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**Crimes Amendment
(Child Protection – Excessive
Punishment) Bill 2000:
Background and Commentary**

by

Gareth Griffith

Briefing Paper No 9/2000

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EXECUTIVE SUMMARY

This paper presents a commentary on the Crimes Amendment (Child Protection – Excessive Punishment) Bill 2000, which received its Second Reading speech in the NSW Legislative Council on 5 May 2000 and was subsequently referred to the Standing Committee on Law and Justice for inquiry and report. The object of the Bill is not to abolish the common law right of parents to physically punish their children altogether. Instead, it seeks to assist parents and the courts by defining what does not constitute reasonable lawful correction.

The paper's main findings are as follows:

- many issues have been raised by the Bill, not least the philosophical differences that exist about the extent to which the state may legitimately intervene in family life (page 1);
- where the conflicting rights of parents and children are at issue, it is necessary to consider the underlying principles which inform the law (page 2);
- there has been a gradual reduction of the once nearly absolute rights and authority of fathers over children. In particular, it is against the background of the rise of the child-centred welfare principle and changing community standards generally that the Bill's proposals should be considered (page 4);
- in NSW the common law defence of lawful correction applies where an adult who is a parent or a person in loco parentis (acting in the role of a parent) is charged with a statutory offence of assault under the *Crimes Act 1900*. For practical purposes, these statutory assaults can be said to have superseded the offences of assault at common law upon which they are founded conceptually (page 4). The defence can also be presumed to apply in relation to offences committed under section 227 of the *Children and Young Persons (Care and Protection) Act 1998* (page 12);
- the distinction made at common law between assault and battery remains relevant. Common law assault consists in acting intentionally or (it seems) recklessly so as to put a person in fear of the immediate application of unwanted physical force against his or her person. A battery, on the other hand, consists in the intentional or reckless application of force to the person of another without consent (page 6);
- the defence of lawful correction exists at common law in NSW, as it does in Victoria, South Australia and the ACT. In broad terms, the defence says that a parent or a person acting in a parental role (*in loco parentis*) can administer moderate corporal punishment to the child if that course is reasonable in all the circumstances (page 6);
- since 1995 a teacher in NSW can no longer rely on the defence of lawful correction where he or she resorts to the use of physical force 'to punish or correct' a child (page 10);

- part of the difficulty in assessing the operation of the defence of lawful correction is that in practice charges of assault in the context of correcting a child rarely come before the courts. Indeed there appear to be no reported cases in recent times in NSW; nor is any relevant statistical evidence available to indicate how often these cases appear before the lower courts (page 13);
- in January 2000 the UK Department of Health released a consultation document canvassing options for reform along similar lines to those proposed under the Bill titled, *Protecting Children, Supporting Parents* (page 14); in February 2000 the Scottish Executive Justice Department issued for the same purpose *The Physical Punishment of Children in Scotland: A Consultation* (page 17). In Australia, a similar approach was adopted in the Model Criminal Code Officers Committee's 1998 report on *Non Fatal Offences Against the Person* (page 21);
- a number of questions can be raised concerning the Bill's drafting with a view to asking how well it achieves its stated intention of clarifying what is a complex area of the law (pages 22-36);
- by defining 'child' as 'a person under 18 years of age' the Bill does not seek to set either a lower or upper age limit within the 0-18 range in relation to which the defence of lawful correction would not apply at all (page 35);
- it has been said of the defence of lawful correction that 'This is an emotional issue over which there are keenly felt opposing positions'. This was reflected in the Second Reading debate for the Bill (pages 37-42); and
- it can be asked what impact the Bill is likely to have? Should it be viewed as 'a way of fighting a worrying rise in what should only be described as assault'? Or is it more likely to operate not so much as a law that will be employed on a regular basis to prevent abuse, but as something like a standard by which parental practice may be guided? (pages 42-43)

1. INTRODUCTION

It is a truism to say the corporal punishment of children is both a complex and controversial subject. The questions it raises are philosophical and practical in nature. These range from issues relevant to the protection of human rights in domestic and international law, specifically the question of whether children should have the same rights as adults, to the difficult matter of how far the state should intrude into what has traditionally been seen as the largely private domain of home life. For those who oppose corporal punishment in any form the answers are easy enough and several countries, including those in Scandinavia, have taken an absolutist approach by prohibiting all physical punishment of children. More problematic, at least from a drafting standpoint, is the option of attempting to establish what constitutes the reasonable chastisement of children. An approach of this kind, which deals not in absolutes but in judgments of degree, would seek to clarify and possibly amend the law by expressing in legislation the kinds of corporal punishment which are unacceptable to the community.

This is precisely the approach which is under consideration at present in several jurisdictions. In January 2000 the UK Department of Health released a consultation document canvassing options for reform along these lines titled, *Protecting Children, Supporting Parents*;¹ in February 2000 the Scottish Executive Justice Department issued for the same purpose *The Physical Punishment of Children in Scotland: A Consultation*.² In Australia, a similar approach was adopted in the Model Criminal Code Officers Committee's 1998 report on *Non Fatal Offences Against the Person*.³

Not prohibiting the physical punishment of children altogether but defining, instead, what level of physical force is excessive and therefore unacceptable is also the approach contemplated under the Crimes Amendment (Child Protection - Excessive Punishment) Bill 2000 (henceforth, the **Child Protection - Excessive Punishment Bill**). The Bill received its Second Reading speech in the NSW Legislative Council on 5 May 2000. Like its predecessor, the Crimes Amendment (Child Punishment) Bill 1997, this Private Member's Bill was sponsored by the Hon AG Corbett MLC. Neither the Government nor the Opposition indicated support for the Child Protection - Excessive Punishment Bill. However, after a lengthy Second Reading debate in which the importance and complexities of the issues involved were recognised, on 2 June 2000 the Legislative Council agreed to refer the Child Protection - Excessive Punishment Bill to the Standing Committee on Law

¹ UK Department of Health, *Protecting Children, Supporting Parents: A Consultation Document on the Physical Punishment of Children*, 18 January 2000. Note that the consultation paper covers only England. Separate consultations are to occur in Wales and Northern Ireland; in Scotland the issue falls within the legislative competence of the Scottish Parliament.

² The Scottish Executive Justice Department, *The Physical Punishment of Children in Scotland: A Consultation*, February 2000.

³ Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code, Chapter 5, Non Fatal Offences Against the Person - Report*, September 1998. (Hereafter, **Model Criminal Code Officers Committee Report 1998**)

and Justice for inquiry and report within five months.

This paper presents a commentary on the Child Protection - Excessive Punishment Bill and seeks to place it in the context of its relevant legal background. It begins with an overview of the present legal position in NSW and a discussion of developments in other comparable jurisdictions. This is followed by an analysis of the Bill and, afterwards, by consideration of the arguments raised in the course of the Second Reading debate. Note that this paper uses the terms 'lawful correction' and 'reasonable chastisement' interchangeably. Note, too, that it does not canvass the arguments for and against the abolition of all corporal punishment.

2.0 THE CURRENT LAW IN NSW – ASSAULT AND THE DEFENCE OF LAWFUL CORRECTION

2.1 Lawful correction – background and rationale

In order to understand the Child Protection - Excessive Punishment Bill for analytical purposes an overview of the present law must first be presented, notably the common law defence of lawful correction and its operation in respect to the offence of assault. In particular, as Lord Scarman recognised in *Gillick*, the leading authority on the conflict between the rights of parents and children, it is necessary to consider the underlying principle governing this difficult area of the law.⁴

Historically, the defence of lawful correction or 'reasonable chastisement' at common law dates back to a judgment in 1860 which explicitly recognised a right of parents to administer physical punishment to their children, but established for the first time that such punishment must be 'moderate and reasonable'.⁵ In that case Cockburn CJ said that a parent, or a person such as a teacher who has the parental authority delegated to him, has a right to administer moderate and reasonable punishment '*for the purpose of correcting what is evil in the child*' (emphasis added). This, it might be supposed, expressed the underlying principle of the law in a way that was consistent with the values prevalent in the Victorian age.⁶

⁴ *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112 at 183. The case involved the right of parents to consent to the medical treatment of a child, in this case the giving of contraceptive advice to a girl under 16 years of age. Among other things, it was held that a girl under 16 years of age has the legal capacity to consent to medical examination and treatment, including contraceptive treatment, if she has sufficient maturity and intelligence to understand the nature and implications of the proposed treatment.

⁵ *R v Hopley* (1860) 2 F&F 202.

⁶ In the nineteenth century the rights of servants, apprentices and possibly wives were also limited in this way under the common law. Now the defence of lawful correction is peculiar to children - P Gillies, *Criminal Law*, 4th Edition, LBC Information Services 1997, p 331. For a discussion of these changing standards see – R Ulrich, 'Physical discipline in the home' (1994) *Auckland University Law Review* 851 at 855-857.

However, the origins of the defence of lawful correction can be traced back at least to the eighteenth century when Blackstone, in his *Commentaries on the Laws of England* (1765), wrote that a parent has sufficient power ‘to keep the child in order and obedience’. He continued: ‘A parent may lawfully correct the child, being under age, in a reasonable manner; for this is for the benefit of his education’. This power of parents over their children, Blackstone reasoned, ‘derived’ from the duties parents have to maintain and educate their children, ‘partly to enable the parent more effectually to perform his duty, and partly as a recompense for his care and trouble in the faithful discharge of it’.⁷ In *Gillick*, Lord Scarman discussed Blackstone’s views in some detail and, while not agreeing with them in every respect, he accepted that Blackstone provides a ‘valuable insight into the principle...of the common law’ which holds that the power a parent has over a child ‘exists primarily to enable the parent to discharge his duty of maintenance, protection, and education until [the child] reaches such an age as to be able to look after himself and make his own decisions’.⁸ Parental power is contingent, therefore, enduring ‘only so long as it is needed for the protection of the child’; it yields to the child’s right to make his or her own decisions when the child is ‘of an age of sufficient discretion to enable him or her to exercise a wise choice in his or her own interests’.⁹

Elaborating on this line of reasoning, a more modern formulation of the rationale behind the ‘power’ of reasonable chastisement which parents (and persons in the place of a parent) have over children can be presented. The power derives, it can be said, from the argument that lawful correction is a justified limit on the principle of the autonomy and inviolability of the individual. That principle, which is fundamental to the common law, guarantees a person’s physical integrity, that is, the right to protection from all forms of inter-personal violence.¹⁰ The argument, however, is that the guarantee is qualified in the case of children on the ground that their autonomous decision making powers are underdeveloped, with the result that their actions can be contrary to their true interests and possibly harmful to others, as well as to property. In other words, children are not fully autonomous moral agents. Thus, in order to manage, discipline and control children, in the interests of their own welfare as well as for the public good, the common law accepts that the physical integrity

⁷ W Blackstone, *The Commentaries on the Laws of England*, Vol 1, 4th Edition, John Murray 1876, pp 426-427.

⁸ *Gillick*, n 4 at 185.

⁹ *Ibid* at 188. Judicial opinion in Australia has supported this view – *Secretary, Department of Health and Community Services v JWB and SMB (Marion’s case)* (1992) 175 CLR 218 at 237 (Mason CJ, Dawson, Toohey and Gaudron JJ); at 290-294 (Dean J); and at 314-315 (McHugh J). The case involved the right of parents to authorise the sterilisation of their child, in this case an intellectually disabled 14 year old girl. Among other things, it was found that the decision to sterilise an intellectually disabled minor falls outside the ordinary scope of parental powers. It was further held that the function of a court when asked to authorise sterilisation is to decide whether, in the circumstances of the case, it is in the best interests of the child.

¹⁰ *Marion’s case*, n 9 at 265-266 (Brennan J). Brennan J reviewed the right to the integrity of the person.

of children may be moderately impaired in certain circumstances. Just as the law establishes special protections for children, thereby recognising their vulnerability, so, according to this argument, does it restrict their rights in a way that is consistent with their capacities as moral agents. That, at least, is one formulation of the principle which underlies the defence of lawful correction.¹¹

Underlying this argument is the assumption that parents will act in the best interests of their children. Subject to certain important qualifications, the law gives considerable autonomy to parents in this regard. However, the powers of parents are not unlimited and developments in the law over the past century or so have tended to reduce those powers. That tendency was summed up by the Australian Law Reform Commission as follows:

There has been a gradual reduction of the once nearly absolute rights and authority of fathers over children, with the recognition of the equality rights of women, the growing autonomy of children, the gradual assumption by the law of a more protective role over children and the increasing priority given to the welfare principle.¹²

It is against this background, notably the rise of the welfare principle,¹³ which takes as its focus the best interests of the child, along with the developing case for children's rights, that the proposals of the Child Protection - Excessive Punishment Bill are to be considered.

2.2 Assault under the Crimes Act 1900

In NSW the common law defence of lawful correction applies where an adult who is a parent or a person in loco parentis (acting in the role of a parent) is charged with a statutory offence of assault under the *Crimes Act 1900*. For practical purposes, these statutory assaults can be said to have superseded the offences of assault at common law upon which they are founded conceptually. All of the non-fatal 'personal violence offences' under the Act – including malicious wounding or the infliction of grievous bodily harm¹⁴ and various sexual and indecent assault offences - can be said to comprise of a basic assault plus some

¹¹ Other justifications for the lawful correction defence are considered in – R Ludbrook, 'The child's right to bodily integrity' (1995) 7 *Current Issues in Criminal Law* 123 at 126-127; J Cashmore and N de Haas, *Legal and Social Aspects of the Physical Punishment of Children*, Discussion Paper, Commonwealth Department of Human Services and Health, May 1995, pp 7-10 and pp 77-78.

¹² Australian Law Reform Commission, *Multiculturalism and the Law: Report No 57*, 1992, p 114.

¹³ This can be said to apply to child protection and welfare legislation generally. For example, in the *Children (Protection and Parental Responsibility) Act 1997* (NSW) the courts are directed to consider the 'best interests of the child'. – section 6 (1).

¹⁴ Section 35, *Crimes Act 1900*. Grievous bodily harm is defined in section 4 to include 'any permanent or serious disfiguring of the person'.

other element(s).¹⁵

Most relevant in the present context, however, are sections 59 and 61 of the Crimes Act. Section 59 deals with a form of aggravated assault ‘occasioning actual bodily harm’, which carries a maximum penalty of imprisonment for 5 years. The term ‘bodily harm’ is given its ordinary meaning by the courts and includes any hurt or injury calculated to interfere with the health or comfort of the victim, but such hurt or injury need not be permanent but must be more than merely transient and trifling.¹⁶ The phrase ‘actual bodily harm’ is capable of including psychiatric injury but does not include emotions such as fear or panic, nor states of mind that were not themselves evidence of some identifiable clinical condition.¹⁷ In terms of the seriousness of the injury that might be inflicted by an assault on a child, ‘actual bodily harm’ is something less than either ‘grievous bodily harm’ or

¹⁸

Section 61 deals with what is called ‘common assault’, not occasioning actual bodily harm, which carries a maximum penalty of imprisonment for 2 years.¹⁹ Ordinarily, however, common assaults are dealt with summarily by a Local Court, in which case the maximum penalty is 12 months imprisonment or 20 penalty units (\$2,200), or both.²⁰

In this context, one issue to consider in relation to the Child Protection - Excessive Punishment Bill is whether the defence of lawful correction might apply only when the

¹⁵ D Brown, D Farrier and D Weisbrot, *Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales*, Vol 2, 2nd Edition, The Federation Press 1996, p 781.

¹⁶ *R v Donovan* [1934] 2 KB 498 at 509; *R v Brown* [1993] 2 WLR 556 at 559. The stepfather of the child in *A v the United Kingdom* [1998] EHRLR 82 was charged with assault occasioning actual bodily harm. The case is discussed in a later section of this paper.

¹⁷ *R v Chan-Fook* [1994] 1 WLR 691 at 696; *R v Lardner*, CCA(NSW), 10 September 1998, unreported, BC9804715; (1998) 5 *Criminal Law News* 69. In the latter case a man entered a woman’s bedroom at night, having first broken into her home, and woke her by shaking her. He struck a blow to her face which knocked her back onto the mattress, then left. She was said by a psychologist to be suffering from ‘nervous shock’ which included difficulty in sleeping, nightmares, memory loss, anxiety, fear and emotional outbursts. The Court held that these constituted emotions and reactions and did not establish a psychiatric condition and, accordingly, did not constitute actual bodily harm.

¹⁸ “Actual bodily harm’ is something less than ‘grievous bodily harm’, which requires really serious physical injury: *DPP v Smith* [1961] 1 AC 280 at 334 and ‘wounding’, which requires a breaking of the skin: *R v Devine* (1982) 8 A Criminal R 45.

¹⁹ The proposed new section 61AA under the Bill would follow immediately after that section. For a commentary on the operation of these sections see – R Howie and P Johnson, *Annotated Criminal Legislation New South Wales*, Butterworths 2000, pp 174-180.

²⁰ Section 33K(2)(b), *Criminal Procedure Act 1986*. The maximum penalty in relation to section 59 offences where these are dealt with summarily is imprisonment for 2 years, or a fine of 50 penalty units, or both - Section 33K(2)(a), *Criminal Procedure Act 1986*

physical force used against a child would constitute the less serious offence of common assault.

2.3 Assault and battery

Under the common law a distinction is made between assault and battery and, although the Crimes Act uses assault in a generic sense to include both offences, the distinction remains relevant to an understanding of assault and battery as separate crimes. In effect, the distinction turns on whether force was in fact used or applied, or whether the threat of force was merely apprehended. Assault, in its pristine common law sense, consists in acting intentionally or (it seems) recklessly so as to put a person in fear of the immediate application of unwanted physical force against his or her person. As Gillies notes, this type of assault can be described as a ‘psychic assault’.²¹ A battery, on the other hand, consists in the intentional or reckless application of force to the person of another without consent.

The question to ask in relation to the Child Protection - Excessive Punishment Bill is whether, in the limitations it places on the defence of lawful correction, it contemplates only the actual application of force (the offence of battery), or does it cover in addition its apprehended application (the offence of assault)?

A further point to bear in mind is that assault and battery ground liability in civil as well as criminal law, with the result that a person found guilty of either offence can be sued by the victim.²²

2.4 Lawful correction – the legal position

At present, the defence of lawful correction exists at common law in NSW, as it does in Victoria, South Australia and the ACT. Lawful correction is a defence against a charge that a parent or a person in the place of a parent has assaulted a child. In broad terms, at common law, the defence says that a parent or a person acting in a parental role can administer moderate corporal punishment to the child if that course is reasonable in all the circumstances. According to the Model Criminal Code Officers Committee report of 1998, for the common law defence to apply, ‘The force must be reasonable in degree and the person administering the punishment must act with the sole intention of correcting the child and believing that it is reasonable to resort to physical force to achieve the correctional objective’.²³ Peter Gillies explains that, for the defence to apply, ‘The punishment must be both subjectively and objectively reasonable. If it is not both of these, the parent or other person becomes liable for an assault’.²⁴ Gillies continues:

²¹ P Gillies, n 6, p 553. Gillies reviews the relevant case law in detail and discusses the authorities which suggest that recklessness supplies mens rea for assault.

²² Ibid.

²³ Model Criminal Code Officers Committee Report 1998, n 3, p 131.

²⁴ P Gillies, *Criminal Law*, n 6 pp 331-332.

Corporal punishment is subjectively reasonable when D acts in the belief that it is reasonable to resort to physical chastisement, and that the quantum of such chastisement is reasonable. Further, D must act out of a desire to correct the child, and not for ‘the gratification of passion or of rage’.

The chastisement is objectively reasonable when a reasonable person would not regard the decision to resort to force, or the quantum of force employed, as unreasonable. In considering whether punishment is reasonable, regard must be had to all the relevant circumstances, including the type of force employed, the type of instrument, if any, used and the age and health of the child.²⁵

Thus, courts in the past have held that, for the defence of lawful correction to apply, such factors as the age and health of the child must be considered²⁶ and that the punishment must be administered with a proper instrument and in a decent manner.²⁷ A more contemporary formulation is that of the European Court of Human Rights which commented in this respect that an assessment of whether the physical punishment was lawful or not must depend on ‘all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim’. The Court also explained that it is not for the defendant to prove it was lawful correction. It is for the prosecution to prove beyond reasonable doubt that the assault went beyond the limits of lawful punishment.²⁸

It is important to recognise that the common law applies a flexible standard in this respect, one that alters (or should alter) in keeping with changing community standards. The result is that past authorities as to what constitutes reasonable chastisement may be rejected by a contemporary court. Indeed, as Lord Scarman observed in *Gillick*, a case dealing with the extent of a parent’s rights in relation to a child’s medical treatment, ‘much of the case law of the 19th and earlier centuries is no guide to the application of the law in the conditions of today’.²⁹ The same has been said where the application of the defence of lawful correction is concerned. A Canadian judge has said in this respect:

It seems to me that a properly directed jury would apply the custom of their community. The concern of today’s community for child abuse should be reflected in the standards to be applied. The

²⁵ Ibid, p 332.

²⁶ *R v Mackie* [1973] Criminal LR 54.

²⁷ *R v Miles* (1842) 6 Jur 243.

²⁸ *A v the United Kingdom* [1998] EHRLR 82.

²⁹ *Gillick*, n 4 at 187.

maxim, ‘spare the rod and spoil the child’ does not enjoy the universal approval it may have had at the turn of this century and indeed at the time of the various revisions of the *Criminal Code*.³⁰

Note that in those Australian States where the common law has been replaced by a Criminal Code, Queensland, Tasmania³¹ and Western Australia,³² the defence of lawful correction is in statutory form. For example, since it was re-formulated in 1997 the relevant section of the Queensland Code now provides:

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.³³

As Cashmore and de Haas say, the common factor in the various codified definitions of lawful correction is the notion of ‘reasonableness’, an approach which is sufficiently flexible to allow for evolving community standards, on one side, and vague enough to generate uncertainty and imprecision, on the other.³⁴ ‘Reasonableness’ is also the key concept for interpretation under the common law, as it is in the Child Protection - Excessive Punishment Bill. The difference is that, under the Bill, legislation would offer guidance to the courts as to what constitutes the unreasonable and therefore excessive use of physical force.

³⁰ *R v Baptiste and Baptiste* (1980) 61 CCC (2d) 438; cited with approval in *R v M* (1995) 103 CCC (3d) 375 at 378. Section 43 of the **Canadian Criminal Code** provides that ‘Every school teacher, 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 seems that the constitutionality of this provision is currently under challenge by the Canadian Foundation for Children, Youth and the Law. The Foundation argues that section 43 violates a number of sections of the Canadian Charter of Rights and Freedoms by permitting children to be legally assaulted.

³¹ *Criminal Code Act 1925* (Tas), sections 50 and 52, with the latter section criminalising excessive use of force.

³² *Criminal Code* (WA), section 257, which includes an apparently anachronistic reference to an ‘apprentice’. See also *Criminal Code Act* (NT), section 27 (p), which justifies the parental use of force, but only in circumstances where ‘it is not unnecessary force’ and is not intended or likely to cause death or grievous bodily harm. Cashmore and de Haas comment that the Northern Territory is the only Code jurisdiction that has a limit on lawful correction ‘that is linked to the seriousness of the injury’ – J Cashmore and de Haas, n 11, p 18.

³³ *Criminal Code Act 1899* (Qn), section 280.

³⁴ J Cashmore and de Haas, n 11, pp 18-19.

2.5 *In loco parentis* – who may administer reasonable chastisement?

Lawful correction is a defence against a charge that a parent or a person *in loco parentis* (acting in a parental role) has assaulted a child. What is meant by this is discussed in the consultation document, *Protecting Children, Supporting Parents* released by the UK Department of Health, as well as in the Scottish Executive's *The Physical Punishment of Children in Scotland: A Consultation*. Both agree that currently, subject to where the physical punishment of children is already specifically outlawed by legislation, the *in loco parentis* doctrine is interpreted relatively broadly. According to the UK Department of Health:

There is an implied delegation, from parents to those in lawful charge of their children, of the parents' right to apply moderate and reasonable physical punishment. If a relative or neighbour were looking after a child, for example, they would be able to claim the defence of reasonable chastisement even if a parent had not explicitly authorised them to smack their child.³⁵

The Scottish Executive writes in similar terms, stating that if a relative (for example, grandparents or step-parents), or a neighbour or a babysitter were looking after a child, 'they would be able to claim that they had given reasonable chastisement even if a parent had not explicitly authorised them to smack a naughty child'.³⁶ The question these consultation documents ask is whether this approach is too broad. In particular, should the defence be limited to all those acting on behalf of parents, but only if parents have given their express permission that those acting on their behalf may physically punish their child? Should the delegation at issue be implied or explicit in nature?

A further question to ask is whether the scope of the present doctrine is as clear as is sometimes suggested. What is the contemporary authority for maintaining that neighbours and babysitters may be covered under it? Part of the difficulty is that most of the older cases deal only with the relationship between school teachers and their students, an issue which is now covered largely by statute. On the other hand, where broader relationships are discussed the law does not appear to be a model of clarity. As Model Criminal Code Officers Committee recognised in its 1998 report, at common law the question of when delegation occurred and, if so, to what extent, was 'more flexible' and therefore 'more uncertain' than any of its statutory counterparts.³⁷ For example, in *R v Murphy*,³⁸ a recent Canadian decision which reviewed the relevant North American case law, an authority against recognising that a babysitter has delegated powers of discipline was cited, while at the same time note was also made of a case supporting the proposition that a school bus

³⁵ *Protecting Children, Supporting Parents*, n 1, para 5.12.

³⁶ The Scottish Executive, n 2, para 5.11.

³⁷ Model Criminal Code Officers Committee report, n 3, p 137.

³⁸ (1996) 108 CCC (3d) 416.

driver was an implied delegate of parental power. The Court said it is clear ‘that the relationship of *in loco parentis* does not arise from the mere placing of a child in the temporary care of another person’.³⁹ It added, ‘Where the responsibility for the care and control of a child has been given to another person, the extent of the disciplinary powers which are implicit within that responsibility will depend on the specific facts of the case’.⁴⁰

How broadly is the law to be drawn in this context? Should the law recognise even an express delegation of parental power to babysitters and others with no direct family ties with the child concerned?

2.6 School teachers and lawful correction

In the past school teachers were also included under the *loco parentis* doctrine and could therefore plead the defence of lawful correction against prosecution for physically punishing a child.⁴¹ However, that situation has now been altered in many jurisdictions.⁴² In NSW the common law defence was amended by the introduction of a statutory prohibition on the use of corporal punishment in any government or non-government school in the State. In a direct reference to the common law, the *Education Reform Amendment (School Discipline) Act 1995*⁴³ specifically defined corporal punishment in this context to mean ‘the application of physical force in order to punish or correct the student’. Corporal punishment in this educational context does not include ‘the application of force only to prevent personal injury to, or damage to or the destruction of property of, any person (including the student)’.⁴⁴ The result is that a teacher in NSW, acting under the locus

³⁹ Ibid at 421.

⁴⁰ Ibid.

⁴¹ See for example *Smith v O’Byrne* (1894) 5 QLJ 126 and *Byrne v Hebden* [1913] QSR 233, as well as the more recent case of *R v Ferguson* (1994) 75 A Crim R 31. A relevant English case is *Cleary v Booth* [1893] 1 QB 465 where it was held that, in some cases, the delegation of parental authority to a school teacher extends to ‘acts done out of school, at any rate while going to and from school’ (Lawrance J). On the need for the punishment to be moderate and not dictated ‘by any bad motive’ on the teacher’s part see *Mansell v Griffin* [1908] 1 KB 160. On the changing standards relevant to this issue see the Canadian case of *Campeau v The King* (1951) 103 CCC 355. This and other relevant cases are discussed in *R v M* (1995) 103 CCC (ed) 375 at 378.

⁴² For example, the UK Department of Health consultation document says that ‘The defence of “reasonable chastisement” ... may not be used by teachers and others working in schools and nurseries, staff in children’s homes, or foster carers (other than in private fostering arrangements). Corporal punishment has been outlawed in all these settings’ – *Protecting Children, Supporting Parents*, n 1, para 3.15.

⁴³ The *Education Reform Act 1990* is now titled the *Education Act 1990*.

⁴⁴ Section 3(1), *Education Act 1990*. For government schools, section 35(2A) prevents any guidelines or codes relating to school discipline from permitting corporal punishment. For non-government schools, section 47(f) stipulates that the prohibition of corporal punishment by the school is a requirement of its registration in the State.

parentis doctrine, can no longer rely on the defence of lawful correction where he or she resorts to the use of physical force ‘to punish or correct’ a child.⁴⁵

2.7 The Children and Young Persons (Care and Protection) Act 1998

It was noted in the Second Reading speech for the Child Protection - Excessive Punishment Bill that the question of the vagueness of what constitutes ‘assault’ on a child had been raised in the 1996 discussion paper released by the Legislation Review Unit of the NSW Department of Community Services as part of its review of the *Children (Care and Protection) Act 1987*. Without making any recommendations, the discussion paper commented:

Is slapping a child an assault? What if the parent uses a belt, or an electrical cord? People have different views on whether any corporal punishment is acceptable, and if so, what degree of force is permissible. It has been suggested that the Act needs at least to define certain kinds of corporal punishment which are unacceptable to the community and therefore constitute child abuse.⁴⁶

In a later discussion of corporal punishment the paper considered what legal consequences should follow if the NSW Parliament ‘were to specify that certain forms of corporal punishment constitute child abuse’. One option raised was the creation of a criminal offence of unlawful corporal punishment under an amended *Child (Care and Protection) Act 1987*. The paper asked three questions:

- Should legislation define certain forms of corporal punishment as child abuse? If so, which forms? Should this be a criminal offence?
- Should legislation specifically prohibit, or permit, certain forms of corporal punishment? If so, which forms?
- Should the Child Protection Council, or some other such body, be given a statutory duty to educate the community concerning discipline practices?⁴⁷

⁴⁵ Query whether the defence could be relied upon where a teacher, in the course of managing or controlling a child, used a reasonable quantum of physical force in order to prevent injury to the child concerned or to others, or to prevent the destruction of property.

⁴⁶ Legislation Review Unit, NSW Department of Community Services, *Review of the Children (Care and Protection) Act 1987, Discussion Paper 1, Law and Policy in Child Protection*, October 1996, p 23.

⁴⁷ Ibid, p 50.

The subsequent report, released in December 1997, does not appear to deal directly with the subject of corporal punishment. Instead, it considered the issue of the ‘restraint’ of a child by a person who has parental responsibility or is an authorised carer. It recommended that ‘The Act should clarify the legal position regarding the use of immediate physical restraint to protect a child or young person from doing serious harm to themselves, others or property’.⁴⁸ The recommendation is reflected in section 158 of the *Children and Young Persons (Care and Protection) Act 1998*, which provides that a person having parental responsibility or who is the authorised carer may restrain a child on a temporary basis and use reasonable force for this purpose.⁴⁹ The section is not yet in force. However, the 1998 Act also includes section 227 which creates a criminal offence for, among other things, ‘intentionally’ taking ‘action that has resulted in or appears likely to result in the physical injury...of a child or young person’. The section reads:

A person who intentionally takes action that has resulted in or appears likely to result in:

- (a) the physical injury or sexual abuse of a child or young person, or
- (b) a child or young person suffering emotional or psychological harm of such a kind that the emotional or intellectual development of the child or young person is, or is likely to be, significantly damaged, or
- (c) the physical development or health of a child or young person being significantly harmed.

is guilty of an offence.

That section has been proclaimed to commence.⁵⁰ The offence, which carries a maximum penalty of 200 penalty units (\$22,000),⁵¹ operates in addition to the assault offences under the Crimes Act and, presumably, the common law defence of lawful correction would apply in relation to it. On the other hand, the *Children and Young Persons (Care and Protection) Act 1998*, the central plank of child protection legislation in NSW, does not specifically prohibit, or permit, certain forms of corporal punishment. The argument can be made, therefore, that the question of what constitutes an assault on a child remains in at least as much doubt in NSW as in any other jurisdiction where the common law defence of lawful correction applies.

2.8 Lawful correction – its operation in NSW

Part of the difficulty in assessing the operation of the defence of lawful correction is that,

⁴⁸ Legislation Review Unit, NSW Department of Community Services, *Review of the Children (Care and Protection) Act 1987 – Recommendations for Law Reform*, December 1997, p 144.

⁴⁹ Restraint may only be used if ‘the child or young person is behaving in such a manner that, unless restrained, he or she might seriously injure himself or herself or another person or might cause the loss of or damage to any property’ – section 158 (1), *Children and Young Persons (Care and Protection) Act 1998*.

⁵⁰ It commenced on 17 April 2000.

⁵¹ Or 100 penalty units (\$11,000) if proceedings are taken before a Local Court

as all the commentators agree, ‘In practice charges of assault in the context of correcting a child rarely come before the courts’.⁵² Indeed there appear to be no reported cases in recent times in NSW;⁵³ nor is any relevant statistical evidence available to indicate how often these cases appear before the lower courts. As an information document released by the Hon AG Corbett MLC explains:

The Bureau of Crime Statistics and Research does not collect these statistics. The Bureau’s Local Courts database does not include details about the victims of crime nor the relationship between the offender and the victim. However, advice from criminal law specialists indicate that such charges of assault are rare because they generally arise out of a domestic environment and are resolved before they are brought to Court. That is, they are withdrawn, witnesses change their minds and so on. More serious cases are dealt with by Apprehended Violence Order.

In the case of small children too young to complain by themselves, the matter normally only comes through the court system at the Children’s Court level, when proceedings are taken for neglect. These are in the nature of civil proceedings, which are interested in the background problems which cause abuse of children (usually alcohol, drugs or gambling addiction) and look at the proper and appropriate placement of the child.⁵⁴

It is often said in this context that the operation of the defence of lawful correction is ‘unsatisfactory and out of date’⁵⁵ and that the courts ‘vary considerably’ in their interpretation of what is meant by ‘reasonable chastisement’.⁵⁶ However, the question of how the courts interpret lawful correction in NSW, specifically, is not discussed. That is not to say that the law in this State is not subject to the same uncertainties and potential difficulties as exist in other common law jurisdictions. It is only to point out that the evidence for the problems involved is drawn from outside NSW.

Internationally, the most publicised recent case in this respect is *A v the United Kingdom*⁵⁷

⁵² P Gillies, n 6, p 332.

⁵³ The only NSW case referred to in the relevant section of The Australia Digest (4th edition) is *R v Hamilton* (1891) 12 LR (NSW) 111; 8 WN 9 (NSW Sup Ct, FC) in which it was held that it is not within the bounds of parental authority for a father to present a loaded pistol at his son to frighten him.

⁵⁴ Hon AG Corbett MLC, *Crimes Amendment (Child Protection – Excessive Punishment) Bill 2000. Frequently Asked Questions*, p 4.

⁵⁵ J Cashmore and N de Haas, n 11, p 42.

⁵⁶ Legislation Review Unit Discussion Paper, n 46, p 49.

⁵⁷ [1998] EHRLR 82. The case arose after ‘A’s’ brother reported that ‘A’ had been beaten with

in which the European Court of Human Rights found in September 1998 that the defence of reasonable chastisement in UK law did not give adequate protection to a child who had been severely and repeatedly beaten by his stepfather. Against this, the 1995 Canadian case of *R v M* suggests that the courts may already be moving in the direction suggested by the Child Protection - Excessive Punishment Bill. After reflecting on the changing standards which must be applied in relation to corporal punishment, the judge in that case concluded, 'In my view, we are now at a point where striking a child with an object in areas of his or her body which can and does result in visible injury of even relatively short duration is clearly excessive'.⁵⁸

On the evidence of the available case law, it is said that 'Many of the uncertainties in the elements of the defence stem from the case-by-case development of the law over many years, and the variability of decisions because "reasonableness" depends on the circumstances of each individual case'.⁵⁹ Cashmore and de Haas observe in this respect: 'The case law regarding the defence of lawful correction currently does not provide clear guidance as to the legal limits of physical punishment'.⁶⁰ The result, according to Robert Ludbrook, is the 'lack of any clear boundary between reasonable punishment and physical

⁶¹ The question, then, is whether legislation should (and can) give this clear guidance, for the purpose of assisting both the courts and parents?

3.0 LEGAL DEVELOPMENTS AND PROPOSALS FOR REFORM

3.1 An English perspective

As noted, this same debate about the defence of lawful correction is currently under way in the United Kingdom. Both the UK Health Department and the Scottish Executive⁶² have released consultation papers in recent months and, as in NSW, the issues involved have generated considerable debate and interest.

Basically, the terms of the debate are the same as those for the Child Protection - Excessive Punishment Bill. The UK assault offences are similar to those found under the NSW crimes

a garden cane by their stepfather-to-be. The man was subsequently charged with assault occasioning actual bodily harm contrary to section 47 of the *Offences Against the Person Act 1861*. He was tried in February 1994 and used the defence of reasonable chastisement. He was found not guilty by a jury. 'A' then appealed to the European Commission of Human Rights, which delivered its judgment in September 1998.

⁵⁸ *R v M* (1995) 103 CCC (3d) 375 at 382.

⁵⁹ J Cashmore and N de Haas, n 11, p 42.

⁶⁰ *Ibid.*

⁶¹ R Ludbrook, n 11, p 129.

⁶² Criminal law, family law and education law are matters devolved to the Scottish Parliament under the *Scotland Act 1998*.

legislation and the common law defence of reasonable chastisement, as it is called in the UK, applies in relation to these. One difference is that the UK *Children and Young Persons Act 1933* gives statutory recognition to the common law right of parents to administer physical punishment to their children.⁶³ Section 1(1) of the Act creates the offences of ‘wilful assault and wilful ill-treatment’ against children by any person over 16. But section 1 (7) provides that nothing in section 1 (1) shall be construed as ‘affecting the right of any parent, teacher, or other person having the lawful control or charge of a child or young person to administer punishment to him’. It could be argued therefore that the position the UK courts and juries find themselves in when interpreting the law of reasonable chastisement is not exactly comparable to that of their counterparts in NSW where no such parental right is recognised at statute. In practice, however, this child welfare legislative schema would rarely be used in relation to a parent who was alleged to have physically assaulted a child.⁶⁴ Instead, charges would be laid under the law of assault to which the common law defence applies.⁶⁵

Another point to make is that the debate may be more urgent in the UK than in NSW. The reason for this is that, as discussed in the last part of this paper, in *A v the United Kingdom*⁶⁶ the European Court of Human Rights found in September 1998 that the defence of reasonable chastisement in UK law did not give adequate protection to a child who had been severely and repeatedly beaten with a cane by his stepfather. Specifically, UK law had failed to protect the boy from ‘inhuman or degrading treatment’ in contravention of Article 3 of the European Convention on Human Rights and Fundamental Freedom; in addition, the Court held that participating States are required to take measures to protect children against such treatment. ‘Children’, the Court said, ‘and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity’. Even before the incorporation of Convention rights into domestic law, the UK Government had undertaken to abide by the judgment of the Court in a case to which it was a party. This means that the ruling required the Government to change the law in a way which takes account of the Court’s judgment. Setting out the

⁶³ An equivalent provision is found under section 12 (7) of the *Children and Young Persons (Scotland) Act 1937*. Note that, as in NSW, the right of teachers in the UK to apply physical punishment has been modified by other statutes. Since 1998 corporal punishment has been prohibited in England and Wales in state and independent schools under section 548 of the *Education Act 1996* (UK). Corporal punishment in state schools was in fact abolished in 1986. An attempt to get the European Court to ban beatings in independent schools failed in 1993 when it was decided that slipping a seven-year old boy at a private boarding school was not ‘degrading’ and therefore did not contravene Article 3 of the European Convention on Human Rights and Fundamental Freedoms. Article 3 provides ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment’ – L Lightfoot, ‘Scottish cases helped to ban beatings’, *Electronic Telegraph*, 30 October 1996. In Scotland, section 48A (1) of *The Education (Scotland) Act 1980* only prohibits corporal punishment in state schools.

⁶⁴ *Protecting Children, Supporting Parents*, n 1, para 3.10.

⁶⁵ Scottish Law Commission, *Report on Family Law*, 1992, para 2.103.

⁶⁶ [1998] EHRLR 82.

parameters of its intended response, the UK Department of Health commented in January 2000:

The Government fully accepts the need for change. The harmful and degrading treatment of children can never be justified. We have made it quite clear, however, that we do not consider that the right way forward is to make unlawful all smacking and other forms of physical rebuke and this paper explicitly rules out this possibility. There is a common sense distinction to be made between the sort of mild physical rebuke which occurs in families and which most loving parents consider acceptable, and the beating of children. The law needs to be clarified to make sure that it properly reflects this common sense distinction.⁶⁷

This is not unlike the approach adopted by the Child Protection - Excessive Punishment Bill. Of course the purpose of the UK consultation paper is to determine where this ‘common sense distinction’ lies and how it is to be formulated legally. For this purpose it outlined a series of ‘questions for consultation’ including:

- who should be able to claim the defence of reasonable chastisement?
- are there any forms of physical punishment which should never be capable of being defended as ‘reasonable’? Mentioned for consideration was physical punishment which ‘causes, or is likely to cause injuries to the head’ and physical punishment using implements.
- should we restrict the defence of reasonable chastisement so that it may be used only by those charged with common assault, and not by those charged with causing actual bodily harm, or more serious assault.

Further, following the formulation adopted by the European Court of Human Rights,⁶⁸ the consultation paper proposed that it should explicitly be set out in law that in considering whether or not the physical punishment of a child constitutes ‘reasonable chastisement’, a court should always have regard to the following factors:

- the nature and context of the treatment;
- its duration;
- its physical and mental effects; and in some instances,
- the sex, age and state of health of the victim.

⁶⁷ *Protecting Children, Supporting Parents*, n 1, para 1.5.

⁶⁸ *A v the United Kingdom* [1998] EHRLR 82 at para 22.

3.2 A Scottish perspective

The approach taken by the Scottish Executive in its February 2000 consultation paper is very similar to that outlined by the UK Department of Health.⁶⁹ There, too, recent cases have brought the defence of reasonable chastisement into the public domain.⁷⁰ In particular, considerable interest has been shown in a case involving a father who was found guilty of assault after smacking his eight-year old daughter on the buttocks during a visit to the dental surgery at Motherwell Health Centre. On one side, the case has been used by those who oppose legislation of the kind proposed under the Child Protection - Excessive Punishment Bill, on the ground that such legislation is likely to introduce undue restrictions on parental rights. On the other the same case has been used to argue the case for law reform and, in particular, for the need to clarify the law in this area. Commentators have also said that the verdict, which was handed down in Hamilton Sheriff Court, was produced by several ‘aggravating’ factors. For example, it is said that the father pulled down the girl’s ‘leggings and underwear, and smacked her on the bare bottom up to seven times.’ The Sheriff noted, ‘the nature of striking her on the bare bottom and the severe force of the blows went beyond the scope of reasonable chastisement a parent is entitled to use. That provides proof of evil intent’.⁷¹ The motive behind the father’s action have also been questioned on the basis that physical chastisement is only justified ‘as a means of signalling and correcting bad or dangerous behaviour’. The daughter, it is said, ‘was merely afraid’ of having an injection: ‘she was doing nothing wrong and she was doing nothing to put herself or any other person in immediate jeopardy’.⁷² If nothing else, the case can be shown to demonstrate the controversies and complexities involved in this area of the law. Its notoriety escalated still further when, in May 2000, the General Teaching Council of Scotland decided to strike the father, who is a primary school teacher, off its register.⁷³

In fact the revision of the defence of reasonable chastisement has been under consideration in Scotland for a number of years. An attempt to clarify the law was made in 1992 with the release of the Scottish Law Commission’s *Report on Family Law*. That report did not recommend that all smacking be banned. It found in this respect that ‘Research provides

⁶⁹ The Scottish Executive proposed making reference to ‘its duration *and frequency*’ – Scottish Executive, n 2, para 5.4.

⁷⁰ A number of these are discussed in P and S Spink, ‘What is reasonable chastisement?’ (June 1999) 44 *Journal of the Law Society of Scotland* 26; BBC News, ‘Scot convicted of belting daughter’, 10 August 1999, http://newss6.thdo.bbc.co.uk/hi/english/uk/newsid_416000/416762.stm

⁷¹ P and S Spink, n 70 at 26. It is noted that ‘in Scotland evil intent is a fundamental component of the crime [of assault]’. Presumably, the significance of this is that, in Scotland, recklessness cannot supply mens rea for assault.

⁷² *Ibid* at 27.

⁷³ ‘Smack your child...lose your job, teacher is told’, *The Sunday Mail*, 7 May 2000. The man’s lawyer has said that an appeal to the High Court would be lodged.

little evidence that physical punishment per se leads to harmful consequences’ and added that ‘the vast majority of parents’ believe in its use and ‘seem to have no difficulty in drawing the line between reasonable and excessive use’.⁷⁴ However, the Commission did support ‘an attempt to clarify the limits beyond which parents cannot go in exercising their right of reasonable chastisement’. It recommended drawing a line which, in its view, could be ‘easily explained and understood’ – ‘No implements. No injury or risk of injury. No lasting pain or discomfort or risk of lasting pain or discomfort’.⁷⁵ The Commission proposed therefore that:

- (a) In any proceedings (whether criminal or civil) against a person for striking a child, it should not be a defence that the person struck the child in the purported exercise of any parental right if he or she struck the child
 - (i) with a stick, belt or other object; or
 - (ii) in such a way as to cause, or risk causing, injury; or
 - (iii) in such a way as to cause, or risk causing, pain or discomfort lasting more than a very short time.

This recommendation was not accepted by the then Government and no such provision was included in the *Children (Scotland) Act 1995*, which among other things provides for the relationship between parents and children and guardians and children in Scottish law. However, as the Scottish Executive has explained, ‘During the passage of the Bill an amendment along these lines was tabled but defeated. There were fears that the introduction of a distinction between smacking and hitting with an implement would devalue the protection available to a child who was smacked’.⁷⁶ In fact the amendment was the subject of lengthy debate in which various cases were discussed and it was pointed out that the proposal had the support of such organisations as the Royal Scottish Society for the Prevention of Cruelty to Children. Against the proposal, it was said to lack ‘objectivity as to what is a very short period of time and it categorises a gentle blow with a soft object as worse than a hard blow with a hand’.⁷⁷ In effect, the debate underlined the problems involved in achieving legal clarity on the subject at issue.

3.3 A European perspective

The most straightforward way to achieve legal clarity, it might be argued, would be to ban corporal punishment altogether. This is the approach which has been adopted in eight European countries, Austria, Croatia, Cyprus, Denmark, Finland, Latvia, Norway and Sweden. In 1979 Sweden was the first country to prohibit by law all physical punishment of children.⁷⁸ The legislation is encompassed within a Parent and Guardianship Code:

⁷⁴ The Scottish Law Commission, n 65, para 2.76.

⁷⁵ Ibid at para 2.99.

⁷⁶ The Scottish Executive, n 2, para 2.12.

⁷⁷ Hansard, House of Commons, 1 May 1995, cols 49-75.

⁷⁸ For an account of the background to the reform and the operation of the law see – R Ulrich, n 6, pp 858-859. Ulrich claims that ‘Prosecutions against parents are assault through

Children are entitled to care, security and a good upbringing. Children are to be treated with respect for their person and individuality and may not be subjected to physical or any other humiliating treatment.⁷⁹

According to one account, the only serious challenge to the Swedish reform came from parents who were members of a fundamentalist religious group.⁸⁰ They made an application to the European Commission of Human Rights alleging that the new law breached their right to respect for family life, which is guaranteed under Article 8 of the European Convention on Human Rights and Fundamental Freedoms. Article 8 provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The European Commission rejected the application, concluding that ‘the actual effects of the law are to encourage a positive review of the punishment of children by their parents, to discourage abuse and prevent excesses which could properly be described as violence against children’.⁸¹

It would seem that in other European countries the right of parents to use physical force against their children in certain circumstances remains in place. In Germany, for example, it is reported that the 1997 reform of family law legislation did not expressly ban the use of corporal punishment by parents. Instead, the relevant provision prohibited ‘degrading methods of discipline, including physical and psychological abuse’. It was further reported that, ‘Although 80 per cent of [German] parents believe they should reason with their children rather than resort to corporal punishment, 60 per cent confessed to dealing out the

chastisement are rare. Instead, the family is corrected and helped by the child care service or child psychiatry. Note that Ulrich uses the Swedish model as basis for arguing the case for legal reform in **New Zealand**. In doing so, Ulrich sets out the legal position in New Zealand under section 59 of the *Crimes Act 1961*, which states that ‘a parent, or person acting in place of a parent, is justified in using force by way of correction, if the force used is reasonable in the circumstances’. But note, too, that the *Education Amendment Act 1990* banned corporal punishment in all state and independent schools and in early childhood centres. For further comment see – EPOCH New Zealand, ‘Robert Ludbrook speaks at the EPOCH dinner’, February 2000 Newsletter, <http://epochnz.virtualave.net/newsletter8>

⁷⁹ As amended 1983, Chapter 6, Section 1; see The Scottish Parliament Information Centre, *Physical Punishment of Children*, Research Note, No 11/23 February 2000, p 7.

⁸⁰ P Newell, ‘Respecting children’s rights to physical integrity’ in *The Handbook of Children’s Rights: Comparative Policy and Practice* edited by B Franklin, London 1995, p 220.

⁸¹ The Scottish Parliament Information Centre, n 79, p 7.

occasional smack’.⁸²

3.4 An international perspective

The United Nations Convention on the Rights of the Child was ratified by Australia in November 1990. Particularly significant in this respect are Articles 19 and 37 of the Convention:

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.

Article 37

States Parties shall ensure that:

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

At present the Convention’s provisions are not enforceable in Australian domestic law. It may also be the case that, as the Scottish Law Commission observed in 1992, such international obligations do not ‘provide a ready made answer’ to questions about the use of corporal punishment: ‘Like the laws of individual countries’, the Commission said, ‘they have to balance children’s rights against parental rights and responsibilities’.⁸³ On the other hand, a system of monitoring states’ implementation of the Convention is undertaken by the UN Committee on the Rights of the Child, and it has been said in this regard that the Committee’s 1997 report suggested that ‘Australia take all appropriate measures, including those of a legislative nature, to prohibit corporal punishment in schools and at home’.⁸⁴ For its part, it seems the Australian Government has taken the position that Article 37 outlaws ‘torture or other cruel, inhuman or degrading treatment or punishment’ and not *all* punishment. According to this interpretation it does not therefore require the complete removal of the defence of lawful correction.⁸⁵

⁸² K von Walderssee, ‘Protests over Bonn silence on smacking’, *Electronic Telegraph*, 27 September 1997.

⁸³ The Scottish Law Commission, n 65, para 2.89.

⁸⁴ Hon AG Corbett MLC, n 54, p 7.

⁸⁵ Model Criminal Code Officers Committee report, n 3, p 135.

3.5 An Australian perspective

The subject of the physical punishment of children has received considerable attention in Australia in recent years. Notably, in 1995 a detailed analysis of the whole issue was commissioned by the Commonwealth Department of Human Services and Health, titled *Legal and Social Aspects of the Physical Punishment of Children*. Written by Judy Cashmore and Nicola de Haas, the discussion paper made no formal recommendations but it did point to the need for the law to provide as clear guidance as possible to all concerned.

In 1998 the Model Criminal Code Officers Committee report on *Non Fatal Offences Against the Person* also considered the defence of lawful correction and recommended that the law should offer more guidance as to what constitutes unreasonable physical punishment in this context. The Committee's view was that 'at the present it goes too far to criminalise a corrective smacking by a parent or guardian, so long as the force used is reasonable'.⁸⁶ On the other hand, having considered the Scottish Law Commission's report, the Committee decided to recommend a similar approach to legal reform. Most important is the following proposed provision:

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

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

At the State level, in NSW the Hon AG Corbett MLC introduced the Crimes Amendment (Child Punishment) Bill 1997 on 19 June 1997. That Bill, which did not proceed beyond the Second Reading stage and subsequently lapsed, is the forerunner of the present Child Protection - Excessive Punishment Bill. The change of title was explained by its sponsor as an attempt to 'more closely' reflect the aim of what is proposed, 'which is NOT to outlaw the physical punishment of children as this does not have community support, but to protect children from the harm that can arise from excessive physical punishment'.⁸⁷ Certain other changes can also be noted:

- the 1997 Bill provided for the commencement of the proposed Act to be 2 months after the date of assent, and not 12 months as in the 2000 Bill which makes provision for a community education program to be conducted in that time;
- unlike the 2000 Bill, its 1997 counterpart did not specify some of the factors that would have to be considered in determining whether the use of physical force was reasonable;

⁸⁶ Ibid, p 137.

⁸⁷ Hon AG Corbett MLC, n 54, p 4.

- the 1997 Bill made reference to ‘actual bodily harm’ whereas the 2000 Bill adopts the Model Criminal Code Officers Committee recommendation and refers to ‘harm’;
- unlike the 1997 Bill, the 2000 Bill does not propose to prohibit the trivial or inconsequential use of force to the head or neck, or to prohibit the use of such force with an object to other parts of the body;
- for the use of force against a child the 1997 Bill did not require express authority by a parent of the child to a person acting in loco parentis; and
- the 1997 Bill did not contain exemptions for Aboriginal or Torres Strait Islanders with respect to the need for the granting of express parental authority before physical force can be used against a child by a person *in loco parentis*.

‘For too long’, it was said in the Second Reading speech on the 1997 Bill, ‘children and their parents have been left exposed to uncertain and unclear common law rules regarding physical punishment and, on occasions, [the courts] have been arbitrary in their reasoning and application’.⁸⁸ Of that Bill, on the other hand, it was said that it would provide ‘all parents with a workable and sensible guide to what is and what is not reasonable when it comes to physical punishment’.⁸⁹

4.0 THE CHILD PROTECTION – EXCESSIVE PUNISHMENT BILL

4.1 Preliminary comment

It is not the purpose of this paper to present a case for or against the Child Protection - Excessive Punishment Bill. The paper does, however, present an analysis of the Bill’s main provisions, in the course of which issues of a technical nature are raised concerning the Bill’s drafting. They are the kind of questions which the Legislative Council Standing Committee on Law and Justice will need to address as part of its inquiry into the Bill.

4.2 The object of the Bill

The object of the Bill is to amend the *Crimes Act 1900* to prohibit the use of excessive physical force to discipline, manage or control a child. As explained in the Explanatory Note, ‘The Bill does so by 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’. The object, therefore, is to clarify the operation of the common law defence of lawful correction, in particular by defining the scope and limits of the defence, thereby providing guidance to the courts as well as to parents and others in regard to what is not reasonable physical punishment where children are concerned. Included in the Bill’s title is the term ‘child protection’. As the Bill’s sponsor said in the

⁸⁸ NSWPD, 19 June 1997, p 10628.

⁸⁹ Ibid, p 10630.

Second Reading speech, its underlying purpose is to protect children from the harms associated with excessive physical punishment. The Hon AG Corbett MLC said in this respect:

The objectives of this bill are to codify the common law provisions of the defence of lawful correction to bring a greater degree of certainty to the judicial interpretation of what is meant by ‘lawful correction’, to provide clear guidance to parents and guardians by clearly defining what is not reasonable lawful correction and, most importantly, to minimise the risk of physical harm or injury to children when they are being physically punished.⁹⁰

For this purpose a new section 61AA titled, ‘Defence of lawful correction’, would be inserted into Part 3 of the *Crimes Act 1900*.

4.3 The long title

The long title for the Bill reads:

An Act to amend the *Crimes Act 1900* to limit the use of excessive physical force to discipline, manage or control children.

For purposes of statutory interpretation long titles are rarely significant. For example, if the long title states that the Act is intended to codify the common law, in some circumstances this may assist the courts in interpreting it as if it were a code and therefore a complete statement of the law on the issue at hand.⁹¹ But if long titles are rarely significant it can still be argued that they are part of an Act and should present a clear formulation of its objects. Is the object of the Child Protection - Excessive Punishment Bill to ‘*limit the use of excessive physical force*’? Alternatively, is its main object to ‘define the limits’ which apply to the defence of lawful correction, thereby establishing what constitutes unreasonable or excessive physical force with a view to prohibiting altogether its use against children? The first formulation might suggest that the Bill seeks to restrict (limit) the use of excessive physical force to some acceptable level or manageable quantity, in the way acceptable speed limits are set for motor vehicles, or manageable blood alcohol limits for drivers. But this would not be consistent with its sponsor’s intention to prohibit *excessive* physical force entirely. Is the long title ambiguous therefore? Would a less prescriptive approach be better, perhaps along the lines adopted for the Crimes Amendment (Child Punishment) Bill 1997?⁹²

⁹⁰ NSWPD, 5 May 2000, p 5376.

⁹¹ DC Pearce and RS Geddes, *Statutory Interpretation in Australia*, 4th Edition, Butterworths 1996, pp 116-117.

⁹² The long title read, ‘An Act to amend the *Crimes Act 1900* with respect to the use of physical force to discipline, manage or control children’.

4.4 Re-stating the common law defence of lawful correction

Proposed section 61AA (1) provides:

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

In effect proposed section 61AA (1) re-states the present common law position that: (a) for physical punishment to be subjectively reasonable it must be ‘for the purpose of the discipline, management or control of the child’ and not, therefore, for such motives as the gratification of passion or of rage; and (b) for physical punishment to be objectively reasonable depends on all the circumstances of the case. As noted, such re-statement of the common law position has already occurred in those Australian jurisdictions where a Criminal Code is in operation. The difference is that the Child Protection - Excessive Punishment Bill goes beyond a very general statement to stipulate some of the factors which are to be taken into account when a court comes to decide if the punishment was objectively reasonable in the circumstances. Thus, regard must be had ‘to the age, health, maturity or other characteristics of the child’, as well as to ‘the nature of the alleged misbehaviour’ and any ‘other circumstances’. In this way the Bill directs the courts to have regard to some factors while at the same time leaving them free to consider, in addition, the totality of the circumstances of the case. Unlike the approach formulated by the European Court of Human Rights and adopted in the recent UK proposals, under the Bill it cannot be said that only ‘in some instances’ need the courts have regard to the ‘age and state of health

In the Second Reading debate on the Bill comments were made about the use of the word ‘reasonable’ in this context and concern was expressed at the Bill’s failure to explain what it means.⁹³ Here the implication seems to be that, by leaving it to the courts to decide what is ‘reasonable’ in the circumstances of a particular case, the Bill merely re-states the confusion and vagueness at the heart of the common law approach. However, as it has been pointed out, the Bill does alter that position, admittedly not by defining the concept of reasonableness, but by the alternative means of informing the courts what can constitute the ‘unreasonable’ use of physical force.

4.5 Defining what is unreasonable physical force – the use of objects

Central to the Bill is proposed section 61AA (2) which seeks to define (but not

⁹³ NSWPD, 26 May 2000, p 5934.

comprehensively)⁹⁴ what constitutes unreasonable physical force for the purposes of the defence of lawful correction. The provision is in three parts: sub-section (a) looks at ‘what’ is used in the course of corporal punishment; sub-section (b) considers ‘where’ the force is applied; and sub-section (c) deals with the ‘quantum’ or ‘degree’ of physical force used and the consequences thereof. Each of these sub-sections can be considered separately. Thus, proposed section 61AA (2)(a) states:

- The application of physical force is not reasonable if:
- (a) the force is applied by the use of a stick, belt or other object (other than an open hand or other than in a manner that could reasonably be considered trivial or negligible in all the circumstances),...

The influence of the Scottish Law Commission and the Model Criminal Code Officers Committee models on this proposal is clear enough. In outlawing punishment with a ‘*stick, belt or other object*’ the specific concern of the Scottish Law Commission was apparently to prohibit the use of ‘implements’. The Model Criminal Code Officers Committee altered the proposal by adding a reference to ‘*an open hand*’, thereby prohibiting ‘*causing harm to a child by use of a stick, belt or other object (other than an open hand)*’. To this the Child Protection - Excessive Punishment Bill would add the further qualification ‘*or other than in a manner that could reasonably be considered trivial or negligible in all the circumstances*’.⁹⁵

This might be described as a form of drafting by accretion and it might also be supposed to involve certain potential pitfalls. In this instance, it has resulted in three uses of the word ‘other’: the first usage indicates a separate or distinct kind of object (*belt or other object*); whereas the second and third usages, ‘*other than*’, have a meaning which is consistent with ‘apart from’ or ‘except’. Even if the intended meaning is discernible to the legally trained mind, from a plain English standpoint it can be asked whether a clearer and simpler formulation might not be found? Moreover, as to the question of meaning, the drafting has resulted in a parenthesis which states, ‘(*other than an open hand or other than in a manner that could reasonably be considered trivial or negligible in all the circumstances*)’. This begs the question whether the qualification relating to the ‘trivial or negligible’ use of physical force refers only to punishment with an open hand? Alternatively, is it intended to operate as a qualification on the use of physical force in the first part of the provision, that is, by any object, apart from an open hand? The latter interpretation would seem to be consistent with the Bill’s intentions, but the former may be the literal meaning of the proposal as it stands.

In any event, a case can perhaps be made that the proposed provision is sufficiently problematic to require some re-drafting. One approach might be to revert to the original Scottish Law Commission proposal and omit any reference to the use of force by an open

⁹⁴ Proposed section 61AA (3) provides that sub-section (2) ‘does not limit the circumstances in which the application of physical force is not reasonable’.

⁹⁵ Note that the Crimes Amendment (Child Punishment) Bill 1997 stated that physical force is not reasonable if ‘the force is applied by any means other than an open hand’.

hand (or any other part of the human body). Another approach might be to re-draft proposed section 61AA (2)(a) along the following lines:

The application of physical force is not reasonable if:
(a) the force is applied by the use of a stick, belt or any object (other than an open hand), except in a manner that could reasonably be considered trivial or negligible in all the circumstances...

The effect of such a provision would be to prohibit the punishment of a child with any object, animate or inanimate – other than an open hand - unless the physical force used was judged by a court to be ‘trivial or negligible’. According to the Second Reading speech, such things as a ‘parent tapping a child lightly on the hand with a ruler’ might be considered trivial or negligible in all the circumstances. Parents, it was said, would not have to ‘fear being prosecuted for trivial matters’. Nevertheless, the Second Reading speech continued, ‘even the trivial use of objects should not be encouraged or condoned because of the inherent dangers of the escalation of force and the unpredictable consequences of the use of any object on the body of a child’. At this point the term ‘object’ appears to be used in a way that is co-terminous with the word ‘instrument’ which, considering the general intelligibility of the law, may suggest a difficulty with the way the provision may be understood by the public at large. From a legal standpoint, however, the Bill’s incorporation of bodily parts (hands, feet and so on) under the term ‘object’ would not seem to be problematic.

Any possibility that the above re-drafting may permit the unreasonable use of physical force by an open hand would be covered by the prohibitions under proposed sections 61AA (2) (b) and (c). This begs the question whether reference needs to be made to physical force by ‘an open hand’ in sub-section (a)? In its favour is the argument that its inclusion makes it clear that, in a moderate form, this means of chastisement is permitted. The Second Reading speech for the Bill explained, ‘The application of physical force by an open hand is meant to be considered in terms of what a parent would normally be understood as doing in giving a child a corrective smack. It is not meant to include the back of the hand, the edges of the open hand in such a way as might deploy a karate chop or any thrusting motion of the fingers to the body of the child’.⁹⁶

Must any reference be made to the means by which harm is caused to a child? A suggestion made in the Second Reading debate on the Bill was that the provision dealing with physical punishment by means of an object be revised so that reference be made ‘to the effect on the child rather than the nature of the instrument used by the parent or the parent’s agent’.⁹⁷ In other words, the suggestion is that the Bill should focus on the harm caused to a child and not on the means by which it is caused.

⁹⁶ NSWPD, 5 May 2000, p 5379.

⁹⁷ NSWPD, 26 May 2000, p 5935.

4.6 Defining what is unreasonable physical force – striking a child’s head or neck

The Second Reading speech went on to say that ‘A considerable body of medical evidence indicates that great risks are involved in hitting children’ around the head or neck. Even striking a child in the face with an open hand, it was said, ‘can result in bruises on the face and injuries to the mouth or gums, including the loss of teeth, or can risk perforating the eardrum. Severely shaking a child’s head or belting a child across the head can result in haemorrhages, spinal and internal injuries, brain damage, delays in motor development and possibly death’. Thus, proposed section 61AA (2)(b) provides:

The application of physical force is not reasonable if...
(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)...

Unlike sub-section (a), this provision is original to the Bill and does not appear to involve any potential drafting problems.⁹⁸ Any physical force applied to a child’s head or neck, which could not be considered ‘trivial or negligible’, would be prohibited under this provision. As noted, this is different to the Crimes Amendment (Child Punishment) Bill 1997 where a blanket prohibition was proposed in this respect. Clearly it is a significant issue in the debate and one which is under consideration in the UK at present where, as part of the consultation process, it has been asked if ‘physical punishment which causes, or is likely to cause injuries to the head’ can ever be defended as reasonable.⁹⁹ While not condoning or encouraging any such use of physical force, the Bill would answer that question in the affirmative, but only where the force used ‘could reasonably be considered trivial or negligible in all the circumstances’. One can only assume that marginal cases would raise difficult questions for the court decide.

The phrase ‘could reasonably be considered trivial or negligible in all the circumstances’ is used in both sub-sections (a) and (b) of proposed section 61AA (2). A further question is whether the Bill intends to establish a consistent standard for judicial interpretation across both sub-sections, or could the courts apply different standards when deciding what is ‘trivial or negligible’ between one context and another? For example, could it be that the courts might view moderate chastisement on the hand with a wooden spoon as ‘trivial or negligible’ in a more or less routine way, while any blow to the head or neck would be scrutinised very closely and only judged to be ‘trivial or negligible’ on rare occasions?

⁹⁸ Note that the Crimes Amendment (Child Punishment) Bill 1997 stated that physical force is not reasonable if ‘the force is applied to any part of the body above the shoulders of the

⁹⁹ *Protecting Children, Supporting Parents*, n 1, para 5.7; The Scottish Executive, n 2, para 5.9.

, which suggests that it is only intended to operate in respect to the offence of battery. If this is correct, potential assault situations would not be criminalised under the Bill as, for example, where a parent in a supermarket shouted¹⁰⁰ and gestured at a child, perhaps threatening to ‘throttle you’, or something along those lines, if he/she did not behave.¹⁰¹ But if the Bill does not apply to threat offences

¹⁰⁰ There is doubt on the question whether words alone can constitute an assault at common law – Model Criminal Code Officers Committee report, n 3, p 9; P Gillies, n 6, p 555.

¹⁰¹ The issue was discussed in the Second Reading debate – *NSWPD*, 26 May 2000, p 5927. Note, however, that ‘idle threats and the words blurted out in momentary anger’ are unlikely

that lasts for more than a short period. As acknowledged in the Second Reading speech, this follows the approach of the Model Criminal Code Officers Committee which recommended the use of the terms ‘harm’ and ‘serious harm’ in this context. Under the proposal the latter would operate as a substitute for the traditional term ‘grievous bodily harm’. Whereas the term ‘harm’ would be defined broadly to mean ‘physical harm or harm to a person’s mental health, whether temporary or permanent’. More specifically ‘physical harm’ and ‘harm to a person’s mental health’ would be defined as follows:

Physical harm includes unconsciousness, pain, disfigurement, infection with a disease and any physical contact with a person that a person might reasonably object to in the circumstances (whether or not the person was aware of it at the time).

to constitute an assault because the intention to intimidate or instil fear in the victim may be lacking. It is that intention which is the key fault element in threat offences – Model Criminal Code Officers Committee report, n 3, p 49. To complicate matters, an assault can also be committed where a person acts recklessly to put another in fear of relatively imminent or immediate violence, but only where the accused foresees the likelihood of inflicting injury or fear and ignores the risk – *Vallance v R* (1961) 108 CLR 56. The issue is discussed in P Gillies, n 6, p 553. Gillies adds that ‘A conditional threat is clearly capable of grounding

Harm to a person's mental health includes significant psychological harm, but does not include mere ordinary emotional reactions such as those of only distress, grief, fear or anger.

One question is whether this is co-terminus with 'actual bodily harm', or is it intended to be different and broader in scope? Another issue relates to the advisability of introducing a new concept of 'harm' into the *Crimes Act 1900* as it stands at present. The position the Bill and Model Criminal Code Officers Committee find themselves in is very different in this respect, for the Model Criminal Code Officers Committee is concerned with the general reformulation of the criminal law whereas the Bill must adapt its amendment to the law as it exists. It might be argued that the advantage of the term 'actual bodily harm' is that, complex as it may be, it is at least consistent with the established scheme of things. What the Bill seems to contemplate is a situation where a person is charged with having caused 'actual bodily harm' but, for the defence of lawful correction to be negated, the prosecution must show that the defendant caused '*harm...that lasts for more than a short period*'.

An objective standard? This preferred formulation was influenced by the Scottish Law Commission's 1992 proposal to prohibit punishment causing '*pain or discomfort lasting more than a very short time*'. In the subsequent debate in the UK that proposal was criticised for its failure to 'overcome the problem of subjectivity', particularly when seeking to distinguish between 'an ordinary safe smack' and the prohibited use of force.¹⁰³ Similar criticisms might be laid against the Bill. On the other hand, the Bill might be thought to have distinct advantages over the Commission's proposal. Its prohibition is directed against harm lasting 'a short period' and not 'a very short time' which should help to distinguish what it seeks to prohibit from 'an ordinary safe smack'. The Bill's formulation would also help to clarify the point that the defence of lawful correction can still apply to the less serious offence of common assault. Moreover, on its face the Bill appears to avoid any reference to such notoriously subjective concepts as 'pain' and 'discomfort'. But, then, the Model Criminal Code Officers Committee's specific definition of 'physical harm', which it is the Bill's intention to incorporate, does include 'pain' as one of its distinguishing features. In doing so, it might be argued that the Bill leads us into difficult, subjective terrain where the courts must have regard to the 'pain' a child claims to have felt on being punished. Of course it would be for the courts to decide what does in fact constitute '*harm...that lasts for more than a short period*'. The question is whether the Bill offers sufficient guidance to the courts in this respect, thereby avoiding the confusion it is claimed the common law finds itself in at present? With such considerations in mind, a number of contributors to the Second Reading debate for the Bill argued that a more objective form of words should be found.¹⁰⁴

¹⁰³ J Cashmore and N de Haas, n 11, p 126.

¹⁰⁴ See the later discussion in part 5 of this paper.

4.8 In loco parentis – person acting for a parent

In what appears to be a further re-statement of the common law, proposed section 61AA (1)(a) provides that the physical force must be ‘*applied by the parent of the child or by a person acting for a parent of the child*’. However, in its definition of the term ‘*person acting for a parent*’, the Child Protection - Excessive Punishment Bill appears to deviate from the common law. In this respect the Bill would narrow the potential scope for the operation of the defence of lawful correction. Thus, proposed section 61AA (5), the elements of which can be discussed separately, includes the following definition:

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

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

4.9 In loco parentis - who may administer reasonable chastisement?

Proposed section 61AA would alter the common law in a number of important respects. First, it prohibits the use of physical force by those who are not family members. For the defence to apply the person acting for a parent must be a step-parent, a de facto spouse or a relative by blood or marriage. Neighbours and friends are excluded, therefore, as are baby sitters and school bus drivers. Assuming that these categories of persons may be covered at present by the *in loco parentis* doctrine, something which may itself be in some doubt, the common law position would be altered under the Bill. The Second Reading speech made it clear that this exclusion is intentional, based on a policy decision:

to give authority only to those who would normally have the closest emotional ties with the child and parent and who would therefore be in a better position to understand the child’s temperament, likes and dislikes, medical and personal history, and so on. The emphasis is on protecting the child.

The provision, it could be argued, is narrow enough to discourage the use of physical force by all non-family members, but wide enough to allow for the complexities of modern family life: step-parents and de facto spouses, along with grandparents and others related by blood or marriage, are all accommodated within the Bill. However, as discussed below, complications may arise in this respect.

4.10 In loco parentis – express parental authority

A second departure from the common law is that any person acting for a parent must be ‘expressly authorised’ by that parent to use physical force. As noted, the situation at present is that there is an implied delegation, from parents to those in lawful charge of their children, of the parental right to apply moderate and reasonable physical punishment. Against this, the Bill follows the recommendation of the Model Criminal Code Officers Committee which was intended to ‘ensure that the mind of parents will be brought to bear on whether they desire others to use physical force on their children’.¹⁰⁵

However, certain differences between the Bill and the Model Criminal Code Officers Committee model should be noted. First, the Bill does not include any equivalent of the Model Criminal Code Officers Committee proposal which provided that force could be used where the person in loco parentis ‘*reasonably believed* that the parent of the child consented to such correction of the child by the person’ (emphasis added). Under the Bill, there is no dilution of the principle that a parent must give his or her express authorisation prior to the use of physical force.

Secondly, the Bill sets out in more detail how this express authorisation is to operate. Under the Bill a step-parent, for example, or a de facto spouse could only use physical force if expressly authorised to do so by a parent of the child. The term ‘parent of a child’ is defined to mean ‘a person having all the duties, powers, responsibilities and authority in respect of the child which, by law, parents have in relation to their children’. This can be described as a functional, as opposed to biological, definition of ‘parent’ focusing as it does on legal powers and responsibilities. It is in fact based on the definition of ‘parental responsibility’ found in the federal *Family Law Act 1975*.¹⁰⁶ The same approach to defining ‘parental responsibility’ is used in the *Children and Young Persons (Care and Protection) Act 1998*, which also defines ‘parent’ to mean a ‘person having parental responsibility for the child’.¹⁰⁷ Consistent with these models, the Bill does not stipulate that a ‘parent’ must be the child’s biological parent. Instead, for a person to have the power to give express authority for the use of physical force, the Bill requires only that the requirements of the legal relationship are satisfied. Does this create a problem, or at least an issue of consistency with other legislation, particularly where de-facto spouses and, possibly, step-parents are concerned?

¹⁰⁵ NSWPD, 5 May 2000, p 5380.

¹⁰⁶ Section 61B. This definition was introduced in 1995 following a recommendation by the Australian Law Reform Commission, n 12, pp 134-5. As the Commission explained it has its origins in the United Kingdom *Children Act 1989*. The intention behind the definitional change was that ‘By shifting the emphasis away from rights and ownership aspects towards continuing parental responsibility for, and relationship with, children the law would more clearly reflect and promote current policy in relation to children’. In particular, it thought that this approach would encourage divorced parents to share responsibility for their children.

¹⁰⁷ Section 3.

¹¹⁰ 'Parental responsibility' is defined 'within the meaning of the *Children and Young Persons (Care and Protection) Act 1998*'. As noted, this is consistent with the definition of 'parent' under the Child Protection - Excessive Punishment Bill. Under the Model Criminal Code Officers Committee report 'parent' is defined to include 'a guardian of the person or any other person who is responsible at law for the person's maintenance' – n 3, p 197.

¹¹¹ Query, for instance, whether a de facto step-parent, or indeed a step-parent, would be a 'parent' for the purposes of the *Children (Protection and Parental Responsibility) Act 1997* where 'parent' is defined to include a guardian and a 'person who has custody of the child', but to exclude 'the father or mother of the child if the father or mother has neither guardianship nor custody of the child' – section 3.

¹¹² Note that, under the *Family Law Act 1975* parental responsibility is not affected by the parents of a child separating, marrying or re-marrying – section 61C.

partner consented to its use? Both biological parents could be said to have ‘parental responsibility’ and thus to be ‘a parent’ for the purposes of the Bill. Presumably, the reference in the singular to ‘a parent’ suggests that the express authorisation of one parent would be sufficient.

Complications of this kind were considered in the UK Department of Health’s consultation paper, *Protecting Children, Supporting Parents*. It was said that a definition of parent as a person who has parental responsibility would exclude those ‘who may be in loco parentis on a permanent basis where no residence order has been made, perhaps step-parents or grandparents’.¹¹³ The paper recognised that complications might also arise where parents have re-married and there are step-parents involved where a distinction would have to be made between the rights of mothers and fathers in respect of those children who are and are not their offspring. Observations of this kind point to the complexities involved in developing wholly consistent approaches to family relationships, across different pieces of legislation at State and federal level, particularly where the whole question of what constitutes a family relationship in contemporary terms has become such a complex issue.

4.11 In loco parentis – the Aboriginal and Torres Strait Islander community

The Second Reading speech commented that, on advice from the Sydney Regional Aboriginal Corporation Legal Service an exemption is made in the Bill for Aboriginal and Torres Strait Islander people from the definition of ‘person acting for a parent’. The exemption was made on the ground that ‘parenting responsibilities are commonly shared amongst the extended family’ and because the requirement for express authority would be ‘inconsistent with Aboriginal and Torres Strait Islander culture, particularly in the case of elders’. Proposed section 61AA (5) provides, therefore, that in the case of a child who is an Aboriginal or Torres Strait Islander a ‘*person acting for a parent*’ is a person ‘*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*’.

It is enough to say in this regard that a case for accommodating cultural diversity in the criminal law can be made where this is considered to be appropriate.¹¹⁴ Obviously, the question is whether it is in fact appropriate in this instance? A supplementary question is whether a person acting for a parent in these circumstances must have been expressly ‘recognised’ by the community to have such authority before using physical force on the child? Perhaps the more likely interpretation is that an elder may have the kind of implied delegation which the common law appears to have recognised in the past where neighbours and others are concerned.

¹¹³ *Protecting Children, Supporting Parents*, n 1, paras 5.13 - 5.16.

¹¹⁴ The issue is discussed in Australian Law Reform Commission, n 12, Chapter 8.

4.12 The definition of ‘child’

The Bill’s definition of ‘child’ as ‘a person under 18 years of age’ is consistent with the general approach adopted in the *Crimes Act 1900*. The Model Criminal Code Officers Committee report noted in this regard that ‘Under the age of 18 is in accordance with a previous decision of the Standing Committee of Attorneys-General and the Convention on the Rights of the Child’.¹¹⁵ The Bill therefore does not seek to set either a lower or upper age limit within the 0-18 range in relation to which the defence of lawful correction would not apply at all. In England, on the other hand, it seems consideration is being given to prohibiting altogether the smacking of babies under one year.¹¹⁶ The Scottish Executive has also posed for consultation the question whether the law should ever consider reasonable ‘The physical punishment of very young children (and if so, of what age)?’¹¹⁷

Perhaps consideration should also be given to establishing an upper age limit for ‘young persons’ between 16 and 18 years of age,¹¹⁸ thereby acknowledging that lawful correction is not a defence where physical force is used in this ‘transitional period during which the young person moves from childhood to adulthood’.¹¹⁹ An argument could be made that such an approach would be consistent with the Bill’s objects, as well as with the modern understanding that ‘As children gain in age and maturity, the law expects parents to recognise their increasing autonomy’.¹²⁰ As with the issue of consent for medical treatment, which was discussed in *Gillick*, the parental power to use physical force to correct a child might also yield to the child’s right to make his or her own decisions when the child is ‘of

¹¹⁵ Model Criminal Code Officers Committee report, n 3, p 37.

¹¹⁶ A Frean, ‘Smacking babies may be a punishable act’, *The Times*, 15 January 2000. The 1998 survey of public opinion conducted by the Office for National Statistics Survey suggested that 76% agreed that children under two should not be smacked at all – Protecting Children, Supporting Parents, n 1, Annex A.

¹¹⁷ The Scottish Executive, n 2, para 5.12. In an unreported case from Western Australia – *Higgs v Booth*, WA Supreme Court A315/316/86, 29 August 1986 – in which, among other things, a foster mother hit a two-year old child with her hand, it was held on appeal that physical punishment was not warranted: R Ludbrook, n 11, p 129.

¹¹⁸ Public opinion on such an issue is hard to gauge, but note that a survey conducted in 1991 by the Scottish Law Commission found that 68% thought it should be lawful to smack a 15 year old - Scottish Law Commission, n 65, para 2.101. It could be argued that such an approach would be consistent with the age limit on the defence of reasonable chastisement in England and Scotland under the relevant child welfare legislation. As noted, under section 1 (7) of the *Children and Young Persons Act 1933* (UK) and section 12 (7) of the *Children and Young Persons (Scotland) Act 1937* the exercise of the parental right of chastisement lasts until the child is 16.

¹¹⁹ Legislation Review Unit report, n 48, p 9. The report recommended defining a child as 13 or under and a young person as 14 to 17. However, section 3 of the *Children and Young Persons (Care and Protection) Act 1998* defines ‘young person’ to mean ‘a person who is aged 16 years or above but who is under the age of 18 years’.

¹²⁰ Australian Law Reform Commission, n 12, p 115.

an age of sufficient discretion to enable him or her to exercise a wise choice in his or her own interests'.¹²¹ Likewise, following a lengthy discussion of the issue in *Marion's case*, Justice Deane observed that 'the relationship between a child and her or his parents will ordinarily pass through a transitional stage in which authority is shared'.¹²² At any rate, it may be worth asking whether a Bill of this kind should contemplate upper and/or lower limits to the operation of the defence of lawful correction within the 0-18 year age group?

4.13 Miscellaneous provisions

The Bill makes it clear that it would not 'derogate from or affect' any defence at common law other than the defence of lawful correction. In other words, a parent might still rely on a defence of self-defence, for example, or the defence of others or property, depending on the circumstances.¹²³

Consistent with the rule against the retrospective operation of criminal laws, the Bill also makes it clear that it would only apply to proceedings arising after its commencement.¹²⁴

Further, the Bill provides for the commencement of the proposed Act to be 12 months after the date of assent. In the Second Reading speech this was explained as follows:

Both legislation and education are essential if our children are to be afforded every possible protection and safeguard against physical abuse. I call on the Government to make a commitment to funding a community education program to teach parents alternatives to the use of harsh physical discipline on their children. For that reason the bill provides that the proposed Act will commence 12 months after the date of assent. During the intervening time, the Commission for Children and Young People has agreed to assist with community education about this legislation, under the Commissioner's role to conduct and promote public awareness activities on matters affecting children. Another reason for the delay of commencement for 12 months is to allow appropriate time for relevant government departments that will be affected by the provisions of the bill to adjust, if necessary, their policies and procedures and to appropriately train staff.¹²⁵

¹²¹ [1986] 1 AC 112 at 188. Note that Lord Scarman was of the view that, save where statute otherwise provides, the minor's capacity to make his or her own decisions is to be a 'question of fact' and 'is not to be determined by reference to any judicially fixed age limit.'

¹²² *Marion's case*, n 9, at 294.

¹²³ Proposed section 61AA (4).

¹²⁴ Proposed section 61AA (6).

¹²⁵ *NSWPD*, 5 May 2000, p 5381.

¹³¹ It was commented in this respect, ‘The need for this Bill is most obviously illustrated if we look at the possible adverse effects on a child’s

¹²⁶ J Cashmore and N de Haas, n 11, p 128.

¹²⁷ *NSWPD*, 5 May 2000, p 5377.

¹²⁸ *NSWPD*, 26 May 2000, p 5934.

¹²⁹ *NSWPD*, 5 May 2000, p 5376.

¹³⁰ *NSWPD*, 26 May 2000, p 5894.

¹³¹ *NSWPD*, 5 May 2000, p 5376.

physical health following the use of inappropriate physical punishment'.¹³² This line of argument continued, 'most child abuse cases display a pattern of parents intentionally or unintentionally hurting their children by crossing the boundaries between physical punishment and assault. The most evident deficiency with the common law in this area is that it does not specify where the boundaries lie.'¹³³

- *Reporting child abuse:* Again, by clarifying the legal position, the Bill will further 'assist all those people with a professional responsibility to report child abuse'.¹³⁴
- *Non-intrusive:* At the same time, the Bill will not 'interfere with families and the way families care for and nurture child'. Although it defines the legal rights and responsibilities parents have it does not 'seek to remove from parents their primary responsibility of guiding a child's growth and development in a reasonable way'.¹³⁵ It was important to stress, it was said, that 'This is not an anti-smacking Bill'. It was observed in this respect that the arguments, based on family rights, which are now used against the Bill were the same as those flawed objections which were once raised against the passing of domestic violence legislation.¹³⁶
- *Non-custodial options:* The courts retain a wide discretion in deciding the sentencing options, including those of a non-custodial nature, for a person found guilty of assaulting a child.¹³⁷ Moreover, as it was pointed out, children only tend to go the police when there is 'extreme abuse' and the Bill would not affect the 'processes undertaken at present by the Police Service, the Department of Community Services and the Office of the Director of Public Prosecutions prior to a judicial hearing...'.¹³⁸
- *Expert and community support:* The Bill is supported by peak medical bodies, including the Australian Medical Association and the Division of Paediatrics of the Royal Australasian College of Physicians, and by many key community service organisations, among them the Community Services Commission and the Association of Children's Welfare Agencies. It is also supported by children's advocates, as well as by the Law Society of NSW, the Human Rights and Equal Opportunity Commission, the Ethnic Communities Council of NSW and the Australian Federation of Islamic Councils.¹³⁹

¹³² NSWPD, 26 May, 5895.

¹³³ NSWPD, 26 May, p 5921.

¹³⁴ NSWPD, 5 May 2000, p 5381.

¹³⁵ NSWPD, 5 May 2000, p 5381.

¹³⁶ NSWPD, 26 May 2000, p 5923.

¹³⁷ NSWPD, 5 May 2000, p 5381.

¹³⁸ NSWPD, 26 May 2000, p 5931.

¹³⁹ NSWPD, 5 May 2000, p 5377.

In effect, the point was made that ‘a number of learned organisations in paediatric, social, educational and parenting fields have endorsed this Bill’.¹⁴⁰ In addition, public survey results from the UK suggest the legal reforms proposed by the Bill are consistent with contemporary opinion.

- *Best practice:* The boundaries for the use of physical force defined by the Bill are within the limits proposed by such respected paediatric organisations as the American Academy of Paediatrics and the Canadian Paediatric Society. It is also consistent with the way the NSW Department of Health defines behaviour it considers as inappropriate physical punishment of children.¹⁴¹
- *International developments:* The Bill is part of a wider international debate about the lawful correction of children and is consistent with the progressive trends within that debate.¹⁴²
- *A step in the right direction:* For those in favour of the complete abolition of corporal punishment it was said that the Bill is ‘a moderate step in the right direction’.¹⁴³

5.3 Arguments against

In outline, the main arguments in opposition to the Child Protection - Excessive Punishment Bill from the Second Reading speech and subsequent debate were as follows:

- *Education before legislation:* It was argued that the Bill has ‘got it the wrong way round’, in that the emphasis should be on supporting and educating parents and ascertaining whether in fact legislation of this kind is required. That legislative reform may be introduced at some point in the future was contemplated, but it should come at the end of and not as a prelude to a process of community discussion and education.¹⁴⁴
- *Biblical chastisement:* The maxim ‘spare the rod and spoil the child’ is to be understood, it was suggested, in the context of an argument for what is called ‘Biblical chastisement’: that is, where very moderate physical force is used as a last resort by a loving parent for the benefit of the child, in particular, to ‘indicate that certain

¹⁴⁰ NSWPD, 26 May 2000, p 5918.

¹⁴¹ NSWPD, 5 May 2000, p 5379.

¹⁴² NSWPD, 5 May 2000, p 5378.

¹⁴³ NSWPD, 26 May 2000, p 5917.

¹⁴⁴ NSWPD, 26 May 2000, p 5918.

¹⁴⁵ NSWPD, 26 May 2000, p 5929.

- *Intrusive:* Some people, it was explained, would regard the Bill ‘as being dangerous or intrusive on the family to try to give an exact legal definition to such a difficult construct as ‘reasonable correction’. Is it not an another example of ‘overregulation’¹⁴⁶
- *Family and parental rights attacked:* The Bill, it was said, ‘adds to a list of devices and instruments that prevent families from determining how to manage their own affairs’. If passed, the argument continued, the proposed law would ‘prevent legitimate discipline in the family home...As the family unit is eroded by twenty-first century life, this type of social engineering is simply not required.’¹⁴⁷ It was also said that, if the Bill were passed, ‘parents will be fearful of providing loving discipline or loving chastisement to their children – something that is part of their responsibility as’¹⁴⁸ Susan Bastik of the Australian Family Association was cited as one of those who would regard such a Bill ‘as an attack on the rights of parents’.¹⁴⁹
- *Unintended consequences and harmful alternatives:* A further concern is that, because public opinion on the subject of ‘reasonable correction’ is ‘so diverse and changes so rapidly’, any attempt, however well-meaning, ‘to codify this difficult concept may have unintended consequences, may make criminals out of people who had the best intentions, or may cause other harmful effects on what might be an otherwise successful and happy family’.¹⁵⁰ Another unintended consequence may be that, instead of seeking to influence a child’s behaviour by rational and humane means, parents may resort to more harmful methods of correction, such as confining children in a ‘locked room’. It was commented in this regard, ‘The sort of emotional damage that can do to a small child or a child who is afraid of the dark can be just as severe as the damage it receives from physical punishment’.¹⁵¹ It can be noted that the definition of ‘harm’ favoured by the Bill includes ‘significant psychological harm’, which leaves open the question of whether the emotional damage contemplated here could amount in some circumstances to such a level of harm?
- *Abuse of legislation:* What is to prevent the precocious child, it was asked, from reporting parents ‘for the smallest of disciplinary smacks, and the authorities will be compelled to investigate those complaints’?¹⁵² Likewise, the concern was noted that the Bill ‘does not specify what, if any, protective measures might ensure that this legislation

¹⁴⁶ NSWPD, 26 May 2000, p 5896 and p 5912.

¹⁴⁷ NSWPD, 26 May 2000, p 5925.

¹⁴⁸ NSWPD, 26 May 2000, p 5927.

¹⁴⁹ NSWPD, 26 May 2000, p 5896.

¹⁵⁰ NSWPD, 26 May 2000, p 5896.

¹⁵¹ NSWPD, 26 May 2000, p 5919.

¹⁵² NSWPD, 26 May 2000, p 5925.

¹⁵⁶ If passed, it was said, the new law would be reported as a measure prohibiting smacking altogether. It would therefore enter the public consciousness as an anti-smacking Bill and, in such circumstances, confused parents would probably opt against using any form of corporal punishment.¹⁵⁷

- *Drafting problems:* Comment was made about various potential drafting problems. For example concern was expressed about what would constitute ‘a short period’ under proposed section 61AA (2)(c), which was described as ‘too wishy-washy’.¹⁵⁸ The intended operation of the reference to ‘or threaten to cause, harm’ in the same section was also questioned.¹⁵⁹ The case for amendment was even argued by the Bill’s supporters who saw a need to look again at the formulation of proposed section 61AA (2)(c): the Bill’s failure to ‘explain what “reasonable” means in this context was said to be a ‘serious flaw. As well, it was suggested that the provision dealing with physical punishment by means of an object be revised so that reference be made ‘to the effect on the child rather than the nature of the instrument used by the parent or the parent’s

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¹⁵³ NSWPD, 26 May 2000, p 5912.

¹⁵⁴ NSWPD, 26 May 2000, pp 5927-5930.

¹⁵⁵ NSWPD, 26 May 2000, p 5912.

¹⁵⁶ NSWPD, 26 May 2000, p 5925.

¹⁵⁷ NSWPD, 26 May 2000, p 5926.

¹⁵⁸ NSWPD, 26 May 2000, p 5926.

¹⁵⁹ NSWPD, 26 May 2000, p 5927.

¹⁶⁰ NSWPD, 26 May 2000, p 5935.

6.0 CONCLUSIONS

There is no doubting the view expressed by the Model Criminal Code Officers Committee in its discussion of the defence of lawful correction that ‘This is an emotional issue over which there are keenly felt opposing positions’.¹⁶¹ The debate concerning the more general and controversial question of whether corporal punishment should be permitted at all is of longstanding. The Child Protection - Excessive Punishment Bill does not propose to prohibit the physical punishment of children altogether and, for that reason, this paper has not dealt with that broader issue. Instead, the declared object of the Bill is to clarify the present common law position and to bring a greater degree of certainty to the judicial interpretation of what is meant by ‘lawful correction’ or the ‘reasonable chastisement’ of children.

It is recognised in the debate that what is, in fact, considered reasonable in this context has changed over time as community standards and values have shifted. Indeed, judicial comment has acknowledged that our understanding of the relationship between parents and their children generally has changed radically over the past hundred years or so. In *Marion’s case*, Justice McHugh said that in the nineteenth and for much of the twentieth century that understanding ‘almost certainly derived from what was considered to be a natural right in the father of near absolute control over the person and property of his child’.¹⁶² Across the community at large that is no longer the way that the relationship between parents and their children is perceived. Reflecting these changing attitudes, as in such related areas of the law as domestic violence, the emphasis is now on the protection of the vulnerable against abuse. As a rule it is the welfare of children which is now given paramount importance when a balance is to be struck between the rights of parents and their children. The Child Protection - Excessive Punishment Bill can be placed in the context of these developments, where the emphasis is on the protection of children by the introduction of legislation which articulates more clearly what constitutes unreasonable chastisement. In support of the proposal it is said that the case-by-case approach of the common law has resulted in confusion and a lack of agreed standards, a situation which, it is claimed, is not in the best interests of either parents or children.

It is not the purpose of this paper to present a case for or against the Child Protection - Excessive Punishment Bill. The paper has, however, made certain observations regarding the Bill’s drafting and it has canvassed, without commentary or analysis, the main arguments from the Second Reading speech and subsequent debate. By way of conclusion it can be asked what impact the Bill is likely to have? Should it be viewed, as an editorial in *The Sun-Herald* has argued, as ‘a way of fighting a worrying rise in what should only be

¹⁶¹ Model Criminal Code Officers Committee report, n 3, p 135.

¹⁶² (1992) 175 CLR 218 at 314. McHugh J’s argument related specifically to the power of a parent to consent to the medical treatment of a child.

¹⁶³ Editorial, ‘Children need discipline, not violent abuse’, *The Sun-Herald*, 25 June 2000.

operating not so much as a law that will be employed on a regular basis to prevent abuse, but as something like a standard by which parental practice may be guided? At present, very few cases arise in Australia in which the defence of lawful correction is an issue. Does this suggest that such a legislative change is not required, that the admittedly horrendous problems associated with the abuse of children are dealt with adequately under the current regime of child protection and criminal laws against assault? Alternatively, is it taken to be an indication that assaults on children, which can and do escalate into serious abuse, are too often left unreported, a situation which the Bill may help to alleviate?

A related issue is whether a legal reform of the sort proposed by the Bill would have greater practical and/or symbolic value if it were incorporated into the child protection legislation and not into the Crimes Act? The United Kingdom example may be helpful in this context, as there the parental right to use reasonable and moderate physical punishment has been recognised for many years under the child protection legislation, yet it would seem that relevant cases are usually dealt with under the law of assault to which the common law defence of reasonable chastisement applies.

Something of a conundrum in respect to the Bill is that, on the one hand, public survey results from the UK are cited in its support, thus suggesting that the changes it proposes are in keeping with contemporary opinion, while on the other hand an education campaign is advocated to make parents aware of what constitutes unreasonable chastisement. What therefore is the assumption underlying the Bill – that community members, and parents in particular, *do or do not* know what kind and quantum of physical punishment is appropriate where children are concerned? Are its critics right when they describe it as an instance of social engineering? Or is it reflecting widely held community standards? In the absence of relevant survey results for NSW, it is hard to draw any conclusions in this respect. Moreover, as there do not appear to be any recent NSW cases applying the defence of lawful correction, no meaningful conclusions can be drawn concerning the approach the courts have taken on the chastisement of children, as to whether it is or is not in keeping with contemporary standards of reasonableness.

Many issues have been raised by the Bill, not least the philosophical differences that exist about the extent to which the state may legitimately intervene in family life. At another level, a number of questions have been posed concerning the Bill's drafting with a view to asking whether it does in fact achieve its stated intention of clarifying what is a complex area of the law. Whatever view is taken of the more general issues surrounding the Bill, there is also no doubt that careful consideration will need to be given to these technical matters.