Choose To Hug Not Hit

This is an edited version of the speech given by the Honourable Alastair Nicholson AO RFD QC, Honorary Professorial Fellow, Department of Criminology, University of Melbourne and Former Chief Justice, Family Court of Australia, and Patron, Children's Rights International and Epoch Tasmania to mark International 'No Smacking' Day.

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> "The family has the greatest potential to protect children and provide for their physical and emotional safety. Human rights treaties recognize the right to a private and family life and home. But in recent years violence against children by parents and other family members has been documented. This can include physical, sexual and psychological violence as well as deliberate neglect. Frequently, children experience physical, cruel or humiliating punishment in the context of discipline. Insults, name-calling, isolation, rejection, threats, emotional indifference and belittling are all forms of violence that can damage a child's well-being."
> (United Nations Secretary General's Study on Violence against Children 2006)
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> **"Men never do evil so completely and cheerfully as when they do it from religious conviction."** (Pascal, Pensees, 1670)

These quotations from the United Nations Secretary General's Violence Study of 2006 and from Pascal (1670) provide the context for the alleged justification for the physical discipline of children.

The reference to 'smacking' has a tendency to mask what I regard as a much more serious issue, namely the abuse of children and the disregard of their rights inherent in the law of this State and other States and Territories. While most of us are rightly concerned about child abuse, it troubles me that we are unable to characterise the hitting of children as falling squarely into this category. I suspect that the use of the word 'smacking' has something to do with it. To most, this raises connotations of a gentle correction to a toddler in order to protect or deter him or her from harm, administered by a gentle but loving parent. People advocating law reform in this area can thus be easily characterised as 'do-gooders' interfering with the legitimate role of parents and potentially criminalising their actions as part of the much reviled 'Nanny State'.

This stereotype has been used by the media, opponents of reform and many politicians to trivialise the significance of the issue of the punishment of children and as a means of avoiding it. Any discussion is almost immediately diverted to this issue, with which so many of the public identify, and it is suggested that any limitation on the right of parents to correct a toddler in this way represents a serious interference with their rights as parents to protect their children and leaves them open to potential prosecution.

The Defence of Reasonable Chastisement

However, whatever changes are made to the law they are not going to result in the loving parent of the stereotype described being subject to prosecution. The major law change that I advocate, namely the removal of 'reasonable chastisement' as a defence to a charge of assault would simply place children in the same position as all others in the community in relation to the law of assault.

In order to understand this, it is necessary to have some understanding of the law of assault. We are all subject to what could be characterised as assaults every day. Physical contact is not necessary for an assault which for example can be constituted by an attempted kiss or brushing against someone in a crowd. No prosecutions are ever launched for such assaults and the reality is that it is only more serious assaults that attract police attention, let alone prosecution. The law has a principle constituted by the Latin phrase ***de minimis,*** which means that it does not concern itself with trivialities. Therefore any attempt to prosecute for this type of trivial assault would certainly fail, as would a prosecution for the type of gentle correction of a toddler to which I have referred.[1] Sweden abolished the defence of

reasonable chastisement in 1979 and the incidence of prosecution for assaults on children did not rise as a result of it. A similar outcome could be expected here if the law was to be changed.

I can understand, however, that parents might fear that any change in the law would leave them open to prosecution for relatively mild acts of punishment of a child. I think it important that any change be made in such a way as to take these concerns into account. In New Zealand police and prosecution authorities have apparently indicated that if the law is changed, as appears likely, their approach would be not to prosecute such mild acts of punishment. Any change should also be accompanied by a significant public education campaign as to the negative effects of smacking and the availability of better alternative methods of disciplining children.

I do not approve of the smacking children of any age. The fact that the gentle correction by a light smack probably does no good and may carry within it the seeds of long term harm is all too readily overlooked, but I think it best eradicated or minimised by a process of education rather than prosecution.

The real point is that the defence of reasonable chastisement operates to protect parents from prosecution and conviction for much more serious assaults on children and in effect operates as a charter for child abuse. 'Smacking' in this context can and often does involve what many would regard as a brutal assault, simply because particular parents use it as a licence for such behaviour, either out of cruelty or a misguided belief that they are properly disciplining the child.

Recent case in Family Court of WA

In a recent case in the Family Court of Western Australia,[2] the father of a 10 year old boy J, had obtained an order for regular contact with the boy and his elder sibling (aged 12), both of whom lived with the mother.

The boy subsequently complained of being disciplined with a belt by his father during contact visits and the mother made an application for suspension of contact pending the obtaining of a report as to the children's wishes. On 21 February 2006 the Family Court made an interim injunction restraining the father from engaging in any physical discipline towards the children until further order.

The father then wrote to the mother indicating that he would not comply with that order. Correspondence followed during which the father re-iterated his position and the mother informed the father that J would not go to his home on contact visits because he was scared of him.

At trial the judge (Holden CJ) after outlining the background said:

> "At trial, the husband was totally unrepentant. In my opinion, he took the view that he was entitled to discipline [J] in any way he considered appropriate and that for the court to prevent him from doing so was an unwarranted interference with his parental rights.

That is a view that I do not share. As I indicated during the course of the trial, I doubt there would be a Judge in Australia who would condone the use of a belt or any other similar object to discipline a young child. The husband made it quite clear at trial that he would not change his view and if the injunction remained in force, then the current situation would continue, namely [J] could come to his father's home when he wanted but on his father's terms as to punishment."

His Honour went on to quote from a counsellor's report. This included statements by J that he was made to read passages from scriptures about telling the truth and told him that he had a right to punish him when he was naughty. The counsellor said:

> "[J] went on to report that his father hits him, sometimes "hard" and he "sometimes gets 6 smacks instead of 5 or 5 instead of 4". This physical discipline was explored further and [J] explained that the father "smacks" him with a belt on his bottom. [J] also claimed that his father would push him around whilst holding him strongly by the shoulders.
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> ***[J] further reported that his father had put a piece of soap in his mouth and sent him to his bedroom for 10 minutes and he was not allowed to wash the soap out during this period."***

His Honour confirmed the injunction and varied the contact order to make it operative subject to the children's wishes.

This case is instructive from a number of points of view. First, there is no doubt that the boy was

subjected to what most people would describe as a series of brutal beatings. Secondly, he described what he received as "smacks", no doubt following his father's description. "Smacks" obviously mean different things to different people. Thirdly, the father not only saw nothing wrong with his treatment of the child but considered it his right to beat him in this fashion, to the point where he would not accept a court direction not to do so. Fourthly, the father was unable to understand or accept that the boy, who still loved him, was frightened of him to the point of not wishing to see him. Interestingly enough, J recorded having been hit with a wooden spoon by his mother, but not for a considerable time and did not have the same fear of her.

Another interesting aspect is that the case was in the family court and not the criminal court system, where I consider that it should have been. Mention is made in one of the mother's letters to the father of contact with an official of the Department of Children's Services, who offered to mediate between the parties, a suggestion that the father refused. Any allegation of this sort of treatment made by a person other than a parent would almost certainly have sparked a Departmental investigation and probably a prosecution, rather than a mediation. An insidious aspect of the defence of reasonable chastisement in cases involving a serious assault by a parent is that this option is often not taken by child protection authorities, no doubt because of the difficulty of obtaining a conviction.

In New Zealand, the defence has been successfully raised in cases where parents have been prosecuted for hitting their child with a bamboo stick, with a belt, with a hose pipe and with a piece of wood and in the latter case chaining the child in metal chains to prevent them from leaving the house. Each of these cases involved jury verdicts.

In Tasmania a 1992 case involving horrific attacks upon two children by their parents over an extensive period led to a conviction of one of them on one count, with the jury disagreeing on the remainder. The allegations included whippings using a cattle prodder, stock whip, dog lead, hearth brush, shearing belt, sticks and pieces of wood and the forcible ingestion of cigars and tying a child up in a shed with a dog chain. The defence of reasonable chastisement was relied upon by the parents.[3]

It can be seen that not only is the defence relied upon with a degree of success in the case of very serious assaults upon children, but it must also operate as a serious inhibitor on any prosecutions. It thus acts as a positive encouragement of child abuse by parents.

The Australian Childhood Foundation has described the key focus of the debate as follows:

> "..whether or not parents should have access to a defence under law that permits them to use physical force against their children. No other adult has access to this kind of legal defence. A parent is not allowed to hit/smack/slap someone else's child. A teacher is not allowed to hit/smack/slap a student. An uncle or aunt cannot hit/smack/slap their niece or nephew – at least not without the consent of the child's parents.
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> *Parents are the only adults who have access to the defence if they hit their own children. It has its roots in common law. It has remained unchanged in crimes statutes in almost all state legislation in Australia dating back to the turn of the (last) century."*[4]

The antiquity of this law is worthy of some reflection. It dates back to a time when a homosexual relationship between males was a criminal offence, there was a death penalty for murder and rape that was not infrequently carried out, and women and children were regarded as chattels of their husbands/fathers. There was no research available as to the ill effects of violence upon children and indeed child protection legislation was rudimentary if it existed at all. Physical punishment was commonplace. Indeed the very principle that chastisement of children must be reasonable was itself a primitive child protection measure, as was the principle that women should not be beaten with a stick thicker than the thumb.

Social Attitudes to the Physical Punishment of Children

There has been enormous social change in so many areas since this law was first introduced, not least being attitudes to the nurture and care of children. The question arises as to why we want to keep this relic as a part of our law.

In fact very few people with any expertise in the area of child development even advocate a gentle 'smack' as an effective method of discipline of children of any age and none appear to espouse more serious physical chastisement.

At the same time a belief in the efficacy of physical punishment as appropriate is widespread throughout the community. A 2006 survey revealed that 69% of Australians agreed that it is sometimes necessary to 'smack' naughty children and a further 8% were uncertain about it. The number agreeing was only slightly less than in a similar survey conducted in 2002.[5] Approximately 45% thought it acceptable to smack hard enough to leave a mark on the child. Confronted with figures like this, it is not surprising that our generally timorous politicians are reluctant to act upon what they must know is a serious problem.

Why should this be so?

Why are children now the only members of the community who are the victims of what amounts to little more than a licence to assault?

19th Century concerns about cruelty to animals eventually extended themselves to cruelty to children and it is an historical fact that the foundation of the first national society for the prevention of cruelty to animals preceded the setting up of the first national society for the prevention of cruelty to children.

Although its usage was heavily reduced, the law continued to permit flogging as part of criminal punishment until comparatively modern times. I still remember the revulsion that I felt as a young barrister when the Victorian Supreme Court ordered the flogging of a prisoner in the 1960s.

In schools, physical punishment was a common method of discipline until recently and still exists in some private schools as the following table shows:[66]

Province/territory	Prohibited in the home	Prohibited in schools	Prohibited in the penal system		Prohibited in alternative care settings
			As a sentence for crime	As a disciplinary measure in penal institutions	
Australian Capital Territory	✗	✓	✓	N/A !	SOME !
New South Wales	✗ !	✓	✓	✓	✓ !
Northern Territory	✗	✗	✓	✓	✗
Queensland	✗	✗ !	✓	✓ !	✓ !
South Australia	✗	✗ !	✓	✓	✓ !
Tasmania	✗ !	✓	✓	✓ !	SOME !
Victoria	✗	SOME !	✓	✓	SOME !
Western Australia	✗	✗ !	✓	✗	SOME !

I think that the problem is one that lies deep in our collective psyche. Flogging and physical punishment has played a significant role in the history of this country and in that of the UK, which provided our foundation.

It is not without significance in this context that that foundation was as a penal colony. The British brought flogging with them to this country. Early accounts record the horror of the Aborigines at the first floggings administered following the arrival of the First Fleet. The then discipline of the Army and the Navy was heavily dependent upon flogging and it was a common method of punishment for crime and for controlling prisoners. Beating was also considered as an acceptable means of disciplining women, at least until the end of the 19th century and contemporary literature records the merciless beating of children.

KEY:

✓ = Corporal punishment prohibited

✗ = Corporal punishment permitted

? = Corporal punishment status unknown

! = Click for additional information

See for further information:
http://www.endcorporalpunishment.org/pages/progress/reports/australia.html#key

It is of concern to note that corporal punishment is still permitted in some schools in the Northern Territory, Queensland, South Australia, Victoria and Western Australia and also in alternative care settings in a number of States and Territories. Worse still is the fact that it is permitted in the home in all States and Territories with some qualifications in NSW.

I think it is the fact that most adults have known and experienced corporal punishment as a normal part of growing up that produces this widespread feeling that it is an acceptable method of disciplining children – the " ***It didn't hurt me***" response. The Tasmanian Law Reform Institute Report cautions that reliance on views of this sort is an inappropriate reliance on anecdotal and unreliable evidence to guide important social policy decision making.[1]

We are I think, reluctant to criticise our parents for the methods of upbringing that they used and the passage of time also tends to soften some of the hurt that was experienced in childhood. The Tasmanian Report refers to a US study which found that 74% of those who recalled being punched, kicked or choked by their parents did not consider that this type of behaviour was abusive and neither did the 38% whose injuries as a result of their parents physical punishment required two types of medical intervention. It also makes the point that not everybody has a happy tale to tell about their experience of physical punishment.[2]

I can empathise with this. At the school that I attended corporal punishment was widespread and was administered by teachers and prefects, usually with a cane, upon a somewhat indiscriminate basis. I came from a home where it was not used and the same was the case at my first school, so that the effects were doubly shocking to me. What was even more shocking was the realisation that it was just part of the system and was widespread in all schools and in most homes. Until quite recently, this was the experience of many and to an extent it still continues. This does much to explain community attitudes but I do not believe that this is a justification for its continuation.

The United Nations Convention on the Rights of the Child (CRC)

There is a strong move in many other civilised countries to do away with the physical punishment of children, which is also inconsistent with the United Nations Convention on the Rights of the Child (CRC), to which Australia is a party.

CRC itself sets out the position in Article 19 as follows:

> 1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
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> 2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Nicola Taylor, a Senior Research Fellow of the Children's Research Centre at the University of Otago, New Zealand, comments that this Article if read in conjunction with Articles 3(1), 6(2), 24(3), 28(2), 37(a) and 40 as well as the Preamble to the Convention, combine to reinforce the child's right to physical integrity and protection from physical punishment. The Preamble states (inter alia) that because of their physical and mental immaturity, children need special safeguards and care, including appropriate legal protection.[3]

Although the UK Joint Select Committee on Human Rights did not take the view that CRC directly banned the physical punishment of children in so many words, it thought that this was the clear intention of the Convention and concluded:

> "However, we find it impossible to avoid the conclusion that the interpretation of Article 19 by the Committee on the Rights of the Child is unequivocal: corporal punishment is a serious violation of both the dignity and the physical integrity of the child and the "appropriate" measures which States are required to take in order to protect children from all forms of physical or mental violence include both legislative measures prohibiting all corporal punishment within the family and public education programmes.
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> …….. We do not think that the very clearly expressed views of the Committee on the Rights of the Child can be ignored. As the only body charged with monitoring compliance with the obligations undertaken by States in the CRC, its interpretations of the nature and extent of those obligations are authoritative. In our view, the Committee has consistently made clear that corporal punishment of children is a serious violation of the child's right to dignity and physical integrity, and that states must both introduce a legislative

prohibition of such punishment at the same time as measures for educating the public about the negative consequences of corporal punishment. In the light of this, we do not consider that there is any room for discretion as to the means of implementing Article 19 CRC as interpreted by the Committee on the Rights of the Child: it requires the reasonable chastisement defence to be abolished altogether. [4]"

CRC is the most widely adopted international treaty in history and has been ratified by every nation except the United States and Somalia. Australia played a major part in its drafting and is obliged by Article 2 of the Convention to respect and ensure the rights set out in the Convention to each child. Its wide acceptance means that is has now become part of international customary law.

On 2 June 2002, the UN Committee on the Rights of the Child, appointed pursuant to the Convention, adopted a new General Comment on the issue of corporal punishment of children.

It defined corporal punishment as follows:

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

The express purpose of the General Comment was:

"….to highlight the obligation of all State parties to move quickly to prohibit and eliminate all corporal punishment and all other cruel or degrading forms of punishment of children and to outline the legislative and other awareness-raising and educational measures that States must take… (Paragraph 2)

I consider that there is no doubt that we are in clear breach of the Convention both at National and State and Territory level in preserving the defence of reasonable chastisement and indeed in not legally banning corporal punishment of children.

International Trends

There is a growing movement throughout the world and particularly in Europe to take such a course. Sweden prohibited corporal punishment in secondary schools as early as 1928. It then repealed the defence of reasonable correction from its Penal Code in 1957 and in 1979, legislated to prohibit all corporal punishment of children, becoming the first country in the world to do so. The legislation was amended in 1983 to state –

"Children are entitled to care, security and a good upbringing. Children are to be treated with respect for their person and individuality and may not be subjected to physical punishment or other injurious or humiliating treatment (Parents Code)".

Nicola Taylor comments that the primary purpose of the ban was to alter public attitudes, acknowledge children as autonomous individuals, increase early identification of children at risk for abuse and promote earlier and more supportive intervention for families. As she points out, the *Parents Code* is part of Swedish civil law and makes no provision for legal sanctions when the physical punishment prohibition is violated and hence does not aim to criminalise parental conduct.

Prosecution of assaults on children remain within the Penal Code and occur only in rare cases. The Swedish emphasis has been firmly on the education of parents about the importance of good child rearing practices. She points out that the impact of Swedish reforms has been most extensively researched. Taylor states:

• Public support for corporal punishment has declined markedly over the past 30 years. In 1965, 53% of Swedes supported corporal punishment, while only 11% do now.

• The decline has been the most dramatic among the younger generation of parents (who benefited themselves from being reared without physical punishment) – only 6% of Swedes under the age of 35 currently support the use of physical punishment;

• Parental practice, as well as attitude, has changed. A 1994 survey of students (aged 13-15 years) revealed that only 3% reported harsh slaps from their parents, and only 1% said they had been hit with an implement;

• No Swedish child died during the 1980s as a result of physical abuse. Four subsequently died between 1990 and 1996, but only one at the hands of a parent;

• Reports of assaults against children have increased since 1981, as they have internationally with the discovery of child abuse. However, the proportion of suspects prosecuted who are in their twenties (and therefore raised in a no-smacking culture) has decreased since 1984. The majority of reported assaults are for petty offences, implying that most children are identified before serious injury occurs;

• There has been no increase in parents being drawn into the criminal justice system for minor assaults;

• The number of children coming into care has decreased by 26% since 1982. An increasing proportion of those children in care have short-term placements;

• Overall rates of youth crime have remained steady since 1983;

• Young people's alcohol and drug use, rape and suicide rates have all decreased.

• Most youth well-being measures demonstrate a substantial improvement.

Other Scandinavian countries have similarly legislated to outlaw corporal punishment of children – Finland (1983), Denmark (1986) and (1997) and Norway 1987. Similar laws were passed in Austria (1989), Cyprus (1994), Latvia (1998), Croatia (1999), Germany (2000), Iceland (2003), Ukraine (2004), Romania (2004) and Netherlands (2006).

The Israeli Parliament abolished the defence of reasonable chastisement in 2000 and in the same year the Supreme Court effectively banned parental corporal punishment.

Changes to UK law

In the UK, the defence of reasonable chastisement still operates, although its continued retention is the subject of strong criticism. Like Australia, what constitutes reasonable chastisement is not defined and the success of the defence depends upon the facts of the case. There have however been changes to the law.

The background to these changes arose in the context of a UK case in relation to a boy and his brother who had been on the child protection register during 1990-91 due to known physical abuse by their mother's de facto partner, whom she subsequently married. Police had cautioned him after he admitted hitting the 9 year old boy with a cane.

In February 1993, the boy's head teacher reported that he had been hit with a stick by his stepfather. Medical examinations revealed several fresh and older bruises consistent with blows from a garden cane which had been applied with considerable force. The stepfather successfully relied upon the common law defence of reasonable chastisement and was found not guilty by a jury.

Proceedings were then taken on behalf of the boy in the European Court of Human Rights (*A v United Kingdom*).[5] In 1998 that Court unanimously held that the beating of the boy by his stepfather constituted inhuman or degrading punishment and awarded damages against the UK Government.

In 2004 an attempt to amend the law to exclude the defence was unsuccessful. However the Act was amended to limit the types of assault to which the act applies and in particular to exclude assaults occasioning actual bodily harm and more serious assaults.

This was an important change because the definition of actual bodily harm would normally include assaults leaving bruising or other permanent marks on the body of the child.

The English legislation still receives considerable criticism, not only because it breaches human rights principles but because it is unworkable. Some of these criticisms were included in a joint statement by a large number of organisations interested in child welfare, a selection of which is set out below:

"IT SENDS THE WRONG MESSAGE
By retaining the defence of "reasonable punishment" in relation to common assault, clause 56 maintains the legality of hitting children and sends the message "carry on smacking". Clause 56 would prevent those working with parents and in child protection from delivering the only clear and safe message – that hitting children has no place in positive discipline.

IT DOES NOT DETER DANGEROUS FORMS OF PUNISHMENT
By removing the defence in relation to assaults which cause visible or provable injury, clause 56 would

effectively encourage parents who are committed to using corporal punishment to favour assaults which are unlikely to cause visible bruising or marks but which may risk causing serious injury – for example blows to the head, shaking, and so on. The clause could not be amended to ban 'risk of injury' because experts agree that all physical punishment of children carries some risk of injury.

IT IS LIKELY TO RESULT IN UNFAIR AND UNNECESSARY PROSECUTIONS

The proposed change in the Charging Standard, suggesting that minor injuries – minor bruising – should in future be charged as "Actual Bodily Harm" (ABH) could lead to a substantial increase in prosecutions which is most unlikely to be in children's interests. While the vulnerability of the victim is plainly a factor to be considered in prosecution and sentencing decisions, this proposal seems inappropriately punitive (the maximum sentence for ABH is five years imprisonment) and discriminatory. Some children bruise easily while others – for example black children – do not show marks from hard blows.

If the Standard is to be that minor bruising justifies an ABH charge, there will be no possibility of the police and others being able to avoid formal investigation and intervention in such cases. Evidence will have to be collected on the precise degree of injury, even though this may be inappropriate treatment of a family in difficulties.

IT HAS NO CLARITY OR LEGAL CERTAINTY

As the Joint Committee on Human Rights notes in its nineteenth report published on 21 September 2004: "There is general agreement that the present law is unsatisfactory because it leads to too much uncertainty about what exactly constitutes 'reasonable chastisement'. In our view the new clause perpetuates this uncertainty, because it requires proof of harm and there is a great deal of uncertainty about what degree of harm is required. For example, will hitting resulting in a reddening of the skin be charged as common assault or actual bodily harm, and for how long need it subsist in order for it to cross the necessary threshold?"[66]

Joint Statement by :

These are valid criticisms and in my view strongly support the view of the Tasmania Law Reform Institute that clarification of the law is insufficient to address the problem. In the face of continuing criticism from the UN Committee on the Rights of the Child and in the shadow of the European Court of Human Rights and public pressure, it seems that the current UK position is untenable.

New Zealand

New Zealand currently has a bill before its Parliament to abolish the defence of reasonable chastisement. Although it has given rise to considerable public agitation and opposition, it has the support of both the Prime Minister and the Leader of the Opposition and is expected to pass in the near future.

As in the UK, the continued application of the defence of reasonable chastisement contained in s.59 of the New Zealand Crimes Act 1961 has resulted in numerous inconsistencies in its application to court cases relating to parental violence against children and particularly, a number of acquittals in cases involving serious abuse of children. These successful acquittals have all occurred in jury trials whereas similar instances have been found unreasonable by Court of Appeal, High Court and Family Court Judges. However, different Judges in the Family Court have ruled that a slap in the face and legs is reasonable discipline in one case and unreasonable in another. This sort of inconsistency is inevitable with legislation of this type, which provides little guidance as to what it really means.

The Barnardos organisation, one of the largest child service providers in New Zealand, has commented that consideration of the defence is almost inexorably intertwined with the decision-maker's individual moral position on the issue of corporal punishment of children.

It expressed concern at any proposal that would legitimate certain acts of violence while criminalising other more injurious acts. It thought that such a move was inherently dangerous and would perpetuate what is a discriminatory law.[7]

The weight of expert opinion in New Zealand and elsewhere has been strongly opposed to the retention of the defence of reasonable chastisement. The New Zealand Psychological Society in a submission to the Justice and Electoral Select Committee of the New Zealand Parliament said –

> "Although we are aware that parents routinely hit and hurt their children far less now than in previous years, public opinion might still not support the repeal of s.59. This is an issue in which we believe Parliament needs to take the lead in

changing, rather than simply reflecting popular views about discipline."

They further commented that –

> "Whilst punishing a child for inappropriate behaviour may temporally suppress that behaviour, it does not bring about lasting change and importantly does not result in the acquisition of new or alternative behaviours. It is more likely to result in the child avoiding detection, avoiding the punishing parent and learning to respond to inter-personal problems with violence."

The submission went on to express the view that childhood experience of corporal punishment is a clear risk factor in the development of mental illnesses and anti-social behaviour. It concluded by stating that the last and possibly most powerful argument related to the effect on the parent of being the punishing agent. It commented that because physical punishment may be seen to work in the short term, parents are likely to resort to it more often. It suggested that this greatly increased the likelihood that corporal punishment will escalate into more serious forms of child abuse and that most child abuse, including assaults which result in child deaths, arises in the context of parents administering physical punishment.[8]

Australia

Against this background, it is surprising how insulated Australia has been from the debate on this issue. It perhaps stems in part from a failure by Australian Governments and particularly the Federal Government to pay regard to human rights issues, coupled with indifference by the media to such issues. However, these are not just human rights issues, important though they are, but are issues relating to child abuse and the need to protect children. I am concerned that we will have to wait for some particularly brutal attack upon a child to occur and be publicised before the current torpor of our politicians and media can be overcome.

There has been very little legislative change in Australia, the only significant change having occurred in New South Wales with the passage of the *Crimes Amendment (Child Protection Physical Mistreatment) Act* in 2001. The Act now provides –

> "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."

While on one view the NSW position is preferable to the rest of the Australian States and Territories, in my view it represents a weak compromise that does not face up to the real issues and sends the wrong message, just as the UK legislation does.

The Tasmanian situation is arguably worse than that of other States and Territories in that s.50 of the Tasmanian Criminal Code provides that –

> "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."

In Tasmania, there is not only a defence of reasonable chastisement available to a punishing parent but they have a positive lawful right to use reasonable force towards a child by way of correction. In my view this is a disgraceful piece of legislation which should be removed along with the common law defence of reasonable chastisement as soon as is practicable.

The then Commissioner for Children in Tasmania, Ms Patmalar Ambikapathy, proposed physical punishment of children as a topic for a project by the Tasmania Law Reform Institute in 2001.

In its 2003 Report, the Institute said that there were two options for reform, the first being to prohibit physical punishment of children and the second being to clarify the law relating to physical punishment by further defining what type and/or degree of punishment is reasonable or unreasonable.

After canvassing the arguments for and against the respective propositions the Institute, by a majority, considered that clarifying the law was not a preferred option for reform for a number of 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.

The Report made a number of significant points. These included:

• The fact that the current criminal and civil law relating to the physical punishment of children is unclear and 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.

• The fact that research indicates that physical punishment is not effective:

• Physical punishment has negative effects for individuals and the community which may include physical injuries, increased risk of physical abuse, anti-social behaviour, aggression, crime and drug involvement, suicide and a more violent society. While acknowledging that the evidence was not totally conclusive it considered that when dealing with the welfare of children, a cautious approach should be taken and "We should not sit back and ignore the strong evidence that physical punishment is harming our children".

• The fact that physical punishment is not used or supported by professionals. It is pointed out that the use of physical punishment is not permitted by law or policy in institutions that deal with children in Tasmania and non Government bodies such as the Parenting Centre and Good Beginnings discourage the use of physical punishment when giving advice to parents.

The majority recommended as follows:

1. 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.[9]

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).

3. 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.[10]

Unfortunately, none of these recommendations have been implemented, nor does it appear that they are likely to be. According to a report that appeared in the Hobart Mercury of 11 September 2006:

> *"The Tasmanian Government yesterday distanced itself from a ban, insisting parents should have the right to deal with their children in their own way. Education Minister David Bartlett said he never smacked his children, but he could not dictate to others. "Parenting is an extremely complex job and I would not presume to tell parents how to do their job." Mr Bartlett said. "I think you should hug your children every day and tell them you love them every day. "But I don't believe that we as a State Government should be telling parents how they should do what is a very complex job."*

The report also indicates that the Shadow Attorney-General, Mr Michael Hodgman, took a similar approach, as did the Premiers of Queensland and NSW.

This is a disappointing but unfortunately highly predictable political reaction. In a speech that I delivered in another context in 2005 I remarked as follows:

> "***The reality is that we have witnessed a complete and abject failure by Australia's politicians to provide much needed leadership to this country and they have sacrificed our freedoms in the process."***

Regrettably, I consider this to be yet another example of the same process. There is little doubt that a majority of Tasmanians and Australians probably think that it is appropriate to physically punish children to varying degrees. It is also beyond argument that the weight of expert opinion is to the effect that physical punishment of children is harmful. Perhaps we would be better to avoid the euphemism of 'physical punishment'. What the public apparently approves of is assaults on children.

Surely any political leader worth their salt would attempt to lead the public on an issue such as this rather than follow such misguided and outdated attitudes. There is nothing so complex about parenting that it requires parents and only parents to have discretion as to whether they assault children or not. We should be protecting children and acting in their best interests and so should parents. The evidence is overwhelming that it is not in their best interests to hit children in any circumstances. The fact that it has been done in the past provides no more justification for it than did past violence against women justify that. By their failure to act, our political leaders are sacrificing the rights and freedoms of our children.

I believe that if our political leaders were to take on a leadership role on this issue, coupled with a public education programme, attitudes would change, as they did in Sweden. There are numerous examples of such changes e.g. attitudes to the wearing of seat belts, driving while under the influence of alchohol, smoking and awareness of the dangers of exposure to the sun. These are essentially public health and safety provisions as this one is.

One heartening development in this somewhat gloomy scene is an initiative by the Federal Government to authorise an agency to conduct a $2.5M campaign warning parents not to smack children and setting out guidelines in 16 languages.[11] This is a welcome, albeit long overdue initiative for which the Government is to be commended. Unfortunately the primary responsibility for taking action of legislative nature lies with the States and Territories, which have so far showed no interest in such an initiative.

There are of course some members of the community whose attitudes will never change and particularly those associated with the fundamentalist religious beliefs. An interesting discussion of this approach by Dr Giles Fraser appeared in an English newspaper last year[12]. It is based upon passages in the Christian Bible such as:

> "***He that spareth the rod hateth his son; but he that loveth him chasteneth him betimes"***.

It appears that some advocates of this approach preach a philosophy of chastising children under 12 months of age with a stick and continuing the process to adulthood using implements such as quarter inch plastic tubing.
Others whose opposition to change is on religious grounds do not adopt this extreme position, but nevertheless look to the Bible as a justification for hitting children. I think that the answer to such persons was well expressed in the Tasmania Law Reform Institute Report:

> ***"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, 'while everybody has freedom of religious belief, practice of religion cannot justify breaches of others' human rights."***

Religious opponents of this type of reform tend to oppose it in strident terms, as has been the case in New Zealand, but these views, while entitled to consideration, clearly should not prevail over the need to protect our children.

At least New Zealand's political leaders have had the courage to act on this issue and it is to be hoped that it will not be too long before the leaders of at least one Australian State or Territory find the courage to act similarly.

I am convinced that with such leadership it is possible to influence the obviously rational and otherwise decent people who comprise the majority that still

believe in physical punishment of children of one sort or another. Many of these people are not satisfied that what they describe as mild physical punishment does any harm and in effect challenge advocates of abolition such as me to prove that it does so.

A Child Centred and Evidence Based Approach

I would like to examine the issue of physical punishment of children from a different perspective.

I think that all would agree that we have serious problems with crime and violence in our community. What I suggest that we need to do is to address the various factors that might be a cause of these problems. If violence towards children is one of them, then we should be very cautious about the retention of provisions which have the effect of encouraging it, like the defence of reasonable chastisement.

It is often said by those who support physical punishment of children that there is no evidence to suggest that it does any positive harm and they assert that it does some good. What I would like to suggest is that there is a very real probability that such punishment is a contributor to such problems.

It is unnecessary to totally prove such a connection, because if, as I believe and the Tasmania Law Reform Institute believed, there is evidence of a connection, then the onus shifts to those who would support the use of physical punishment to show that it is of any benefit and that the benefit outweighs the possible harm caused by the continuation of the practice.

I think it important to examine the evidence as to the long term effects of physical punishment on children. A useful discussion is to be found in the Tasmania Law Reform Institute Report.[13] Another is contained in an article ***"Is physical punishment a mental health risk for children?"*** by Anne B Smith of the Children's Issues Centre of the University of Otago, New Zealand.[14]

The consensus view seems to be that corporal punishment is only associated with one desirable behaviour, and this is immediate compliance. It is otherwise associated with children's aggression and other antisocial behaviour towards peers, siblings and adults and may legitimise violence for children in interpersonal relationships.

There also appears to be a consistent link between the use of corporal punishment and delinquent and anti social behaviour.

> *"Ironically, the behaviour which parents are most likely to intend to prevent when they physically punish children, is exactly the behaviour that they are likely to be strengthening".*[15]

Some studies suggest that even low and common levels of spanking are associated with increases in anti social behaviour. A number of studies have shown an association between harsh discipline and poor academic achievement and social adjustment at school. There can also be an adverse effect upon parent-child relationships. Even more worrying is the development of internalising behaviours such as depression, anxiety, suicidal ideation and other mental health problems.

Smith concludes after reviewing the literature that:

> "Research on the long-term effects of punishment are consistent, and overwhelmingly negative over a wide variety of child development outcomes."

A landmark Canadian study came to similar conclusions, particularly as to the long term effects of physical punishment.[16]

Bullying

One common and extremely troublesome form of anti social behaviour in our society involves bullying, both in our schools and workplaces.

In our Australian schools surveys show that approximately 19% of children between the ages of 7 and 17 are bullied at least weekly and a further 27% are bullied less often.[17] This means that nearly half of all our children are victims of bullying and one in five is bullied on a weekly basis. Bullying takes many forms, but a significant part of those forms is physical violence. It is estimated that some 8.1% of boys and 3.4% of girls are frequently bullied in this way, and a further 20% of students are sometimes hit or kicked by their peers at school.

These are figures that should give rise to great concern. They mean that far too many of our children live through a form of hell in their schools on a regular basis. The recent extension of bullying to cyberspace has added a new and frightening dimension to the problem, as recent events in Australia have shown.

Longitudinal studies strongly suggest that repeated bullying impacts upon a child's physical and mental health, which some research suggests can produce persistent negative effects on mental health in adult years.[18] There is significant evidence that bullying can lead to low self esteem, depression, mistrust of others, psychosomatic symptoms and school refusal.[19] In extreme cases, suicide is a possibility. We also have similar problems with adult bullying, particularly in the home and in the workplace.

Again expert studies of the cause of bullying in schools indicate that students who consistently bully suffer from more family problems than other children. They are more likely to be raised by families in which parents show them and others less love and affection. They are more likely to have authoritarian father models and to be on the receiving end of abusive parental responses and harsh punishment.[20] This appears to be particularly so where the parent/s is/are over controlling as well as cold and uncaring. School bullies are also predisposed to increased risks of becoming involved in violence and abuse of others in later life"[21]

The question must be asked as to why bullying is considered as acceptable behaviour by some children. There are no doubt many causes. I suggest that at least part of the problem may stem from the fact that many parents still use physical punishment as a means of dominating and controlling children, as do some schools. Children learn from the example of their parents and teachers and if they see that parents and teachers use physical force and violence to dominate them or as a method of disciplining them, then it is not surprising that children use the same methods towards their fellows, thus perpetuating them. They in turn when they become parents are likely to believe that this is an acceptable approach, which does much to explain the prevalence of the belief in the community that 'smacking' of children is acceptable.

In their 2006 publication "Crossing the Line" the authors comment:

> "Children learn from watching adult behaviour. Physical punishment, at best, communicates a confused message to the child about who and in what circumstances it is acceptable to hit someone else. For example, a parent who "smacks" a child because they have hit a sibling is unlikely to prevent further episodes of hitting between siblings. Young children have limited cognitive capacities to decipher such a complex and seemingly incongruent position. Further illustrating this question one adult pondered.
>
> *'Are we punishing them or are we demonstrating to them that violence is an acceptable way of solving a dispute? If we, as adults, tell children we love them and then resort to violence when there is a strong disagreement, what message does that give the child?"*[22]

The relationship between physical punishment of children and bullying is a subject that needs further research. A 1994 US study obtained estimates of smacking behaviour from interviews with parents of young children. Subsequently, the level of aggression at school of those children who were frequently smacked or slapped was compared with others. A significant relationship was found suggesting that frequent smacking was associated with more aggressive behaviour of children at kindergarten and children who had been subjected to violent punishment were more aggressive than the others.[23]

A subsequent US study by a group that included some of the original authors tended to confirm this view. [24]

A sample of 578 children was assessed in kindergarten through the 8th grade using growth modeling to determine the basic developmental trajectories of mother-reported and teacher-reported externalizing and internalizing behaviors for three physical maltreatment groups of children-early-harmed (prior to age 5 years), later-harmed (age 5 years and over), and non-harmed children.

Results demonstrated that the earlier children experienced harsh physical treatment by significant adults, the more likely they were to experience adjustment problems in early adolescence. Over multiple domains, early physical maltreatment was related to more negative sequelae than the same type of maltreatment occurring at later periods. In addition, the fitted growth models revealed that the early-harmed group exhibited somewhat higher initial levels of teacher-reported externalizing problems in kindergarten and significantly different rates of change in these problem behaviors than other children, as reported by mothers over the 9 years of this study. The early-harmed children were also seen by teachers, in kindergarten, as exhibiting higher levels of internalizing behaviors. The later-harmed children were seen by their teachers as increasing their externalizing problem behaviors more rapidly over the 9 yrs than did the early- or non-harmed children. These findings indicate that the timing of maltreatment is a salient factor in examining the developmental effects of physical harm. They also indicate however that the

children who are not subjected to this treatment are significantly better off than the others.

It could of course be argued that such results can be explained by reason of the child's temperament, i.e. a disposition which might lead to physical punishment and also to bullying. Further research would be helpful in this regard, but my major point is that if there is evidence, as there appears to be, that there is a connection between physical punishment of children and subsequent bullying, it provides a strong reason to call into question the desirability of physical punishment, particularly when other methods of controlling children are thought to be more effective.

Family Violence

The extent of family violence in our community is at a high level, particularly violence against women and all too often, against children.

It is perhaps useful to first define family violence. In its policy framework for the Women's Safety Strategy, the Victorian Law Reform Commission adopted the following definition:

> "Violent, threatening, coercive or controlling behaviour that occurs in current or past family, domestic or intimate relationships is called family violence. This encompasses not only physical injury but direct or indirect threats, sexual assault, emotional and psychological torment, economic control, property damage, social isolation and behaviour which causes a person to live in fear".[25]

The Australian Government adopted a similar definition for what it then called 'domestic violence' in its Framework for Developing Approaches to Domestic Violence 2001-2003. It also stated that "Children and young people are profoundly affected by domestic violence, both as witnesses and as victims".[26]

As an aside, a striking fact that occurred to me when writing this section of the paper is as to how physical punishment of children fits squarely into these definitions and how the effects of physical punishment of children can be said to profoundly affect children as the Australian Government definition suggests.

Australian studies indicate that between 23% and 34% of women experience intimate partner violence during their lives. Men also experience family violence, with a South Australian survey indicating that 12.1% of men reported experiencing family violence at the hands of their partner.

It is thought that family violence figures understate the extent of the problem by a considerable degree in that approximately 40% of women subjected to violence by their current partner do not disclose their experience to anyone and women subject to physical assault are even less likely to report their experience to the police.[27]

This violence is significant, not only for its effects upon the participants, but also upon their children, who are often aware of it and witness it.

The principal thrust of my argument is to ask the question, as I did of bullying, as to why we have such a high level of family violence in our community and what are its causes? Why is violence thought to be a solution to family problems?

It seems to me that there is an obvious relationship between family violence and bullying behaviour and it is one that I have observed on many occasions during my judicial career.

I also consider it to be highly probable that there is a connection between the perpetration of such violence and prior abuse of the perpetrators, including physical punishment as children. Again this is not surprising. These attitudes to the use of violence are learned attitudes. If a child's parents treat him/her abusively and violently, then it is not surprising that the child will also see this conduct as appropriate. In my view the only way in which we are likely to break this cycle is to stress from the earliest possible stage that violence is not a solution to anything.

Conclusion

I think that if we were to approach the question of eliminating the physical punishment of children from the point of view that it is a probable or even a possible, contributor to the enormous social problems of bullying and family violence, then we place the practice in its correct perspective. Of course bullying and family violence are multi-faceted problems with a number of causes. This should not obscure the fact that we have the power and capacity to reduce one contributing factor, if only we have the will to do so. I firmly believe that the majority of the public and parents, if they were aware of the full facts surrounding this issue, would not want to perpetuate a situation where children suffer serious harm. The following passage puts the issue well:

The vast majority of parents do not want to expose their children to health risks, so when they receive

clear messages arising from research, such as that if infants are put to sleep on their back they are less at risk for cot death, many will take notice. In New Zealand there has been a pleasing flow-on drop in cot deaths probably as a result of parent education and professional support. Yet we have been so far reluctant to disseminate messages about the effects of punishment on children."[28]

Organisations like EPOCH and the Australian Children's Foundation and Children's Commissioners like Tasmania's former Children's Commissioner, Patmalar Ambikapathy, and law reform bodies like the Tasmania Law Reform Institute can and have played their part in bringing about change. Similarly international bodies continue to place pressure on Australia, and countries like it, to comply with international norms and treaties. Sadly, a country that formerly prided itself upon being a good international citizen no longer is one and pays little heed to human rights.

The remedy lies very much in the hands of our political leaders, who surely can bring more intelligence to bear upon this issue than was demonstrated in their quoted responses that I referred to previously. We are dealing with a serious ethical and public health problem that needs to be taken far more seriously than it has been to date. Our responses to issues of violence and particularly bullying and family violence have tended to be reactive rather than proactive and it is more than time that we acted to eliminate possible causes of the problem rather than merely trying to cope with the results.

It is I think appropriate to conclude as I began from the conclusion of the United Nations Secretary-General's Study of Violence against children of 2006:

> "The study concludes that violence against children happens everywhere, in every country and society and across all social groups. Extreme violence against children may hit the headlines but children say that daily, repeated small acts of violence and abuse also hurt them. While some violence is unexpected and isolated, most violent acts against children are carried out by people they know and should be able to trust: parents, boyfriends or girlfriends, spouses and partners, schoolmates, teachers and employers. Violence against children includes physical violence, psychological violence such as insults and humiliation, discrimination, neglect and maltreatment. Although the consequences may vary according to the nature and severity of the violence inflicted, the short- and long-term repercussions for children are very often grave and damaging." [29]

Note

The views expressed in this paper are mine alone. However, I would like to acknowledge the assistance of Professor Kenneth Rigby of the University of South Australia in checking the accuracy of my references in the section on bullying and for the helpful comments and criticisms that he made. I would also like to thank my former Senior Legal Adviser at the Family Court of Australia, Margaret Harrison and my wife Lauris Nicholson, for checking the work and for their comments and suggestions.

Footnotes

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[25] Ibid Victorian Law Reform Commission, Review of Family Violence Laws 20

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[27] Victorian Law Reform Commission, Review of Family Violence Laws, Consultation Paper, Melbourne 2004 19

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The full text of the study can be accessed at the same website.

Parliamentary Inquiry into the impact of illicit drugs on families

The House of Representatives Families Committee is currently undertaking a public Inquiry into the impact of illicit drugs on families. The Committee will report on how the Australian Government can better address the impact on families of the importation, production, sale, use and prevention of illicit drugs. The Committee is calling for people to have their say. Issues being considered include:

- the financial, social and personal costs to families who have a member using illicit drugs, including the impact of drug-induced psychoses or other mental disorders
- the impact of harm-minimisation programs on families
- ways to strengthen families who are coping with a member using illicit drugs.

For more information or to make a submission please visit the website of The House of Representatives Families Committee or phone (02) 6277 4566.

Australia Signs Landmark Treaty on Human Rights and Disability

30 March 2007

The Human Rights and Equal Opportunity Commission has welcomed the Australian Government's announcement that it will sign the Convention on the Rights of Persons with Disabilities in New York today.

"I'm very proud and happy that Australia will be among the first nations to sign this Convention," Human Rights Commissioner and Commissioner responsible for Disability Discrimination, Graeme Innes AM, said.

Commissioner Innes served as part of the Australian Government delegation which negotiated the Convention.

"Australia played a very constructive role in producing this Convention and it is pleasing to see that commitment continuing," Commissioner Innes said.

The Convention adds to existing human rights laws by confirming once and for all that people with disability are entitled to the full range of human rights. It also provides clearer goals for governments throughout the world to work towards ensuring human rights in practice for people with disability.

Signing the Convention allows governments to show commitment to the purposes of the Convention. The next step is to ratify, or formally become party to, the Convention.

Nations which ratify the Convention commit themselves to taking measures to implement in practice the rights which are recognised by the Convention, including through reviewing laws and government programs.

"We now look forward to the Australian Government working positively towards ratifying and implementing the Convention in consultation with state and territory governments and with the disability community," Commissioner Innes said.