

TASMANIA
LAW REFORM
INSTITUTE

**Physical Punishment
of Children**

FINAL REPORT NO 4

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Background to this report

The publication of this final report is made following consultation with the public. The consultation was performed by the release of an Issues Paper on this topic in October 2002. The Issues Paper examined the current law relating to the physical punishment of children which allows parents, or a person in the place of a parent, to use force to punish a child as long as that force is 'reasonable in the circumstances'. The Issues Paper found that the lack of clarity in the current law resulted in children not being as effectively protected from physical punishment as they could be, and therefore in need of reform. Two options for reform were discussed in the Issues Paper:

1. prohibit the use of physical punishment; or
2. clarify the law relating to physical punishment by further defining what type and/or degree of punishment is reasonable or unreasonable.

Fifty-six groups, individuals and couples responded to the Issues Paper. A list of those who responded appears in Appendix A. In the writing of this report we have given detailed consideration to all responses. We again thank these people for taking the time and effort to respond.

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

This report 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.

address: Tasmania Law Reform Institute
Private Bag 89,
Hobart, TAS 7001

email: law.reform@utas.edu.au

fax: (03) 62267623

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

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), Terese Henning (appointed by the Council of the University), Mr Mathew Wilkins (nominated by the Tasmanian Bar Association) and Ms Kate McQueeney, (nominated by the Women Lawyers Association).

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 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.

This suggests that some children may not be being as protected from excessive physical punishment as effectively as possible and we therefore recommend reform of the law.

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;
- Physical punishment of children violates their human rights;
- Abolition achieves maximum certainty in the law;
- Abolition will send a clear message to parents, allowing educative campaigns and programs to be effective.

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.

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 prohibiting 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 prohibiting 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 Institute is of the view (by majority) that clarifying the law is not the preferred option for reform for the following reasons:

- Clarifying the law does not respect the human rights of children;
- Clarifying the law is less likely to be effective;
- Education is less likely to be effective without a prohibition;
- Public support for prohibition can be achieved through education and the use of a time delay;
- There does not appear to be community consensus on the types or levels of physical punishment that are acceptable.

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.

Recommendations

This report makes three alternative recommendations. Each of these recommendations is made by a majority of the Institute's Board, however they were not unanimous. In summary, they are:

Recommendation 1:

(Philip Jackson and Paul Turner dissented from this recommendation)

Recommendation 1 is that the defence of reasonable correction be abolished. The following steps should be taken as part of this process:

- (a) Remove the defence of reasonable correction from the *Criminal Code*;
- (b) Include a clear statement in the *Children, Young Persons and their Families Act* that physical punishment and any form of cruel, degrading or terrifying punishment is prohibited;
- (c) Introduce a statute relating to civil proceedings stating that the defence of reasonable chastisement has been abolished;
- (d) Impose a time delay of 12 months on the coming into force of all amending legislation;
- (e) Undertake a widespread education campaign to inform the community of the changes to the laws and provide information and resources to assist them in the use of alternative discipline techniques; and
- (f) Conduct a detailed analysis of current public opinion of this topic, to be repeated after a number of years to ascertain changes in the community's views. Such research would be particularly beneficial to other states and countries considering changing their laws.

Recommendation 2:

(Philip Jackson and Paul Turner dissented from this recommendation)

If the Parliament does not implement the first recommendation, in the alternative, a staged approach is recommended. The first stage involving the clarification of s 50, the second stage, 2 years later – the abolition of the defence (repeal of s 50).

Recommendation 3:

(Terese Henning dissented from this recommendation)

Thirdly, if the Parliament does not implement the first or second recommendations, it is recommended that s 50 be clarified, and that in 2 years the appropriateness of the availability of the defence be reviewed.

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).

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.³

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 Magistrates 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 Haas 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*.⁴ In that case it was said that the punishment should be ‘moderate and reasonable’, should be judged in relation to ‘the age, physique and

³ Although it is unlikely force would be reasonable in cases of serious crimes where all the other ingredients were proved.

⁴ [1955] VLR 114.

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 punishment⁵ and the repetition or continuity of the punishment.⁶

The use of an instrument

The use of a cane has been held to be both reasonable (UK, 1994)⁷ 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 fist⁸
- aiming a gun at a child to frighten the child⁹
- tying a child to a tree, gagging the child and driving away¹⁰
- throwing a book at a child¹¹
- hitting a child with a cricket stump¹²
- hitting a child with a wooden spoon, leaving bruising visible four days later on a four year old¹³

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,¹⁴ and to children two and a half years old.¹⁵

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 abrasion¹⁶
- a slap to the face chipping a tooth¹⁷
- beating with a belt causing bruising to the face¹⁸
- a slap around the face bursting an eardrum¹⁹

Held to be unreasonable:

- a not very violent strike to the head with the palm of the hand rupturing an eardrum²⁰
- 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)²¹
- a slap to the face cutting an ear²²
- ten blows to the head of a two-year-old²³

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,²⁴ this is also shown by some of the cases above. However, other cases have held that punishment resulting in welts²⁵ or bruising²⁶ 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.

⁵ *R v Haberstock* (1970) 1 CCC (2nd) 433.

⁶ *R v Bresnehan* Serial No A78/1992.

⁷ The complete citations for a number of cases were not included in the report by Cashmore and de Haas.

⁸ *R v Terry* [1955] VLR 114.

⁹ *R v Hamilton* [1891] 12 LR (NSW) Sup Ct.

¹⁰ *R v Bedelph* [1981] 4 A Crim R 192.

¹¹ *R v Taylor*, *The Times* 28 December 1983 High Court.

¹² Adelaide, 1994; New Zealand, 1994 (*NZ Herald* 28 June 1994).

¹³ *Higgs v Booth* WA (unreported) Supreme Court, A315/316/86, 29 August, 1986.

¹⁴ *R v Miller* [1951] VLR 346.

¹⁵ *R v Griffin* [1869] 11 Cox CC 402; *Higgs v Booth* WA (unreported) Supreme Court, A315/316/86, 29 August, 1986.

¹⁶ *White v Weller ex parte White* [1959] Qd R 192.

¹⁷ *R v Haberstock* (1970) 1 CCC (2nd) 433.

¹⁸ UK, 1992.

¹⁹ UK, 1985.

²⁰ *Ryan v Fildes* [1938] 3 All ER 517.

²¹ *Pemberton v A-G* [1978] Tas SR 1.

²² Rome, February 1994.

²³ Adelaide, 1994.

²⁴ (1913) St R Qd 233.

²⁵ Ontario, 1992.

²⁶ UK, 1985; Victoria, 1994 (the parent did not invoke the defence).

Civil Law

The situation under civil law is 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).²⁷ 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.²⁸ 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.²⁹ 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 upon³⁰ (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.

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;

²⁷ J G Flemming (1998) *The Law of Torts* 9th ed, LBC: NSW, at 107.

²⁸ *Ibid*, at 29-31.

²⁹ *Ibid*, at 29.

³⁰ F Trindade and P Cane (1999) *The Law of Torts in Australia* 3rd ed, Oxford University Press: Victoria, at 259.

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:³¹

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.

Children in child care

Similarly, physical punishment of children in child care is prohibited by policy. Licensing guidelines state:³²

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 Supplied by the Department.

³² 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 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 some children may not be being protected from excessive physical punishment as effectively as possible and that reform of the law is necessary.

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:³³

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.

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 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 and responses to the Issues Paper demonstrate, 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.

³³Submission regarding the NSW Crimes Amendment (Child Protection - Excessive Punishment) Bill 2000, to the Standing Committee on Law & Justice, September 2000.

Because the law does not guide parents as to what is acceptable physical punishment, it may be 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 may be easily overstepped. Most cases of physical abuse in Tasmania are the result of physical punishment getting out of control and/or inadequate parenting skills.³⁴

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.³⁵ If a case is considered for prosecution no guidelines exist to help prosecutors judge whether the parent's actions were reasonable or not.³⁶

In the Supreme Court,³⁷ in the last ten years only four convictions of parents who have excessively punished their children could be found.³⁸ 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.³⁹ 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.⁴⁰ 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;⁴¹ 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 1999⁴² 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*,⁴³ 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);
- the "tapes incident": the stepmother whipped all the children on the hands with a horsewhip because a missing cassette tape had been found destroyed;

³⁴ Dr E Hallam, paediatrician, contracted by the Tasmanian Child Protection service to assess suspected cases of child abuse. See further discussion below.

³⁵ Personal communication with Mr Tim Ellis SC, the Director of Public Prosecutions (8/4/2002) and Inspector Cretu, head of police prosecutions (9/4/2002).

³⁶ *Ibid.*

³⁷ Data on prosecutions in the Magistrate's Courts is not available.

³⁸ This does not include 'shaken-baby' cases.

³⁹ *R v C* 31/7/2002.

⁴⁰ 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.

⁴¹ *R v Knowles* 8/5/2002.

⁴² *R v Salter* 3/12/1999.

⁴³ Serial No A78/1992; and on appeal: *Bresnehan v R* (1992) 1 Tas R 234.

- 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. Because the jury’s verdict was guilty to this non-specific charge, it was unclear which incidents they found proven. The parents denied that most of these punishments took place at all. 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.

On appeal by the father the sentence was reduced to 10 weeks and backdated. This reduction was made because it was held that the trial judge had taken some incidents into account which were not the subject of a conviction.⁴⁴ However, for the present purposes it is also interesting to note that the trial judge and all three judges in the Court of Criminal Appeal gave mitigatory weight to the fact that the father acted with a genuine belief that his methods were for the ultimate good of the child. So long as the law permits physical punishment of children subject to the proviso of unreasonableness, the law will be obliged to give such genuine beliefs mitigatory weight. It is the view of a majority of the Board that behaviour which results from a genuine belief in the appropriateness of physical punishment which is judged to be excessive or unreasonable is best discouraged by a law which prohibits physical punishment. Denunciation of physical punishment can be much stronger if the law prohibits it entirely and this would leave little room for mitigatory weight to be given to a genuine belief that it was for the good of the child. In other words, it is the existence of the defence of reasonable chastisement and its lack of clarity that leaves open the possibility of giving more than negligible 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 does not encourage prosecutions in this area. While this may be considered appropriate for other reasons, it perpetuates the problem of the law remaining unclear because case law, that 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 gives a rough indication of the extent of the problem of physical child abuse in Tasmania. Authorised child protection workers⁴⁵ may apply, on the Secretary’s⁴⁶

⁴⁴ Due to the jury being unable to reach a verdict on the charges relating to the other three children.

⁴⁵ 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.

⁴⁶ The Secretary of the Department of Health and Human Services.

behalf, to the Magistrates Court (Children's Division) for a care and protection order of a child.⁴⁷ The Court may make the order if it is satisfied that the child is 'at risk'.⁴⁸ 'At risk' is defined in the Act and includes being, or likely to be abused or neglected.⁴⁹ The Act defines abuse or neglect as –⁵⁰

- (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 divides 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. ...'⁵¹ 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.⁵²

The Australian Institute of Health and Welfare's publication 'Child Protection Australia 2000-01'⁵³ reports that in the financial year 2000-2001 in Tasmania there were 315⁵⁴ 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.⁵⁵

Conclusion

Lack of clarity in the law offers no real guidance to parents and hinders prosecutions. The claim can therefore justifiably be made that the current law is not working effectively to protect children or to guide parents.

Response to discussion point

The Issues Paper asked the question:

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

⁴⁷ *Children, Young Persons and their Families Act, 1997*, s 42(2).

⁴⁸ *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).

⁴⁹ *Children, Young Persons and Their Families Act, 1997*, s 4.

⁵⁰ *Children, Young Persons and Their Families Act, 1997*, s 3(1).

⁵¹ Materials supplied by the Child Protection Service.

⁵² Personal communications, Child Protection Service.

⁵³ Child Welfare Series No 29, 2002.

⁵⁴ The Australian Institute of Health and Welfare reported in *Child Protection Australia 2001-02* that in the last financial year in Tasmania there were 508 notifications and 158 substantiations. Breakdowns of what type of abuse the substantiations related to were not available.

⁵⁵ Kids Help Line, *2001 Statistical Summary*, Infosheet No 2, available at:

<<http://www.kidshelp.com.au/research/infosheets.html>>

A clear majority of respondents (39 of 56) agreed that the current law should be clarified.

Eighteen⁵⁶ out of the fifty-six responses received (32%) did not agree that the current law should be clarified.

One of these responses was from the Chief Justice who felt that physical punishment is effective, and that it is dangerous to try to define what is 'reasonable'. The Chief Justice stated:

The great virtue of the jury system is that it provides a barometer of the community's attitudes as to what is reasonable conduct in the almost infinite circumstances of the cases which come before courts.

Some members of the Good Beginnings group were opposed to changing the law because they are concerned about the effect that 'criminalising smacking' would have on parents (in particular parents such as parolees, who may not have the benefit of positive police discretion).

The brief response from the Criminal Law Subcommittee of the Law Society simply stated:

After consideration it was felt that the protection mechanisms within existing legislation, such as Child Protection legislation, were sufficient to protect the interests of children.

Of the remaining 15 responses that did not agree that the law should be clarified, 12 were from Tasmanian individuals or couples and 3 were from Tasmanian religious groups, including the Anglican Bishop of Tasmania. Most of these responses did not address the reasons for clarification that were discussed in this part of the Issues Paper. Rather, it could be said that for other reasons they felt it necessary to maintain parents' right to physically punish their children and did not view clarification of the law as an option. These other reasons were:

- strong religious views (6 respondents);
- concern about intrusion into the private sphere of the family or intrusion on parental rights (5 respondents);
- the necessity of physical punishment in order to teach children respect for authority (4 respondents); and
- concern for the negative effects upon society if physical punishment could not be used; such as:
 - 'peoples lives should be made a mess as they will have no rights in controlling their own children and allow them to run amuck'⁵⁷
 - 'The troubles of society today is a result of the lily-livered gutless members of the legal profession and politicians who try to foist their political correctness stupidity on the rest of mankind.'⁵⁸

⁵⁶ The group response from Good Beginnings was counted twice as some members of the group supported prohibiting physical punishment while others did not support any change in the law.

⁵⁷ Response from Mr Geoffrey Wharton.

⁵⁸ Response from Mr Graham Johnson.

Part 3

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.⁵⁹

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 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:⁶⁰

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).

⁵⁹ See legislation in Appendix B.

⁶⁰ 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 B.

Scottish proposals

Following the case of *A v UK*⁶¹ 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.⁶²

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:⁶³

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 2002.⁶⁴ The 'Justice 2' committee supported banning blows to the head, shaking, and the use of implements, however would not support the prohibition on hitting children under 3 years. Given the Justice 2 committee's stance the government abandoned its proposals in relation to children under 3.⁶⁵ The amended legislation has now been passed by the Scottish Parliament.⁶⁶

Prohibiting physical punishment

Countries which have prohibited physical punishment

Sweden was the first country to prohibit 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 prohibiting 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.⁶⁷ Clearly a change in legislation preceded a change in social attitudes.

Dr. Joan Durrant's study, 'A Generation Without Smacking: the impact of Sweden's ban on physical punishment',⁶⁸ found that following⁶⁹ 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;

⁶¹ *A v United Kingdom* (1998) 27 EHRR 611.

⁶² Scottish Executive White Paper (13/12/2001) *Making Scotland Safer: Improving the Criminal Justice System*, at 42.

⁶³ *Ibid.*, at 43.

⁶⁴ Criminal Justice (Scotland) Bill.

⁶⁵ Scottish Parliamentary debate, 18/9/2002.

⁶⁶ Scottish Parliamentary debate, 20/2/2003.

⁶⁷ Ministry of Health and Social Affairs, Sweden (2001) *Ending Corporal Punishment*, at 14.

⁶⁸ 1999, Save the Children, London.

⁶⁹ Due to the large number of factors which could possibly have caused or contributed to these effects, it cannot be proven that they were or were not caused by or contributed to by the ban on physical punishment.

- 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.

The Issues Paper was criticised in parliamentary debate by the Hon. Shadow Attorney-General Mr Michael Hodgman for failing 'to refer to contradictory evidence about the effect of the ban in Sweden, such as the report by Dr Robert Larzelere of the University of Nebraska medical centre which showed a 489 per cent increase in physical abuse cases classified as criminal assaults between 1981 and 1994'.⁷⁰ These reporting rates were addressed in considerable detail in Durrant's findings. Durrant found that although there was a substantial increase in the number of assaults against children being reported to the police, this was to be expected given that one of the goals of the ban was to increase awareness of the physical abuse of children and to encourage the public to take assaults against children seriously.⁷¹ Despite the increased rate of reporting, Durrant found that 'prosecution rates have declined since 1984'.⁷² In addressing the criticisms made by Larzelere Durrant has said:⁷³

It is important to note that reporting rates increased dramatically in *every* nation that recognized child physical abuse as a social problem, including Canada, the United State, and the United Kingdom. It is useless as a measure of actual assault rates because of its extreme sensitivity to changing definitions and public awareness of violence. For example, there were fewer than 1,000 child abuse and neglect reports in the United States in 1960; now that number has grown by more than 1,000 times. It would be extremely naïve to believe that the 1960 figure was accurate or that abuse has actually increased to such an extent.

The Shadow Attorney-General also quoted comments by Ruby Harrold-Claesson, president of the Nordic Committee for Human Rights. The Institute is not aware that this group has an official status. The claims of Harrold-Claesson are not reported in any refereed research publication that the Institute could locate.

Nine other countries have now also prohibited the use of physical punishment. This has been achieved by legislation in Finland, Denmark, Norway, Austria, Latvia, Croatia, Cyprus, Germany and Iceland, 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.

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.⁷⁴

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.⁷⁵

New Zealand

The defence of 'reasonable chastisement' (section 59 of the NZ Crimes Act) is also under review in New Zealand. The following information is an excerpt from 'Maharey Notes',⁷⁶ written by New Zealand's Social Services and Employment Minister, the Hon Steve Maharey, 2 December 2002:

PHYSICAL PUNISHMENT OF CHILDREN

⁷⁰ Parliamentary debate, 20 August 2003.

⁷¹ JE Durrant, 'A Generation Without Smacking: the impact of Sweden's ban on physical punishment' 1999, Save the Children, London, at 11.

⁷² *Ibid* at 14.

⁷³ JE Durrant, 'Comments on Larzele's Critiques', September 2002, unpublished paper forwarded to the Institute by Mr Peter Newell, Co-ordinator of Global Initiative to End All Corporal Punishment.

⁷⁴ Discussion Paper 103, 'Review of the Child Care Act', 2002, at xxviii.

⁷⁵ S Bitensky, 'Spare the rod, embrace our humanity', 1998, University of Michigan Law School.

⁷⁶ Volume 3, Issue Number 78, 2 December 2002.

The government has decided to invest in a campaign to provide parents and caregivers with alternatives to smacking and has asked for a budget bid to be prepared for consideration next year detailing the resources needed to run a public education campaign. The decision comes following consideration by Cabinet of an options paper on ways New Zealand might meet its obligations under the United Nations Convention on the Rights of the Child. The UN has criticised New Zealand because section 59 of the Crimes Act (1961) permits parents to use "reasonable" force to discipline their children. Section 59 is seen as providing legal endorsement for the use of force when children are being disciplined.

Cabinet also decided to discuss what further action might be taken in regard to section 59 in March next year. Options range from a legal ban on physical discipline (including smacking) to, defining exactly what force can be used on children and repeal of section 59 of the Crimes Act. Social Services and Employment Minister Steve Maharey outlines the issues in the following article.

the Third Way, by Steve Maharey

SMACKING, SECTION 59 AND CHILDREN

The assumption at large in the media that the government has "backed off" the repeal of Section 59 of the Crimes Act that gives parents the right to physically discipline their children is wrong. The truth is that the government is working through the issue and has not yet arrived at a conclusion.

The government began considering what to do about Section 59 in response to the United Nations Convention on the Rights of the Child.

Article 19 of the Convention requires "all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse while in the care of parent(s), legal guardian(s) or any other person who has the care of the child". The United Nations Committee has criticised New Zealand because Section 59 of the Crimes Act (1961) permits parents to use "reasonable" force to discipline their children. Section 59 is seen as providing legal endorsement for the use of force when children are being disciplined.

New Zealanders should not take this criticism personally. The United Nations (UN) has criticised many nations because it argues that once the law endorses the use of physical punishment it is very difficult to divide excessive from so called reasonable force. Parents and caregivers who use force are able to use the defence that the law allows them to do so.

In response to the UN, an increasing number of nations have been changing their laws to ban the use of force against children (for example, Germany, Sweden, Finland and Israel) or carefully defining when and how force can be applied (for example, the American states of Washington, Delaware and Arkansas). The government has been looking closely at the experience of these nations and states as it considers what to do. A paper on these issues went to Cabinet in March of last year.

More recently Cabinet discussed a paper looking at the kinds of options which might allow us to meet the requirements of the United Nations but made no final decisions. However it did decide to invest in a campaign to provide parents and caregivers with alternatives to smacking. I have the responsibility for putting together a budget bid to pay for the programme.

In March next year Cabinet will again discuss what action might be taken in regard to Section 59. There are many options ranging from a legal ban on physical discipline (including smacking) to, defining exactly what force can be used on children and repeal of Section 59 of the Crimes Act. I favour the repeal of Section 59.

If Section 59 was repealed it would mean that parents and caregivers could not use the law to defend the use of physical discipline on children. However, it would not mean that a parent who restrained a toddler trying to get onto a busy road would face prosecution. Nor would a parent who smacked a child on the bottom. Such obviously necessary or trivial actions would not attract the attention of the law.

In other words children would be treated like everyone else in society. Adults are not allowed to physically punish or assault each other yet Section 59 currently provides a defence for adults who use force on children. Repeal of Section 59 would mean children would be protected from physical discipline within the family and their rights would be brought into line with those of adults.

There is no doubt that any changes to laws concerning the physical discipline of children will be controversial. That is good. It is time for New Zealanders to think long and hard about the amount of violence that is aimed at children. The horror stories we read about in the newspaper are just the tip of a very large iceberg which sees far too many children hurt by the very people who are supposed to be caring for them. Changing the way adults think about children and what is an appropriate way to discipline them is central to lowering the number of children who are scarred for life by violence.

In the many nations where this issue has already been considered, there has been a strong emphasis on education. The law cannot be changed without a very extensive programme aimed at ensuring parents and caregivers have positive alternatives to force. Children need to be provided with clear boundaries for their behaviour and where parents have relied on physical discipline they will need to know what to do.

All of this may sound like hard work. However, the smacking debate will not go away. The UN is not working in isolation. Its attempts to protect children from violence come from a worldwide concern about the issue. New Zealand is not at the cutting edge of the debate, it is following at least fifteen other nations (Sweden, Finland, Norway, Austria, Germany, Portugal, Italy, Israel, Cyprus, Denmark, Croatia, Latvia, Belgium, Bulgaria and the Republic of Ireland).

Of course, New Zealand started down this track back in 1990 when it removed the cane and the strap from schools. It was a tough choice. Teachers needed training so they could use alternatives to physical punishment. However, no one seems to be lobbying for a return to the old days. It is time to push out the frontier again.

Five church leaders in New Zealand have also publicly supported the repeal of the defence of reasonable chastisement (section 59):⁷⁷

AUCKLAND CHURCH LEADERS SUPPORT REPEAL OF s.59 OF CRIMES ACT (*Hitting of Children*)

The undersigned Auckland Church Leaders support the call to Government to repeal Section 59 of the Crimes Act (1961) which condones use of reasonable force when disciplining children.

“The expression ‘spare the rod and spoil the child’ is mistakenly used to endorse hitting children,” said Bishop Richard Randerson, spokesperson for the group. “Those words are not an accurate quotation of the biblical verse (Proverbs 13.24), which goes on to say ‘the one who loves a child is diligent in correction’. Such correction does not need to be by way of physical hitting : non-physical alternatives are available.

“In our experience the majority of parents want to do their best for their children. It is misguided to believe that hitting children is in their interests. The most effective way of guiding children’s behaviour is through example. This was the way of Jesus whose life role-modelled a preference for love over violence. By contrast, hitting children endorses a pattern of violence which is passed on from one generation to the next.

“The repeal of s.59 removes legal endorsement for the physical discipline of children, and brings NZ law in line with Article 19 of the United Nations Convention on the Rights of the Child. We understand the stresses of being a parent, and the difficult circumstances under which some New Zealanders have to raise their children. We applaud the Government’s initiative for an extensive parenting education programme.

“As church leaders we also recognise the crucial connection between poverty and violence. The Ministry of Social Development estimates that 24% of all NZ children and young people are in households which fall below an income-based poverty line. We urge that Government give continuing attention to the adequacy of levels of support for families, housing, education and health. We strongly support a parenting allowance sufficient to make it feasible for one parent to care for children at home instead of being forced to work through financial stringency.

Signed by : Bishop Patrick Dunn, Roman Catholic Bishop of Auckland
 The Rev Douglas Lendrum, St David’s Presbyterian Church
 The Rev David Pratt, Methodist Church, Auckland
 The Rev. Ron O’Grady, Associated Churches of Christ
 Bishop Richard Randerson, Dean of Holy Trinity Anglican Cathedral
 Contact : Bishop Richard Randerson, Tel (09) 373 3424 (h); (09) 303 9500 (b)
 E-mail : randers@ihug.co.nz

England, Wales and the Republic of Ireland

Following the case of *A v UK*⁷⁸ 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*

⁷⁷ On the official web site of the Anglican Church in Aotearoa, New Zealand and Polynesia: <<http://www.anglican.org.nz/News/Hitting.htm>>

⁷⁸ *A v United Kingdom* (1998) 27 EHRR 611.

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:⁷⁹

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.

The UK Government has decided not to introduce any further changes but will keep the defence of reasonable chastisement ‘under review’.⁸⁰ The UN Committee on the Rights of the Child has strongly criticised this inaction in its concluding observations on the UK’s second report to the Committee:

In light of its previous recommendations..., the Committee deeply regrets that the State party persists in retaining the defence of “reasonable chastisement” and has taken no significant action towards prohibiting all corporal punishment of children in the family. ...

The Committee is of the opinion that governmental proposals to limit rather than to remove the “reasonable chastisement” defence do not comply with the principles and provisions of the Convention and the aforementioned recommendation, particularly since they constitute a serious violation of the dignity of the child. Moreover, they suggest that some forms of corporal punishment are acceptable and therefore undermine educational measures to promote positive and non-violent discipline. ... The Committee recommends that the State party:

with urgency adopt legislation throughout the State party to remove the “reasonable chastisement” defence and prohibit all corporal punishment in the family and in any other contexts not covered by existing legislation;⁸¹

However, in the National Assembly for Wales support has been expressed for a total ban on physical punishment.⁸²

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:⁸³

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.

The Office of Law Reform of Northern Ireland released a consultation document about physical punishment in 2001.⁸⁴ A paper setting out the results of the consultation and proposals for the way forward is due for release late this year.⁸⁵

⁷⁹ Department of Health (UK), Press release, 8/11/2001.

⁸⁰ *Ibid.*

⁸¹ Committee on the Rights of the Child, concluding observations on the UK’s second report under the Convention on the Rights of the Child, 4 October 2002, CRC/C/15/Add.188.

⁸² Debate on 24 January 2002.

⁸³ 2000, Stationary Office, Dublin, at 74, quoted in Northern Ireland Office of Law Reform ‘Physical Punishment in the home’ 2001, at 36.

⁸⁴ Office of Law Reform, Northern Ireland, *Physical punishment in the home- thinking about the issues, looking at the evidence*, September 2001.

⁸⁵ Laura McPolan, Office of Law Reform, Northern Ireland, personal communication, 28/10/2003.

Part 4

Options for reform

The Law Reform Institute is of the view that the present law lacks clarity and is therefore in need of reform. There are two options.

The first option for reform is to abolish the defence of reasonable correction altogether. This option achieves maximum clarity in the law. It has been adopted in a number of countries and is advocated by a growing number of groups and individuals and was supported by 25 (out of 56) of the responses to the Issues Paper. Ten of these responses came from individuals. Fifteen of these responses came from groups or organisations including: the Department of Health, the National Children and Youth Law Centre, Tasmanian Women's Council, the Commissioner for Children, The Paediatrics and Child Health Division of the Royal Australasian College of Physicians (national and state divisions), Australian Confederation of Paediatric and Child Health Nurses, NAPCAN Tasmania and Australians Against Child Abuse.

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. This option was supported by 14 (25%) responses to the Issues Paper (however 2 of these did not in principle support the use of physical punishment). Ten of these responses came from individuals/couples and the others came from the Police Department, the Women's Legal Service, the Child Health Association and the Geneva Fellowship (a religious organisation).

The arguments for and against these two options are:

Option 1: abolition of the defence:

- Physical punishment of children violates their human rights;
- Physical punishment of children is undesirable/harmful and should not be countenanced by the law;
- Abolition achieves maximum certainty in the law;
- Abolition will send a clear message to parents, allowing educative campaigns and programs to be effective.

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.

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 report now sets out the arguments and counter arguments that have been raised in debating these six questions.

It is noted that some respondents felt that these were not the most appropriate questions to ask. A number of responses asserted that a child's basic human rights dictate that physical punishment be prohibited and that whether or not it is effective or harmful is entirely beside the point: 'can you imagine considering such

questions in relation to violence against women?’⁸⁶ Equally, torture may be ‘effective’ but it remains unacceptable because it violates human rights. The Institute recognises the force of this point. Nevertheless, considering the arguments for and against the above six questions may well be helpful to many people in deciding whether the state should sanction the physical punishment of children.

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. Thirdly, it violates international human rights laws. And fourthly, it is inconsistent with current attitudes to children: that they should be treated in accordance with their best interests.

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. Allowing the physical punishment of children means that they do not enjoy the right to physical integrity that adults enjoy. It is argued that this implies that children are not entitled to the same dignity and respect as adults, effectively treating them as lesser human beings.

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. An obvious 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. The Institute considers that it is not.

The contrary view is that inequality in the treatment of children is 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, proponents of physical punishment argue that 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. Adults do not need to be able to physically punish other adults because they are not responsible for them – it is not their duty to teach them how to behave.

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

⁸⁶ Response from Global Initiative to End All Corporal Punishment of Children.

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.'⁸⁷ One response⁸⁸ to our Issues Paper pointed out that the Committee on the Rights of the Child has made similar recommendations to other countries. Of particular note are its concluding observations on the UK's second report to the Committee:

In light of its previous recommendations..., the Committee deeply regrets that the State party persists in retaining the defence of "reasonable chastisement" and has taken no significant action towards prohibiting all corporal punishment of children in the family.

The Committee is of the opinion that Government's proposals to limit rather than to remove the "reasonable chastisement" defence do not comply with the principles and provisions of the Convention and the aforementioned recommendations, particularly since they constitute a serious violation of the dignity of the child (see similar observations of the Committee on Economic, Social and Cultural Rights, E/C.12/1/Add.79,para.36). Moreover, they suggest that some forms of corporal punishment are acceptable, thereby undermining educational measures to promote positive and non-violent discipline.

The Committee recommends that the State party:

(a) With urgency adopt legislation throughout the State party to remove the "reasonable chastisement" defence and prohibit all corporal punishment in the family and in any other contexts not covered by existing legislation;⁸⁹

⁸⁷ Available at the United Nations Website at:

<[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.15.Add.79.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15.Add.79.En?OpenDocument)>

⁸⁸ Response from Global Initiative to End All Corporal Punishment.

⁸⁹ Committee on the Rights of the Child, concluding observations on the UK's second report under the Convention the Rights of the Child, 4 October 2002, CRC/C/15/Add.188, available at:

<[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.15.Add.188.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15.Add.188.En?OpenDocument)>

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*⁹⁰

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 jurisdictions 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.

The response from the Global Initiative to End All Corporal Punishment informed the Institute that:

Other major human rights Treaty Bodies – the Human Rights Committee, Committee against Torture and the Committee on Economic, Social and Cultural Rights have also condemned corporal punishment of children. In May this year the Committee on Economic, Social and Cultural Rights, examining the UK's fourth report under the International Covenant on Economic, Social and Cultural Rights, recommended abolition of corporal punishment in the family, referring to "the principle of the dignity of the individual, which provides the foundation for international human rights law" and the recommendations of the Committee on the Rights of the Child.⁹¹

Just recently, the Commission on Human Rights Special Rapporteur on Torture, Theo Van Boven from the Netherlands, devoted a substantial part of his report to the UN General Assembly to corporal punishment of children and reviewed the growing consensus across the human rights world against it. The report states "that any form of corporal punishment of children is contrary to established principles on the prohibition of torture and other cruel, inhuman or degrading treatment or punishment".⁹²

At least 17 of the 25 responses which supported the prohibition of physical punishment gave the need to respect the human rights of children as one reason for their views.

A recent challenge has been made in the Supreme Court of Canada to s 43 of the Ontario *Criminal Code*, which is the equivalent of Tasmania's s 50. The Canadian Foundation for Children, Youth and the Law applied for a declaration under the Ontario *Rules of Civil Procedure* that s 43 of the Ontario *Criminal Code* is unconstitutional and of no force and effect as it violates a child's rights under sections 7, 12 and/or 15 of the *Canadian Charter of Rights and Freedoms*, which provide –

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

⁹⁰ *A v United Kingdom* (1998) 27 EHRR 611.

⁹¹ Concluding observations of the Committee on Economic, Social and Cultural Rights on the UK's fourth report under the International Covenant on Economic, Social and Cultural Rights, May 17 2002, E/C.12/1/Add.79, para. 36.

⁹² UN General Assembly, 'Torture and other cruel, inhuman or degrading treatment or punishment', A/57/173, 2 July 2002, available at: <<http://daccess-ods.un.org/TMP/4475431.html>>

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

A declaration was also sought striking down the common law parental right to use corporal punishment. The application was dismissed at first instance by the Ontario Superior Court, and at second instance by the Court of Appeal for Ontario. This decision was appealed to the Supreme Court of Canada, who heard argument on 6 June 2003, and has reserved its decision.⁹³ If the Court is willing to grant the application it would strengthen claims that physical punishment is inconsistent with human rights (although international human rights are not identical to the rights under the Canadian Charter, there are clear similarities).

***Physical punishment is inconsistent with the modern attitude to children:
that they should be treated in accordance with their best interests***

There is no doubt that the best interests of children should dictate their treatment. Not only does international law clearly state this principle, it is firmly embedded in Australian family law and reflected in Tasmania's *Children, Young Persons and Their Families Act 1997*. The object of this Act is stated in s 7(1) to be:⁹⁴

... to provide for the care and protection of children in a manner that maximises a child's opportunity to grow up in a safe and stable environment and to reach his or her full potential.

Section 7 goes on to state:

(2) The Minister must seek to further the object of this Act and, to that end, should endeavour –

...

(d) to provide, or assist in the provision of, preventative and support services directed towards strengthening and supporting families and reducing the incidence of child abuse and neglect; ...

No doubt the defence of reasonable correction was inserted in the Code because at that time (1924) it was believed to be in the child's best interests for parents to be able to administer physical punishment to them. With time attitudes change, and s 50 has been amended so that ship captains and teachers can no longer hit their crew and students – we no longer consider this necessary or desirable. While there is clearly public debate as to whether the use of physical punishment can be in a child's best interests, the Institute has formed the opinion, upon consideration of the weight of evidence suggesting that physical punishment is associated with negative effects (discussed below), that its use is not in the best interests of children.

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.⁹⁵ 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 should not be questioned. 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 that 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

⁹³ The court was yet to hand down a decision at the time of publishing this report.

⁹⁴ See also references to the principle of the best interests of the child in the second reading speech of the Children Young Persons and Their Families Bill 1997, Mr Cleary, Hansard, 1/10/1997, Pt 2, pages 41 – 89, <<http://www.parliament.tas.gov.au:8000/>>

⁹⁵ J Cashmore, N de Haas, *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.

or guilt after smacking or spanking their child⁹⁶ and that the use of physical punishment is a possible source of marital conflict in the child-rearing domain.⁹⁷ Statements made by callers to Radio National's 'Australia Talks Back',⁹⁸ in a program stimulated by the Institute's Issues Paper, lend some support to this argument:

June: 'I think most people do quite a few things which really when they are calm and thoughtful they often wish they hadn't. I think lots of parents, myself included. I mean I occasionally smacked, I wish I hadn't. I hated it at the time and when I think back now I cringe a little.'

Sara: 'Well I have smacked my child and when I did smack her, the older one, I remember just sitting on the doorstep and just crying and crying thinking what have I done, this is a dreadful thing that I have done.'

The comments of one caller to Radio National's 'Australia Talks Back' are particularly interesting and demonstrate the struggle many people face in trying to rationalise the actions of their parents and themselves:

Jodie: Good-day Sandy, how are you. Look my parents smacked me as a child and I certainly do not feel that I was abused in any way. They were very good at reasoning, they would tell us why we were ever smacked and we also grew up on a tin mine so we had a lot of dangerous equipment that we were actually in charge of - three girls, pretty young. And so the reasons that we were smacked were generally because we were doing something very dangerous or for deliberate disobedience or for rudeness - things like that. It was psychological as well because you had to hold your hand out - there was no chasing after you to give you a smack. You held your hand out and you took your punishment and as we got older my dad reckoned that it was hurting him more than it was hurting us - physically it would hurt his hand. So he reckoned that if we smacked ourselves we would get twice the smack. It was actually just a wonderful thing because it was when we were about 10, but he would be really cranky and he would say "give yourself a smack" for rudeness or for driving the car wrongly.

Announcer: Jodie, did you smack yourself?

Jodie: We did, we did because he was really cross. He would say "give yourself a smack" and in the back of your mind you knew that it was crazy and it was a bit funny but he would kind of be reaching across the table about to do it if you did not. It was brilliant because it really stopped him from that snap, that having to do that scary thing where I guess you are being violent to your child and when they are not really a child anymore, they are starting to get up to a teenager, but also especially when it is something dangerous. Even when I was learning to drive, I was 15 or so and sort of turned wrongly, and it always stuck in my mind because I had to pull over to the side of the road and give myself a smack as a teenager.

Announcer: Jodie, can I ask a question - do you have children of your own?

Jodie: I have I've got a two and a half year old.

Announcer: Where do you stand with regards to your own child?

Jodie: It is harder I must admit. I feel sure that they did the right thing but I still find it hard to smack my toddler and I have done it a couple of times when she has done something really dangerous and a couple of times I have done it because I have "lost it" and I've really felt awful about that. I think at this age it is bit hard to say but I think it was really good from about 4 to 7. It made sense to me as a kid.

Perhaps not surprisingly, most of the responses who supported the use of physical punishment referred to the fact that they had themselves used or received physical punishment.

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 - 'the state of public opinion cannot justify persisting breaches of fundamental human rights.'⁹⁹ 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, or more recently the reduction of the speed limit in Tasmanian towns to 50 km/ph. The main reason for prohibiting physical punishment would be educative. It is argued that the fact that physical

⁹⁶ 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.

⁹⁷ 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.

⁹⁸ Radio National, Australia Talks Back 'Should the smacking of children be banned?' 7 November 2002, announcer: Sandy McCutcheon.

⁹⁹ Response from Global Initiative to End All Corporal Punishment of Children.

punishment is considered acceptable by so many people, despite current human rights laws and research suggesting that it is ineffective and has negative consequences, is the very reason that the law needs to be changed – to help influence a change in community attitudes towards physical punishment and children generally. The National Children’s and Youth Law Centre’s response commented:

In view of the widespread condemnation of violence in our society it is odd that Australians cling so tenaciously to the belief that hitting children is okay.

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 out some forms of physical punishment that are not reasonable) has received strongest opposition from religious individuals and organisations. Two responses to the Issues Paper which supported clarifying the law and six responses that wanted no change to the law discussed religious reasons for their views or were from religious groups/organisations or individuals. There is some divergence of opinion as to just what the Bible, Scriptures and Proverbs say about the use of corporal punishment, and this was also discussed by some responses that favoured prohibiting physical punishment. However, the Institute does not feel that it is necessary to enter this debate.

On the assumption that some religious beliefs encourage physical punishment of children, it is argued that while respecting religious beliefs is important, what is in the best interests of children must be the overriding principle. In addition, ‘[w]hile everybody has freedom of religious belief, practice of religion cannot justify breaches of others’ human rights.’¹⁰⁰

In addition it is noted that five of New Zealand’s religious leaders have publicly advocated the removal of the right to use physical punishment.¹⁰¹

One respondent felt very strongly that a law prohibiting physical punishment would amount to ‘religious discrimination’.¹⁰² The Institute rejects this argument first on the common sense ground that many practices which are advocated by religions or religious writings are not permitted under Tasmanian law nor regarded as unjustified religious discrimination (‘an eye for an eye’, female circumcision); and secondly such arguments have not been supported on the international legal stage. For example, the response from the Global Initiative to End All Corporal Punishment points out:

In 1982, the European Human Rights Commission rejected an application by Swedish parents who alleged that Sweden’s 1979 ban on parental physical punishment breached their right to respect for family life and religious freedom. The Commission concluded: “The actual effects of the law are to encourage a positive review of the punishment of children by their parents, to discourage abuse and to prevent excesses which could properly be described as violence against children.”¹⁰³

More recently, in September 2000, the European Court rejected unanimously and without a hearing an application by individuals associated with a group of Christian private schools in the UK, alleging that implementation of the ban on corporal punishment in private schools breached parents’ rights to freedom of religion and family life.¹⁰⁴ Just a month earlier, the South African Constitutional Court had rejected a more or less identical application from a group of very similar Christian private schools.¹⁰⁵

Few respondents discussed cultural considerations. However the National Children’s and Youth Law Centre responded:

¹⁰⁰ Response from Global Initiative to End All Corporal Punishment of Children.

¹⁰¹ See discussion in Part 3 of this report.

¹⁰² Response from Mr John Dekker.

¹⁰³ *Seven Individuals v Sweden*, European Commission of Human Rights, Admissibility Decision, 13 May 1982.

¹⁰⁴ *European Court of Human Rights, Admissibility Decision on Application no. 55211/00 by Philip Williamson and Others against the UK*, 2000.

¹⁰⁵ *South African Constitutional Court, Case no. CCT4/00; judgement August 18 2000. Judgements can be found at <<http://www.concourt.gov.za>> Lower court judgements: 2000(4) SA 757 (CC); 2000 (10) BCLR 1051 (CC).*

... cultural considerations are often presented as prominent at the expense of children's rights issues. Cultures have different attitudes towards physical punishment, both of children and in a more general sense. So called 'cultural relativists' have thus questioned the appropriateness of government intervention in this field, this time on the grounds that each culture has its own internal standards which cannot be judged by those outside. Again, however, the extreme vulnerability of children and their lack of representation within cultural decision making bodies must be recognised. Again, following the work of feminist critics, we must ask whose 'culture' are we protecting, when children are not given a voice to participate in this culture.¹⁰⁶

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:¹⁰⁷

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 note¹⁰⁸ 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 stated¹⁰⁹ 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.¹¹⁰ This study, described as 'one of the most comprehensive examinations of the subject',¹¹¹ analysed 88 studies, spanning the last 62 years. 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.

¹⁰⁶ Citing: Cf. B Hernandez-Truyol, 'Women's Rights as Human Rights – Rules, Realities and the Role of Culture: A Formula for Reform' (1996) 21(3) *Brooklyn Journal of International Law* 659; T Higgins, 'Anti-Essentialism, Relativism and Human Rights' (1996) 19 *Harvard Women's Law Journal* 111.

¹⁰⁷ 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.

¹⁰⁸ At 85.

¹⁰⁹ '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.

¹¹⁰ E Gershoff, 'Corporal Punishment by Parents and Associated Child Behaviours and Experiences: A Meta-Analytic and Theoretical Review' 128 *Psychological Bulletin* 539.

¹¹¹ Washington Post, 26/6/2002.

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 materials¹¹² 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. According to learning theory, 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 (i.e. the parent ('spanking without warning may be the closest approximation to this condition')).¹¹³ 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.'¹¹⁴ It has also been 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 give with the punishment may go 'unheard', with many children not even remembering why they were punished in the first place.¹¹⁵

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

Mr Robert Ludbrook, legal and policy consultant and founding director of the National Children's and Youth Law Centre, observed in his response that '[t]he point that a smack is over quickly and clears the air again presents an adult point of view. Children who are smacked often feel anxious, betrayed and resentful for some considerable time after the event.'

Quite significantly, a number of respondents who favoured neither change in the law nor clarifying the law did not think that physical punishment was effective:

Police Department: 'The application of physical force in any context rarely engenders respect and it is clearly not persuasive in terms of an argument.

'Physical punishment, being a corrective measure administered after the event, may act as a deterrent if it is understood in the context of a penalty. However, if the application of force is excessive, if it is wrongly assigned, if it is administered inconsistently, or if it is seen merely as an expression of frustration or arbitrary power, then the effect can only be counter productive.'

Mr Darryl Cook: 'I very rarely use any form of physical punishment with my children, indeed I consider other techniques considerably more effective

'Notwithstanding the above I will occasionally deliver a smack, sometimes I give prior warning, sometimes it is a spur of the moment reaction after a tiring day. I do not consider this in any way immoral, and as I have said its effectiveness is debateable, and will only get worse as the children age.'

¹¹² *Managing Difficult Behaviour*, supplied by the Department of Health and Human Services.

¹¹³ G Holden, 'Perspectives on the Effects of Corporal Punishment: Comments on Gershoff (2002)' 128 *Psychological Bulletin* 2002, 590 at 591, citing M Domjan, *The essentials of conditioning and learning* (2nd ed), Belmont CA: Wadsworth.

¹¹⁴ Holden, *ibid*, at 591.

¹¹⁵ P Leach, 'Spanking: a shortcut to nowhere...', 1996, <<http://www.empathicparenting.org/spank.htm>>

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, the use of choices and consequences, 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.

The Honourable Michael Hodgman QC MHA, Shadow Attorney-General, stated in his response to the Issues Paper:

Children who, for example, hurt another child or animal need to be shown that such behaviour is not acceptable in our society.

The Institute agrees. However, the Institute does not agree that applying physical force to a child is an appropriate way to show that such behaviour is unacceptable.

A number of respondents to the Issues Paper mentioned the need to use physical punishment when a child is acting dangerously – about to run onto a road or place a hand on the stove were common examples given. All parents are naturally concerned to ensure the safety of their children and this is commendable. However, other respondents pointed out that children can be easily grabbed to stop them running on the road or doing some other dangerous act, and then other techniques can be used to communicate that they should not do that again. Even very young children can understand simple explanations, especially when said in a stern, angry or worried voice: eg: 'No, fast cars could hurt you', 'No, the stove is hot, it will hurt your hand', etc. Parents and professionals who do not use physical punishment know from personal experience that they are able to stop their children doing dangerous things.

It can also be argued that applying physical punishment is a relatively simple task, whereas 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. This suggestion was emphatically rejected by the response from Good Beginnings workers who agreed that all people are capable of changing their behaviour, although different people may need varying levels of support to do so.

Some proponents of physical punishment argue that youth today are less disciplined and respectful than they have ever been and youth crime is at an all time high because of this. Accordingly, it is felt that if today's youth were given firmer discipline such as physical punishment these problems might be addressed. It was argued that banning physical punishment would lead to increased rates of crime¹¹⁶ and leave parents with only a weak range of discipline techniques:¹¹⁷

We must make sure that in protecting our children, we don't leave parents with so little authority and grounds on which to achieve it, that children do not learn to be disciplined and responsible adults. This would occur to our society's detriment.

On the other hand it is clear 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:¹¹⁸

¹¹⁶ Response from the Honourable Michael Hodgman QC MHA, Shadow Attorney-General.

¹¹⁷ Response from Mr and Mrs Tim and Debbie Harback.

¹¹⁸ '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.

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. Proponents of physical punishment criticise these findings, claiming they are based on uncertain evidence and in any event are 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'.

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').¹¹⁹

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

¹¹⁹ 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.

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:¹²⁰

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.¹²¹ Gershoff claims that this supports the notion that 'corporal punishment and physical abuse are two points along a continuum'.¹²²

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.¹²³

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 parents¹²⁴ and that parents themselves are often concerned that when they use physical punishment they might lose control and hurt their child.¹²⁵ 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.¹²⁶

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.

¹²⁰ Report 15, tabled 24/10/2000, at 49.

¹²¹ 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.

¹²² *Ibid*, at 553.

¹²³ Personal communication, 22 July 2002.

¹²⁴ M Strau, '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.

¹²⁵ 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.

¹²⁶ 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.

Increasing antisocial behaviour and delinquency

Two American studies¹²⁷ 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 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.¹²⁸

Aggression

Another recent American study has shown that slapping by parents increased the probability of a child assaulting the parent.¹²⁹ 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.¹³⁰

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.¹³¹

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.

Cognitive ability

Another recent American study has shown that corporal punishment is associated with a retarded rate of cognitive development.¹³² 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

¹²⁷ M Straus, D Sugeran, 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').

¹²⁸ 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.

¹²⁹ T Brezina, 'Teenage violence towards parents as an adaptation to family strain' (1999) 30 *Youth and Society* 416.

¹³⁰ 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.

¹³¹ 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.

¹³² 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, 1999.

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.¹³³ It is theorised that this could be because:¹³⁴

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.

Other negative effects for the individual

There is evidence¹³⁵ 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

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.

Straus¹³⁶ 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.¹³⁷

¹³³ 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.

¹³⁴ 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.

¹³⁵ 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.

¹³⁶ M Straus, 'Discipline and deviance: Physical punishment of children and violence and other crime in adulthood' (1991) 38 *Social Problems* 133 at 137.

¹³⁷ *Ibid*, at 137.

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). Straus says:¹³⁸

[t]hese 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.

Dr Benjamin Spock, whose studies and books on child rearing are known worldwide, says of corporal punishment:¹³⁹

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.

A statement from the National Committee on Violence (1989) reflects this view:¹⁴⁰

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.

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 Haas'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:¹⁴¹

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.

The Institute concludes that there is sufficient evidence to find that there are probably a number of negative effects produced by the use of physical punishment. The Institute acknowledges that the evidence is not yet totally conclusive – such is the nature of much social and scientific evidence. For example twenty years ago many would have argued that there was no conclusive evidence linking smoking and lung cancer. Today such an assertion would seem preposterous. When dealing with the welfare of children their best interests must be considered, requiring a somewhat cautious approach. We should not sit back and ignore the strong evidence that physical punishment is harming our children.

¹³⁸ *Ibid*, at 147.

¹³⁹ *Dr Spock on Parenting* (1988) New York, Simon and Schuster.

¹⁴⁰ National Committee on Violence, K Dwyer 'Violence Today No. 3: Violence Against Children' 1989.

¹⁴¹ 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>>

It did me no harm

Statements such as ‘it did me (and/or my children) no harm’ were made by a number of respondents to the Issues Paper 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 is claimed to teach valuable lessons and respect for parents and authority.

However, there is a significant problem with making judgements based solely on personal experiences: it is very difficult to be objective when assessing these experiences. 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.¹⁴²

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.

In addition, it can be pointed out that not everybody has a happy tale to tell about their experience with physical punishment:

Ms Helen Duhring, a respondent to the Issues Paper: ‘I am the conveyor of a group called SCCAR (Survivors Confronting Child Assault and Rape) in Burnie. I am also a registered psychiatric nurse. I have to continue now to meet a lot of people adversely affected by physical punishment.’

*Sandy McCutcheon, announcer, Radio National ‘Australia Talks Back’:*¹⁴³ ‘...I am just casting my mind back to my own childhood and it is hard for me to remember, because I guess I blocked a lot of it out, but my own feeling was that being physically punished whether it was at school or at home, increased my defiance and increased my own sort of internal aggression.’

Sue, caller to ‘Australia Talks Back’: ‘Well we used to get belted literally and people around me would be saying “If you kids are going to do this you are going to get a belting” and hit with a belt. Oh horror, horror stuff. I am against it.’

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. Importantly, in the Department of Health and Human Services’ response to the Issues Paper it was stated:

... the Department of Health and Human Services does not support the view that physical punishment is an acceptable form of discipline and parents must use it if they are to raise children properly. ...the use of force to punish or correct a child is not desirable, and progressive law reform in this area is to be encouraged.

¹⁴² 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.

¹⁴³ Radio National, Australia Talks Back ‘Should the smacking of children be banned?’ 7 November 2002.

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 exist to be exercised for their children's benefit while the children are learning and growing to maturity.¹⁴⁴

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.

Five responses to the Issues Paper argued that a law banning physical punishment would be an unjustified intrusion into the private sphere of the family and/or an intrusion on parental rights. 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 people's 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. One response went as far as saying that 'children belong to parents'.¹⁴⁵

The Police Department response recommended a cautious approach to 'any measure which threatens to undermine the parental prerogative and take away the ability of the family to self manage its affairs'. The Institute agrees that caution is appropriate when intruding into what is traditionally perceived as the private sphere of the family. However, one must also be careful not to be overcautious:

Without reform, law and the legal system will create and perpetuate injustice and inefficiency. The costs of prudent reform are less than the costs of imprudent conservation. It is better to be a fool who sometimes rushes in than to be an angel who always fears to tread.¹⁴⁶

The law in fact already intrudes into the 'private' area of family life by stating that the physical punishment of children 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 may wish 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. Arguments about the need for respect for the privacy of the family should be rejected as outmoded and perpetuating inequalities. Such arguments were raised in relation to assaults and rape upon wives by their husbands and have been firmly rejected and are now regarded with abhorrence.

Mr Robert Ludbrook, legal and policy consultant and founding director of the National Youth Law Centre, also pointed out in his response:

Parents are a much more powerful and articulate lobby group than children and the emphasis on parental rights ignores that children are the group most affected by physical punishment and that their views should be given no less weight than those of groups arguing for the rights of parents. Community attitudes which accepted that it was alright for husbands to hit their wives have long gone. Children are not a cohesive or effective lobby group and individual children are loathe to criticise their parents for obvious reasons. It is for adult advocates for children to take the initiative to lobby for repeal of s 50.

¹⁴⁴ Office of Law Reform, Northern Ireland, *Physical punishment in the home- thinking about the issues, looking at the evidence*, September 2001, at 9.

¹⁴⁵ Response from Mr and Mrs Tim and Debbie Harback.

¹⁴⁶ WH Hurlburt QC, *Law Reform Commissions in the United Kingdom and Australia Canada*, 1986, Juriliber, at 434.

Would a law banning physical punishment be effective?

Lack of public support

Some responses indicated 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 removing the defence of reasonable discipline 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. A small opinion poll undertaken in June this year in Tasmania shows little support for a ban on physical punishment.¹⁴⁷ Attitudes and practices can change, particularly with education – just as they have in the past over 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 a 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).¹⁴⁸

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.'¹⁴⁹
- 'We must send a clear and unambiguous message that violence does not solve problems at any level and is unacceptable on any level.'¹⁵⁰
- 'I think on any objective analysis it would have to be agreed that hitting a child does not help the child at all.'¹⁵¹
- 'I personally believe that there is no place in today's society ... nor within the future societies, for any form of corporal punishment.'¹⁵²
- '... corporal punishment has absolutely no place in society today. ... assault against a child is exactly the same as assault against an adult.'¹⁵³
- 'I completely disapprove of [corporal punishment], to be honest with you.'¹⁵⁴
- 'If parents were denied the right to administer corporal punishment to their children I would have no hesitation in supporting it.'¹⁵⁵

¹⁴⁷ 'Most oppose ban on smacks' *The Mercury* 13 June 2003.

¹⁴⁸ Survey conducted by MORI Telephone Surveys Ltd in February 2002, commissioned by NSPCC.

¹⁴⁹ 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.

¹⁵⁰ 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.

¹⁵¹ Mr Parkinson, Hansard, debate of the Education Amendment Bill 1997, Legislative Council 11/11/97 Pt 1 pg 1-45.

¹⁵² Ms Silvia Smith, Hansard, debate of the Education Amendment Bill 1997, Legislative Council 11/11/97 Pt 1 pg 1-45.

¹⁵³ Paula Wriedt, Hansard, debate of the Education Amendment Bill 1997, House of Assembly, 23/4/1998 Pt 2 pg 42-116.

¹⁵⁴ Mrs Cains, Hansard, debate of the Education Amendment Bill 1997, House of Assembly, 23/4/1998 Pt 2 pg 42-116.

¹⁵⁵ Mr Wing, Hansard, debate of the Education Amendment Bill 1999, Legislative Council, 30/9/1999, Pt 1 pg 1-47.

More recent parliamentary debate in response to the Institute's Issues Paper indicates that a majority of Tasmanian parliamentarians would not support a 'ban on smacking'. While some parliamentarians are against banning smacking because they feel there is a parental right to use reasonable discipline,¹⁵⁶ others appear to have taken this stance due to fears that a 'ban' would not have community support.¹⁵⁷

The large proportion of responses to the Issues Paper in favour of banning physical punishment also indicates that public support generally may be larger than expected, particularly if people are assured that parents will not be prosecuted for trivial smacks.

It is also suggested that given the large amount of media and public debate that surrounded the release of the Institute's Issues Paper, a total of 18 responses favoring no change in the law is a fairly small number.

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. This was confirmed by the Police Department response to the Issues Paper, which stated:

The Department will continue to exercise discretion in bringing prosecutions. ... it seems unlikely that there would be an upsurge in the reporting of minor infractions as power relationships and loyalty considerations within the home tend to stifle complaints. The general reluctance of the population to involve itself in all but serious matters suggests that minor breaches will not be brought to police attention in a way that will facilitate prosecution.

Police and prosecutorial discretion exist so that trivial infringements of the law are not prosecuted. The Director of Public Prosecutions' guidelines for the exercise of the discretion to prosecute¹⁵⁸ state that the prosecutor must consider whether 'the public interest required a prosecution to be pursued. It is not the rule that all offences brought to the attention of the authorities must be prosecuted.' Factors are then listed which may be given consideration in determining whether the public interest requires a prosecution. Some of these factors which might be particularly relevant to cases relating to the use of physical punishment are:

- (a) the seriousness or, conversely, the triviality of the alleged offence or that it is of a "technical" nature only;
- (b) any mitigating or aggravating circumstances;
- (f) the degree of culpability of the alleged offender in connection with the offence;
- (h) whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute;
- (k) whether the consequences of any resulting conviction would be unduly harsh and oppressive;

¹⁵⁶ Mr Michael Hodgman, Hansard, House of Assembly, 20/8/2003.

¹⁵⁷ Mrs Judy Jackson, Attorney-General, Hansard, House of Assembly, 20/8/2003.

¹⁵⁸ Director of Public Prosecutions, Tasmania, Annual Report 2001-2002: The Role of an Independent Prosecutor and Guidelines for the Exercise of the Discretion to Prosecute, available at: <http://www.justice.tas.gov.au/cl/dppar01.htm>

- (o) the likely length and expense of a trial;
- (q) the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the Court;

Guidelines on exercising the decision to prosecute also exist at the police prosecutions level, within The Tasmania Police Manual. These also require the consideration of the public interest.¹⁵⁹

A time delay before the law came into operation (see Part 5: Recommendations) 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 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.

Response to discussion points

The Issues Paper asked the questions:

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?

While not all respondents answered these specific questions, the following emerged:

- 25 responses (45%) favoured a prohibition on physical punishment.
- Another two responses did not favour the use of physical punishment, although they did not think it should be prohibited at this stage.
- The main reasons given for these views were human rights, equality, protection of children and that physical punishment is ineffective and has negative effects.
- Two respondents indicated that they had changed their opinion after reading the Issues Paper.

- 32 responses (57%) did not favour prohibiting physical punishment. Of these, 14 favoured clarifying the current law and 18 favoured no change to the law.¹⁶⁰
- The main reasons for their views were religion, intrusion into the privacy of the family and parental rights, the need to teach children respect for authority and the belief in the effectiveness of physical punishment. Many responses which favoured clarifying the law were clearly concerned with the need to more adequately protect children while not criminalizing the actions of ordinary parents.

¹⁵⁹ Police Commissioner's Standing Orders, 8.9.7(4).

¹⁶⁰ these 18 responses have been discussed in more detail at the end of Part 2 of this report.

Option 2: Clarifying the law

The second option for reform is to clarify the law¹⁶¹ by defining what types and levels of physical punishment are reasonable. Following consideration of the responses¹⁶² and further reflection the Institute (by majority) is of the view that the abolition of the defence of reasonable chastisement/correction is the preferred option for reform for the following 5 reasons:

1. Clarifying the law does not respect the human rights of children

Respecting the human rights of children is the paramount consideration. Respect for international human rights laws is imperative in today's global society. Australia, Tasmania and the international community have consistently asserted that children are entitled to be treated with the same dignity and respect for their physical integrity as adults. Clarification of the law does not achieve this goal.

2. Clarifying the law is less likely to be effective

Clarifying the law will not achieve a consistent standard of physical discipline. Further, it may be viewed by some people as an endorsement of the types of physical punishment that are not prohibited. Government departments and organisations and health professionals do not support the use of physical punishment. It is important that the law sets a high standard for the appropriate treatment of children.

The position of the Institute (by majority) is that all types of physical punishment should be prohibited. While the evidence to suggest that light and infrequent smacking is harmful may be scant, endorsing such practices enforces the view in the community that physical punishment generally (ie including much less restrained types of punishment) is acceptable.

In his response to the Issues Paper Robert Ludbrook also commented on the need for the law to clearly prohibit all levels of violence:

The clear rule that hitting people is wrong is well understood and is the basis of our criminal and civil law. The eminent jurist Blackstone said in 1765 that 'The law cannot draw a line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred and no other having the right to meddle with it, in any the slightest manner'. These wise words are true 237 years later. There cannot be gradations of violence and any attempt to categorise and rank different manifestations of violence will add complexity and confusion and ultimately fail.

3. Education is less likely to be effective without a prohibition

Education alone may be perceived as merely advice, which can be taken or left, it does not have to be obeyed. On the other hand, most people understand and accept that they must obey the law, and they will accordingly make an effort to do so.

The criminal law may serve a powerful educative function because of its coercive authority. Therefore it may help to combat sincerely and deeply held beliefs of many people that physical punishment is acceptable and necessary.¹⁶³ While education alone may be effective in changing the attitudes and practices of some parents, parents with deeply held beliefs or with little time or inclination to consider all the evidence, are unlikely to be so easily persuaded.

¹⁶¹ Tasmania Law Reform Institute *Physical Punishment of Children* Issues Paper no 3, October 2002, at 40.

¹⁶² 9 of the 23 responses who favoured prohibiting physical punishment were absolutely opposed to the option of clarifying the law – even as a second choice. Clarifying the law was seen as worse than no progress at all.

¹⁶³ Response by Benedict Bartl.

4. Public support for prohibition can be achieved through education and the use of a time delay

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 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.

The Swedish experience supports this. 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.¹⁶⁴ Clearly a change in legislation preceded a change in social attitudes.

Irwin Hyman states:¹⁶⁵

The history of [behavioural] science reveals that every major technical, social and educational reform has had to overcome "commonsense" thinking based on traditional beliefs. Sometimes, scientists themselves are the most vociferous opponents of new theories, even though objective examination of the facts offers convincing proof.

The experience in relation to removing the right of teachers to use physical punishment supports this conclusion. At the time of this legal change, there was public outcry and claims that children's behaviour would become unmanageable. These fears have not eventuated and it is now widely accepted that teachers should not hit children.¹⁶⁶

5. There does not appear to be community consensus on the types or levels of physical punishment that are acceptable

A real problem with attempting to clarify the law is reaching agreement about what types or levels of physical punishment are acceptable. The Institute (by majority) is of the opinion that no useful community consensus exists on the types or levels of physical punishment that are acceptable. As a means of stimulating discussion, the Issues Paper suggested a number of limits on the use of physical punishment. Twelve responses to the Issues Paper discussed some or all of these limits. These few responses clearly demonstrate the difficulty that would be encountered in trying to reach consensus about, and legislatively enact, specific limits for the use of physical punishment. The experience of the NSW parliament also reflects this difficulty. The original bill introduced by Alan Corbett was heatedly debated and amended (watered down) several times before being passed.¹⁶⁷ Accordingly, attempts to clarify the law may simply be productive of greater uncertainty.

These are the limits that were suggested in the Issues Paper and the responses made to them:

Type of punishment

In the Issues Paper it was proposed that only smacking with an open palm be permitted. This follows the Model Criminal Code.¹⁶⁸ 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

¹⁶⁴ Ministry of Health and Social Affairs, Sweden (2001) *Ending Corporal Punishment*, at 14.

¹⁶⁵ IA Hyman 'Should Children Ever Be Hit?' (1988) June *Journal of Interpersonal Violence* 227, at 228.

¹⁶⁶ Response by Mr Robert Ludbrook. One respondent, Mr David James, claimed that the behaviour of school children has sharply deteriorated with the removal of the cane from schools. Another respondent, Mr WD Stuart, claimed that the stress levels of teachers are rising due to its removal. Little evidence was suggested to support these contentions and they are not accepted by the Institute.

¹⁶⁷ See for example NSW Parliamentary debates 5/5/2001, 26/5/2000, 5/4/2001, and in particular comments made in debate by Alan Corbett on 31/5/2001, available at <<http://www.parliament.nsw.gov.au>>

¹⁶⁸ See Appendix B.

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.¹⁶⁹

Four responses agreed with this proposed limit and four did not.

Agreed: *Ms Leah Bond*
Child Health Association
Mr David James
Women's Legal Service

Disagreed:

Baptist Churches of Tasmania – 'We are not convinced though that the prohibition of the use of an implement is desirable.'

Mr and Mrs Mike and Joan Harrison – the hand 'can be hardened and therefore is more likely to bruise than a flexible implement.'

Mr David James – 'I would not support the banning of the use of implements ... I would support trying to define what sort of implements might be used.'

Mr WD Stuart – said that parents should be able to use an implement of a kind unlikely to cause damage

It was also suggested that the legislation specify that punishments that are humiliating, degrading or terrifying be prohibited. Only one response commented on this suggestion. Mr Greg James was in favour of it.

Parts of the body to which force may be applied

The Issues Paper suggested that 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).¹⁷⁰ This extension was suggested because of the vital and vulnerable nature of the organs within the torso.

Eight responses agreed with this suggestion, one did not.

Agreed: *Baptist Churches of Tasmania*
Mr and Mrs K and L Birch
Ms Leah Bond
Child Health Association
Mr Mark Fordham
Mr and Mrs Tim and Debbie Harback
Mr and Mrs Mike and Joan Harrison
Mr David James
Women's Legal Service

Disagreed: *Mr Greg James*, should only be to the back of the hand

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:¹⁷¹

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**

¹⁶⁹ 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.

¹⁷⁰ See Appendix B.

¹⁷¹ in its policy statement: 'Guidance for Effective Discipline', (1998) 101(4) *Pediatrics*.

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. However, a number of responses pointed out that this term is also imprecise.

Seven responses agreed with this limit and one did not.

Agreed: *Baptist Churches of Tasmania*

Ms Leah Bond

Child Health Association

Mr Mark Fordham

Mr and Mrs Tim and Debbie Harback

Mr David James

Women’s Legal Service – agree, ‘however harm should not have a narrow definition ... some children bruise easily, others do not. This area would require the flexibility of the reasonableness test.’

Disagreed: *Mr and Mrs Mike and Joan Harrison* ‘We do not believe that a mark lasting a few minutes is strong enough to cause a stubborn, wilful child to recognise the fundamental principle that wrong doing has consequences. ... We do not think marks less than a day should be viewed as abuse.’

Young children

In the Issues Paper it was said that 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’.¹⁷² Given the not insignificant research indicating that physical punishment can have negative effects it was 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.

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.¹⁷³

No responses specifically agreed with this proposed 3-year age limit (the Department of Police response was vague on the matter). Two suggested an age limit of 18 months and three suggested an age limit of 12 months. Two responses disagreed but suggested no alternative age limit.

Clearly it would be difficult to reach a consensus even on this one limit. The Scottish experience confirms this.

Baptist Churches of Tasmania – ‘We agree that physical chastisement should not be applied to very young children, say under 18 months, but restricting till the age of three would seem to significantly limit its effectiveness.’

Mr David James – disagree, would support 18 months limit

Ms Leah Bond – ‘I feel it is acceptable to give a light smack to children aged 1-3 years.’

¹⁷² R Cant (Social Systems and Evaluation), *Evaluation of the National Good Beginnings Parenting Project*, 2000, at 1.

¹⁷³ See discussion in Part 3 of this report.

Mr and Mrs Tim and Debbie Harback – disagree, ‘I would never endorse punishing a child in any way below a year of age’

Mr Greg James – disagree, would support 12 months limit

Women’s Legal Service – disagree, would support 12 months limit

Department of Police – ‘...may also fix age constraints. No remedial benefit can accrue from smacking a baby or toddler...’

Mr Mark Fordham – ‘I am not sure about the minimum age of three though, as I feel some children younger than this can learn from a last-resort (and literal) slap on the wrist.’

Mr and Mrs Mike and Joan Harrison – disagree

Older children

It was 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:¹⁷⁴

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.

Three responses agreed with this proposed 13-year age limit. One suggested a 15-year limit and one suggested a 10-year limit. Two other responses disagreed but suggested no other alternate limit.

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 was 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.¹⁷⁵

Agreed: *Baptist Churches of Tasmania*

Mr Mark Fordham

Mr and Mrs Tim and Debbie Harback

Mr David James, but also include step parents and grandparents

Disagreed: *Women’s Legal Service*, any person having care or control of the child should be responsible for any punishment.

It was also 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.

No respondents commented upon this suggested limit.

¹⁷⁴ W Saadeh, ‘Point’ 41 *Clinical Pediatrics* 2002.

¹⁷⁵ See Appendix B.

Part 5

Recommendations

This report makes three alternative recommendations. Each of these recommendations is made by a majority of the Institute's Board, however they were not unanimous. In summary, they are:

Recommendation 1:

(Philip Jackson and Paul Turner dissented from this recommendation)

Recommendation 1 is that the defence of reasonable correction be abolished. The following steps should be taken as part of this process:

- (a) Remove the defence of reasonable correction from the *Criminal Code*;
- (b) Include a clear statement in the *Children, Young Persons and their Families Act* that physical punishment and any form of cruel, degrading or terrifying punishment is prohibited;
- (c) Introduce a statute relating to civil proceedings stating that the defence of reasonable chastisement has been abolished.
- (d) Impose a time delay of 12 months on the coming into force of all amending legislation;
- (e) Undertake a widespread education campaign to inform the community of the changes to the laws and provide information and resources to assist them in the use of alternative discipline techniques; and
- (f) Conduct a detailed analysis of current public opinion of this topic, to be repeated after a number of years to ascertain changes in the community's views. Such research would be particularly beneficial to other states and countries considering changing their laws.

Recommendation 2:

(Philip Jackson and Paul Turner dissented from this recommendation)

If the Parliament does not implement the first recommendation, in the alternative, a staged approach is recommended. The first stage involving the clarification of s 50, the second stage, 2 years later – the abolition of the defence (repeal of s 50).

Recommendation 3:

(Terese Henning dissented from this recommendation)

Thirdly, if the Parliament does not implement the first or second recommendation, it is recommended that s 50 be clarified, and that in 2 years the appropriateness of the availability of the defence be reviewed.

Recommendation 1

Recommendation 1(a): Prohibiting physical punishment – criminal law

It is recommended that the defence of reasonable correction be removed from the criminal law. For technical reasons it may not be possible to remove the defence by simply repealing s 50.¹⁷⁶ It is therefore recommended 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, humiliating or terrifying 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. 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.

This recommendation is made for the following reasons:

- It protects the human rights of children;
- It sends a clear message that physical punishment is unacceptable;
- It achieves maximum certainty; and
- It will allow an education campaign (etc) to have maximum effect.

Recommendation 1(b): A clear statement

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

This recommendation is made for the following reasons:

- It sends a clear message that physical punishment is unacceptable; and
- It sets out in an aspirational manner the way which children should be regarded and treated.

In the Commissioner for Children’s response to the Issues Paper she proposes expanding this statement by adding the words:

or exposed to actual or threatened physical violence of another family member.

The Institute sees no detriment in adding these words to such a statement, the above having been intended to be an example only.

Recommendation 1(c): 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 section be inserted in the *Children, Young Persons and Their Families Act 1997* stating that the common law defence of reasonable chastisement has been abolished in relation to all civil proceedings.

¹⁷⁶ It is possible that the defence could still operate under s 8 of the *Criminal Code Act 1924*, which allows common law defences to operate.

Recommendation 1(d): Time delay

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 amending legislation be stated to come into force 12 months 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. In addition it would allow parents time to become familiar with and confident using alternative discipline techniques.

Recommendation 1(e): Education campaign and support for families

It is recommended that the proposed legal changes be accompanied by a community education campaign and additional support and information for families. The Institute does not have the relevant expertise to make detailed recommendations in relation to this campaign and support. In the Issues Paper we stated the following:

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. The contents of this report should be officially referred to such bodies.

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 (similar to the gambling awareness campaign);
- 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).

Over half the respondents to the Issues Paper referred to the need for an intensive education campaign and additional support for families. While it is not the role of the Institute to determine how such a campaign should be run, the following ideas from respondents to the Issues Paper are worth considering:

Response by Dr Hallam and Dr Wagg:

Additional methods suggested:

- include section in Infant "Blue Book" – Infant Health Record
- target education of focus groups - child care workers

- teachers – PD especially Christian schools
- infant & health nurses
- Good Beginnings
- Medical students – include in curriculum, “Kids and family programme”
- Age of education should be lower Grade 5, 6 similar to sex education when children are developmentally able to be receptive to this information. This could be reinforced in Grade 9, 10.
- Should be part of an overall campaign e.g. “Children First” where a more positive focus would be likely to be effective.”

Response by R Ludbrook:

‘It is important that any public information campaign should be community led (although funded by government) and that images of children as victims should be avoided. Children themselves should be involved in developing and delivering the campaign. The thrust of the campaign should be that children are full members of our society and should enjoy the same human rights that are accorded to adults.

‘In Sweden an effective element of the campaign was printing information on milk cartons and this might be explored as a possibility in Tasmania. An effective strategy used in England was to run a television program putting the arguments against hitting children and to invite viewers to phone a toll free number in order to have their questions answered and to request a copy of a helpful booklet. The phone lines were answered by volunteers (of whom I was one) and attracted a huge response.’

Response by Women’s Legal Service Tasmania Inc:

It is submitted that an individual body should be assembled in order to conduct a wide spread education campaign.

Rather than charging one particular body with the responsibility of such a campaign, it is submitted that a task force comprising a membership derived from government and community bodies should be formed.

It is submitted that a task force with an appropriately appointed and instructed “mixed” membership would be more effective than an individual group or body in achieving high exposure and community education in relation to any reforms instituted.

Comments¹⁷⁷ in the response by Dr Margaret Sims, co-ordinator of Children and Family Studies, Edith Cowen University, WA, would also be of assistance to those administering such a campaign and services. Of particular note she said:

Research on attitudinal change (attitude change is needed before we can expect parental behaviour change) suggests that the most effective strategies needed in a programme include:

- Awareness raising of the issues – why punishment is no longer acceptable, why it doesn’t work, etc
- Multiple sources and backing up the information
- Information coming from people highly valued and respected by parents (different people for different groups of parents)
- Ensuring parents are not stressed when presented with the information - the non-punitive aspect of the change-over is crucial
- Ensuring parents feel confident they have the necessary skills to change their behaviour

Recommendation 1(f): Conduct public opinion research

It is recommended that the government undertake a detailed analysis of current public opinion on the physical punishment of children. Such a study would obviously be beneficial to the strategic planning of any educational campaigns. It is further recommended that such research be repeated after a number of years to ascertain changes in the community's views. The findings could be particularly beneficial to the growing number of other states and countries considering changing their laws regarding physical punishment.

¹⁷⁷ Not fully reproduced here.

Recommendation 2:

If the Parliament does not implement the first recommendation, in the alternative, a staged approach is recommended. The first stage involving the clarification of s 50, the second stage, 2 years later – the abolition of the defence (repeal of s 50).

Recommendation 2(a): Stage 1: Clarification of s 50

It is recommended that s 50 be clarified to make it clear that some types of physical punishment can not be considered reasonable. This should be done by amending section 50 to make it clear that it is lawful for a parent of a child, or person in the place of a parent of a child with the express permission of the child's parent, to smack that child for the purposes of punishment or correction. But that it is not lawful for any other force or cruel, degrading, humiliating or terrifying treatment, or the threat of any other force or such treatment, to be used for any purpose towards any child. The section should define 'smack' to mean the reasonable application of force with an open hand to a part of the body not including the head neck or torso of the child and:

- (a) which does not cause and is not likely to cause harm or injury such as cuts, welts or bruising;
- (a) which does not cause pain for more than a matter of minutes;
- (b) 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 cruel, degrading, humiliating or terrifying; and
- (d) which is reasonable having regard to the child's physical and mental condition.

Recommendation 2(b): Stage 2: Abolition of the defence

It is recommended that the defence of reasonable correction be abolished 2 years after the coming into force of the amending legislation recommended by Recommendation 2(a). This should be done by the implementation of Recommendations 1(a),(b),(c) and (e).

Recommendation 3:

Clarification of s 50

If the Parliament does not implement the first or second recommendations, it is recommended that s 50 be clarified, in accordance with Recommendation 2(a), and that after 2 years the appropriateness of the availability of the defence be reviewed by the Attorney-General, and that a report of the outcome of that review be tabled in each House of Parliament within 6 months of the end of the 2 year period.

Appendix A

Responses received to the Issues Paper

1. Mr Joshua Armstrong
- 1a. Australian Confederation of Paediatric and Child Health Nurses (Tasmania)
2. Australians Against Child Abuse
Mr Joe Tucci, Chief Executive Officer
3. The Baptist Churches of Tasmania
Public Questions Committee
4. Mr Benedict Bartl
5. Mr and Mrs L and K Birch
- 5a. Bishop of Tasmania, John Harrower
6. Ms Leah Bond
7. Ms and Mrs Brian Bosveld
- 7a. Mrs Wendy Burbury
8. Mr Marion Carder
- 8a. The Chief Justice of Tasmania
9. Child Health Association
Christine Minchin, State Coordinator
10. Children's Ombudsman, Norway
11. Children's Rights Commissioner, Belgium,
Ms Ankie Vandekerckhove
12. Commissioner for Children, Tasmania
Ms Patmalar Ambikapathy
13. Mr Darryl Cook
14. Criminal Law Sub-committee of the Law Society of Tasmania
Kim Baumeler, Chair
15. Ms Cheryl Davis
President of the Family Support Services Association
16. Mr John Dekker
- 16a. Department of Health and Human Services
17. Department of Police and Public Safety; Richard McCreadie, Commissioner of Police
18. Ms Helen Duhring, Conveyor of SCCAR (Survivors Confronting Child Assault and Rape) in Burnie, psychiatric nurse
19. Mr and Mrs HP and EP Eiler
20. EPOCH New Zealand, Ms Beth Wood
21. Ms Isabella Fiske McFarlin
Director Emeritus, Free The Kids! USA
22. Mr and Mrs Mark and Trish Fordham
23. Geneva Fellowship Inc. Mr Terry Miller
24. Global Initiative to End All Corporal Punishment of Children,
Mr Peter Newell and Mr Thomas Hammarberg, Joint Coordinators, UK
25. Good Beginnings Tasmania
group meeting, oral response
26. Dr Elizabeth Hallam
Consultant Paediatrician
- Chair State Committee,
Paediatrics and Child Health Division,
Royal Australasian College of Physicians
and Dr Fiona Wagg
Royal Australasian and New Zealand College of Physicians
27. Mr and Mrs Tim and Debbie Harback
28. Mr and Mrs Mike and Joan Harrison
29. The Hon Michael Hodgman QC MP Shadow
Attorney-General
30. Mr David James
31. Mr Greg James
high school teacher
32. Mr Graham Johnson
33. Mr Robert Ludbrook
Legal and Policy Consultant,
founding Director of the National Children's and Youth Law Centre
34. Ms Becci Mcgee
35. NAPCAN Tasmania
Denise Cripps, State Coordinator
36. National Children's and Youth Law Centre
37. Paediatrics and Child Health Division of the Royal Australasian College of Physicians
Assoc. Professor Neil Wigg, Chairman, Paediatric Policy Committee
38. Mrs Diana Parish
39. Mr Gustav L Risberg
40. Ms Morag Seward
41. Dr Margret Simms
Co-ordinator Children and Family Studies, Edith
Cowan University, WA
42. Mr WD Stuart
former naval officer and high school
teacher
43. Tasmanian Women's Council
Margaret Reynolds, Convenor
44. Mr and Mrs Jim and Rebecca Tinning
45. Mr Bryan Walpole
Medical Officer, Macquarie Island
46. Mr Geoffrey Wharton
47. Mr Richard Wilson
48. Women's Legal Service Tasmania
Susan Fahey, solicitor
49. Mr Ken Wriedt
former parliamentarian
50. Ms Bernadette Zeeman
specialist in community development, child and
adolescent development, community services and
children's services
51. A confidential response

Appendix B

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:
 - () the parent of the child consented to such correction of the child by the person; or
 - () the person reasonable believed that the parent of the child consented to such correction of the child by the person; or
 - () 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:
 - () causing or threatening to cause harm to a child that lasts for more than a short period; or
 - (a) causing harm to a child by use of a stick, belt or other object (other than an open hand).