STATUTORY REVIEW

Section 61AA, Crimes Act 1900 (NSW)

Lawful Correction

Criminal Law Review

Department of Justice and Attorney General

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EXECUTIVE SUMMARY

Section 61AA of the *Crimes Act 1900* was introduced to codify the common law defence of 'lawful correction' available to parents, or those acting on their behalf, when disciplining their children through physical force.

The NSW Department of Justice and Attorney General has reviewed the provision in accordance with section 61AA(8) to determine whether the section continues to be appropriate for securing its policy objectives

As part of the review process, key stakeholders were invited to make submissions. Available case law an comparative legislation was also reviewed.

The review main findings and recommendation

(1) There is little case law regarding the use of the defence in practice.

(2) The majority of respondents felt that section 61AA has been successful in meeting its policy objectives.

(3) Several submissions indicated that section 61AA reflects community attitudes and provides guidance on the issue of discipline of children.

It is recommended that section 61AA of the Crimes Act 1900 continue to operate as a defence under New South Wales law.

1. INTRODUCTION

1.1 Terms of reference for the review

This paper reviews section 61AA of the *Crimes Act 1900* - Lawful Correction (see attachment A for legislation). Section 61AA was inserted into the *Crimes Act* on 5 December 2001 after the NSW Parliament passed the Crimes Amendment (Child Protection – Physical Mistreatment) Bill ('the Bill').

Before section 61AA was introduced the defence of 'lawful correction' was a common law defence. Under the common law, the courts determined on a case-by-case basis what would constitute "reasonable correction". The objective of section 61AA was to codify the common law by: (1) defining the circumstances in which the defence of lawful correction can be raised as a defence in any criminal proceedings relating to the use of physical force against a child and (2) providing guidance to the courts as well as to the parents and others in regard to what is not reasonable physical punishment where children are concerned.

The aim of the review is to "determine whether s 61AA's provisions continue to be appropriate for securing the policy objectives of the section"[1].

The policy objectives include:

[1]As stated in section 61AA(8) of the *Crimes Act 1900.*

(1) ensuring that children are protected from unreasonable punishment, without limiting the ability of parents to discipline their children in the appropriate manner;
(2) ensuring that sensible parents have a defence, but that child abusers do not; and
(3) codifying the Government's belief that excessive force is never reasonable, irrespective of whether the person administering the force uses an implement.

1.2 Conduct of the review

This review examines whether the policy objectives of the section are being met. It also considers whether the codifying of the common law position in relation to 'lawful correction' introduced by the Act, has assisted in promoting these objectives.

The review has been conducted by the Department of Justice and Attorney General at the direction of the Attorney General. The review process involved research into the use of the defence in practice and consultation with key stakeholders on the question of whether the policy objectives were being met.

Submissions were sought from key stakeholders. A schedule of people and organisations that made submissions to the review is at Appendix 1.

2. BACKGROUND

2.1 Overview of the principle of 'lawful correction'

The issue of corporal punishment in the home is a difficult and divisive subject. The issue is often susceptible to heated and complex discussions that tend to centre around two main questions: Should children have the same rights as adults? And, how far should the state intervene in what has traditionally been perceived as a "private" domain - parenting and the family home?

For some countries, like Sweden, the answer to the argument is simple; the rights of the child are paramount and must be upheld by the state.

Other countries, including the United Kingdom, Scotland and Canada, have opted for a less interventionist position by defining in law what constitutes "reasonable chastisement" of children or, by providing for the legal defence of "lawful correction". This approach attempts to balance the rights of the child against the rights of a parent (or guardian) to discipline.

The latter approach has attracted some criticism, as it is argued it compromises the rights of the child by allowing for "acceptable punishment" which is out of step with international human rights law and out of date with legislative changes occurring in other jurisdictions.

In contrast, supporters of such an approach in Australia claim that it protects children against "unreasonable punishment" and provides parents and guardians with a guideline as to what would be considered the unacceptable punishment of children. At the same time it allows parents to discipline their child.

The right of parents and carers to use reasonable force to punish their children is one of the few exceptions to the general rule that the application of force to another person is an 'assault' or 'battery' in law and that it constitutes a criminal offence and a civil wrong. The other situations in which ordinary citizens can use force against

another person relate to self-defence, defence of one's property and restraint of another person who is about to harm themselves or another person.

2.2 Comparative legislative provisions in other states and territories

All Australian states and territories legally allow a parent or guardian the right to administer reasonable (that is, not excessive) physical punishment to a child. New South Wales is the only state that has placed legislative limits on physical punishment to a child.

Corporal punishment in government schools has been banned by legislation, regulation or policy in all Australian states and territories with the exception of the Northern Territory.

Northern Territory

The *Criminal Code Act* (NT) Schedule 1, s 27 (p) provides that the application of force is justified (provided it is not unnecessary force and it is not intended and is not such as is likely to cause death or grievous harm) "in the case of a parent or guardian of a child, or a person in the place of such parent or guardian, to discipline, manage or control such child". "Unnecessary force" is defined as "force that the user of such force knows is unnecessary for and disproportionate to the occasion or that an ordinary person, similarly circumstanced to the person using such force, would regard as unnecessary for and disproportionate to the occasion" (Schedule 1, s 1). Section 27 is not directed at force used upon another who may be preventing a parent from using such force on the child (*Carruthers v Griffis* [2000] NTSC 11).

Section 11 of Schedule 1 further states that "A person who may justifiably apply force to a child for the purposes of discipline, management or control may delegate that power either expressly or by implication to another person who has the custody or control of the child either temporarily or permanently". Notably, s 11 provides that where that other person is a schoolteacher of the child, it is simply presumed that they have been delegated the power unless it is expressly withheld. Hence, the NT provision goes beyond the NSW provision by enabling schoolteachers to rely on the defence.

Queensland

The *Criminal Code 1899* (Qld) s280 offers the defence of 'domestic discipline'. Under this defence, "it is lawful for a parent or a person in the place of a parent, or for a schoolteacher or master, to use, by way of correction, discipline, management or control, towards a child or pupil, under the person's care such force as is reasonable under the circumstances." This provision offers far less guidance than the NSW provision as to what factors go towards a determination of 'reasonable' force.

However, where a person in a position equivalent to a parent inflicted an electric shock upon a child by use of a hand-operated generator, that person was found to have used unreasonable force (*R v Griffin* [1997] QCA 115). The provision also goes further than the NSW provision in offering the defence not only to parents and persons in the place of parents, but also to schoolteachers.

Victoria

The defence of reasonable chastisement exists under a common law rule. The common law has placed limits on the right of a parent to inflict reasonable and

moderate corporal punishment on his or her child for the purpose of correcting the child's behaviour. In *R v Terry* [1955] VLR, Sholl J stated (at 116):

> *"There are exceedingly strict limits to that right [to use reasonable force on a child]. In the first place, the punishment must be moderate and reasonable. In the second place, it must have a proper relation to the age, physique and mentality of the child, and in the third place, it must be carried out with a reasonable means or instrument."*

South Australia

The defence of reasonable chastisement is not codified in South Australia. As in Victoria, the common law defence of 'lawful correction' applies. The South Australian Supreme Court confirmed the principles in *R v Terry* in 1996:

> *"The common law permits a parent to chastise his or her child. A parent may chastise his or her child "in a reasonable manner; for this is for the benefit of his education...Moreover, the law recognizes that if the circumstances for correction arise, the punishment must be moderate and reasonable. It cannot be administered "for the gratification of passion or rage"[2] ...If the punishment is immoderate or excessive, or if it is administered for reasons unconnected with the purposes mentioned above, then the punishment is unlawful."[3]*

Parents and other adults who exercise parental control, such as schoolteachers in a private school have the right to administer moderate and reasonable physical punishment to children in their care (although it is not clear if adults who are merely in temporary control of a child, such as baby sitters, are included). However, excessive force may be regarded as assault, which is both a criminal offence and a civil wrong, giving the child the right to compensation for pain and any medical or other expenses incurred as a result.

Western Australia

The Western Australian provision also extends the defence to schoolteachers. As s 257 of the *Criminal Code* (WA) stipulates, "It is lawful for a parent or a person in the place of a parent, or for a schoolmaster or master, to use, by way of correction, towards a child, pupil, or apprentice, under his care, such force as is reasonable under the circumstances".

The defence allows the relevant person to use "such force as is reasonable under the circumstances" but, unlike the NSW provision, no indication is given as to what may or may not be considered as "reasonable" for the purposes of this section.
The defence is also available for persons holding the position of "master", however this term is also undefined, and has not been clarified in reported case law.

Tasmania

In Tasmania, the defence of 'domestic discipline' is available. Section 50 of the *Criminal Code Act 1924* (Tas) states that "It is lawful for a parent or a person in the place of a parent to use, by way of correction, any force towards a child in his or her care that is reasonable in the circumstances." Thus, in Tasmania, the defence does

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[2] *R v Hopley* (1860) 2 F & F 202; 175 ER 1024
[3] *R v Kinloch* (1996) 187 LSJS 124 Lander J at 130

not extend to schoolteachers. Again, however, no definition of "reasonable" force is provided.

2.3 International perspectives

The 'absolutist' approach

In 1979, Sweden was the first country in the world to prohibit all corporal punishment of children. In 1957, the law excusing parents who caused their children minor injury through corporal punishment was removed from the Penal Code. In 1966, the provision allowing, "reprimands" was removed from the Parenthood and Guardianship Code. Corporal punishment was explicitly prohibited in a 1979 amendment to the Parenthood and Guardianship Code.

The precedent set by Sweden has led to 17 other countries following suit and abolishing all forms of corporal punishment of children including the imposition of corporal punishment in the home or by parents. These countries are: Austria, Croatia, Cyprus, Denmark, Finland, Latvia, Norway, Germany, Italy, Israel, Sweden, Iceland, Ukraine, Bulgaria, Hungary, Belgium and Romania, and more recently Greece and New Zealand.

In 2007 New Zealand passed legislation effectively prohibiting corporal punishment of children by parents. Section 59 of the *Crimes Act* 1961 provides for 'parental control' (see Appendix 2), however it explicitly states that:

> *Nothing in subsection (1) or in any rule of common law justifies the use of force for the purpose of correction.*

The move by New Zealand to abolish the defence of lawful punishment was greeted with wide opposition, as well as enormous support. Arguably, strong views on both sides of the debate have not abated, with the New Zealand public going to a citizen initiated referendum on the issue in August 2009. About 56% of eligible voters responded to the question "Should a smack as part of good parental correction be a criminal offence in New Zealand?". Of those, more than 87% supported an over-turning of the so called "anti-smacking' law".

For some of these countries, the move toward an absolutist approach was a staged process. Firstly, corporal punishment in the public sphere was abolished, followed by removal of the defence of reasonable punishment, which was available to the parents. Then a more explicit prohibition was included in civil legislation.

In other countries such as Italy and Israel, corporal punishment in the home was abolished by court decisions when cases involving parental violence against children were brought before the courts.

International human rights law tends to support an 'absolutist' approach. The Convention on the Rights of the Child requires States to protect children from all forms of violence under Article 19 (see Appendix 3). Australia ratified the Convention on the Rights of the Child on 17 December 1990. However, opponents of the absolutist approach argue that 'reasonable force' does not automatically equate to violence, injury or abuse, and that irrespective of this, the determination of what is reasonable is a matter for a jury, not Parliament.

The United Nations Committee on the Rights of the Child adopted a new General Comment on the issue of corporal punishment in 2006. It states:

> *"The right to protection from corporal punishment and other cruel or degrading forms of punishment aims to highlight the obligation of all States parties to move quickly to prohibit and eliminate all corporal punishment and all other cruel or degrading forms of punishment of children and to outline the legislative and other awareness-raising and educational measures that States must take."*[4]

The Committee defines corporal punishment as:

> *"any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light. Most involves hitting ('smacking', 'slapping', 'spanking') children, with the hand or with an implement – whip, stick, belt, shoe, wooden spoon, etc. But it can also involve, for example, kicking, shaking or throwing children, scratching, pinching, burning, scalding or forced ingestion (for example, washing children's mouths out with soap or forcing them to swallow hot spices)."*[5]

The Committee suggests that State parties take all appropriate measures, including of a legislative nature, to prohibit corporal punishment in private schools and at home.

The Committee on the Rights of the Child has expressed concern "that corporal punishment in the home is lawful throughout Australia under the label "reasonable chastisement""[6]. The Committee notes that it is troubled by the failure of Australian legislation to prohibit corporal punishment at home, no matter how light that punishment is. The Committee therefore recommends that Australia should "take appropriate measures to prohibit corporal punishment at home", while also strengthening educational campaigns, with the involvement of children, to promote "positive, non-violent forms of discipline and respect for children's rights, while raising awareness about the negative consequences of corporal punishment."[7]

The 'less interventionist' approach and the defence of "lawful correction"

Canada

The Canadian *Criminal Code [R.S., 1985, c. C-46]* contains a provision similar to s 61AA. Section 43 of the *Criminal Code* provides that:

> *"Every schoolteacher, parent, or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances."*

It is worth noting that the Canadian provision goes further than provisions under Australian law by offering the defence to schoolteachers. However, 'reasonable' force remains undefined.

Scotland

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[4] Committee on the Rights of the Child, General Comment No.8 (2006)

[5] Committee on the Rights of the Child, General Comment No.8 (2006) at para. 11

[6] Committee on the Rights of the Child, Concluding observations: Australia (2005) at para. 35

[7] Committee on the Rights of the Child, Concluding observations on Second and Third Report (2005) (Unedited Version) at paras. 5, 35 and 36

In Scotland, parents may legally exert a certain degree of physical force towards their children. Section 51 of the *Criminal Justice (Scotland) Act 2003* provides for a defence to a charge of assault, based on the claim that the assault was justifiable if the court, having regard to a number of factors[8], is satisfied that the accused is among the category of people entitled by common law to physically punish the relevant child.

Scotland's provision is similar to that in s61AA in several respects. Firstly, the defence does not operate where the punishment to the child occurs via blows to the head, shaking or the use of an implement[9]. Secondly, the Scottish provision, requires that the court consider a range of circumstances in determining whether the punishment was reasonable, including the child's personal characteristics, the nature of what was done to the child, the reason for it, the circumstances in which it took place and whether it was proportionate to the child's behaviour; that is, the court is to consider the whole circumstances of the case[10]. In contrast to the NSW provision, which applies to children under 18, the Scotland provision only applies to children under 16. Any alleged "punishment" of a person aged 16 or older would constitute an assault.

The *Children and Young Persons (Scotland) Act 1937* provides that it is an offence for people over 16 years of age who have parental responsibilities relating to children or who have charge or care over them, to treat that child with cruelty (including 'wilful assault')[11]. However, the same section also provides that the rights of any parent, teacher, or other person having the lawful control or charge of a child or young person to administer physical punishment to the child are not affected by the offence provision[12].

Scottish case law provides that parents (that is, people with parental responsibilities) are entitled to use moderate force for the purpose of disciplining children. Additionally, guardians and other persons who have a close connection with the child, and who have care and control of the child (for example, step-parents), are entitled to physically punish the child. Where the accused did not possess such a right, the prosecution must only prove that the assault occurred.

United Kingdom

Section 58 of the *Children Act 2004* (United Kingdom) relates to 'reasonable punishment'. Under that section "battery of a child cannot be justified on the ground that it constituted reasonable punishment"[13], where that battery was in relation to either wounding and causing grievous bodily harm[14], assault occasioning actual bodily harm[15], or cruelty to persons under 16[16] each of which are defined under particular Acts mentioned in s 58(2).

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[8] Including, for example, the nature of what was done, the reason for it, the circumstances in which it took place, its duration and frequency, and any effect (whether physical or mental) which it has been shown to have had on the child (s51(1)(a)(b)(c)).
[9] *Criminal Justice (Scotland) Act 2003 s 51*
[10] *Criminal Justice (Scotland) Act 2003 s 51 (1)(a)(b)(c) and (2)*
[11] s 12
[12] s 12(7)
[13] *Children Act 2004* (United Kingdom) s 58 (1)
[14] *Children Act 2004* (United Kingdom) s 58 (2)(a)
[15] *Children Act 2004* (United Kingdom) s 58 (2)(b)
[16] *Children Act 2004* (United Kingdom) s 58 (2)(c)

Northern Ireland has virtually identical provisions in s 2 of the *Law Reform (Miscellaneous Provisions) (Northern Ireland) Order 2006*. Neither the UK nor the Northern Ireland provisions give any indication of what factors may be relevant in determining whether more borderline forms of punishment may be viewed as "reasonable".

2.4 NSW and the defence of 'lawful correction'

The passage of section 61AA through parliament

On 5 December 2001, the Crimes Amendment (Child Protection – Physical Mistreatment) Bill ('the Bill') was assented to by the NSW Parliament. But not without its tribulations, as Member of Parliament David Campbell noted, "The bill has had a long and tortuous path."[17]

The Bill's passage through Parliament was as follows:

1. May 2000: Alan Corbett introduced the Bill into Parliament as the Crimes Amendment (Child Protection-Excessive Punishment) Bill.
2. Bill referred to Legislative Council Standing Committee on Law and Justice.
3. October 2000: Legislative Council Standing Committee on Law and Justice released its report on the Bill: it unanimously recommended support for the Bill subject to minor modification.
4. Scrutiny, debate and amendment of original Bill – modifications recommended by Committee were made by the time the Bill was presented to Legislative Assembly.
5. 21 June 2001 and 28 November 2001: Second Reading speeches.
6. Motion agreed to and Bill passed through remaining stages.
7. Bill assented to on 5 December 2001.
8. The Bill was then incorporated into the *Crimes Act 1900* (NSW) as s 61AA.

Policy considerations

The Attorney General, Bob Debus, identified the policy considerations underpinning the provision in his Second Reading speech. Firstly, Mr Debus stated that broadly, the provision seeks "to ensure that children are protected from unreasonable punishment, without limiting the ability of parents to discipline their children in the appropriate manner" by clarifying the law on the use of excessive physical force to discipline, manage or control a child.[18] Underlying this objective is the Government's view that "children should not be immune from ordinary parental discipline when the situation requires it."[19]

Secondly, the provision aims to ensure that "sensible parents"[20] will have a valid defence, but child abusers will not. Hence, the provision outlines the limitations upon physical mistreatment of children and upon the use of excessive force. This is achieved through the provision's codification of the circumstances in which the

[17] New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 November 2001, 19110 David Campbell.
[18] New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 November 2001, 15025 Bob Debus.
[19] New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 November 2001, 19112 Bob Debus.
[20] New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 November 2001, 15026 Bob Debus.

common law defence of "lawful correction" of children can be raised by parents, and those acting on behalf of parents, in criminal proceedings.[21]

Thirdly, in stating that the use of physical force must be "reasonable"[22] in the circumstances, the provision codifies a further policy of the Government, namely the belief that "excessive force is never reasonable, irrespective of whether the person administering the force uses an implement."[23] This aim emerges from the Government's conviction that unreasonable force is the element that most often causes injuries to children.[24] By bringing *all* forms of force within the ambit of the provision, the Government has extended the applicability of the provision beyond force utilising sticks and belts, as had been referred to in an early version of the Bill.

Parliamentary debate on the provision

In its passage through the Legislative Assembly, this provision generated considerable, and at times heated, debate. To obtain a cross-section of the arguments raised, it is useful to consider the salient viewpoints of selected Members of Parliament.

At one end of the spectrum, Stephen O'Doherty gave the proposed provision his full support. Expressing his personal views, and not those of the Liberal Party to which he belongs, Mr O'Doherty grounded his arguments in his central belief that "society starts to break down when children grow up on an undisciplined culture."[25] To this end, he asserted that if parents do not discipline their children, so as to ensure the children are raised with a certain set of values and beliefs, then parents have failed in their duty as parents.[26]

Importantly, Mr O'Doherty noted that in its original form, the legislation was of great concern to many community groups, especially Christian organisations, who feared that the provision demonstrated State intervention in the private sphere beyond a reasonable point. Mr O'Doherty states that even he would not have supported the Bill in its original form[27] but following amendments gave the Bill his full support, arguing that the provision's requirement that the application of force must be "reasonable" was probably "a helpful way of describing in law what we would all, as parents and legislators, think should be the case in commonsense practice."[28] Further, for Mr O'Doherty, the provision's "reasonableness" requirement did not go beyond the existing commonsense practice of the courts in determining matters of this nature.[29]

David Campbell, of the Government, supported the provision based on reasoning similar to that of Mr O'Doherty. In Mr Campbell's opinion, it was "commonsense" to

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[21] New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 November 2001, 15025 Bob Debus.
[22] *Crimes Act 1900* (NSW), s 61AA (1)(a).
[23] New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 November 2001, 15025 Bob Debus.
[24] New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 November 2001, 19112 Bob Debus.
[25] New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 November 2001,19107 Stephen O'Doherty
[26] New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 November 2001,19107 Stephen O'Doherty.
[27] New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 November 2001,19107 Stephen O'Doherty.
[28] New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 November 2001,19108 Stephen O'Doherty.
[29] New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 November 2001,19108 Stephen O'Doherty.

codify these principles so as to establish "a reasonable community standard that people can understand."[30] Notably, Mr Campbell considered the submissions received by the Legislative Council Standing Committee on Law and Justice in its examination of the Bill. He stressed that "the majority of submissions received by the committee and the evidence heard supported the Bill", and further, that "every witness or submission writer from a medical background supported the bill."[31] Mr Campbell relied on evidence presented to the Committee, which stated that the most serious injuries to children arriving at hospitals are caused by so-called discipline that has gone wrong. Other bases for Mr Campbell's support of the provision were that the Bill did not remove any other possible defence to an assault charge, and nor did it criminalise the use of force to restrain or control a child.[32]

At the other end of the spectrum, Andrew Stoner vehemently opposed the provision in the Bill, arguing that it was "fraught with danger"[33] because it could potentially open the way for accusations of "unreasonable levels of discipline, further government interference in parenting, and the continuation of regulation over social and family issues." Mr Stoner argued that there were already laws in place that protect children from physical abuse and that the Bill "is entirely unnecessary"[34]. He emphasised that he supported "appropriate discipline", but that he was concerned about the wording of s 61AA(2)(b), asserting that the terms 'harm' and 'short period' were troublingly ambiguous.[35] From this perspective, Mr Stoner argued that the provision could lead to a blurring of the distinction between 'discipline' and 'child abuse'.[36]

Dr Elizabeth Kernohan also raised doubt regarding the wording of the provision. Noting that s 61AA defines child as being "a person under 18 years of age", she argued that because so many 16 and 17 year old males are "often more than six feet tall and may weigh 12 stone",[37] they should not be regarded as children. Consequently, Dr Kernohan suggested, the Bill's definition of 'child' should be revised to include, for example, only persons up to 13 years of age.[38]

3. POLICY OBJECTIVES OF SECTION 61AA

Section 61AA of the Crimes Act 1900 provides a legal defence of lawful correction to what would normally constitute an assault. The section codifies the common law, providing that the defence is available only when the "the physical force was applied by the parent of the child or by a person acting for a parent of the child"[39], and "the

[30] New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 November 2001, 19110 David Campbell.
[31] New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 November 2001, 19110 David Campbell.
[32] New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 November 2001, 19110 David Campbell.
[33] New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 November 2001, 19110 Andrew Stoner.
[34] New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 November 2001, 19110 Andrew Stoner.
[35] New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 November 2001, 19111 Andrew Stoner.
[36] New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 November 2001, 19111 Andrew Stoner.
[37] New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 November 2001, 19111 Elizabeth Kernohan.
[38] New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 November 2001, 19112 Elizabeth Kernohan.
[39] Crimes Act 1900 s61AA(1)

application of that physical force was reasonable having regard to the age, health, maturity or other characteristics of the child, the nature of the alleged misbehaviour or other circumstances"[40].

The policy objectives are to:

1 Ensure that children are protected from unreasonable punishment, without limiting the ability of parents to discipline their children in the appropriate manner
2 Ensure that sensible parents have a defence, but that child abusers do not.
3 Codify the Government's belief that excessive force is never reasonable, irrespective of whether the person administering the force uses an implement.

Section 61AA includes provision for a review[41]. Submissions were invited as to whether the provision is meeting its policy objectives.

4. SUBMISSIONS TO THE REVIEW

Ten submissions were received in relation to the review of section 61AA. The submissions received provided varied perspectives on the impact of section 61AA, however most stated that the section was effective in meeting the policy objectives.

Two submissions raised concerns regarding the provision being in conflict with Australia's obligations under the UN Convention on the Rights of the Child, and suggested that the provision blurred the line between discipline and abuse[42].

Several submissions noted that the section was of benefit to their staff in a practical way. For example, the Ministry for Police noted that there was anecdotal evidence suggesting that operational police were considering s 61AA when determining whether there is sufficient evidence to justify commencement of proceedings. Similarly, the NSW Department of Community Services noted that the provisions outlined in s 61AA might provide some guidance to staff in determining whether a referral to Joint Investigation Response Teams was appropriate.

There is limited evidence of the defence being used in practice since its inclusion in the Act. Indeed, some submissions contend that the fact that the defence has not been litigated since its inclusion in the Act suggests that it is meeting its policy objectives[43] and supports the assertion that the section reflects community attitudes[44].

A more detailed discussion of respondents' submissions in relation to section 61AA is set out below.

5. DISCUSSION

Policy Objective 1: Ensuring that children are protected from unreasonable punishment, without limiting the ability of parents to discipline their children in the appropriate manner

[40] Crimes Act 1900 s 61AA(1)
[41] Crimes Act 1900 s 61AA(8)
[42] National Children's and Youth Law Centre submission, 23 November 2006; and Human Rights and Equal Opportunity Commission submission, 24 November 2006
[43] Legal Aid New South Wales submission 21 November 2006; and NSW Commission for Children and Young People submission 24 November 2006
[44] Public Defenders submission 5 December 2006

In its submission, the Department of Corrective Services supported retention of section 61AA, but suggested that the provision should expand what is considered "unreasonable force" by specifying that the use of an implement or a closed fist on any part of a child's body constitutes unlawful discipline of a child and would not be considered "reasonable" force.

Both HREOC and the National Youth Law Centre expressed concern that the provision failed to meet Australia's obligations under the *UN Convention on the Rights of the Child*, in particular Article 19. In HREOC's view, the Convention does not leave room for any level of legalised violence and that the policy objectives in relation to 'appropriate' discipline should be interpreted to include only non-violent disciplinary techniques and excludes discipline inflicting physical or mental harm.

The National Youth Law Centre also raised concerns about the section affording less protection against violence to children under the law than is provided to adults; suggested the provision was a form of age discrimination and that it permits a practice associated with adverse health and developmental outcomes. Finally, they suggest that it is open to varying interpretation, ensuring that the line between discipline and abuse is blurred.

In contrast, the Public Defenders Office was of the opinion that the section has value in defining the limits of the common law defence of lawful correction, and noted that legal controversy about placing limits on parental discipline has not been an issue since the implementation of the law. The NSW Commission for Children and Young People echoed this position, noting that the section "sends a clear message to the community that unreasonable punishment of children is not acceptable".

Policy Objective 2: Ensuring that sensible parents have a defence, but that child abusers do not.

There is limited reported case law on use of the defence of lawful correction. A search of caselaw databases returned one matter in which the defence was raised[45]. In this case a mother and stepfather were tried for failing to provide necessary food and unlawful imprisonment of their daughter (step-daughter). The jury acquitted them of count one (failing to provide necessary food), but found them guilty of count two. The conviction was appealed. On appeal the appellants argued that his Honour failed to provide direction to the jury about the law regarding parental discipline.

The Court of Criminal Appeal found it was not the type of case in which such a direction was necessary, because the duration of the alleged detention of 22 months placed the crime out of the "realms of reasonable parental discipline"[para 65]. The Court also noted that such a direction would have been "distracting and confusing for the jury".

The lack of practical application of the defence was also apparent in responses to the review. The Director of Public Prosecutions and Legal Aid indicated in their submissions that they were not aware of the defence being used in practice. Legal Aid suggested that while the reasons for this may vary, this suggested that there was some support for the assumption that the section was meeting its' policy objectives. The Ministry for Police noted two local court matters that did involve section 61AA. The first matter involved a carer charged in relation to biting a child on the arm, leaving a mark. The defence argued lawful correction, based on the accused

[45] JCS v Regina, JMS v Regina, Regina v JCS, Regina v JMS [2006] NSW CCA 221

statement that she bit the child because she wanted to teach her not to bite. The prosecution rebutted the defence in this instance.

The second matter involved an accused charged with using a belt to strike his 11 year old son on the hands and leg after an argument, leaving a red welt visible to police. The child had a history of behavioural problems and suffered from ADHD. The prosecution accepted a plea of guilty to common assault on the basis that the overall criminality of the accused was properly reflected by this charge. However, the prosecutor noted that while considering the defence of s61AA, he found it difficult to assess because of the requirement to impose one's own values and the provision's silence around the use of implements. He also indicated that while the section provides "some assistance, it is particularly limited in providing clear guidelines as to what punishment is appropriate".

However, the Ministry for Police also noted that there was anecdotal evidence that operational police were considering the defence when determining whether to commence proceedings against a person that, when combined with the rare argument on the provision in court, could infer that the provision is meeting its policy objective.

The submission from the Office of Public Defenders indicated that the defence has not been used in any reported cases in NSW, nor considered in any reported cases.

As suggested by several respondents, the fact that section 61AA has rarely been used in practice does suggest that it is meeting this policy objective by providing some level of guidance to parents and investigators on what is 'acceptable' in terms of discipline of children. While some respondents supported amendment of the section to clarify this further, the lack of practical application of the section does not support the need for this at this time.

Policy Objective 3: Codifying the Government's belief that excessive force is never reasonable, irrespective of whether the person administering the force uses an implement.

As previously noted, this objective is based on the Government's conviction that unreasonable force is the element that most often causes injuries to children.[46]

As previously noted, HREOC and the National Youth Law Centre believe that the provision fails to protect children from excessive force because essentially the provision provides a "reasonable excuse" for parents to physically discipline their children, thus blurring the line between discipline and abuse.

However, the majority of respondents believe the provision successfully codifies the belief that excessive force is never reasonable. While the submissions from the Ministry for Police and Department of Corrective Services indicate that further clarity would be helpful, both support the retention of the provision. This does suggest that the provision goes at least part of the way toward meeting this policy objective.

Other submissions support the assertion that the provision meets this policy objective because it "sends a clear message to the community that unreasonable punishment of children is not acceptable"[47]. This is in line with the Government's position, noted

[46] New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 November 2001, 19112 Bob Debus.

[47] NSW Commission for Children and Young People submission 24 November 2006

by Mr Campbell during the Bill's passage through Parliament, that the provision was "commonsense" and would establish "a reasonable community standard that people can understand."[48]

The submission from Legal Aid indicated that the absence of the use of the defence "can support the assumption that the policy objectives of the section appear to have been achieved" and that the Commission "considers the section provides an adequate balance between public expectations in relation to the issue of reasonable punishment and the need to ensure that children are protected from parental abuse". Similarly, the submission from the Office of Public Defenders also indicated that the section "has value in defining the limits of the common law defence of lawful correction", while noting "it clearly has not been an area of legal controversy since its implementation."[49]

6. CONCLUSION

The incorporation of section 61AA into the *Crimes Act 1900* codifies the defence of 'lawful correction' that previously existed under the common law in NSW.

The majority of submissions to the review were supportive of the provision, noting that it provided some guidance about what constitutes 'reasonable' discipline of children by parents or those acting with that authority. While acknowledging that there were two submissions that were critical of the provision and argued that it should be repealed, the limited practical application of the defence indicates that the provision is not as contentious as these two submissions suggest. Indeed, this position was noted by several respondents who observed the lack of use of the defence in practice as being indicative that the provision reflects community attitudes and is meeting its policy objectives.

It is therefore considered that section 61AA is not in need of repeal or amendment at this time.

7. RECOMMENDATION

It is recommended that section 61AA of the Crimes Act 1900 continue to operate as a defence under New South Wales law.

[48] New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 November 2001, 19110 David Campbell.
[49] Public Defenders submission 5 December 2006

APPENDIX 1

Schedule of people and organisations that have made submissions to the review of Section 61AA

Human Rights and Equal Opportunity Commission

Legal Aid New South Wales

Ministry for Police

National Children's and Youth Law Centre

NSW Bar Association

NSW Commission for Children and Young People

NSW Department of Community Services

NSW Department of Corrective Services

NSW Director of Public Prosecutions

Office of Public Defenders

APPENDIX 2

New Zealand: Crimes Act 1961

Section 59: Parental control

(1) Every parent of a child and every person in the place of a parent of the child is justified in using force if the force used is reasonable in the circumstances and is for the purpose of:

(a) preventing or minimising harm to the child or another person; or
(b) preventing the child from engaging or continuing to engage in conduct that amounts to a criminal offence; or
(c) preventing the child from engaging or continuing to engage in offensive or disruptive behaviour; or
(d) performing the normal daily tasks that are incidental to good care and parenting.

(2) Nothing in subsection (1) or in any rule of common law justifies the use of force for the purpose of correction.

(3) Subsection (2) prevails over subsection (1).

(4) To avoid doubt, it is affirmed that the Police have the discretion not to prosecute complaints against a parent of a child or person in the place of a parent of a child in relation to an offence involving the use of force against a child, where the offence is considered to be so inconsequential that there is no public interest in proceeding with a prosecution.

APPENDIX 3

Convention on the Rights of the Child

Article 19

1.States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.