met by the change I suggested a moment ago, which is to redraft (a) to read, "... has taken responsibility for the care and management of the child with the reasonable belief that a parent of the child consents".

The Hon. J. F. RYAN: I am not sure whether the word "parent" is defined somewhere else in the bill.

CHAIR: It is.

Mr ODGERS: It is.

The Hon. J. F. RYAN: I am just wondering what happens when the Department of Community Services [DOCS], for example, gives authority to look after a child without the consent of the parent. That sometimes happens.

Mr ODGERS: I think the definition of "parent' would cover that, as I understand it.

The Hon. P. J. BREEN: One issue about your third suggested amendment relates to "a person acting for a parent". I notice in the Corbett bill that it contains the limitation that the child must be "of or above the age of 18". I take it from your redraft that the intention is to include siblings who are under the age of 18 and allow them to be in a position to properly discipline children.

Mr ODGERS: With respect, it is extraordinary that, under the Corbett bill, a 17-year-old brother of what might be a three year old, a four year old or a five year old would be guilty of a criminal offence if he touched the child. It is just inconceivable—extraordinary.

The Hon. P. J. BREEN: Would you agree that the Corbett bill does have undesirable consequences so far as putting people who are acting in the place of a parent in a position where they are more disadvantaged under the criminal law than they were before the bill is enacted, if it is enacted?

Mr ODGERS: There is no doubt whatsoever that the effect of the Corbett bill would be to place large numbers of people at much greater risk of prosecution for offences of assault than is the case at present. And I would go so far as to say that it would quite inappropriately put them at risk of that. The last example I gave you is a classic example. The fact that a 17-year-old elder brother must be guilty of a crime of assault where he pushes his brother, whatever the circumstances other than self-defence, is of course mind-boggling.

The Hon. P. J. BREEN: The evidence we heard from the law society was uncertain on the point of whether there was a difference between reasonable chastisement and lawful correction. Are we talking about the same common law defence?

Mr ODGERS: There is very little law on it. My view is that if a court in 2000 was considering the issue, the court would take a flexible approach and would regard them as essentially within the same area with the same principles applying to them.

The Hon. P. J. BREEN: On the question of the likelihood of the bill impacting on child carers and other people such as teachers who have responsibility for children, Gillian Calvert, who is the Commissioner For Children And Young People, gave evidence to the committee as follows:

> Parents have a right of protective restraint under the common law, independently of the reasonable chastisement rule.

Could it be that the defence of protective restraint under common law might be available to teachers and child carers and others standing in the position of a parent where they are involved in disciplining children?

Mr ODGERS: I do not know the answer to that. When I was thinking about it, the premise struck me initially as implausible—that is, we are really talking about two different defences. In a sense, I suppose we are, although the common law is a flexible beast. The fact of the matter is that it would be regarded as a defence to assault under the common law where you are acting reasonably to correct that child. Equally, it would be plainly a defence where you were acting to protect the child from some harm. They would both be seen as defences reflecting the same basic principle which is that it really is reasonable conduct which should not make you liable for criminal prosecution. That is really what we are talking about here.

The bill as it presently stands is designed to regulate the whole area of discipline, management and control of children and to limit the availability of defences of the sorts that I have just been discussing. It may be correct that the effect of the bill would not be to cut back the defence of restraints if that falls outside the area of management or control, but it seems to me that it really is an aspect of management or control and that it would be covered by this bill. I may be wrong here but off the top of my head, I would have thought it questionable whether or not a teacher would have a defence where he or she is applying force even when applying force for the purpose of restraining or protecting a child. It is not clear to me that the teacher would have a defence to a charge of assault in those circumstances.

CHAIR: On this point, in regard to the matter you are now discussing, is there, to your knowledge, a defence available at common law to assaults relating to restraint as distinct from lawful correction? Is there any doctrine of which you are aware that distinguishes between the two?

Mr ODGERS: Look, I have not researched that as thoroughly as I should have. I suspect that there is, and it may well be that the effect of subsection (4) of the Corbett bill will mean that to the extent that you can advance a defence based on restraint rather than correction, that will continue. It may be that the extreme scenario I described a moment ago would not in fact operate. Within the area of correction, however—that is, essentially, trying to keep kids under control and, as a parent, I guess that is something we all try to do in a civilised manner—our concern is that the bill goes too far, particularly in respect of the definition of a person acting for a parent. I do not know if I have answered your question. I am sorry. I got a bit distracted.

The Hon. P. J. BREEN: No, I think you have answered it. The concern that I have—and you may share it—is that if we are going to deal with this issue of correcting the children's behaviour in relation to the rights and wrongs of what you can and cannot do, we ought to cover the field, as it were, and not leave something out. If that question of the parents' rights of protective restraint is going to stand alone as a separate common law defence, despite the existence of the bill when it becomes an Act, it may well be that this whole exercise is futile.

Mr ODGERS: Yes. I guess that I look at it loosely or generally in the sense that I can see a distinction on the one hand between force that is exercised for punishment and force exercised essentially protect a child from imminent harm. I can see the distinction between those two concepts: It is a meaningful distinction. I would have thought that the latter, protection of the child from imminent harm, would be a defence under the common law. I have no doubt it would be. I would expect that that defence would continue to operate notwithstanding this bill. However, if one is starting to get into the territory of restraint as some kind of euphemism for punishment—"This hurts me more than it hurts you, and it is really for your own good"—that should be regarded as within the rubric of this bill and should not be something that is dealt with elsewhere, and I would not expect that it would be.

CHAIR: I hesitate to trouble you any further. However, I mention that earlier this week I wrote to Professor Patrick Parkinson, who is a professor of law at the University of Sydney, seeking advice regarding various matters in connection with this current inquiry, including the matter I raised with your moment ago, that is, whether restraint can be distinguished from lawful correction under the common law. if it is convenient to you, if you have the time, and if you are able to communicate any further written advice to us in brief form, would you be possibly willing to consider doing that? It seems to me that we might resolve the substantial difficulties that are before the Committee in regard to this legislation.

Mr ODGERS: I am happy to help as best I can. Professor Parkinson is not a criminal lawyer, but nonetheless I am sure that he can research the particular area of law that we are talking about. Unfortunately, I suspect strongly that there is very little authority on it. Applying what I understand to be basic criminal law principles, I will be repeating myself a little but I will repeat what I said a moment ago, I would be confident that, under the criminal law, it would be a defence to apply a force to a child for the purpose of protecting that child from an imminent threat of harm. Indeed, it is analogous to a defence of self-defence, but you are defending the child against another threat. It would be perceived as an aspect of self-defence. Self-defence is available generally, not just defending yourself but defending your property and, indeed, defending your child.

If you are using force against the child for the purposes of protecting that child from something else or, indeed, protecting another child from the one whom you are restraining, then it would fall within that general rubric of defences. It is a quite different thing to what we are dealing with today, which is the use of force for the purposes of "corrections", which is ultimately designed to modify the behaviour, it seems to me, of the child. It is a different sphere of human operation, and it is quite a different concept to defending somebody against a physical threat, which is what the first scenario is. That would be my strong view, that in essence that is the distinction. I do not know whether that is helpful.

CHAIR: Yes, it is helpful.

Mr ODGERS: To the extent that teachers, even under the present regime, are permitted to use force against the child either to protect the child from harming himself or to protect other children from harm, then I have no doubt whatsoever that this bill would not impact on that for the reasons I have given.

CHAIR: An issue that has been explored in the Committee, particularly with child protection specialists, is whether the bill should include an absolute prohibition on the use of physical force against a child under a specified age, and I am thinking in that regard of an age of 12 months or 18 months. For example, a paediatrician, Professor Vimpani from the University of Newcastle, expressed the view to us that no child under 18 months should be struck for any reason. Would you see any difficulty including the provision of that type as an additional paragraph, shall we say, in your proposed subsection (2)?

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

The Hon. J. F. RYAN: Can I extend your nervousness to the submission of the Public Defender who argued to the Committee, at least in his submission—I was no present to hear his evidence—that the law may not be necessary simply because he cannot think of many instances in which clarity in the law was a problem in finalising a successful prosecution? Therefore he inferred from that that further clarity in the law was not necessary because he said the matters that are prosecuted in this area seem to be reasonably clear when the matter comes before court?

Mr ODGERS: My view, and I think the view of the Bar Association, is that he is bringing an unduly narrow perspective to this. I think the primary function of this exercise is not really to improve the law, but rather it is the educative function. To be able to say clearly to members of the community that certain kinds of conduct simply are not acceptable or not permissible is a useful thing to do. As a criminal lawyer I constantly see examples in public life where the flexibility of the law causes concern. To take one good example, the use of force by homeowners to protect themselves against people who break in. My view is that the law is perfectly acceptable at the moment because it is flexible enough to look at the reasonableness of the actions in the circumstances.

That is the present approach in this area as well. I appreciate, however, that people often want more clarity and more certainty, and there are reasons why that is legitimate. I also see that in this area there is an important educative function, and that it is therefore legitimate to give more precision. That is why we supported the bill in general terms. While I agree with Mr Nicholson that within the constraints of the operation of the criminal law people who engage in child abuse will not have a

defence under the common law, and in that sense nothing will change and in that sense there is no real need to change the law, there are other reasons why it should be changed.

The Hon. J. F. RYAN: I will read you another section of his report that I thought was at least worthy of getting a response from you. He said that the problem with this approach, that is the bill, is that the new test by its very design makes certain applications of force a serious criminal offence, even though the force might be universally accepted as reasonable in the circumstances. Under the proposed changes, merely smacking the child's leg with a ruler, even though perfectly reasonable in the circumstances, will found a criminal prosecution if the force was more than negligible or trivial. The public may well feel some disquiet about the practical effects of this once the inevitable prosecutions begin. I am sympathetic to the idea he has, but do you feel that your redrafting of the bill satisfies any concern he might have expressed in that?

Mr ODGERS: No, that example he has given would remain prohibited under my draft. It would still be prohibited. While I appreciate the point he is making, I think it is unlikely that the prosecution would take place in those circumstances, and the price you pay of the risk of prosecution in circumstances that most people would regard as silly is outweighed by the public interest in greater precision as to what is not acceptable.

The Hon. J. F. RYAN: What sort of damage could you do with a ruler that would not be considered to be negligible or trivial?

Mr ODGERS: That is a good point. I think he postulated that it does cause damage that is more than negligible or trivial, and in those circumstances one may well legitimately say that you should not have the defence.

The Hon. P. J. BREEN: If a parent hits someone with a ruler and breaks the person's finger, for example, it seems to me that the parent would not be in such a favourable position under your amendments as a person acting for the parent, because a person acting for a parent might not reasonably contemplate in advance that the ruler would break the child's finger, in which case the defence would be available to them, as I read it.

Mr ODGERS: No. I am sorry, you have misunderstood the way it works. The definition of person acting for a parent means that if a person falls within that definition, and we have the definition there, then they are put in the same position, exactly the same position as a parent. If the parent would not have a defence, this person would not have a defence; if the parent would have a defence, this person would have a defence. They would not be treated differently.

The Hon. P. J. BREEN: What about the parent who breaks the child's finger with the ruler?

Mr ODGERS: No defence, because it is defined not to be reasonable.

The Hon. P. J. BREEN: Even though the parent might say, "I could never imagine in my wildest dreams that I would break the child's finger", that is still no defence?

Mr ODGERS: No defence. The issue might arise as to unanticipated consequences only under (2) (c) where you have used an open hand, you have not applied force to the head or neck, yet it has produced a harm that lasts for more than a short time. My view is that that person, whether it is a parent or a person acting for a parent, should have a defence if it was not likely that that consequence would occur.

The Hon. P. J. BREEN: Would your amendment contemplate that?

Mr ODGERS: That is one of the goals of the draft. The redrafting of (2) (c) is to achieve precisely that result.

The Hon. P. J. BREEN: A parent breaking a child's finger with a ruler would not be in?

Mr ODGERS: No, no protection there because under (2) (a) the parent has used something other than an open hand.

The Hon. J. F. RYAN: But if the parent could argue that what it did was unlikely to have occurred—?

Mr ODGERS: There still would be no protection, no defence.

The Hon. J. F. RYAN: They might be in now, under the common law, might they not?

Mr ODGERS: Yes. Under the common if law a tribunal of fact believes that the application of force was reasonable in the circumstances, then they might have a defence. There is no doubt that the effect of subsection (2) is that there will be circumstances that arise where you lose the defence, even though you might have had it under the common law.

The Hon. P. J. BREEN: It makes it narrower, does it not?

Mr ODGERS: Without doubt. And in the case of teachers and childcare workers it removes it entirely. In the case of the suggestion you put to me earlier about the redrafting of (c) to talk about an assault, it would remove it entirely for everybody.

(The witness withdrew.)

(The Committee adjourned at 3.44 p.m.)