

T A S M A N I A
L A W R E F O R M
I N S T I T U T E

Physical Punishment of Children

Jenny Gawlik Terese Henning Kate Warner

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How to respond to this issues paper

The Tasmania Law Reform Institute invites responses to the issues discussed and proposals made in this issues paper. Questions are contained within the paper. The questions are intended as a guide only – you may choose to answer all, some or none of them. Please explain the reasons for your views as fully as possible. If you would like your views and/or the fact that you made a response to this paper to be kept confidential, simply say so, and the Institute will respect that wish.

Responses should be made in writing by 16 December 2002.

Responses may be sent to the Institute by mail, fax or email.

address: Tasmania Law Reform Institute
GPO Box 252-89,
Hobart, TAS 7001

email: law.reform@utas.edu.au

fax: (03) 62267623

Inquires should be directed to Jenny Gawlik, on the above contacts, or by phoning (03) 62262069.

This issues paper is also available on the Institute's web page at:

www.law.utas.edu.au/reform

or can be sent to you by mail or email.

Information on the Tasmania Law Reform Institute

The Tasmania Law Reform Institute was established on 23 July 2001 by agreement between the Government of the State of Tasmania, the University of Tasmania and The Law Society of Tasmania. The creation of the Institute was part of a Partnership Agreement between the University and the State Government signed in 2000.

The Institute is based at the Sandy Bay campus of the University of Tasmania within the Law Faculty. The Institute undertakes law reform work and research on topics proposed by the Government, the community, the University and the Institute itself.

The Institute's Director is Professor Kate Warner of the University of Tasmania. The members of the Board of the Institute are Professor Kate Warner (Chair), Professor Don Chalmers (Dean of the Faculty of Law at the University of Tasmania), The Honourable Justice AM Blow OAM (appointed by the Honourable Chief Justice of Tasmania), Paul Turner (appointed by the Attorney-General), Philip Jackson (appointed by the Law Society) and Terese Henning (appointed by the Council of the University).

About this issues paper

This issues paper discusses reforming the law in relation to the physical punishment of children in Tasmania. Any group or person is invited to respond to this issues paper. Following consideration of all responses it is intended that a final report will be published, containing recommendations.

The topic for this issues paper was proposed by the Commissioner for Children in September 2001 in response to a call for proposals by the Institute.

Executive summary

The current criminal (and civil) law relating to the physical punishment of children states:

It is lawful for a parent, or person in the place of a parent to use, by way of correction, any force towards a child in his or her care that is reasonable in the circumstances.

The type or degree of force that is 'reasonable' is not set out in legislation. There is no consensus in the community as to what constitutes 'reasonable' punishment and legal precedents are inconsistent. This means that the law relating to the physical punishment of children is unclear. Lack of clarity means:

- the law is unfair;
- the law offers no guide to parents on what level of physical punishment of their children is acceptable; and
- prosecutions are difficult even in cases of apparently serious child abuse.

Obviously if these problems exist the overall result is that children are not being as effectively protected from excessive physical punishment as they could be.

For these reasons we should reform the criminal and civil law relating to the physical punishment of children.

There are two options for reform. The first is to prohibit the use of physical punishment. The second option is to clarify the law relating to physical punishment by further defining what type and/or degree of punishment is reasonable or unreasonable.

The arguments for and against these two options are:

Option 1: abolition of the defence:

- Physical punishment of children is undesirable/harmful and should not be countenanced by the law;
- Abolition achieves maximum certainty.

Option 2 : clarification of what is reasonable:

- The reasonable physical punishment of children is a legitimate socialising technique and should continue to be sanctioned by the criminal law and by the state.
- This option introduces minimal change in the current law and is therefore more likely to gain majority community support.

Abolition

Deciding between these two options requires consideration of whether physical punishment should be permitted at all. The arguments that have been raised in debating this issue are set out in response to six questions.

1. Is physical punishment morally acceptable?

It is argued that physical punishment is not morally acceptable because first, it denies children the same right to physical integrity that adults enjoy, and secondly, because it violates anti-discrimination laws. And thirdly, it violates international human rights laws. On the other hand, the wide use of physical punishment indicates it is morally acceptable to the majority of Australians. There are also cultural and religious beliefs in a moral duty to use corporal punishment (when necessary) in order to properly raise children.

2. Is physical punishment effective?

It is argued that physical punishment is an ineffective discipline technique because it achieves only short-term compliance (sometimes) and does not help internalise moral values. On the other hand physical punishment is seen by many as effective and in some situations invaluable.

3. Is physical punishment necessary?

Physical punishment is said to be necessary to discipline children effectively in situations where other discipline techniques are less or not effective or are too difficult to apply. The contrary view is that discipline can be firm and effective without the use of physical punishment. This is achieved on a daily basis by teachers, foster parents, child-carers and many parents.

4. Is physical punishment harmful?

Against the use of physical punishment it is argued that its use makes a wide range of negative effects more likely at both an individual and societal level such as physical injuries and abuse, anti-social behaviour, aggressive behaviour and involvement with crime. On the other hand it is argued that there is no compelling evidence to support these assertions, and that common experience refutes them.

5. Would banning physical punishment be an unjustified intrusion into the privacy of the family and parental rights?

It is argued that banning physical punishment would prevent parents and families from managing their own affairs as they see fit and that parents have the right to raise their children in the way that they think is best. On the other hand it is pointed out that the physical punishment of children is already regulated (it must be 'reasonable') and that while parents need to be able to raise and discipline their children the way they think best, they do not have and should not have an absolute legal right to do this.

6. Would banning physical punishment be effective?

It is argued that banning physical punishment would not be effective due to a lack of public support and difficulty in enforcing the law. However, public support may be higher than asserted, particularly if people are assured that trivial smacks will not be prosecuted, and that education rather than enforcement would be the aim of a change in the law.

Clarifying the law

The second option, clarifying the law, would involve setting clear limits on what type of physical punishment is acceptable. Limits are suggested relating to the type of punishment, parts of the body to which force may be applied, the degree of harm that may be inflicted, age of the child and persons who may apply the punishment.

Law reform developments in other jurisdictions

The law in New South Wales has recently been amended in an attempt to clarify what physical punishment is not reasonable. The Scottish government is also proposing to clarify the law by banning blows to the head, shaking and punishment with an implement.

In a number of countries physical punishment has been completely prohibited. Most notable of these is Sweden, where the ban has been in operation since 1979. Since the ban was introduced Sweden has seen a reduction in the rates of some youth crime and alcohol and drug use and a reduction in the youth suicide rate. There has been no increase in the number of parents prosecuted for minor assaults or in the number of children removed from their parents by social workers.

Proposals

Finally, a number of possible reforms to Tasmanian legislation are proposed:

Proposal 1a – removing the defence of reasonable correction

Proposal 1b – including a clear statement

Proposal 2a – stating what punishment is permitted

Proposal 2b – setting out what is not reasonable and factors to be considered

Proposal 2c – follow the Model Criminal Code

Education: Any change to the law will need to be accompanied by an education campaign to inform people of the change, why it was made and to promote non-physical discipline methods.

Time delay: The option of a time delay on the commencement of any new or amending legislation is noted.

Definition of physical punishment

When the term **physical punishment** is used in this paper it means:

the use or threatened use of physical force towards a child by a person in a position of authority or power over the child, as a means of inflicting unpleasant consequences following or to prevent bad behaviour

Actions taken to protect a child from harming themselves or others or harming property (such as physically restraining a child) are not 'physical punishment' as they are intended to *protect*, not punish.

Although this paper deals solely with 'physical' punishment, it is acknowledged that other forms of punishment which are degrading, humiliating, detrimental to health or terrifying to a child may have equally or more severe adverse effects upon a child. For this reason it may be desirable for any reform relating to physical punishment to encompass degrading or humiliating punishment. However for convenience this paper will usually refer only to physical punishment.

Discipline is a wider concept than physical punishment. Discipline involves the use of a variety of techniques or strategies with the aim of teaching the appropriate way to behave. Physical punishment is one discipline technique. Others include explanations, praise, role-modelling (showing by example), distraction (particularly for young children), withdrawal of treats or privileges and removing the child from the situation ('time-out').

Physical abuse may also be differentiated from physical punishment. The *Children, Young Persons and Their Families Act, 1997* defines physical abuse as harm detrimental to the child's well being or placing their development in jeopardy. The Child Protection Service further defines physical abuse ('physical maltreatment') as 'significant physical harm or injury experienced by a child as a result of severe and/or persistent actions or inaction. It includes injuries such as cuts, bruises, burns and fractures caused by a range of acts including beating, shaking, ... or excessive discipline or punishment. ...'.¹ The Child Protection Service considers that reasonable physical discipline should not result in any injury such as bruising.² Physical punishment may not be abusive in this sense, although obviously sometimes it is.

¹ Materials supplied by the Child Protection Service.

² Personal communication, Child Protection Service workers.

Part 1

The current law

Introduction

In Tasmania, the law relating to the physical punishment of children contains a number of apparent inconsistencies. The criminal law prohibits physical punishment of children in schools and juvenile detention centres but permits parents and people acting in the place of a parent to physically punish their children with the qualification that it must be reasonable. However, policy and licensing guidelines prohibit the physical punishment of children in foster care and childcare. In addition, under the civil law, a child (like any other person) can sue any person who physically punishes him or her. However, a parent (or person acting in the place of a parent) would have a defence to an action if the punishment were reasonable.

Criminal law

The criminal law regulates the physical punishment of children. Section 50 of the *Criminal Code* provides –

It is lawful for a parent, or person in the place of a parent to use, by way of correction, any force towards a child in his or her care that is reasonable in the circumstances.

This means that parents can use physical punishment with the intention of disciplining their children without being guilty of an offence, as long as the force used is *reasonable* in the circumstances. As originally enacted the Code provided that it was also lawful for a schoolmaster to use reasonable force towards a pupil, however this was removed in 1999 (see discussion below at 13).

Section 50 operates as a defence that can be raised in relation to any charge involving the application of force to a child by a parent or person in place of a parent. In theory such charges can range from minor cases of assault to serious charges of grievous bodily harm or manslaughter.

The term ‘reasonable’ in section 50 is not defined by the *Criminal Code*. On the one hand this means that the law in this area is flexible and so can reflect changes in community standards of what is and is not acceptable. On the other hand the term has

been said to be so imprecise and uncertain that it can provide no clear guidance on what is and is not lawful.

Because the law does not set out in legislation what is and what is not reasonable, if the defence is raised in court reasonableness must be determined on a case by case basis. In making this decision the judge, jury or magistrate can be guided by their own experience or knowledge of community standards, as well as by past court cases.

There are relatively few reported cases from Tasmania or elsewhere that have considered what is reasonable punishment. This is because parents are rarely charged with assaulting their children and also because these cases are usually heard in the lower or Magistrate's Courts where decisions are not reported.

In a comprehensive discussion paper, *Legal and Social Aspects of Physical Punishment*, commissioned by the Commonwealth government in 1995, Cashmore and de Hass outline the case law considering what is reasonable punishment in detail. The following is a summary of their findings:

Guidance as to what is and is not reasonable was provided in *R v Terry*.³ In that case it was said that the punishment should be 'moderate and reasonable', should be judged in relation to 'the age, physique and mentality of the child' and should 'be carried out with a reasonable means or instrument' not 'totally unrelated to usual disciplinary practices'. Also relevant is the timing between the misbehaviour and punishment⁴ and the repetition or continuity of the punishment.⁵

The use of an instrument

The use of a cane has been held to be both reasonable (UK, 1994)⁶ and unreasonable (Melbourne, 1994); it was also suggested in *Terry* that it would be reasonable if applied to a healthy fourteen-year-old boy. Instruments and actions which have been held to be unreasonable include:

- a hard blow with a closed fist⁷
- aiming a gun at a child to frighten the child⁸
- tying a child to a tree, gagging the child and driving away⁹
- throwing a book at a child¹⁰
- hitting a child with a cricket stump¹¹
- hitting a child with a wooden spoon, leaving bruising visible four days later on a four year old¹²

³ [1955] VLR 114.

⁴ *R v Haberstock* (1970) 1 CCC (2nd) 433.

⁵ *R v Bresnehan* Serial No A78/1992.

⁶ The complete citations for a number of cases were not included in the report by Cashmore and de Hass.

⁷ *R v Terry* [1955] VLR 114.

⁸ *R v Hamilton* [1891] 12 LR (NSW) Sup Ct.

⁹ *R v Bedelph* [1981] 4 A Crim R 192.

¹⁰ *R v Taylor*, *The Times* 28 December 1983 High Court.

¹¹ Adelaide, 1994; New Zealand, 1994 (*NZ Herald* 28 June 1994).

¹² *Higgs v Booth* WA (unreported) Supreme Court, A315/316/86, 29 August, 1986.

The age, physique and mentality of child

In *Terry* it was said that a child incapable of understanding correction should not be punished. This principle has been applied to a child less than twelve months old,¹³ and to children two and a half years old.¹⁴

Blows to the head

There is inconsistency in the reported judgments as to whether blows to the head are reasonable or not.

Held to be reasonable:

- slaps to the face of a well grown and athletic boy leaving some bruising and abrasion¹⁵
- a slap to the face chipping a tooth¹⁶
- beating with a belt causing bruising to the face¹⁷
- a slap around the face bursting an eardrum¹⁸

Held to be unreasonable:

- a not very violent strike to the head with the palm of the hand rupturing an eardrum¹⁹
- striking a child on the head with a piece of wood; slapping a child across the face several times leaving red marks; pulling ears; tapping children on the head with a chair rung (all by a teacher)²⁰
- a slap to the face cutting an ear²¹
- ten blows to the head of a two-year-old²²

Extent of the injury

In *Byrne v Hebden* it was said that the presence of bruising or welts does not necessarily indicate that the force used was unreasonable,²³ this is also shown by some of the cases above. However, other cases have held that punishment resulting in welts²⁴ or bruising²⁵ is unreasonable.

Clearly there are significant inconsistencies in the case law with the result that it provides minimal assistance in determining the legal limits of physical punishment.

¹³ *R v Miller* [1951] VLR 346.

¹⁴ *R v Griffin* [1869] 11 Cox CC 402; *Higgs v Booth* WA (unreported) Supreme Court, A315/316/86, 29 August, 1986.

¹⁵ *White v Weller ex parte White* [1959] Qd R 192.

¹⁶ *R v Haberstock* (1970) 1 CCC (2nd) 433.

¹⁷ UK, 1992.

¹⁸ UK, 1985.

¹⁹ *Ryan v Fildes* [1938] 3 All ER 517.

²⁰ *Pemberton v A-G* [1978] Tas SR 1.

²¹ Rome, February 1994.

²² Adelaide, 1994.

²³ (1913) St R Qd 233.

²⁴ Ontario, 1992.

²⁵ UK, 1985; Victoria, 1994 (the parent did not invoke the defence).

Civil Law

The situation under civil law is basically the same as it is under the criminal law.

A child (like any other person) can sue any person who physically punishes him or her by bringing an action against that person for trespass to the person (assault, battery or false imprisonment).²⁶ In the case of battery, the child would need to prove an intentional act of contact – there is no requirement that damage be intended or proved.²⁷ The child can obtain nominal damages for invasion of the right to personal integrity; compensatory damages for actual injury done; and possibly aggravated or exemplary damages.²⁸ However, a parent (or person acting in the place of a parent) would have a defence if the punishment was reasonable in the circumstances. This is usually called the defence of ‘reasonable chastisement’ or ‘reasonable correction’. Like the criminal law, the term ‘reasonable’ is not clearly defined, and when deciding what is reasonable reference is had to past cases, including criminal cases. As in criminal law, *R v Terry* is frequently relied upon²⁹ (see discussion above).

Children in the juvenile justice system

The physical punishment of children in detention centres is prohibited by statute. The *Youth Justice Act, 1997*, s 132, provides:

The following actions are prohibited in relation to a detainee while in a detention centre:

- (a) the use of isolation, within the meaning of section 133, as a punishment except as provided in that section;
- (b) the use of physical force unless it is reasonable and –
 - (i) is necessary to prevent the detainee from harming himself or herself or anyone else; or
 - (ii) is necessary to prevent the detainee from damaging property; or
 - (iii) is necessary for the security of the centre; or
 - (iv) is otherwise authorised by or under this or any other Act or at common law;
- (c) the administering of **corporal punishment**, that is, any action which inflicts, or is intended to inflict, physical pain or discomfort on the detainee as a punishment;
- (d) the use of any form of psychological pressure intended to intimidate or humiliate the detainee;
- (e) the use of any form of physical or emotional abuse;
- (f) the adoption of any kind of discriminatory treatment.

²⁶ J G Flemming (1998) *The Law of Torts* 9th ed, LBC: NSW, at 107.

²⁷ *Ibid*, at 29-31.

²⁸ *Ibid*, at 29.

²⁹ F Trindade and P Cane (1999) *The Law of Torts in Australia* 3rd ed, Oxford University Press: Victoria, at 259.

Physical punishment in schools

Physical punishment in Tasmanian schools is illegal. This has been clear since legislative amendments in 1999 removed the reference to teachers from s 50 of the Criminal Code and inserted the following offence in the *Education Act*, 1994:

s 82A

(1) The principal of a school or a teacher at a school must not administer corporal punishment to a student of that school.

Penalty: Fine not exceeding 50 penalty units.

(2) In this section, "teacher" includes –

- (a) a member of the staff of a school; and
- (b) any other person instructing or teaching, or assisting or supporting teaching, at a school.

Corporal punishment is defined in s 3 of the *Education Act*:

"corporal punishment" means physical punishment by means of cane, stick, strap, belt, hand or by any other means;

Children in foster homes

Physical punishment of children in foster care is prohibited by policy. Training materials given to foster parents or carers contain the following information:³⁰

The Department's policy specifically prohibits the use of the following punishments:

- corporal punishment inflicted in any manner (this includes spanking);
- threats or derogatory remarks against the child or his/her natural parents;
- deprivation of meals;
- deprivation of visits with natural parents;
- verbal abuse;
- unusual, unnecessary or severe punishment. Physical restraint may be used in situations where a child's behaviour demands immediate control in order to protect him/her, or other individuals and/or property.

However, even though there is a policy prohibition on physical punishment, carers would still be protected from criminal and civil liability by the defence of reasonable chastisement. This contradiction between policy and the law is potentially confusing.

³⁰ Supplied by the Department.

Children in child care

Similarly, physical punishment of children in child care is prohibited by policy. Licensing guidelines state:³¹

The licensee shall ensure that the dignity and rights of the child are maintained at all times. The licensee shall ensure that:

- (a) A child is given positive guidance towards acceptable behaviour, with encouragement freely given.
- (b) Behaviour guidance techniques used do not include physical, verbal or emotional punishment, including, for example, punishment that humiliates, frightens, or threatens the child.

Again, this desirable policy does not reflect the criminal and civil law.

³¹ Tasmanian Centre Based Child Care Licensing Guidelines, July 1997, standard 4.4.2.

Part 2

Need for reform

Introduction

Part 1 showed that the current criminal and civil law relating to the physical punishment of children is unclear. This Part will show how this lack of clarity causes the following problems:

- the law is difficult to obey;
- the law offers no guide to parents on what level of physical punishment of their children is acceptable; and
- prosecutions against parents are difficult, even for serious assaults.

This suggests that children are not being protected from excessive physical punishment as effectively as possible and that reform of the law is desirable.

It can be argued that the flexibility of the term ‘reasonable’ allows the defence of reasonable correction to keep pace with changing community standards and attitudes to the punishment of children. In addition, by having a flexible standard the law can be applied on a case-by-case basis, allowing detailed consideration of all the facts in an individual case before deciding whether the punishment was reasonable. However, as discussed below, the lack of clarity has serious negative effects, which outweigh these possible advantages.

An unclear law is unfair and morally unacceptable

One of the most obvious negative effects of the lack of clarity in the law is that people do not know how the law affects them or when they may be in breach of it. Professor Patrick Parkinson of the University of Sydney’s law faculty has clearly explained this problem.³²

Parliament has a fundamental duty to all citizens to ensure that the law is clear enough that they can know what the law requires of them. It is inevitable that some laws are very complex. Tax law is an example, Corporations Law is another. It is appropriate in such cases for people to rely on professional advisers. Most are in business, and such advice is a legitimate business cost.

³²Submission regarding the NSW Crimes Amendment (Child Protection - Excessive Punishment) Bill 2000, to the Standing Committee on Law & Justice, September 2000.

In areas of law which regulate the lives of ordinary citizens, clarity is especially important, because people cannot be expected to consult lawyers about everything they do. It would be unacceptable if the laws of speeding were so vague that drivers were advised only to drive at a speed which is “reasonable in the circumstances”. People should not be exposed to criminal prosecution if they fail to adhere to vague laws. ...

The current law of reasonable chastisement is not clear. It depends on the opinion of the magistrate, judge (or occasionally, jury). The careful review of the reported cases in The National Child Protection Council report, “Legal and Social Aspects of the Physical Punishment of Children” (1995) demonstrates how uncertain the law is. It depends on what a court considers to be reasonable. A defendant will only find out what the court thinks when she is in the dock facing criminal charges. This is morally unacceptable.

The law offers no clear standards

Because the law is unclear it can offer no guide to parents on what our community views as morally acceptable and appropriate physical punishment. The law only states that the punishment must be ‘reasonable’. This is a vague, indeterminate term that may mean different things to different people in different circumstances. As the case law demonstrates, there is no consensus or commonly identifiable understanding of what is reasonable physical chastisement. To some reasonable physical punishment may stop at a light tap on the buttocks, to others it may include smacking with a wooden spoon, thrashing with a leather strap or beating with a broom handle. The limits of reasonableness in this context are virtually unknowable and certainly unpredictable. So what is repugnant and excessive to some may seem measured and acceptable to others.

Because the law does not guide parents as to what is acceptable physical punishment, it is easier for punishments, which begin as reasonable force, to escalate to excessive force in the heat of the moment. When there is no clear line, it is easily overstepped.

Lack of clarity in the law could also actually hinder the development of a consensus among the community as to what physical punishment is acceptable. Because as individuals we are unsure about what the law is, even if we feel that someone is punishing their child beyond what is reasonable (eg someone in a public place or a friend or family member), we may be reluctant to comment or become involved because we cannot say with authority that what they have done is wrong. The consequence is a lack of dialogue in the community about what is acceptable physical punishment.

Prosecutions for serious assaults are difficult

Because the law is vague the prosecution of parents who excessively punish their children is unpredictable and difficult. In Tasmania very few such cases are prosecuted. It appears that only a minority of cases even reach the stage of being considered for prosecution.³³ If a case is considered for prosecution no guidelines exist to help prosecutors judge whether the parent's actions were reasonable or not.³⁴

In the Supreme Court,³⁵ in the last ten years only four convictions of parents who have excessively punished their children could be found.³⁶ The two most recent convictions involved the same little girl. In July 2002, a mother pleaded guilty to assault of her three-year-old daughter.³⁷ Frustrated when her daughter cried all day, she smacked the child extremely hard four times on the buttocks, causing bruising. She did not raise the defence of reasonable punishment.³⁸ She was aged 17 and heavily pregnant with her second child at the time of the assault. Sentence was adjourned for 12 months on condition that she be of good behaviour and in addition she was placed on probation with a condition that she continue to attend parenting classes from Good Beginnings Australia or a similar organisation. In May 2002 her partner pleaded guilty to assaulting the little girl with a leather belt on the buttocks and legs, causing bruising;³⁹ this occurred immediately after the assault on the child by her mother. He was under the influence of drugs at the time of offence. Because he pleaded guilty there was no issue in relation to reasonable correction. In December 1999⁴⁰ a mother pleaded guilty to striking her 6-year-old son all over his body, in an attack lasting several hours. She was also under the influence of drugs at the time.

The fourth case, *R v Bresnehan*,⁴¹ was tried in 1992. In this case a father and his wife (the children's step-mother) were prosecuted for various charges of ill treatment of a child and assault against all four of their children. Only the father was convicted of one count of ill treatment of his youngest son. In relation to the other charges of ill treatment of a child and assault the jury returned hung verdicts. The alleged incidents included:

- the "cigar incident": the children were forced to smoke cigars and eat the cigar butts; the youngest son was whipped, grabbed by the throat and thrown to the ground, two other children were also whipped (one or more of the children had been caught smoking);

³³ Personal communication with Mr Tim Ellis, the Director of Public Prosecutions (8/4/2002) and Inspector Cretu, head of police prosecutions (9/4/2002).

³⁴ *Ibid.*

³⁵ Data on prosecutions in the Magistrate's Courts is not available.

³⁶ This does not include 'shaken-baby' cases.

³⁷ *R v C* 31/7/2002.

³⁸ It is not known why she chose not to raise the defence – perhaps it was thought that due to the bruising the defence would not succeed, or perhaps the mother regretted her actions and just wanted the matter over as quickly as possible.

³⁹ *R v Knowles* 8/5/2002.

⁴⁰ *R v Salter* 3/12/1999.

⁴¹ Serial No A78/1992; and on appeal: *Bresnehan v R* (1992) 1 Tas R 234.

- the “tapes incident”: the stepmother whipped all the children on the hands with a horsewhip because a missing cassette tape had been found destroyed;
- the “gun powder incident”: the youngest son was forced to hold his face over a mug of loose gun powder and the powder was ignited (he had taken it and apparently played with it);
- a cattle-prodder was used to sting the children on the tongue and bottom;
- a child was tied in a shed with a dog chain and hit with a shearing belt for not feeding the dogs properly;
- hitting with a dog lead for bed wetting;
- hitting with a stock whip;
- hitting with a hearth brush;
- hitting with a shearing belt;
- hitting with a piece of wood;
- hitting with “Agfest” sticks (made out of fibre-glass or plastic, one with a knob on the end of it);
- kicking;
- putting a quantity of pepper on food as a disciplinary measure;

For the charge of ill treatment of his youngest son the father was initially sentenced to 12 months imprisonment. The trial judge commented in passing this sentence:

In my view, the evidence establishes that you initiated a regime of draconian punishment against your youngest son. You used implements upon him which must have caused severe pain on a number of occasions. Fortunately, the physical consequences were not permanent but I have no doubt that the psychological scars were (and still are) deep. One hopes that these scars will heal in time but it must be remembered that abused children sometimes turn into abusing adults themselves. I think Mr. Bent's report indicates that [M] is disturbed to some extent.

However, on appeal by the father the sentence was reduced to 10 weeks and backdated. This reduction was made partly because it was held that the trial judge had taken some incidents into account which were not the subject of a conviction,⁴² and also because not enough weight was given to the finding that the father acted with a genuine belief that his methods were for the ultimate good of the child.

This case demonstrates the extreme type of physical punishment which some people may consider is reasonable. It also shows that the court is prepared to accept that some people could think that such conduct is reasonable. Moreover, it is the existence of the defence of reasonable chastisement that leaves open the possibility of giving mitigatory force to an unreasonable but genuine belief in the appropriateness of punishment. The consequence is that the law fails to set effective and appropriate standards of reasonable punishment.

The fact that the law is unclear obviously does not encourage prosecutions in this area. While this may be considered appropriate for other reasons, it perpetuates the problem

⁴² Due to the jury being unable to reach a verdict on the charges relating to the other three children.

of the law being unclear because case law, which would have the potential to clarify what is reasonable, is not generated.

Child abuse in Tasmania

The above discussion begs the question of whether excessive punishment of children is a problem in Tasmania which warrants attempting to facilitate prosecution by creating greater certainty in the law.

The activities of the Child Protection Service can give a rough indication of the extent of the problem of physical child abuse in Tasmania. Authorised child protection workers⁴³ may apply, on the Secretary's⁴⁴ behalf, to the Magistrates Court (Children's Division) for a care and protection order of a child.⁴⁵ The Court may make the order if it is satisfied that the child is 'at risk'.⁴⁶ 'At risk' is defined in the Act and includes being, or likely to be abused or neglected.⁴⁷ The Act defines abuse or neglect as –⁴⁸

- (a) sexual abuse; or
- (b) physical abuse or emotional injury or other abuse, or neglect, to the extent that –
 - (i) the injured, abused or neglected person has suffered, or is likely to suffer, physical or psychological harm detrimental to the person's wellbeing; or
 - (ii) the injured, abused or neglected person's physical or psychological development is in jeopardy

The Child Protection Service further defines abuse and neglect into different categories including 'physical maltreatment'. The term physical maltreatment is said to describe 'significant physical harm or injury experienced by a child as a result of severe and/or persistent actions or inaction. It includes injuries such as cuts, bruises, burns and fractures caused by a range of acts including beating, shaking, ... or excessive discipline or punishment. ...'⁴⁹ Where an allegation of physical maltreatment has been made, and a doctor confirms that the injuries are inconsistent with an accident, the matter will often be referred to the police for investigation. The Child Protection Service considers that reasonable physical discipline should not result in any injury such as bruising. Where the injury appears to be the result of excessive discipline and it is felt that referral to the police is not warranted because the injury is mild or unlikely to occur again, the service may refer the parent to the Parenting Centre or other parent support organisation for help and advice with discipline.⁵⁰

⁴³ Authorised officers are defined in s 3 of the *Children, Young Persons and their Families Act, 1997*. Police officers can also be authorised under the Act.

⁴⁴ The Secretary of the Department of Health and Human Services.

⁴⁵ *Children, Young Persons and their Families Act, 1997*, s 42(2).

⁴⁶ *Children, Young Persons and their Families Act, 1997*, s 42(3)(a)(i), the Court should also be satisfied that the order should be made (s 42(3)(a)(ii)). There is also an alternate basis for making a care and protection order (s 42(3)(b)). Such an order may grant custody of the child to a number of people, including the guardian of the child, a member of the child's family and the Secretary, s 42(4)(b).

⁴⁷ *Children, Young Persons and Their Families Act, 1997*, s 4.

⁴⁸ *Children, Young Persons and Their Families Act, 1997*, s 3(1).

⁴⁹ Materials supplied by the Child Protection Service.

⁵⁰ Personal communications, Child Protection Service.

The Australian Institute of Health and Welfare's publication 'Child Protection Australia 2000-01'⁵¹ reports that in the financial year 2000-2001 in Tasmania there were 315 notifications (after screening) to the Child Protection Service of abuse or neglect. There were 278 investigations by the service (88% of notifications). Of these investigations, there were 103 substantiations, 10 classifications of child at risk, and 137 cases not substantiated. Of the 103 substantiations, 54 related to physical abuse (52%). Generally, younger children are most likely to be the subject of substantiations, and the natural parent is most likely to be responsible. This data suggests that the lack of prosecutions cannot be ascribed to rarity of incidents.

Of some concern, figures from Kids Help Line show the proportion of young Tasmanians reporting physical abuse is almost double the national level, despite the fact that the level of use of the service is in proportion to our population.⁵²

Conclusion

There are a number of problems which may be attributed to the lack of clarity in the current law. The claim can therefore justifiably be made that the current law is not working effectively to protect children or to guide parents.

Discussion Point

*These questions may be a useful guide in responding to this Part.
Please explain the reasons for your views as fully as possible.*

1. Do you agree with the conclusion that the current law should be clarified?
If not why?

⁵¹ Child Welfare Series No 29, 2002.

⁵² Kids Help Line, *2001 Statistical Summary*, Infosheet No 2, available at:
<<http://www.kidshelp.com.au/research/infosheets.html>>

Part 3

Options for reform

This paper has demonstrated that there is a real need for reform of the law relating to the physical punishment of children. There are two options for reform.

The first option for reform is to abolish the defence of reasonable correction altogether. This would make the law very clear. This option has been adopted in a number of countries and is advocated by a growing number of groups and individuals.

The second option is to clarify the law relating to physical punishment. This can be done by setting out in legislation what is or is not reasonable punishment, and/or the factors which a court should consider when deciding whether a particular punishment was reasonable.

The arguments for and against these two options are:

Option 1: abolition of the defence:

- Physical punishment of children is undesirable/harmful and should not be countenanced by the law;
- Abolition achieves maximum certainty in the law.

Option 2 : clarification of what is reasonable:

- The reasonable physical punishment of children is a legitimate socialising technique and should continue to be sanctioned by the criminal law and by the state;
- This option introduces minimal change in the current law and is therefore more likely to gain majority community support.

Clearly the choice between these two options hinges on the thorny question of whether the state should sanction the physical punishment of children in any circumstances.

The following questions are relevant to this issue:

- Is physical punishment morally acceptable?
- Is physical punishment effective?
- Is physical punishment necessary?
- Is physical punishment harmful?
- Would banning physical punishment be an unjustified intrusion into the privacy of the family and parental rights?
- Would a law banning physical punishment be effective?

This issues paper now sets out the arguments and counter arguments that have been raised in debating these six questions.⁵³

Is physical punishment morally acceptable?

It is argued that physical punishment is morally wrong on a number of grounds. First, it denies children the same right to physical integrity that adults enjoy. Secondly, it violates anti-discrimination laws. And thirdly, it violates international human rights laws.

The countervailing arguments are that the wide use of physical punishment is evidence of its moral acceptability to the majority of Australians, and that the cultural and religious beliefs of many people create a moral duty to use corporal punishment in order to raise children properly.

Unjustifiable infringement of children's right to physical integrity

The defence of reasonable chastisement applies only to assaults upon minors. There is no equivalent defence to assault upon an adult. It is therefore argued that allowing the physical punishment of children implies that they are not entitled to the same dignity and respect as adults.

It is true that many laws and policies do not affect all people equally. However, when this is the case the reason for that different treatment should be clear and justified. A clear example of this is the law that children under the age of 16 years must attend school. Therefore, the question is whether the current unequal treatment of children by the law is justified.

Inequality in the treatment of children is generally justified on the grounds that children, though people, are not adults and therefore cannot be treated like adults. They do not have adult experience or understanding and cannot reason in an adult manner. Accordingly, parents need to be able to physically punish their children because they are responsible for those children, and have a legal and moral duty to guide them to adulthood. We do not need to be able to physically punish other adults because we are not responsible for them – it is not our duty to teach them how to behave.

⁵³ Neither the arguments nor counter arguments are intended to represent the views of the Institute or the authors.

Allowing physical punishment violates anti-discrimination laws

A ground supporting the assertion that physical punishment is morally wrong is that it violates our own state's anti-discrimination laws. Tasmania's *Anti-discrimination Act* came into force in 1998. Section 16 of this Act prohibits 'direct discrimination' on the basis of age. Direct discrimination is defined in s 14 of the Act and occurs when people are treated less favourably than others because they have a particular attribute or characteristic. Section 14(3) provides that for direct discrimination to take place it is not necessary that the prescribed attribute be the sole or dominant ground for the unfavourable treatment; or that the person who discriminates regards the treatment as unfavourable; or that the person who discriminates has any particular motive in discriminating. In other words, it does not matter that the motive for so treating a person is their best interests. Although there are many exemptions and exceptions to this basic principle set out in the Act, none appear to be relevant to the issue of physical punishment of children. Thus it is arguable that the Tasmanian Government is currently discriminating against children by not providing them with the same protections under the law of assault as adults. It appears that at the very least, the law allowing for the physical punishment of children is not in keeping with the spirit of anti-discrimination principles.

Allowing physical punishment violates international human rights laws

Australia has obligations under international human rights treaties and conventions to which it has agreed to become a party. These human rights obligations should not be ignored. They represent important human rights standards that most countries in the world have agreed to uphold. Regarding the issue of the physical punishment of children, two of these international treaties are particularly relevant:

The International Convention on the Rights of the Child

This convention was ratified by Australia in 1990. It recognises that the best interests of the child should always be the primary concern (Article 3), as well as recognising the responsibilities, rights and duties of parents to provide appropriate direction and guidance in the exercise by the child of his or her rights. The clearest statement about physical punishment is in Article 19 of the convention. This says that all appropriate legislative, administrative, social and educational measures shall be taken to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent mistreatment, maltreatment or exploitation, including sexual abuse, while in the care of parents, legal guardians, or any other person who has care of the child. Because physical punishment can be seen as violence it can be argued that its use is prohibited by the treaty.

Article 37 of this treaty also provides '[n]o child shall be subjected to torture or other cruel, inhumane or degrading treatment or punishment.' It can be argued that physical punishment is by its very nature degrading as it treats a child as inferior and as having fewer rights to physical integrity than adults.

Countries that ratify the treaty agree to report periodically to the United Nations Committee on the Rights of the Child about how they are meeting their obligations under the convention. In 1997, in the Committee's concluding observations on Australia's initial report under the convention, the Committee suggested that Australia 'take all appropriate measures, including of a legislative nature, to prohibit corporal punishment . . . at home. The Committee also suggests that awareness raising campaigns be conducted to ensure that alternative forms of discipline are administered in a manner consistent with the child's human dignity and in conformity with the Convention.'⁵⁴

International Covenant on Civil and Political Rights

This treaty includes the right to the protection of the law without discrimination (Article 26). As has been discussed above in relation to Tasmania's anti-discrimination laws, it can be argued that at present the law of assault discriminates against children by offering them less protection than adults.

*A v UK*⁵⁵

In 1998 a step-father in the UK who had repeatedly beaten his 9-year-old step-son with 'considerable force' resulting in severe bruising successfully resorted to the common law defence of reasonable chastisement and was acquitted of assault. The child sought a ruling from the European Court of Human Rights that the common law defence of reasonable chastisement violated Article 3 of the *European Convention on Human Rights* which states '[n]o one shall be subjected to torture or to inhumane or degrading treatment or punishment'. The Court held that the United Kingdom law (ie including the common law defence of reasonable chastisement) did not offer adequate protection against inhumane or degrading treatment or punishment contrary to Article 3.

Following this decision all countries in the United Kingdom are considering or have considered reform of the defence of reasonable chastisement.

Although Australia is not a party to the *European Convention on Human Rights*, Article 3 of that Convention is similar to Article 19 of the *Convention on the Rights of the Child*, to which Australia is a party (as discussed above). Thus it can be argued that our criminal law, by allowing corporal punishment in s 50 of the Code (which is essentially the same as the common law defence of reasonable chastisement) violates international human rights law.

⁵⁴ Available at the United Nations Website at:
<[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.15.Add.79.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15.Add.79.En?OpenDocument)>

⁵⁵ *A v United Kingdom* (1998) 27 EHRR 611.

Physical punishment is morally acceptable to the majority of Australians

Australian research has shown that the majority of children in Australia are smacked and that physical punishment is seen as appropriate by the majority of Australians.⁵⁶ Some argue that this clearly indicates that physical punishment is morally acceptable in our community.

The contrary argument is that the fact that physical punishment is widely practised and accepted does not mean that it is, or should be, considered *morally acceptable*. Most people do not accept physical punishment because it agrees with their moral standards. Rather, people accept physical punishment because it is something they have grown up with and are used to, perhaps having given little thought to whether it is morally right or not. Once physical punishment has been used, either by one's parents or one's self, it is a natural process of internalisation to justify its use in a way that is consistent with the desire to think well of our parents and of our own parenting skills. The fact physical punishment is often used when parents lose control, or as a last resort, lends some support to the contention that we do not use physical punishment because it is morally acceptable. Further support is found from research which has found that many parents feel remorse or guilt after smacking or spanking their child⁵⁷ and that the use of physical punishment is a possible source of marital conflict in the child-rearing domain.⁵⁸

The fact that a practice is considered acceptable by a large number of people does not mean that it cannot or should not be legislated against. Parliament frequently makes laws prohibiting activities which are common place and condoned by a majority of the community. An example of this is the prohibition on driving without a seatbelt.

Religious and cultural beliefs

Some advocates of physical punishment claim a religious belief in a moral duty to use physical punishment (as a last resort and in a controlled and loving manner) in order to raise children well. It is argued that this belief must be respected and should not be interfered with by the state. Past legislative intervention in this area (banning corporal punishment in Tasmanian schools and the introduction of the NSW legislation setting

⁵⁶ J Cashmore, N de Hass, *Legal and Social Aspects of the Physical Punishment of Children*, Discussion Paper, 1995, Commonwealth Department of Human Services and Health, citing: P Amanto, *Children in Australian Families*, 1987; R Duke, J Atchison, *Adults' and children's perceptions of smacking*, Student Report, University of South Australia, 1993 (Magill); Western Australia Department for Community Development, *'Abuse in the Family' Baseline Survey*, 1994, Perth, Donovan Research; Harrison Market Research, 1993 cited by L Wightman, *Australian Attitudes to Corporal Punishment*, Paper presented to Fourth Australasian Conference on Child Abuse and Neglect, 1993, Griffith University, Queensland.

⁵⁷ G Holden, 'Perspectives on the Effects of Corporal Punishment: Comments on Gershoff (2002)' 128 *Psychological Bulletin* 2002, 590 at 592, citing A Graziano, J Hamblen, W Plante, 'Subabusive violence in child rearing in middle-class American families' (1996) 98 *Pediatrics* 845 and G Holden, P Miller, S Harris 'The instrumental side of corporal punishment: Parents' reported practices and outcome experiences' (1999) 61 *Journal of Marriage and the Family* 908.

⁵⁸ G Holden, 'Perspectives on the Effects of Corporal Punishment: Comments on Gershoff (2002)' 128 *Psychological Bulletin* 2002, 590 at 592, citing J Dobson, *The new dare to discipline*, 1992, Wheaton, IL: Tyndale House.

out some forms of physical punishment that are not reasonable) has received strongest opposition from religious organisations.

On the other hand it is argued that while respecting religious beliefs is important, what is in the best interests of children must be the overriding principle.

Is physical punishment effective?

Physical punishment is not effective as a discipline technique

Following extensive and detailed consideration of research undertaken in this area, Cashmore and de Haas' concluded:⁵⁹

the research indicates that **reliance on physical punishment is not effective** and that it can sometimes be counterproductive. Although it can lead to compliance, it is much more effective if it is accompanied by an explanation and if the child thinks the punishment is reasonable. Physical punishment itself does not help children internalise their own standards of behaviour and develop a regard for the effect on others of what they do. Physical punishment that is too severe or frequent can encourage aggression, and it may reinforce unwanted behaviour rather than discourage it. (emphasis added)

Cashmore and de Haas also note⁶⁰ that the children of parents who rely on physical punishment:

- tend to have less remorse over misbehaviour and transgressions
- are less likely to resist temptation without external constraints
- are less willing to confess and accept responsibility
- are more likely to base their judgements on fear of detection and punishment rather than on internalised standards of morality

The Paediatrics and Child Health Division of The Royal Australasian College of Physicians has stated⁶¹ that:

the use of force, either physical force and/or psychological threats, is an ineffective and unhelpful method of punishment and discipline of children.

A recent analysis of research on corporal punishment by Elizabeth Gershoff tends to support these conclusions.⁶² This study, described as 'one of the most comprehensive examinations of the subject',⁶³ analysed 88 studies, spanning the last 62 years.

⁵⁹ J Cashmore, N de Haas, *Discussion Paper, Legal and Social Aspects of the Physical Punishment of Children* (1995) Commonwealth Department of Human Services and Health, at 93.

⁶⁰ At 85.

⁶¹ 'Protecting Children is Everybody's Business: Paediatricians Responding to the Challenge of Child Abuse' 2nd edition, published by The Royal Australasian College of Physicians, 2001, at 22.

⁶² E Gershoff, 'Corporal Punishment by Parents and Associated Child Behaviours and Experiences: A Meta-Analytic and Theoretical Review' 128 *Psychological Bulletin* 539.

⁶³ Washington Post, 26/6/2002.

Gershoff reviewed 5 studies which examined the relationship between immediate compliance by children and corporal punishment. Of these 5 studies 3 found corporal punishment to be linked with immediate compliance, while 2 did not, leading Gershoff to call for more research into this relationship. Fifteen studies examined the relationship between corporal punishment and moral internalisation. Thirteen out of these fifteen studies found that children subjected to corporal punishment were less likely to internalise moral values.

Support for the view that physical punishment is ineffective can also be found in the rationale for prohibiting physical punishment in schools, juvenile detention centres, foster care and child-care in Tasmania. Training materials⁶⁴ given to foster parents/carers state:

Prospective and new carers sometimes find it difficult to comprehend how they are expected to manage difficult behaviours without the use of corporal punishment. Experienced carers have, however, proven that it is possible and preferable to manage a child through a positive approach to discipline.

The modern view on physical punishment is that it does not effectively change behaviour because:

- it teaches only what is not desired, not what is acceptable;
- children's feelings of anger and hurt are often strong after being hit and they have difficulty remembering the reasons for the punishment;
- it only works when the threat is there;
- it encourages learning on how to avoid punishment, rather than how to behave better.

Furthermore, learning theory suggests physical punishment is unlikely to be effective. To be effective punishment should occur after *every* transgression, be *immediate*, be *intense* at least for the first transgression and not be signalled by a discriminative stimulus.⁶⁵ Holden suggests that 'these conditions represent a tall order for parents; in fact it is likely that parents are destined to fail on all four counts.'⁶⁶ It is also suggested that the pain and often anger and/or other emotions (humiliation, fear, rejection) caused by physical punishment are so overwhelming or distracting to the child that any explanations or reasoning parents may offer may go 'unheard', with many children not even remembering why they were punished in the first place.⁶⁷

Advocates of physical punishment argue that physical punishment can be used effectively and in some situations is invaluable. Physical punishment can be used to

⁶⁴ *Managing Difficult Behaviour*, supplied by the Department of Health and Human Services.

⁶⁵ G Holden, 'Perspectives on the Effects of Corporal Punishment: Comments on Gershoff (2002)' 128 *Psychological Bulletin* 2002, 591 at 592, citing M Domjan, *The essentials of conditioning and learning* (2nd ed), Belmont CA: Wadsworth.

⁶⁶ Holden, *ibid*, at 591.

⁶⁷ P Leach, 'Spanking: a shortcut to nowhere...', 1996, <<http://www.empathicparenting.org/spank.htm>>

quickly get a child's attention and stop unwanted behaviour. Other forms of discipline may be satisfactory when dealing with compliant children or in ideal situations but physical punishment works with less compliant children in less than ideal situations. Alternative punishments, such as loss of privileges, are often too remote for a child to care about. They also prolong an incident unnecessarily, whereas a smack is over and done with quickly.

Is physical punishment necessary?

Regardless of whether people think physical punishment is acceptable, most people would probably agree that children need discipline. Discipline is a much broader concept than punishment. Discipline involves the use of a variety of techniques or strategies with the aim of teaching the appropriate way to behave. Physical punishment is one discipline technique. Others include explanations, praise, role-modelling (showing by example), distraction (particularly for young children), withdrawal of treats or privileges and removing the child from the situation ('time-out').

Proponents of physical punishment are of the view that physical punishment is an effective discipline technique which is not harmful and is in fact necessary to discipline children effectively in situations where other discipline techniques are less or not effective. Such situations might include dangerous situations and/or situations in which lengthy discussions or negotiations are not possible, or when dealing with children who are very difficult, malicious or hysterical.

Furthermore, it can be argued that applying some of the other suggested discipline techniques requires a level of self-awareness, skill, understanding, control and patience that many parents simply do not possess. If physical punishment were not available to these parents their children may not be given sufficient or suitable discipline.

It is also argued that youth today are less disciplined and respectful than they have ever been and youth crime is at an all time high. Accordingly, it is felt that if today's youth were given firmer discipline such as physical punishment these problems might be addressed. Prohibiting physical punishment would leave parents with only a weak range of discipline techniques.

On the other hand it is said that discipline can be firm and effective without the use of physical punishment. This is achieved on a daily basis by teachers, foster parents (who no doubt deal with some very difficult children), child-carers and many parents. The

Paediatrics and Child Health Division of The Royal Australasian College of Physicians state:⁶⁸

Alternative methods of discipline, which are far more effective and beneficial for children, include:

- parents responding positively, rewarding desired behaviour combined with ignoring undesirable behaviour; and,
- setting appropriate limits and applying fair consequences for breaking them, related logically to the misdemeanour where possible.

Is physical punishment harmful?

Considerable academic and community debate surrounds the question of whether physical punishment has harmful effects. Opponents of the use of physical punishment argue that its use makes a wide range of negative effects more likely at both an individual and societal level such as physical injuries and abuse, anti-social behaviour, aggressive behaviour and involvement with crime. These findings have been criticised as being based on uncertain evidence and in any event refuted by common experience.

Physical punishment has negative effects for individuals and the community

The negative effects of physical punishment are argued to include:

- Physical injuries
- Increased risk of physical abuse
- Increased anti-social behaviour
- Increased aggression
- Increased risk of being involved with crime, suicide, drugs
- A more violent society

Physical injuries

The most obvious effect of physical punishment is physical damage or injury. Although most physical punishment will not be intended to result in physical damage or injury, there may always be a risk of damage occurring because:

- children are more vulnerable to injury than adults;
- adults tend to underestimate their own strength;
- blows miss their mark;
- mild punishment can escalate and get out of control or ‘go too far’.

⁶⁸ ‘Protecting Children is Everybody’s business: Paediatricians Responding to the Challenge of Child Abuse’ 2nd edition, published by The Royal Australasian College of Physicians, 2001, at 23.

An English study by Nobes and Smith found that over a third of children in ordinary families receive 'severe' punishment (punishments 'that were intended to, had the potential to, or actually did cause physical and/or psychological injury or harm to the child').⁶⁹

Increased risk of physical abuse

It has been suggested that the use of physical punishment increases the risk of physical abuse occurring. There is no conclusive evidence to prove or disprove that this is the case. Apart from the difficulty of defining 'abuse' (it can be argued that all physical punishment is violence and is abusive), the number and complexity of issues which might contribute to abuse make conclusive research in this area extremely difficult.

In their report on the Bill defining unreasonable punishment in NSW, the NSW Standing Committee on Law and Justice stated:⁷⁰

The Committee is persuaded by the strength of arguments from those best placed to understand the way in which abuse and injuries occur. Evidence from experts such as Professor Kim Oates, of the New Children's Hospital, Professor Graham Vimpani, Dr Judy Cashmore and Professor Patrick Parkinson, who developed the current NSW child protection legislation, all argued in different ways that abuse was a continuum. There are a small number of sociopathic parents who will abuse children under any conditions. Apart from this group **there is no clear cut-off where excessive punishment ends and abuse begins**. Professor Oates was very definitely of the view that **most of the serious injuries seen by his hospital's child protection unit come as a result of physical discipline gone wrong rather than premeditated or systematic abuse**. (emphasis added)

All ten studies analysed by Gershoff on the issue of physical abuse found that children subject to corporal punishment were more likely to become the victims of physical abuse.⁷¹ Gershoff claims that this supports the notion that 'corporal punishment and physical abuse are two points along a continuum'.⁷²

Dr Elizabeth Hallam, who is contracted by the Tasmanian Child Protection service to assess suspected cases of child abuse, agreed that the majority of cases of physical abuse are the result of physical punishment getting out of control and/or inadequate parenting skills.⁷³

⁶⁹ G Nobes, M Smith, 'Physical punishment of children in two-parent families' (1997) 2 *Clinical Child Psychology and Psychiatry* 271, cited in Children are unbeatable! Alliance's response to the UK Department of Health's Consultation Document on the Physical Punishment of Children, 2000.

⁷⁰ Report 15, tabled 24/10/2000, at 49.

⁷¹ E Gershoff, 'Corporal Punishment by Parents and Associated Child Behaviours and Experiences: A Meta-Analytic and Theoretical Review' 128 *Psychological Bulletin* 539, at 547, Table 4.

⁷² *Ibid*, at 553.

⁷³ Personal communication, 22 July 2002.

Dr Hallam said that in particular the incidence of abuse by non-biological parents is rising. She said that the transient nature of many families today means that some non-biological parents do not form a proper bond with children who may be left in their care. The bond or love between parent and child usually acts as a break on punishment – holding parents back from going too far when punishing their child. When this bond has not properly formed, it is easier for punishments to get out of control in the heat of the moment and in the difficulties and frustrations of disciplining children, which may be new to the non-biological parent. Dr Hallam said that a law prohibiting the use of physical punishment altogether has the potential to reduce the risk of physical abuse in such situations.

Research has also shown that abusive parents are more likely to believe in and rely upon physical punishment than non-abusive parents⁷⁴ and that parents themselves are often concerned that when they use physical punishment they might lose control and hurt their child.⁷⁵ One suggested explanation for this is the relative ineffectiveness of physical punishment, meaning that repeated and escalating levels of punishment occur to force the child to maintain the good behaviour.⁷⁶

Those who reject the connection between physical punishment and physical abuse point to the fact that most children are physically punished but most children are not physically abused as indicating that no significant connection exists between physical punishment and physical abuse.

Increasing antisocial behaviour and delinquency

Two American studies⁷⁷ have shown that when parents use corporal punishment to reduce antisocial behaviour, the long-term effect tends to be that antisocial behaviour is increased. These studies observed a large sample of children over time and controlled for the level of antisocial behaviour at the start of the study, family socio-economic

⁷⁴ M Straus, 'Discipline and Deviance: Physical Punishment of Children and Violence and Other Crime in Adulthood' (1991) 38 *Social Problems* 133, at 141-142. J Belsky, 'Etiology of child maltreatment: A developmental-ecological analysis' (1993) 114 *Psychological Bulletin* 413; W Deley 'Physical punishment of children: Sweden and the USA' (1988) 19 *Journal of Comparative Family Studies* 419; E Whipple & C Webster-Stratton, 'The role of parental stress in physically abusive families' (1991) 15 *Child Abuse and Neglect*, 279, all cited in J Cashmore, N de Haas, *Discussion Paper, Legal and Social Aspects of the Physical Punishment of Children* (1995) Commonwealth Department of Human Services and Health, at 107.

⁷⁵ A Burns, J Goodnow, *Children in Australia: Contemporary Issues* (1985) Sydney, Allen & Unwin; R Duke, J Atkinson, *Adults' and children's perceptions of smacking* (1993) Student Report, University of South Australia (Magill); both studies cited in J Cashmore, N de Haas, *Discussion Paper, Legal and Social Aspects of the Physical Punishment of Children* (1995) Commonwealth Department of Human Services and Health, at 108.

⁷⁶ J Cashmore, N de Haas, *Discussion Paper, Legal and Social Aspects of the Physical Punishment of Children* (1995) Commonwealth Department of Human Services and Health, at 108; 'Protecting Children is Everybody's business: Paediatricians Responding to the Challenge of Child Abuse' 2nd edition, published by The Royal Australasian College of Physicians, 2001, at 23.

⁷⁷ M Straus, D Sugarman, J Giles-Sims, 'Spanking by Parents and Subsequent Antisocial Behaviour of Children' (1997) 151 *Archives of Paediatric and Adolescent Medicine* 761; M Gunnoe, Mariner C, 'Towards a developmental-contextual model of the effects of parental spanking on children's aggression' (1997) 151 *Archives of Paediatric and Adolescent Medicine* 768, cited in M Straus, 'New evidence for the benefits of never spanking' 38 *Society* 2001 (this article is also available on the internet at <<http://www.childrightseducation.org/english/archives/strausarticle.html>> as: 'The benefits of avoiding corporal punishment: New and more definitive evidence').

status, sex of the child, and the extent to which the home provided emotional support and cognitive stimulation.

This finding is supported by Gershoff's review, which found that 12 out of 13 studies found an undesirable link between the use of corporal punishment and delinquent and antisocial behaviour in children and 4 out of 5 studies found an undesirable link between the use of corporal punishment and criminal and antisocial behaviour in adults.⁷⁸

Aggression

Another recent American study has shown that slapping by parents increased the probability of a child assaulting the parent.⁷⁹ This study examined over a thousand adolescent boys at two time periods and controlled for race, socio-economic status, the age of the parents, the child's attachment to the parent and attitude toward aggression, and physical size.

Examination of survey data has revealed a direct relationship between the amount of physical punishment received as a child and the likelihood of assaulting a spouse.⁸⁰

All 27 of the studies Gershoff found that examined the link between childhood aggression and corporal punishment, did find such a link. A further four out of four studies found a link to adult aggression. Five studies that she found which examined the link between corporal punishment and abuse as an adult of one's own child or spouse, also found a link between the two.⁸¹

These links have been attributed to the fact that children model their behaviour on their parents' behaviour. This means if parents hit children, children learn that hitting and being violent or aggressive are acceptable ways to behave. Thus children who are hit by their parents are more likely to hit other children and family members. Even when children are told that hitting is wrong, if the parent continues to hit them they learn that hitting is permissible if you are the biggest and in control, and/or if you lose control.

⁷⁸ E Gershoff, 'Corporal Punishment by Parents and Associated Child Behaviours and Experiences: A Meta-Analytic and Theoretical Review' 128 *Psychological Bulletin* 539, at 547, Table 4.

⁷⁹ T Brezina, 'Teenage violence towards parents as an adaptation to family strain' (1999) 30 *Youth and Society* 416.

⁸⁰ M Strause 'Ordinary violence, child abuse, and wife-beating: What do they have in common' in D Finkelhor, R Gelles, G Hotaling, M Straus (ed) *The Dark side of Families: Current Family Violence Research* (1983) 213, California, Sage; cited in M Straus, 'Discipline and deviance: Physical punishment of children and violence and other crime in adulthood' (1991) 38 *Social Problems* 133, at 142.

⁸¹ E Gershoff, 'Corporal Punishment by Parents and Associated Child Behaviours and Experiences: A Meta-Analytic and Theoretical Review' 128 *Psychological Bulletin* 539, at 547, Table 4.

Cognitive ability

Another recent American study has shown that corporal punishment is associated with a retarded rate of cognitive development.⁸² This research was prompted by the theory that if parents avoid physical punishment they are more likely to engage in verbal methods of behaviour control such as explaining to the child, and that the increase in verbal interaction with the child will in turn enhance the child's cognitive ability. The theory was tested on 960 children at two different time periods. The study controlled for mother's age and education, whether the father was present in the household, the number of children in the family, the mother's supportiveness and cognitive stimulation, ethnic group and the child's age, gender and birth weight.

Quality of the parent-child relationship

Gershoff examined 13 studies looking at the relationship between the use of corporal punishment and the quality of the parent-child relationship and all of these found an undesirable link between the two.⁸³ It is theorised that this could be because:

The painful nature of corporal punishment can evoke feelings of fear, anxiety and anger in children; if these emotions are generalised to the parent, they can interfere with the positive parent-child relationship by inciting children to be fearful of and to avoid the parent ... such avoidance may in turn erode bonds of trust and closeness between parents and children.⁸⁴

Other negative effects for the individual

There is evidence⁸⁵ that harsh physical punishment is associated with:

- drug and alcohol abuse
- accident proneness
- self-punishment
- retaliation
- poor school performance and relationships with classmates
- low self-esteem
- depression

⁸² M Straus, M Paschall, 'Corporal punishment by mothers and child's cognitive development: A longitudinal study' paper presented at the 6th International Family Violence Research Conference. Durham, NH: Family Research Laboratory, University of New Hampshire.

⁸³ E Gershoff, 'Corporal Punishment by Parents and Associated Child Behaviours and Experiences: A Meta-Analytic and Theoretical Review' 128 *Psychological Bulletin* 539, at 547, Table 4.

⁸⁴ E Gershoff, 'Corporal Punishment by Parents and Associated Child Behaviours and Experiences: A Meta-Analytic and Theoretical Review' 128 *Psychological Bulletin* 539, at 542, citing numerous authors.

⁸⁵ D Herman, 'A statutory proposal to prohibit the infliction of violence upon children' (1985) 19 *Family Law Quarterly* 1; S Juan, *Only Human* (1990) Sydney, Random house; M Straus, 'Discipline and deviance: Physical punishment of children and violence and other crime in adulthood' (1991) 38 *Social Problems* 133; J Zarb, 'Perceptions and response style of referred adolescent girls with family problems' (1990) 19 *Journal of Youth and Adolescence* 277; all cited in J Cashmore, N de Haas, *Discussion Paper, Legal and Social Aspects of the Physical Punishment of Children* (1995) Commonwealth Department of Human Services and Health, at 106.

Effects on society

It is argued that these negative effects upon the individual, outlined above, inevitably result in flow on negative effects for the community. For example, if we look at just one of the possible effects of physical punishment on an individual: increased aggression, we can predict its direct effects at a societal level. While the victim of the physical punishment is young, his or her aggression could lead to bullying at school, which in turn can decrease school performance and increase other antisocial behaviour of both the bully and the bullied. When that child becomes an adult their aggressive behaviour may lead to crime and hospital admissions. Thus we see a pattern of reduced community safety and increased social costs.

Straus⁸⁶ has theorised and studied the relationship between the acceptance of physical punishment by a community and the level of violence in other spheres of that community. He developed the ‘**cultural spillover theory**’ to explain this phenomenon. His thesis is –

that violence in one sphere of life tends to engender violence in other spheres, and that this carry-over process transcends the bounds between legitimate and criminal use of force. Thus, the more a society uses force to secure socially desirable ends (for example, to maintain order in schools, to deter criminals, or to defend itself from foreign enemies) the greater the tendency for those engaged in illegitimate behaviour to also use force to attain their own ends.⁸⁷

At a national level (in the USA) Straus found a correlation between the use of physical punishment and assaults on siblings and parents, assaults on spouses, child abuse, street crime (assault and stealing), school violence and homicide rates. A cross-national comparison was also made, finding that, as predicted by cultural spillover theory, the more the use of physical punishment is approved by teachers in a country, the higher the rate of infant homicide in that country (controlling for four variables).

These results can be interpreted as evidence of the cultural spillover principle because approval of physical punishment by teachers in no way implies that teachers approve of murdering infants. However, such approval creates the conditions for increasing the incidence of infant homicides.⁸⁸

Dr Benjamin Spock, whose studies and books on child rearing are known worldwide, says of corporal punishment:

It certainly plays a role in our acceptance of violence. If we are ever to turn to a kindlier society and safer world, a revulsion against physical punishment for children would be a good place to start.⁸⁹

⁸⁶ M Straus, ‘Discipline and deviance: Physical punishment of children and violence and other crime in adulthood’ (1991) 38 *Social Problems* 133 at 137.

⁸⁷ *Ibid*, at 137.

⁸⁸ *Ibid*, at 147.

⁸⁹ *Dr Spock on Parenting* (1988) New York, Simon and Schuster.

A statement from the National Committee on Violence (1989) reflects this view:

The greatest chance we have to prevent violence in society is to raise children who reject violence as a method of problem solving, who believe in the right of the individual to grow in a safe environment.⁹⁰

On the other hand it is argued by those supporting the use of physical punishment that there is little or no evidence that physical punishment has any of these negative effects, particularly when used on a mild and/or infrequent basis and by a loving parent. This is supported by Cashmore and de Hass's statement in their 1995 discussion paper that '[t]here is no evidence that mild and infrequent physical punishment does any harm, beyond the danger of accidental injury and the possibility of escalation.' However, as discussed above, a number of recent studies claim to provide such evidence. It is argued that the evidence of the negative effects of physical punishment is not strong or conclusive, with some studies showing no negative effects. Larzelere has compared his own review of a large number of studies with Gershoff's study and states:⁹¹

How parents use any disciplinary tactic is more important than what tactic they use... The evidence to date supports a conditional sequence model for optimal disciplinary tactics. For 2- to 6-year olds, parents should establish a solid foundation of a positive, loving parent-child relationship. They should emphasize proactive teaching – an ounce of prevention is worth a pound of cure. When misbehaviour occurs, they need effective responses, beginning with verbal correction and reasoning. Disciplinary reasoning becomes more effective by itself when it is backed up periodically with non-physical punishment. When a 2- to 6-year-old refuses to cooperate with non-physical punishment, such as time out, it needs to be enforced with something like a two-swat spank to the buttocks. ...when spanking is used in this way at these stages, the evidence to date indicates it is effective, especially in getting children to cooperate more with milder disciplinary tactics. In this way, parents can reduce the need to use spanking at all as the child gets older. Parents need more disciplinary options, not fewer ones.

It did me no harm

The statement “it did me (and/or my children) no harm” is also often used to argue that physical punishment does not have negative effects. It is natural to refer to our own knowledge and experience when thinking about an issue like physical punishment. The view is that we should trust this personal experience and accept it as evidence that physical punishment does not have negative effects – on the contrary, it taught us valuable lessons and respect for our parents.

However there is a significant problem with making judgements based solely on our own experiences: it is very difficult to be objective when assessing these experiences.

⁹⁰ National Committee on Violence, K Dwyer 'Violence Today No. 3: Violence Against Children' 1989.

⁹¹ R Larzelere, 'A comparison of two recent reviews of scientific studies of physical punishment by parents' 2002, at <<http://people.biola.edu/faculty/paulp/Larzelere02.html>>

For example, it is normal to excuse and justify our own and our parents' behaviour. An extreme example of this can be shown from a 1994 survey of 11,600 adults in the US which found that 74% of those who had been punched, kicked or choked by their parents did not consider this type of behaviour was abusive, and even 38% of those who had required two different types of medical intervention for injuries from physical punishment did not see their parents' behaviour as abusive.⁹²

Accordingly, while it is natural to make judgements based on personal experience, it is inappropriate for such anecdotal and unreliable evidence to guide important social policy decision-making.

Physical punishment is not used or supported by professionals

As discussed in Part 1, currently in Tasmania the use of physical punishment is not permitted either by law or policy in institutions that deal with children. This includes the education system, registered/licensed child-care operators, and the juvenile justice system. In addition foster parents are not permitted to use physical punishment and government and non-government bodies in Tasmania, such as the Parenting Centre and Good Beginnings, discourage the use of physical punishment when giving discipline advice to parents. Arguably, this demonstrates a lack of support for physical punishment among Tasmanian policy makers, professionals and people working with children.

Would banning physical punishment be an unjustified intrusion into the privacy of the family and parental rights?

Intrusion into families and upon parental rights

'At the start of the twenty-first century, the way we think about parents and children has changed dramatically. The Roman father had a right of life and death over his children – they were his property. Although not so extreme, the emphasis in the Victorian family was still on the father's firm authority, which children had to obey. Today, the emphasis is not so much on parents' rights as on their obligations. They have a duty to guide their children to moral, emotional and physical maturity, enabling them to take responsibility for themselves when they are old enough. Parents' rights

⁹² J Kunston, M Selner, 'Punitive childhood experiences reported by young adults over a ten-year period' (1994) 18 *Child Abuse and Neglect* 155; cited in Save the Children Fund, *Ending Corporal Punishment of Children*, 2001.

exist to be exercised for their children's benefit while the children are learning and growing to maturity.'⁹³ Parents' and children's rights and responsibilities intertwine; when differences arise, it is a well-established principle of law that what is in the best interests of the child must prevail.

It may be argued that a law banning physical punishment would be an unjustified and intrusive interference in a private area of life. Banning physical punishment would prevent parents and families from managing their own affairs as they see fit. Government should not intrude into every area of peoples' lives. Parents have the right to raise their children in the way that they think is best. It is up to parents to decide what method of discipline they use.

The counter arguments are that the physical punishment of children is already regulated (it must be 'reasonable'). Parents must raise their children according to the minimum standards which parliament sets. It is parliament's duty to review these minimum standards to ensure that they are operating effectively and that they are adequate, appropriate, and in the best interests of children and of the community as a whole. While parents need to be able to raise and discipline their children the way they think best, they do not have and should not have an absolute legal right to do this – parents must raise and discipline their children within the boundaries that the law sets.

Would a law banning physical punishment be effective?

Lack of public support

There may be concern that a law banning physical punishment would not command public support and therefore would not be effective. Parents would be forced to choose between obeying the law and doing what they think is best for their children – parents should not be placed in this position. If parents do not obey the law it will bring the law into disrepute.

The contrary argument is that the primary purpose of a law banning physical punishment would be educative, and the change in the law would necessarily be accompanied by an extensive education campaign. None of the countries that have banned physical punishment to date had prior support in opinion polls. Attitudes and practices can change, particularly with education – just as they have in the past over

⁹³ Office of Law Reform, Northern Ireland, *Physical punishment in the home- thinking about the issues, looking at the evidence*, September 2001, at 9.

issues like sexual harassment, discrimination, drink driving and using safety belts. This is a case where the law should lead public opinion, not follow it.

There is some evidence that public opinion may in fact be supportive of ban on physical punishment. A recent telephone survey conducted in England and Wales found that the majority of people would support a law that protects children from being hit if they were sure that parents would not be prosecuted for trivial smacks (58%. Support was stronger amongst younger people: 70% of 16-25 year-olds, 71% of 25-34 year-olds and 64% of 35-44 year-olds).⁹⁴

Past Parliamentary debate in relation to the banning of corporal punishment in Tasmanian schools indicates that some Members of Parliament would also support a ban on physical punishment:

- 'I believe strongly that corporal punishment is no longer consistent with the values of our society which considers its use not only repugnant but also self-defeating. This archaic disciplinary method does not sit well in a society which is attempting to redefine its conflict resolution mechanisms both on the individual and governmental scale, nor does it sit well in the context of current social re-evaluation of the abuse of power dynamics within personal relationships, particularly with those long and painful campaigns against child abuse and domestic violence.'⁹⁵
- 'We must send a clear and unambiguous message that violence does not solve problems at any level and is unacceptable on any level.'⁹⁶
- 'I think on any objective analysis it would have to be agreed that hitting a child does not help the child at all.'⁹⁷
- 'I personally believe that there is no place in today's society ... nor within the future societies, for any form of corporal punishment.'⁹⁸
- '... corporal punishment has absolutely no place in society today. ... assault against a child is exactly the same as assault against an adult.'⁹⁹
- 'I completely disapprove of [corporal punishment], to be honest with you.'¹⁰⁰
- 'If parents were denied the right to administer corporal punishment to their children I would have no hesitation in supporting it.'¹⁰¹

⁹⁴ Survey conducted by MORI Telephone Surveys Ltd in February 2002, commissioned by NSPCC.

⁹⁵ Michael Aird, Hansard, second reading speech of the Education Amendment Bill 1997, Legislative Council 11/11/97 Pt 1 pg 1-45; and Christine Milne, second reading speech of the Education Amendment Bill 1997, House of Assembly, 23/4/1998 Pt 2 pg 42-116.

⁹⁶ Christine Milne, second reading speech of the Education Amendment Bill 1997, House of Assembly, 23/4/1998 Pt 2 pg 42-116; and Michael Aird, Hansard, second reading speech of the Education Amendment Bill 1997, Legislative Council 11/11/97 Pt 1 pg 1-45.

⁹⁷ Mr Parkinson, Hansard, debate of the Education Amendment Bill 1997, Legislative Council 11/11/97 Pt 1 pg 1-45.

⁹⁸ Ms Silvia Smith, Hansard, debate of the Education Amendment Bill 1997, Legislative Council 11/11/97 Pt 1 pg 1-45.

⁹⁹ Paula Wriedt, Hansard, debate of the Education Amendment Bill 1997, House of Assembly, 23/4/1998 Pt 2 pg 42-116.

¹⁰⁰ Mrs Cains, Hansard, debate of the Education Amendment Bill 1997, House of Assembly, 23/4/1998 Pt 2 pg 42-116.

¹⁰¹ Mr Wing, Hansard, debate of the Education Amendment Bill 1999, Legislative Council, 30/9/1999, Pt 1 pg 1-47.

Difficult to enforce

Advocates of physical punishment argue that the law should not ban it because such a law would be difficult to enforce. However, a clear standard is far easier to enforce than a vague standard like reasonable force. Moreover, the primary aim of a law banning physical punishment would be educative, therefore it is argued that difficulty in enforcement is not crucial.

Turning parents into criminals

An understandable concern about banning physical punishment is that parents will be labelled as criminals for giving their children light smacks. This might also have the very undesirable effect of discouraging parents from seeking help about discipline matters because of fear of being treated as a criminal or bad parent because they have simply smacked their child.

While, technically, any physical force used to punish a child would be an assault, it would be expected that trivial assaults would not be prosecuted, just as trivial assaults between adults or between children (say siblings or friends having an argument) are not currently prosecuted. Police and prosecutorial discretion exist so that trivial infringements of the law are not prosecuted. A time delay before the law came into operation (see discussion at 55) would also give parents a chance to become accustomed to the new law and using alternative discipline techniques.

It would be important that any education campaign accompanying a change in the law did not label parents who use physical punishment as unloving, inadequate or bad parents and that it made it clear that non-judgmental help is available for parents adjusting to the change in the law. It should also be made clear that there would be no change in the law relating to child abuse – a normal smack would not be evidence of abuse or justify attention from the Child Protection Service.

While police and prosecutorial discretion would ensure that parents are not labelled as criminals for trivial infringements of the law, the prosecution of serious cases of child abuse would be facilitated, resulting in the more effective protection of children.

Discussion Points

*These questions may be a useful guide in responding to this Part.
Please explain the reasons for your views as fully as possible.*

2. Having considered all the arguments presented, do you think physical punishment should be prohibited or not?
3. What are the most important reasons for your conclusion? Was this your view prior to reading this issues paper?

Option 2: Clarifying the law

If physical punishment is not prohibited then the law should be clarified. From a practical point of view, this may be difficult to achieve – it is very difficult to define what is or is not reasonable punishment in a clear, concise and useful way. If the definition of what is reasonable (or not reasonable) is too brief then it may be of little use, leaving too many unanswered questions. On the other hand, if the definition is too detailed it may not be clear and easy to communicate.

This option has a level of attraction because it involves minimal change to the law in comparison with prohibiting physical punishment, because it is easy to reconcile with widespread parenting practices, and because it is within the probable comfort zone of the majority in that it does not criminalise what may at present be commonly accepted practice.

Perhaps the greatest problem with this option is delineating what types or levels of physical punishment are acceptable. Obviously public input will be vital to answering this question. As a means of stimulating discussion, the following limits are suggested.

Type of punishment

Only smacking with an open palm should be permitted. This follows the Model Criminal Code.¹⁰² Other actions such as kicking, punching, shaking, biting or pulling hair should not be permitted. Hitting with an implement of any kind should be prohibited. Although it is recognised that considerable damage can be caused by an open hand smack this form of physical punishment is preferable to others because it can be more easily controlled than a blow delivered with an object and because a person smacking with their hand also feels the pain delivered. This means the punishment is not delivered without the person realising the extent of the pain they are causing, which may also help stop punishment getting out of control. Research shows that the majority of Australian children have not been hit with an implement.¹⁰³

It is also suggested that the legislation specify that punishments that are humiliating, degrading or terrifying be prohibited.

¹⁰² See Appendix A.

¹⁰³ R Duke and J Aitchison (1993) *Adults' and children's perceptions of smacking* Student report, University of South Australia (Magill), cited in J Cashmore, N de Haas, *Discussion Paper, Legal and Social Aspects of the Physical Punishment of Children* (1995) Commonwealth Department of Human Services and Health, at 62.

Parts of the body to which force may be applied

It should not be permissible to apply force to the parts of a child's body which are most vulnerable to injury. This includes the head, neck and torso of the child. Smacks to the buttocks, arms and legs would be permitted. This would be an extension of the law in NSW, where no force may be applied to the head or neck of the child (unless it is trivial).¹⁰⁴ This extension is suggested because of the vital and vulnerable nature of the organs within the torso.

Degree of harm

Punishment which causes injury or harm or is likely to cause injury or harm should not be permitted. 'Harm' should be said to include marks on the skin such as welts, bruising or red marks lasting for more than a matter of minutes. The American Academy of Pediatrics has stated:¹⁰⁵

Other forms of physical punishment such as striking a child with an object, striking a child on parts of the body other than the buttocks or the extremities, **striking a child with such intensity that marks lasting more than a few minutes occur**, pulling a child's hair, jerking a child by the arm, shaking a child, and physical punishment delivered in anger with intent to cause pain, are **unacceptable and may be dangerous to the health and wellbeing of the child**. These types of physical punishment should never be used. (emphasis added)

The NSW legislation provides that harm should not be caused which lasts for more than a short period. The term 'matter of minutes' is seen as preferable to the term 'short period' as it is more definite.

Young children

If physical punishment is not generally prohibited, there are strong arguments favouring prohibition for very young children.

It is now widely accepted that the 'quality of nurturing and cognitive stimulation that children have in their first few years of life have a profound effect on their later well being'.¹⁰⁶ Given the not insignificant research indicating that physical punishment can have negative effects it is suggested that it is particularly important to err on the side of caution where this age group is concerned, and prohibit the use of physical punishment. Very young children are also most at risk of physical injury from physical punishment because their bodies are fragile and not fully developed and because their large heads and poor motor skills make them more likely to lose their balance and fall when being hit.

¹⁰⁴ See Appendix A.

¹⁰⁵ in its policy statement: 'Guidance for Effective Discipline', (1998) 101(4) *Pediatrics*.

¹⁰⁶ R Cant (Social Systems and Evaluation), *Evaluation of the National Good Beginnings Parenting Project*, 2000, at 1.

In addition children under 3 are least likely to understand the concept of correction or punishment and are less able to reason and understand what is right and wrong. This is exacerbated by their lack of language skills meaning that they may not understand that what they have done is wrong or why they are being punished.

In 2001 the Scottish government announced its intention to prohibit the physical punishment of children under 3 years, however, it now appears this aspect of proposed legislation will not succeed.¹⁰⁷

Older children

It is suggested that physical punishment of children aged 13 years or more be prohibited. It is not difficult to explain and reason with or find alternative punishments for children of this age. One supporter of the use of physical punishment has said:¹⁰⁸

Spanking should not be used in adolescents because of lack of evidence for effectiveness and the increased risk for dysfunction and aggression later in life.

It is likely that a smack with the hand would be too mild to be effective with children of this age group, and therefore physical punishment would be more prone to escalation and could provoke an unacceptable situation with problems of retaliation. Physical punishment on this age group is likely to reinforce the idea of violence as an appropriate response to conflict.

Persons who can apply punishment

The primary person who should be permitted to physically punish a child is that child's parent. This refers to the child's legal parent, whether by birth or adoption, and would not include step-parents, de facto-parents, God-parents or grandparents. It is suggested that any other person only be permitted to physically punish a child with the express permission of that child's parent – ie the parent must specifically tell that other person that they may physically punish their child. This basically accords with the NSW law and the Model Criminal Code.¹⁰⁹

It is suggested that (as was done in NSW) an exception to this general rule should be set out in relation to Aboriginal children. This would provide that where a child is an Aboriginal or Torres Strait Islander, 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, would be permitted to apply physical punishment to the child without the express permission of the child's parent.

¹⁰⁷ See discussion below at 46.

¹⁰⁸ W Saadeh, 'Point' 41 *Clinical Pediatrics* 2002.

¹⁰⁹ See Appendix A.

Discussion Points

*This question may be a useful guide in responding to this Part.
Please explain the reasons for your views as fully as possible.*

4. Is clarifying the limits on the use of physical punishment your preferred option for reform?
5. Which of the proposed limits would you endorse?

Part 4

Law reform developments nationally and internationally

The uncertainty of what is ‘reasonable’ physical punishment has been considered to be a problem in other Australian states and in other countries with similar laws to our own. In recent years law reform has been undertaken or considered in many of these places.

Clarifying what is reasonable punishment

New South Wales

In 2001 New South Wales introduced the *Crimes Amendment (Child Protection Physical Mistreatment) Act*. Prior to the introduction of this Act the common law defence of reasonable chastisement applied in New South Wales. This Act amended the *Crimes Act, 1900* (NSW), by setting out what is unreasonable physical punishment. Conduct made illegal by the act includes any force applied to the head or neck of the child and any force applied to any other part of the body of the child in such a manner as to be likely to cause harm to the child that lasts for more than a short period.¹¹⁰

The Act was passed with the support of the Government and Opposition, as well as support from medical, legal and child protection experts, and independent bodies such as the New South Wales Commission for Children and Young People and the Community Services Commission. An education campaign to accompany the Act was made the responsibility of the Commissioner for Children and Young People.

The Model Criminal Code

The Model Criminal Code Officer Committee (MCCOC) of the Standing Committee of Attorneys-General also recommends clarifying the law in relation to what is and is

¹¹⁰ See legislation in Appendix A.

not reasonable punishment. The MCCOC, in its report *Non Fatal Offences Against the Person* proposed that parents not be criminally responsible for stated offences if the conduct of the parent amounted to reasonable correction of the child. As to what reasonable correction is the MCCOC proposed:¹¹¹

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:

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

Scottish proposals

Following the case of *A v UK* the Scottish government issued a consultation paper: 'The Physical Punishment of Children in Scotland'. Two hundred and twenty-two responses were received to the consultation. Of these 34% were in favour of a total ban on physical punishment, 43% were prepared to consider some clarification of the law and 17% thought there should be no change.¹¹²

In 2001 the Scottish executive announced its intention to provide greater protection to children and clarity to adults by setting out factors to guide courts when determining the reasonableness of punishment and by prohibiting blows to the head, shaking and the use of implements. The executive also proposed to prohibit the physical punishment of children up to and including the age of two, stating:¹¹³

A child cannot learn from punishment unless it understands the relationship between the bad behaviour and the punishment. Before the language skills have properly developed, many children will not be able to understand why they are being punished. There may be room for debate about the exact age which should be prescribed, but it is clear from our consultation responses that many people would regard punishment to be wrong or ineffective for children below a certain age.

These proposals were introduced to the Scottish Parliament in March this year¹¹⁴ and are currently in the committee stage and being debated in Parliament. The 'Justice 2' committee has supported banning blows to the head, shaking, and the use of implements, however would not support the prohibition on hitting children under 3 years, and so it appears that the Government will abandon this aspect of the proposed legislation.¹¹⁵

¹¹¹ 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, at 130, the proposal is fully produced in Appendix A.

¹¹² Scottish Executive White Paper (13/12/2001) *Making Scotland Safer: Improving the Criminal Justice System*, at 42.

¹¹³ *Ibid*, at 43.

¹¹⁴ Criminal Justice (Scotland) Bill.

¹¹⁵ Scottish Parliamentary debate, 18/9/2002.

Prohibiting physical punishment

Countries which have banned physical punishment

Sweden was the first country to ban the physical punishment of children. In 1979 a provision was added to the Parenthood and Guardianship Code which now reads:

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 corporal punishment or any other humiliating treatment.

There was no punishment accompanying the law banning physical punishment, as the law aimed to set standards and educate, not to punish. In 1965, before the change to the law, 53% of the population regarded corporal punishment as an indispensable part of children's upbringing. In 1996, only 11% favoured corporal punishment. In 2000 a survey of children in middle school found that only 2% found it acceptable for parents to use some form of corporal punishment.¹¹⁶ Clearly a change in legislation preceded a change in social attitudes.

Joan Durrant's study, 'A Generation Without Smacking: the impact of Sweden's ban on physical punishment',¹¹⁷ found that following the introduction of the ban in Sweden:

- there has been no increase in parents being drawn into the criminal justice system for minor assaults;
- there has been no increase in children being removed from parents through the intervention of social workers, with the number of children coming into care decreasing since 1982;
- overall rates of youth crime have remained steady since 1983;
- the percentage of those convicted of theft aged 15-17 years has decreased;
- the percentage of those suspected of narcotic crimes aged 15-17 years has decreased;
- the percentage of those convicted of rape aged 15-20 years has decreased;
- fewer young people consume alcohol and drugs; and
- the rate of youth suicide has declined.

Nine other countries have now also introduced a ban on physical punishment. This has been achieved by legislation in Finland, Denmark, Norway, Austria, Latvia, Croatia, Cyprus and Germany, and by case law in Israel. In addition, in Italy in 1996 the Supreme Court declared all corporal punishment to be unlawful however this has not yet been confirmed by legislation. Belgium has also added a new clause to its Constitution confirming children's right to moral, physical, psychological and sexual integrity; its legal effect is unclear and an explicit ban on all corporal punishment is under consideration.

¹¹⁶ Ministry of Health and Social Affairs, Sweden (2001) *Ending Corporal Punishment*, at 14.

¹¹⁷ 1999, Save the Children, London.

The South African Law Commission has also advocated the removal of the defence of reasonable chastisement:

The Commission therefore proposes that upon any criminal charge of assault or related offences (such as assault with intent to do grievous bodily harm), it shall not be a defence that the accused was a parent, or person designated by a parent to guide the child's behaviour, who was exercising a right to impose reasonable chastisement upon his or her child.¹¹⁸

In the American state of Minnesota the defence of reasonable correction cannot be raised to a charge of assault. This is the result of a number of complex statutes, and is not widely known.¹¹⁹

The England, Wales and the Republic of Ireland

Following the case of *A v UK* the English Department of Health conducted a consultation on the physical punishment of children. Nearly all the organisations which responded to the consultation were in favour of change and opposed to physical punishment. Seventy percent of individual members of the public who responded to the consultation were in favour of not changing the law. Since the consultation the *Human Rights Act* 1998 (UK) has come into force. Section 3 of this Act provides that so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the 'Convention rights' incorporated by the *Human Rights Act*, which include Article 3 of the European Convention on Human Rights (s 1). In a press release the UK Department of Health stated:¹²⁰

This now means that when a Court considers a case that involves section 1 of the Children and Young Persons Act 1933 and/or the defence of reasonable chastisement, the law must be read together with Article 3. The Court will also need to take account of the judgments of the European Court of Human Rights in this area [*Human Rights Act*, s 2], including the case of *A v UK*. Therefore in considering whether or not the physical punishment of a child constitutes reasonable chastisement a Court will have to take account of the factors outlined by the European Court of Human Rights in its judgment on *A v UK*, namely:

- 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.

¹¹⁸ Discussion Paper 103, 'Review of the Child Care Act', 2002, at xxviii.

¹¹⁹ S Bitensky, 'Spare the rod, embrace our humanity', 1998, University of Michigan Law School.

¹²⁰ Department of Health (UK), Press release, 8/11/2001.

The UK Government has decided not to introduce any further changes but will keep the defence of reasonable chastisement 'under review'.¹²¹ However, in the National Assembly for Wales support has been expressed for a total ban on physical punishment.¹²²

The Law Reform Commission in the Republic of Ireland examined the issue of the physical punishment of children in 1994. They took the view that it was too early to take away the defence of reasonable and moderate chastisement, but that education of parents and the public about discipline could in due course facilitate a change in the law. The Irish Government has stated its commitment to ending parental physical punishment using educational means to the UN Committee on the Rights of the Child. The Commitment is restated in the National Children's Strategy Report *Our Children – Their Lives* which says:¹²³

Quality parenting programmes are to be made available to all parents...As part of a policy of ending physical punishment, parenting courses will focus on alternative approaches to managing difficult behaviour in children.

¹²¹ *Ibid.*

¹²² Debate on 24 January 2002.

¹²³ 2000, Stationary Office, Dublin, at 74, quoted in Northern Ireland Office of Law Reform 'Physical Punishment in the home' 2001, at 36.

Part 5

Proposals

This paper has considered two options –

- prohibiting physical punishment; or
- clarifying the law relating to physical punishment.

The following proposals relate to each of these options.

Prohibiting physical punishment – criminal law

Proposal 1a – removing the defence of reasonable correction

Under this proposal the defence of reasonable correction would be removed from the criminal law. For technical reasons it may not be possible to remove the defence by simply repealing s 50.¹²⁴ It is therefore proposed that s 50 be repealed and replaced with a statement that it is not lawful for any person to use, by way of punishment or correction, any force or degrading or humiliating treatment towards any other person. This would make it clear that the common law defence of reasonable chastisement is no longer available, but at the same time would create no new ‘smacking’ offence. Non-prosecution of minor assaults would no doubt continue. However, the abolition of the defence of reasonable chastisement would make prosecutions in serious cases simpler.

Children would not be taken away from their parents simply because they were smacked. There would be no change to child protection legislation or the definition of child abuse.

Proposal 1b – including a clear statement

Additionally a clear statement should be inserted in the *Children, Young Persons and Their Families Act, 1997*, that physical punishment is not acceptable. Such a statement

¹²⁴ It is possible that the defence could still operate under s 8 of the *Criminal Code*, which allows common law defences to operate.

would not create a criminal offence. The following example of such a statement is based on that used in Sweden:

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 or threatened with physical punishment or any other degrading, humiliating or terrifying treatment.

Discussion Point

*This question may be a useful guide in responding to this Part.
Please explain the reasons for your views as fully as possible.*

6. If physical punishment is to be prohibited, would you support Proposal 1a and Proposal 1b?

Clarifying the law relating to physical punishment

Proposal 2a: stating what punishment is permitted

This proposal aims to clarify the law by setting out what punishment is permitted, thus avoiding vague terms like ‘reasonable’. For example s 50 could state ‘physical punishment of children is only permitted by parents if (a) it is a smack; and (b) the child is over 3 and under 13’ The term ‘smack’ would be defined to mean:

- the application of force with an open hand –
- to a part of the body not including the head neck or torso of the child;
- (a) which does not cause and is not likely to cause harm or injury such as cuts, welts or bruising;
- (b) which does not cause pain for more than a matter of minutes;
- (c) which does not leave a mark on the skin for more than a matter of minutes;
- (c) which is not applied in a manner that is degrading, humiliating or terrifying;
- and
- (d) which is reasonable having regard to the child’s physical and mental condition.

Proposal 2b: setting out what is not reasonable and factors to be considered

Under this proposal parents, and those in the place of parents, would still be permitted to punish their children physically as long as that punishment was ‘reasonable’. However, to clarify the law, some types of punishment would be specified as unreasonable. To implement this proposal s 50 would be amended by adding a list of

unreasonable punishments. These could include actions such as hitting a child's head, hitting a child with an implement, hitting a child under or over a certain age, causing injury to a child and so on. Punishment not specifically prohibited would still be judged by the standard of 'reasonableness'. To assist in determining whether a punishment is reasonable, a list of relevant factors would be included. This list could include things such as the age of the child, the health and physical and mental condition of the child, the circumstances in which the punishment was applied, the effect of the punishment on the child and whether the application of force was part of an ongoing series of events, including other applications of force. A further option would be to reverse the onus of proof relating to reasonableness, so that the onus would be on the parent, or person in place of a parent, to prove that the force used was reasonable on the balance of probabilities.

Proposal 2c: follow the Model Criminal Code

Under the Model Criminal Code parents are not criminally responsible for specified offences (such as assault) if the conduct of the parent amounts to reasonable correction of the child. As to what is reasonable correction, the MCCOC proposes:

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:

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

Discussion Points

*These questions may be a useful guide in responding to this Part.
Please explain the reasons for your views as fully as possible.*

7. Which of these proposals for clarifying what is reasonable punishment do you prefer? Why?
8. Do you think there are any potential problems with the legal operation of these proposals?

Education campaign and support for families

Whichever proposal is accepted, it will need to be accompanied by a community education campaign and additional support and information for families. The Commissioner for Children or the Department of Health and Human Services could be responsible for such an education campaign.

It would also be desirable for additional support and information for parents to be made available through existing family and child support services.

Community education could be used to help people:

- recognise and challenge inherited values and attitudes towards children which influence our treatment of them;
- understand child development so that they do not have unrealistic expectations of their child's behaviour;
- understand the negative effects of physical punishment;
- understand and use alternative, non-violent discipline techniques;
- not to replace physical punishment with something which may be equally or more detrimental to a child such as humiliation or verbal abuse;
- realise that non-judgmental help in using non-physical discipline is available.

Some suggested methods that could be used by the education campaign are:

- television, radio and print media impact advertising;
- interviews on local news and current affairs television and radio programs;
- newspaper and magazine articles; possibly a weekly/monthly 'column' offering parenting advice;
- pamphlet letterbox drop (1 page);
- discipline booklets (10-20 pages) and/or a short video (10-30min) made available for parents requiring more detail or assistance;
- parenting programs run by parenting centres; possibly new parents could be required to attend a post-natal evening meeting (1 session) discussing discipline;
- short parenting program for grade 9 and 10 students (perhaps conducted in conjunction with sexual education).

Discussion Points

These questions may be a useful guide in responding to this Part.

Please explain the reasons for your views as fully as possible.

9. Do you favour or object to the suggested aims of such an education campaign?
10. Do you favour or object to the proposed methods of conducting such an education campaign?
11. Do you suggest any alternate or additional aims or methods of conducting such an education campaign?

12. Do you think that the Commissioner for Children, the Department of Health and Human Services, or some other individual, group or body should be responsible for conducting such an education campaign?

Time delay option

Due to the fact that any change in the law will need to be publicised and an education campaign will need to be undertaken, it is proposed that any new or amending legislation be stated to come into force 6 months or 1 year after the day on which it receives Royal Assent. This would give the education campaign time to ensure parents are well aware of the changed laws.

Discussion Point

*This question may be a useful guide in responding to this Part.
Please explain the reasons for your views as fully as possible.*

13. Do you agree with this proposal? If so how long do you think the time delay should be?

Civil law

To avoid confusion the civil law position in relation to the defence of reasonable chastisement should follow the criminal law.

It is proposed that a statute be introduced relating to civil proceedings which would either:

- reproduce the amended criminal law relating to physical punishment; or
- state that the defence of reasonable chastisement has been abolished.

Discussion Points

*These questions may be a useful guide in responding to this Part.
Please explain the reasons for your views as fully as possible.*

14. Do you agree that the civil law relating to the physical punishment of children should be kept in line with the criminal law? If not, why?
15. Do you suggest any alternate ways the civil law could be reformed?

Appendix A

New South Wales, Crimes Act 1900:

61AA Defence of lawful correction:

- (1) In criminal proceedings brought against a person arising out of the application of physical force to a child, it is a defence that the force was applied for the purpose of the punishment 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.
- (2) The application of physical force, unless that force could reasonably be considered trivial or negligible in all the circumstances, is not reasonable if the force is applied:
 - (a) to any part of the head or neck of the child, or
 - (b) to any other part of the body of the child in such a way as to be likely to cause harm to the child that lasts for more than a short period.
- (3) Subsection (2) does not limit the circumstances in which the application of physical force is not reasonable.
- (4) This section does not derogate from or affect any defence at common law (other than to modify the defence of lawful correction).
- (5) Nothing in this section alters the common law concerning the management, control or restraint of a child by means of physical contact or force for purposes other than punishment.

(6) In this section:

child means a person under 18 years of age.

de facto spouse means one of two adult persons:

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

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

person acting for a parent of a child means a person:

- (a) who:
 - (i) is a step-parent of the child, a de facto spouse of a parent of the child, a relative (by blood or marriage) of a parent of the child or a person to whom the parent has entrusted the care and management of the child, and
 - (ii) is authorised by a parent of the child to use physical force to punish 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.
- (7) This section does not apply to proceedings arising out of an application of physical force to a child if the application of that force occurred before the commencement of this section.
- (8) The Attorney General is to review this section to determine whether its provisions continue to be appropriate for securing the policy objectives of the section. The review is to be undertaken as soon as possible after the period of 3 years from the commencement of this section. A report on the outcome of the review is to be tabled in each House of Parliament within 6 months after the end of the period of 3 years.

Model Criminal Code

5.1.41 Correction of children

- (1) A parent of a child is not criminally responsible for an offence against Division 5 (Causing harm), 6 (Threats and stalking) or 8 (Kidnapping, child abduction and unlawful detention) committed against the child if the conduct of the parent constituting the offence amounted to reasonable correction of the child.
- (2) Any other person who has the care of a child is not criminally responsible for an offence against Division 5 (Causing harm), 6 (Threats and stalking) or 8 (Kidnapping, child abduction and unlawful detention) committed against the child if the conduct of the person constituting the offence amounted to reasonable correction of the child and:
- (a) the parent of the child consented to such correction of the child by the person; or
 - (b) the person reasonably believed that the parent of the child consented to such correction of the child by the person; or
 - (c) the parent of the child consented to the person taking responsibility for the care and management of the child (but only in the case of an offence against Division 8).
- (3) 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).