The Commission for Children and Young People

1. The Commission for Children and Young People was established by the Commission for Children and Young People Act 1998. The Act lays down three statutory principles which govern the work of the Commission:

(a) the safety, welfare and wellbeing of children are the paramount consideration

(b) the views of children are to be given serious consideration and taken into account

(c) a co-operative relationship between children and their families and community is important for the safety, welfare and well-being of children: s10.

The principal functions of the Commission include the making of recommendations to government and non-government agencies on legislation, policies and practices and services affecting children: s11(d).

This submission

3. The Commissioner is pleased to have the opportunity to make a submission on the Crimes Amendment (Child Protection – Excessive Punishment) Bill 2000, a private members’ Bill introduced by Hon. Alan Corbett MLC (referred to in this submission as ‘the Corbett Bill’).

The debate around the issue of corporal punishment is often emotive and subjective. The Commission has attempted in this submission to provide a balanced survey of the issues bearing in mind the Commissioner’s primary responsibility to treat the safety, welfare and well-being of children as the paramount consideration.
4. This submission deals with the following topics:

- The common law rule allowing ‘reasonable chastisement’
- Reasonable chastisement rule and civil law
- Efficacy of corporal punishment
- Corporal punishment and human rights
- International human rights instruments
- Corporal punishment and age discrimination
- International human rights instruments
- Parent’s rights and children’s rights
- International moves to ban corporal punishment
- Children’s attitudes to corporal punishment
- Adult attitudes and practice
- Longer term effects of corporal punishment
- Professional opinion on corporal punishment
- Child rearing manuals
- Corporal punishment of children as a cultural norm
- Total abolition or clarification and limitation?
- Legal reform or Education?
- The position of the Commissioner for Children and Young People
- Wording of the Bill
- Conclusion
Common law rule allowing ‘reasonable chastisement’

5. In New South Wales parents and those having the care of children are entitled to use reasonable force as a means of correcting their child’s behaviour. If parents or carers face a criminal charge of assault or other crime of violence they can rely on the defence of ‘reasonable chastisement’. The prosecution has to prove that the parent or carer used more than ‘reasonable force’ or that the force was used for a purpose other than the ‘correction’ of the child.

6. The same rule applies in other states of Australia. In Australian Capital Territory, Northern Territory, Queensland, South Australia, Tasmania and Western Australia the reasonable chastisement defence is set out in statute law. In Victoria and New South Wales it forms part of the common law. This right of ‘reasonable chastisement’ has its roots in Roman law and became part of New South Wales law at the time of British settlement. It has never been adopted by the New South Wales Parliament but is part of the law of the State and is applied by the courts.

7. The right of parents and carers to use reasonable force to punish their children is one of the few exceptions to the general rule that the application of force to another person is an ‘assault’ or ‘battery’ in law and that it constitutes a criminal offence and a civil wrong. The other situations in which ordinary citizens can use force against another person relate to self-defence, defence of one’s property and restraint of another person who is about to harm themselves or another person.

8. The common law rule originally applied to a wide range of relationships. Husbands could hit their wives, the head of a household could hit the domestic servants, employers could hit their apprentices and employees, the master of a ship was entitled to hit crew members, prison guards were able to physically punish inmates, residential care staff could physically punish children in their care, school and pre-school teachers and day care workers were entitled to strap or cane children. The right to use physical punishment has progressively been removed and restricted in New South Wales and other Australian States and Territories. In New South Wales physical punishment is now permitted only by parents and carers.

9. The basis for the reasonable chastisement rule is not made explicit in the common law. In Roman times it was based on the principle that children owed their very existence to their parents and parents accordingly had absolute authority and control over their children’s lives. If one looks at the categories of people who were given the right of chastisement it is clear that it was a means by which more powerful people could impose their will on less powerful people and enforce compliance with their demands.
10. The reasonable chastisement rule has been interpreted and applied by the Courts over the years and there are now some aspects of the rule about which there is widespread judicial agreement:

_Onus of proof:_ If a parent or carer is charged with assault or some other crime involving physical violence against a child in his/her care, the onus is on the prosecution to prove beyond reasonable doubt that the actions of the parent or carer exceeded the bounds of reasonableness. In other words the parents are given the benefit of any doubt. This is undoubtedly one of the reasons why it has proved difficult for the Police to obtain a conviction in a case where a parent or carer is accused of assaulting or injuring a child. Even where a serious injury is caused to the child the parent may claim that the injury was not intended and was caused by the child’s moving out of the way, trying to deflect the blow or running away. The fact that the onus of proof favours parents over children was one of the reasons why the European Court in _A v United Kingdom_ (1998) found that English law on corporal punishment breached the European Convention of Human Rights.

_Who is a child?_ The common law allows reasonable chastisement of a child but has never provided a definition of ‘child’. The common law power to chastise originally flowed from the relationship between father and child and the age of the child was irrelevant. Although there are no decided cases on the point it is likely that the parental power to chastise would today be seen to cease when a child no longer depended on his or her parents for care and support. A Canadian case held that corporal punishment could not be administered by a carer to a young adult with an intellectual disability. It had been argued that her mental age was that of a child even though she was an adult chronologically and legally.

What is reasonable force? What is reasonable force will depend not only on the degree of force used but on the age and physical development of the child. If an implement is used it must be reasonably fitted for the task of inflicting corporal punishment. In most reported cases a stick or a strap is accepted as an appropriate means of punishment. There are cases in which the use of a stockwhip or tawse (whip) have been held reasonable but a cudgel or baseball bat have been held unreasonable. The reasonable correction rule applies to children of whatever age and does not, for example, prevent the smacking of a baby or young child. However a New Zealand High Court judge commented recently that corporal punishment would seldom be appropriate for a young child or for an older teenager. It is not clear whether, in assessing the reasonableness of the force used, the court can consider the part of the body to which the force is directed and the manner in which the force is inflicted but this is probably the case. There are cases where blows to the head or face and the boxing or pulling of a child’s ears have been held to be reasonable chastisement. There have also been cases where kicking or punching a child have been accepted as reasonable.

_Correction and protective restraint_ It is sometimes claimed that parents need to have the right to use force to control their children so they can protect them from danger. Examples are given of a child about to touch a hot element or
about to run out onto a busy road. Parents have a right of protective restraint under the common law independently of the reasonable chastisement rule. Special statutory powers of restraint of children are given to persons with parental responsibility for a child and ‘authorised carers’ in s158 Children and Young Persons (Care and Protection) Act 1998 (not yet proclaimed) and to detention centre staff in r36 Children (Detention Centres) Act 1987 Regulations (1995). Neither of these statutory powers confers a right to use corporal punishment.

*Motive of punisher:* The case law clearly shows that the purpose of the punishment must be to correct the bad behaviour of the child. If the punisher has some perverted sexual motive or has lost his temper and hits the child from uncontrolable rage then the punishment will not be accepted as reasonable chastisement. Similarly a punisher who hits a child from some spite or revenge is unlikely to succeed with the reasonable chastisement defence.

*Seriousness of misbehaviour* The Courts have consistently refused to look at whether the child’s behaviour merited the punishment given or any punishment. It is seen as a matter for parental discretion whether punishment is deserved and appropriate. There have been cases where children are punished not for their misbehaviour but as a warning against the consequences of future possible misbehaviour or as part of a group punishment, for example where several children are punished because no one will ‘own up’ to a misdemeanour or where a child refuses to name others responsible for some offence.

*Changing community attitudes* It has been said that the common law is not fixed nor immutable but will change in accordance with scientific knowledge and community attitudes. For example, it is now known to be extremely dangerous to shake a baby and one would anticipate that courts would be reluctant to excuse such behaviour as reasonable use of force. There has been a perceptible change in community attitudes towards interpersonal violence including violence between family members. What was considered normal by earlier generations attracts broad disapproval today. While decided cases suggest a reducing tolerance for harsh physical punishment of children it is very difficult to demonstrate a pattern. The circumstances in each case are different and the attitudes of judges vary. A great deal of research suggests that older people are more supportive of harsh physical punishment than younger people and that males are more supportive than females. It is possible that judicial attitudes towards physical punishment reflect the age and life experience of individual judicial officers.

11. Because the defence of reasonable chastisement is usually raised in lower court criminal cases which are decided on their own particular facts and not usually reported it is difficult to state with confidence what the boundaries are between reasonable chastisement and immoderate or unreasonable force. Several points emerge from a reading of the reported decisions.
Corporal punishment which has resulted in quite serious injuries to children has been deemed to be ‘reasonable’ in some situations. It is natural for a child to move in order to escape the physical impact of a blow and for a blow may fall on a part of the child’s body not intended by the punisher. As Hon R.S.L. Jones has pointed out in his second reading speech, quite violent punishment causing serious injuries to children has sometimes been accepted by the Courts as lawful correction.

It is very difficult to extract clear principles from the decided cases. For example there is no clear statement that physical punishment is inappropriate for babies and young children because of the danger of injury and the unlikelihood that very young children will learn from a smack or that physical punishment should not be administered to older teenagers (because they are more susceptible to reasoning and because the use of force may lead to an escalation of violence).

12. An example of the confusion surrounding the current law is the case of Higgs v Booth WA Supreme Court A315/316/86 29 August 1986. A foster mother hit her two foster children. The three-year year old had severe bruising to her buttocks and lower back clearly visible three or four days later. The Magistrate held that the punishment was reasonable and proper. On appeal the Judge held that physical punishment was not warranted in respect of the two year old (because of her age) and the force used against the three year old was not reasonable. Here we have different judicial officers taking opposite views as to the appropriateness of physical punishment as a means of correction of young children and as to whether punishment which left bruises was ‘reasonable’. The punishment inflicted on the three-year-old would not have been permitted under the Corbett Bill because it would have caused harm lasting for more than a short period: c61AA(2)(c).

13. Another deficiency in the reasonable chastisement rule is its failure to take into account the situation of children with a disability. This is illustrated by the NSW case of Ruse v Thew Supreme Court 12822/23/94 23 September 1995. A male nurse at a residential centre for children with a disability was charged with assaulting or ill-treating an eleven-year-old autistic boy who had motor skills but no speech skills. Another worker had called out after seeing the boy shove a girl and put his hand inside her pants. The accused worker was seen by a member of the public to yank the boy’s ear and to pull him aggressively six or seven metres. The management plan for the boy read ‘Do not try to physically restrain’ and there was evidence that because of the boy’s disability he did not understand appropriate social behaviour. The Magistrate considered the nurse’s actions inappropriate but not sufficiently serious to amount to ill-treatment. He viewed the incident as ‘trivial, insubstantial or a mere lack of nicety’ and dismissed the charges as not establishing a prima facie case. On appeal, the Supreme Court found there had been a technical assault but accepted the view that the worker had not gone beyond generally acceptable standards of conduct.

While a worker is entitled to intervene to protect another child it is obvious in this case that the force used was more than was necessary for that purpose.
The issue was whether the worker used reasonable force by way of correction. Pulling an eleven year old by the ear is a dangerous action. There is also some uncertainty whether it would ‘correct’ the behaviour of an autistic eleven year old with limited understanding of social behaviours.

If the Corbett Bill was passed into law the care worker’s actions would not be protected by the reasonable chastisement rule because the force was applied to the child’s head: c61AA(2)(b). It is unlikely that today the pulling of an eleven year old by the ear for some distance would be dismissed as ‘trivial or negligible’.

14. Commentary
The common law principle which allows parents to use physical force to correct their children’s behaviour became part of Australian law on settlement of the country. In New South Wales it is not part of statute law and has not been adopted by Parliament as in other Australian states. It is part of Australian law by default rather than by design.

The present law does not set the parameters of reasonable corporal punishment and the case law gives mixed messages to children and to parents and carers as to what is and is not reasonable. There appears to be two sets of standards of appropriate physical punishment: the first under the reasonable chastisement principle and the second under child protection laws.

The lack of precision of the current law compromises the safety and well-being of children. It also places parents and carers in an invidious position. The criminal law gives them the message that they can hit children as long as the force is reasonable, while child protection law stresses that violence to children is unacceptable and allows state intervention where children are abused or ill-treated.

The Corbett Bill goes considerable distance in clarifying the legal position and in setting a middle ground between the reasonable chastisement rule and child protection principles. It is a practical and workable compromise.

The Corbett Bill does not interfere with the right of parents to restrain their children to protect them from harm. The need for parents to use force to restrain their children is not a reason for retaining the right of reasonable chastisement.

Efficacy of corporal punishment

15. Corporal punishment involves the deliberate infliction of pain. The pain may be fleeting or it may be intense and continue for hours or days. The basis of the reasonable chastisement rule is that the pain (and perhaps the accompanying humiliation) suffered by the child will cause the child to behave acceptably in future in order to avoid further punishment. While it is normal
human behaviour to avoid pain and humiliation where possible, the efficacy of corporal punishment as a means of improving children’s behaviour remains controversial.

16. In the Discussion Paper *Legal and Social Aspects of the Physical Punishment of Children* (1995) Cashmore and de Haas consider the effectiveness of physical punishment. They conclude that its effectiveness depends on whether it is accompanied by an explanation, on the age of the child, on the frequency with which it is administered and on the acceptance or resistance of the child to the punishment. They quote research that shows that one year olds are less compliant with rules against touching breakable objects if the parents rely solely on corporal punishment.

17. Cashmore and de Haas conclude that corporal punishment promotes enforced obedience and the notion that behaviour is externally controlled. The child’s attention is directed to pain avoidance rather than to the reason why certain behaviour attracts parental disapproval. Physical punishment does not strengthen the child’s internal controls nor develop their awareness of how their behaviour may affect other people.

Summarising the literature, they comment that:

‘Reliance on physical punishment is not effective and … 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 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’: Cashmore and de Haas 93.

18. Most experts agree that corporal punishment is unlikely to ‘correct’ the behaviour of babies and very young children but there appears to be no decision to the effect that parents who hit babies cannot rely on the reasonable chastisement rule. In cases where corporal punishment fails to correct the misbehaviour of a child there is the dilemma whether more and harsher punishment is justified or whether corporal punishment should not be tried again because it has failed in its corrective purpose.

19. **Commentary**

While smacking children has been relied on as a mainstay of child rearing for countless generations and while it may reinforce messages about good behaviour that parents give to their children the research suggests that it is not a particularly effective means of modifying children’s behaviour. Children are more likely to respond to praise, encouragement and reward and to other disciplinary methods including loss of privileges and explaining why their behaviour is unacceptable, what effect it is likely to have on others.
Reasonable chastisement rule and civil law

20. It is generally accepted that the reasonable chastisement rule provides a defence in civil proceedings (including child protection proceedings) as well as in criminal proceedings. If a parent is sued by a child for damages for assault or other act of violence the parent can rely on the reasonable chastisement defence. If protection proceedings are initiated on the grounds of physical abuse of a child the parents can raise the reasonable chastisement defence. The Corbett Bill amends the Crimes Act and refers only to criminal proceedings. It does not affect the right of parents to rely on the reasonable chastisement defence in civil proceedings.

21. It is rare for children to bring claims in damages against their parents in relation to alleged physical abuse. The Courts have shown a disinclination to consider such claims except in cases of serious injury to the child. Nevertheless it is hard to see why conduct which would amount to a crime under criminal law should be permitted under civil law.

22. There are a number of laws in New South Wales that provide children with special protection from physical violence:

- The Children’s Court can make a care order if satisfied that a child has been or is likely to be assaulted, ill-treated or exposed or subjected psychological harm: s10 & s3 Children (Care and Protection) Act 1987

- The Children’s Court can make a care order if satisfied that a child has been or is likely to be physically abused or ill-treated s71(1)(c) CCYP (Care and Protection) Act 1998 (in force late 2000)

- The Courts can make an apprehended violence order in favour of a child where satisfied that there are grounds to fear that a personal violence offence may be committed against the child. The Act recognises that domestic violence is predominantly perpetrated against women and children: s562AE and s562AC(3)(b) Crimes Act 1900

- The Family Court, in making orders for residence and contact (i.e. custody and access) must consider the need to protect the child from abuse, ill-treatment or violence: s68F(2)(g)(i) Family Law Act 1975.

All of these laws afford special protection to children and young people in recognition of their physical and intellectual immaturity and their special vulnerability to physical and psychological harm from exposure to violence.

23. It is anomalous that child protection, domestic violence and family law provides children with special protection, while the reasonable chastisement rule denies them the protection from violence enjoyed by adults.
24. As pointed out by former Attorney General, Hon. John Hannaford in the Legislative Council debate on the second reading of the Corbett Bill many people believe that the right of parents to smack their children has been abolished in New South Wales. The cause of the confusion in the minds of the public is that there are currently two conflicting sets of rules. The common law allows parents to use reasonable force to punish their children yet child protection laws provide strict sanctions for abuse or ill-treatment of children.

25. **Commentary**

The Corbett Bill places limits on the right of reasonable chastisement in criminal cases but does not place equivalent limits under civil law. There are persuasive reasons for extending the ambit of the Bill to cover both civil and criminal law.

Parents and the community are currently receiving discrepant messages: on the one hand being told that it is acceptable to hit children by way of punishment but on the other being warned that, if you do hit your children, the state may intervene under child protection powers.

The Corbett Bill would clarify the reasonable chastisement rule by providing a clear-cut set of rules as to what is and what is not legally permissible.

**Corporal punishment and the right to bodily integrity**

26. The Courts have for centuries acknowledged that the individual’s right to bodily integrity is the most important of all human rights. In 1765 the jurist Blackstone wrote that ‘every man’s person (is) sacred and no other (has) the right to meddle with it, in any the slightest manner’. An English Judge in 1984 referred to the ‘the fundamental principle, plain and uncontestable, that every person’s body is inviolate’.

The reasonable chastisement rule is an exception to the general principle that every person has a right to bodily integrity. Children are now the only group in society to whom physical force can be legitimately applied.

27. **Commentary**

The notion that children are entitled to less protection from physical punishment breaches the universal principle of bodily integrity.

**International human rights instruments**


Article 19 of UNCROC requires Australia to ‘take all legislative .. measures to protect the child from all forms of physical or mental violence’. The UN Committee on the Rights of the Child has consistently stated that parental
rights of corporal punishment breach the Convention and Article 19 and has urged many countries to revoke laws which permit parents, carers, teachers and others to use corporal punishment. The Committee in 1994 stated that:

‘... it has paid particular attention to the child’s right to physical integrity. In the same spirit it has stressed that corporal punishment of children is incompatible with the Convention and has often proposed the revision of existing legislation, as well as the development of awareness and educational campaigns, to prevent child abuse and the physical punishment of children CRICI 134 Annex IV. In its observations on reports submitted by some countries the Committee has made the point that ‘No one would argue that a reasonable level of wife-beating is admissible’.

The Committee asks reporting countries to state whether their criminal and family legislation prohibits all forms of physical or mental violence including corporal punishment: Guidelines for Periodic Reports para 88.

29. The Committee has recommended legal change to abolish corporal punishment in its concluding observations on the first reports submitted by nearly all countries that are parties to the Convention including Australia.

30. International Covenant on Civil and Political Rights
The United Nations Covenant on Civil and Political Rights (ICCPR) gives all Australians protection from cruel, inhuman and degrading treatment or punishment: Article 7. In a case under the European Convention of Human Rights A v UK (1998), the European Court of Human Rights held that corporal punishment administered with a stick by the child's step-father amounted to cruel or inhuman punishment.

The Human Rights Committee stated in 1982 and repeated in 1992 that the ban on inhuman or degrading treatment or punishment extends to corporal punishment as a disciplinary measure emphasising that children were entitled to no lesser protection than adults: Australia is a party to ICCPR and a complaint could be made to the UN Human Rights Committee under the optional protocol to ICCPR. While the UN Committee’s decision is not binding on Australia it would have significant persuasive influence.

31. Commentary
New South Wales is currently in breach of its obligations under UNCROC (as are all other Australian states and territories). No reservation has been entered in relation to corporal punishment although it would be open to Australia to do so. Australia’s next report under UNCROC is due in 2003 and, if no action has been taken in the five year period since the first report, Australia is likely to face criticism from the United Nations Committee on the Rights of the Child. New South Wales law on corporal punishment could also be challenged by the lodging of a complaint with the UN Committee on Human Rights. There is consequently international pressure on New South Wales and other Australian states to review the reasonable chastisement rule.
By passing the Corbett Bill New South Wales would be the first Australian state to limit the effect of the parental right to reasonable chastisement and to provide clear statutory guidelines. It would demonstrate a commitment to the Convention on the Rights of the Child although it would not entirely meet the standards set by the Committee which takes the view that any law permitting corporal punishment of children breaches the Convention.

Corporal punishment and age discrimination

32. The reasonable chastisement rule treats children differently and less favourably than adults. There would be an outcry if the law allowed children to chastise badly behaved adults or men to hit women as a punishment. New South Wales law as it stands discriminates against children on the grounds of their age. They are excluded from the right to be protected from assault, a right that adults take for granted. Age discrimination is outlawed by human rights legislation and by international human rights instruments:

33. New South Wales and all other Australian states and territories now have legislation making age discrimination unlawful in areas such as education, employment, accommodation and access to goods and services. These laws do not apply to the treatment of children in family or out of family care and so do not overrule the common law nor provide a remedy for children who are discriminated against. However the general principle that children should not receive less favourable treatment because of their age is well established and departure from that principle can be justified only by showing that there are benefits to children which justify differential treatment.

34. The Human Rights and Equal Opportunity Commission in its recently released report *Age Matters* points out that ‘many age distinctions have long been taken for granted in Australian law and policy’. The report comments that much discrimination against children and young people is based on stereotypes and assumptions about their behaviour and ability. Corporal punishment is based on the assumptions that children and young people are more prone than adults to behave in anti-social ways and that the use of force is an effective and appropriate way of curbing their bad behaviour. There is little evidence that this is, in fact, the case.

35. The International Covenant of Civil and Political Rights, the International Covenant on Social and Economic Rights and the Convention on the Rights of the Child all require Australia to ensure that human rights are enjoyed by all people without discrimination. While these instruments do not refer specifically to discrimination on the grounds of age it is accepted by HREOC and most commentators that age discrimination is covered by the words ‘or other status’.

36. It is not discrimination if differential treatment can be justified for some compelling reason. Such justification may be based on the need for special treatment to redress some inherent or historical disadvantage or from the
need to provide special protection to members of a vulnerable group. But such justifications have to be carefully scrutinised and based on evidence.

37. Commentary
The current law as to reasonable chastisement discriminates unfairly against children on the basis of their age. At a time when considerable effort is being made to ensure that Australian laws and policies are non-discriminatory there is a need to acknowledge the discriminatory effect of the reasonable chastisement rule. Those arguing for continuation of the status quo should be required to prove that there are real benefits to children.

Parent’s rights and children’s rights

38. The reasonable chastisement rule reflects a view that parents have an unqualified right to control their children. An English Judge in 1898 in the Agar-Ellis case summarised the common law ‘Children are under the authority and control of their parents until they reach adulthood. That is the law’. In the last forty years this view of the common law has increasingly been questioned. It was significantly modified by the landmark case of Gillick, a decision of the English House of Lords, in 1985. In that case Lord Fraser made the important point that ‘the parental rights to control a child do not exist for the benefit of the parents. They exist for the benefit of the child and they are justified only in so far as they enable the parent to perform his duties towards the child and towards other children in the family’.

39. This shift of emphasis from parental rights to parental responsibilities has been adopted in both Commonwealth family law: s61B Family Law Act 1975 and New South Wales child protection law: s79 Children and Young Persons (Care and Protection) Act 1998 (not yet proclaimed).

40. The argument that the law should not interfere with such a personal and sensitive matter as parenting of children is really an argument that parents should be free to bring up their children in any manner they choose. But although the law has traditionally been reluctant to interfere in internal family matters it has usually been willing to intervene in situations where one family member assaults or threatens another family member. The issue of violence between family members has been a focus of much new legislation over the last two decades to provide greater protection for vulnerable family members.

41. The corporal punishment rule is premised on the notion that parents and carers love their children and would never want to harm them. This is obviously true for the great majority of parents and carers but it is certainly not a universal truth.

42. The greatest risk of non-accidental injury to children is posed by members of the child’s own family, primarily a father, step-father or male partner of the child’s mother. Of 123 child homicides in the period 1989-1993, 86 persons responsible were biological or non-biological parents and three were other

43. **Commentary**  
The reasonable chastisement rule was formulated at a time when it was believed that parents had virtually absolute rights to control their children. The common law has evolved and parental rights are now seen as being limited to situations where they are needed for a parent to carry out his or her responsibilities to the child. The notion that the law should not interfere with parenting practices has never applied to situations of domestic assault and has been eclipsed by contemporary attitudes to family violence and children’s rights.

Sadly, the view that family members can be trusted not to harm their children does not match up with the reality that parental violence is the most common cause of non-accidental injury to children.

**International moves to ban corporal punishment**

44. *Sweden and Scandinavian countries* Sweden was in 1979 the first country to pass a law abolishing the right of parents to use physical punishment on their children. The law change was accompanied by a widespread public education campaign advising parents and carers of the reason for the law and suggesting alternatives to smacking. These messages were printed on milk cartons and found their way into nearly all homes. Sweden’s lead has been followed by Finland (1983), Norway (1987) and Denmark (1997).

45. Research by Durrant in 1999 (*Annexure 1*) shows that since the law was changed:

- Attitudes in Sweden have changed from over 65% of adults being in favour of physical punishment in the 1960s to less than 15% now in favour.
- In most years there have been no child abuse deaths. There has been no increase in prosecutions of parents for assault of children.
- Social services have been set up to support parents.

46. *Other European countries* Corporal punishment of children is now unlawful in Austria (1989), Cyprus (1994), Latvia (1998) and Croatia (1999). In Germany (1999) and Bulgaria (1999) Bills are currently before Parliament that would ban physical punishment of children. Recent Court decisions in Italy (1996) and Israel (1999) have effectively removed the right of parents to use corporal punishment in those countries. A National Commission in Belgium (1999) and a Parliamentary Committee in the Republic of Ireland (1997) have recently recommended full prohibition of corporal punishment.
47. Scotland and England  The Scottish Law Commission in 1992 recommended that the law be changed to outlaw the hitting of children with a stick, strap or other implement or hitting them in such a way as to cause more than short term pain or discomfort. The current Bill follows quite closely the Scottish recommendations.

These recommendations have not been implemented but Scotland, like England, has been forced to review its laws as a result of the decision of the European Court of Human Rights in A v U.K. which held that British law on parental physical punishment breached the European Convention which required that no person be subjected to inhuman or degrading treatment or punishment. A Discussion Paper released this year proposed that rather than imposing a ban of parental physical punishment the common law exception be qualified by a proviso that any physical punishment must not be inhuman or degrading. This proposal has been criticised for obfuscating rather than clarifying the legal position and giving parents the difficult task of deciding whether a particular form of punishment is ‘inhuman or degrading’. A further criticism is that, in the event of criminal proceedings being brought against a parent or carer, the onus would be on the prosecution to prove not only that the force used was reasonable but further that the punishment was inhuman or degrading. A similar consultation is taking place in England and Wales.

48. New Zealand  The reasonable chastisement principle is given statutory force in s59 Crimes Act. The wording of the Act makes it clear that it can be raised as a defence in civil as well as criminal proceedings. The Family Court, in interpreting child protection and domestic violence laws, has concluded that the definitions of ‘ill-treatment’ and ‘abuse’ must be read in the light of parental powers of reasonable chastisement. There is some evidence that the Family Courts are less tolerant of harsh or inappropriate physical discipline than the criminal courts.

The Department of Child, Youth and Family in 1998 and 1999 ran a major education campaign Breaking the Cycle to discourage parents from hitting their children and to suggest more effective means of dealing with bad behaviour. The campaign used television as a key medium supported by posters, a free help line and pamphlet distribution. A follow up survey showed a positive attitudinal shift and a significant behavioural shift in the willingness of parents to consider alternatives to smacking. A youth advocacy group YouthLaw has published an historical survey showing the progressive limitation in the use of corporal punishment (Annexure 2).

49. Canada and United States  The reasonable chastisement rule forms part of the Canadian Criminal Code. A recent challenge (2000) under the Canadian Charter of Rights and Freedoms was unsuccessful, but the Court suggested that the time had come to ‘provide specific criteria to guide parents, teachers and law enforcement officials’. In the United States, Bills in Wisconsin and Florida to ban parental smacking were unsuccessful.
50. Commentary
There is a world-wide trend to review and revoke laws which permit parental corporal punishment. Increasingly in Europe and in other countries of the former Commonwealth the reasonable chastisement rule has been abolished or is under review. In some cases the motivation for change has been pressure to comply with international or European human rights instruments, in others the impetus has come from a greater recognition of the problem of domestic violence and from a belief that children deserve special protection from all forms of violence.

The Swedish experience shows that legal change accompanied by public education can bring about significant changes in parental and community attitudes to corporal punishment. The New Zealand experience confirms that community education campaigns are also an effective means of changing parental and community attitudes.

Children’s attitudes to corporal punishment

51. Australian research
In one Australian study children of primary and secondary school age were asked whether their mothers or fathers hit them. Of the younger students 81% of the boys and 74% of the girls said their mothers hit them and 76% of the boys and 63% of the girls reported having been hit by their fathers. Of the older students 14% of the boys and 17% of the girls reported being hit by their mothers and 30% of the boys and 22% of the girls reported being hit by their fathers: P. Amato Children in Australian Families (1987).

In a South Australian study, 94% of children aged 4 to 14 reported having been smacked with approximately half of these reporting being smacked with an implement. 53% of children believed that the punishment they had received had been deserved: R Duke and J Aitchison Adult’s and Children’s Perceptions of Smacking (1993).

52. Overseas research
In 1998 Save the Children (UK) and National Children’s Bureau conducted a comprehensive consultation with 76 children aged between four and seven years who participated in small group discussions. The report It Hurts You Inside: Children Talking About Smacking highlighted the following key findings:

- Children defined smacking as hitting and most described a smack as being hard or very hard
- Children said smacking hurt and they did not like it. A large majority thought smacking was wrong.
- A number of children thought that smacking was wrong because the child might get hurt.
• Children said they usually got smacked on the bottom, arm or head.

• Children said they were smacked mainly for being violent, being naughty, for breaking or spoiling things or because they failed to listen to or disobeyed their parents.

• Children do not smack adults because they are frightened the adult will hit them back.

• Half the children said when they became parents they would not hit their own children.

A survey by National Society for the Prevention of Cruelty to Children (UK) reported in *Talking About My Generation* asked 8 – 15 year olds about their parents’ disciplinary methods. Only 18% reported having been slapped or smacked by their parents. Younger children were four times more likely to have been slapped than older children. Children who reported physical punishment were more likely to be from upper and middle class families and children from larger families. An interesting finding was that children who were subjected to physical punishment were also more likely to be criticised, shouted at and threatened.

Children in the survey were also asked what forms of discipline were most likely to be effective in stopping future bad behaviour. Overall 61% of children thought that ‘talking to you and explaining why what you did was wrong’ was the most likely to be effective with 70% of older children and 52% of young children and 67% of girls and 54% of boys supporting this approach. These results suggest that children’s actual experience is closely associated with their attitudes to punishment.

12 – 15 year olds were asked how acceptable different disciplinary methods were for a child of their age. Only 31% thought threatening to smack a child was acceptable and 16% judged smacking or slapping a child acceptable.

53. **Commentary**

Research involving children provides a reminder that smacking hurts, that they do not like being smacked, that they do not see smacking as effective and that they see hitting children as wrong.

Some parents justify smacking as being done out of love for the child or being done for the child’s own good. Such explanations are not accepted by most of the children surveyed. The research also casts doubt on the argument that a short, swift slap is preferable to other methods of discipline. It appears that parents who use physical punishment are more likely to use other coercive methods of controlling their children.
Adult attitudes and practice

54. Adult attitudes and practice – Australian research
The most comprehensive research into attitudes of Australian adults about parenting and corporal punishment comes from a survey conducted by Reark Research Pty Ltd for the Department of Human Sciences and Health in 1994 (Annexure 3).

The findings were that:

• 80% of respondents agreed that reasoning with a child is preferable to physical punishment. Only 9% preferred physical punishment to reasoning. Support for reasoning was strongest among more educated respondents and those in the 16-29 age group.

• 41% agreed that parents had the right to discipline children in any way they see fit and 46% disagreed with this statement.

• 41% saw a need to be tough with children to bring them into line while 44% disagreed. Toughness was supported by older respondents, by males, by persons born outside Australia, by people involved primarily in home duties and by people who had been brought up strictly.

• 85% disagreed with the statement that ‘Parents who are under stress can be excused if they get too rough with physical discipline’.

A study conducted by the Office of the Status of Women showed that about six out of ten Australian adults believed it was justifiable for a parent to threaten to hit, slap or smack a child. But only 5% of respondents supported beating, kicking, or threatening or using a weapon.

In a Western Australian survey 81% of adults considered it justifiable to slap or smack a child and 76% of men and 60% of women considered that children need physical discipline.

55. Adult attitudes and practice – Overseas research

New Zealand
Jane and James Ritchie carried out research into parental smacking between 1963 and 1981. Their 1967 survey found that 11% of mothers reported hitting their children every day, 25% hit their children at least once a week and 40% once a month. A follow up survey in 1977 showed more mothers (55%) hitting their children at least weekly. A 1993 study by Maxwell found that only 20% of respondents had hit their children in the previous week and those who supported the ‘thrashing’ of a child had dropped from 11% to 3%.

United Kingdom
Research by Newson into practices of parents in the north of England (1964) showed that 62% of mothers smacked their one year olds, 97% smacked their four year olds and 75% smacked their children at least weekly. At age seven,
only 41% of children were being smacked weekly and by age eleven the percentage had dropped to 18%. More recent research has shown that over 90% of parents in the U.K. consider it necessary to smack or slap children: P. Leach Should Parents Hit their Children, The Psychologist (1993).

Recent research in Scotland shows that 88% of parents consider it acceptable to smack a naughty child with one’s hand but there is a divergence of views as to the age groups of children for whom smacking is appropriate.

_Ireland_

A market research survey indicated that 22% of parents frequently or constantly use corporal punishment, 64% use it occasionally or rarely and 14% never use it. This survey asked adults who had received physical punishment as children whether they felt they had been punished unfairly. Of those constantly or frequently physically punished at home 65% felt that at times they had been punished unfairly: _Irish Marketing Survey_

_United States_

Various surveys in the United States show a high degree of support for corporal punishment of children. In a 1989 survey 84% of respondents agreed that ‘It is sometimes necessary to discipline a child with a good hard spanking’.

Straus (1991) summarising the United States research evidence, concluded that at least two-thirds of mothers of toddlers hit their child three or more times a week. More than 20% of children below the age of one, 90% of three year olds and 25% of 15-17 year olds experience parental physical punishment. While most parents chastise their children with a slap on the hand or the bottom, research shows that 31% pushed, shoved or grabbed the child, 10% used an object such as a hair brush, paddle or belt and 3% threw something at their child.

56. _Commentary_

Research in United States, United Kingdom and New Zealand suggests that being smacked is a daily or weekly experience for many younger children but that as children grow older they are less likely to be smacked. There is some evidence that today’s parents smack their children less frequently and less harshly than earlier generations but the Ritchie’s New Zealand research concluded that support for smacking is not based on pragmatic, rational considerations but forms part of a deeply entrenched belief system that is impervious to change.

The research makes it clear that babies are often smacked and older teenagers, although smacked less frequently than younger children, are subjected to physical punishment by their parents.

While there is broad support for smacking children with an open hand there is only minority support for the use of straps, belts, sticks or other implements.
Longer term effects of corporal punishment

57. People who have received corporal punishment as a child often comment ‘It did not do me any harm’. Even if it were possible to agree on a definition of ‘harm’ it would be virtually impossible to show that corporal punishment had caused lasting harm to a particular individual. While it may be possible to gather evidence as physical harm suffered by an individual, psychological harm is very difficult to prove or disprove.

In terms of physical harm it is hard to disagree with Newell (1989) 31 that ‘it should be obvious that hitting people – and particularly children – carries the risk of causing physical injury in addition to pain’.

58. Considerable research has been undertaken in recent years to measure whether people who have received physical punishment in childhood are more likely to show negative behaviours in adulthood. Cashmore and de Haas (1995) pp87-92, 101–110 reviewed a number of studies and found that:

- A number of young adults who received physical punishment as children report suffering bruising, cuts, broken teeth and limbs. Other studies have shown that children have suffered damage to eyes, ears and even brain damage.

- Children who are physically punished harshly or frequently tend to be more verbally and physically aggressive than those who are not physically punished or receive only mild or infrequent punishment.

- People who have experienced corporal punishment in childhood have a higher incidence of delinquency, drug and alcohol abuse, accident proneness, poor school performance, low self-esteem and depression: Fergusson & Lynskey (1997) (Annexure 4).

- Parents who use corporal punishment frequently are more likely to abuse their children: Whipple & Richey (1997).

- Young adults who were physically punished as children are more accepting of physical punishment and more likely to intend using it when they become parents.

- It is a common phenomenon that child abuse may start as reasonable corporal punishment which escalates and gets out of control. Parents who have abused their children often seek to justify their behaviour by claiming they were punishing their child’s bad behaviour.

The research was summarised by Cashmore and de Haas (1995) thus:

‘It is clear that physical punishment can be physically and emotionally harmful, especially if it is severe, frequent and not accompanied by any explanation.'
There is no evidence that mild or infrequent physical punishment does any harm beyond the danger of accidental injury and the possibility of escalation’.

59. Durrant’s research into the effects of abolition of corporal punishment in Sweden (Appendix 1) has pointed to a significant reduction in the number of child abuse cases and child homicides.

60. **Commentary**

While individual research studies may be criticised, the broad thrust of the evidence is that the use of harsh or frequent corporal punishment on children increases their aggressiveness and poses a risk of enduring psychological and physical harm. The experience of Sweden, the first country to ban corporal punishment, is that abolition has resulted in a significant and continuing reduction in child abuse and non-accidental injury to children.

**Professional opinion on Corporal Punishment**

61. Over the last 20 years many child protection and health professionals and organizations have expressed opposition to laws which allow parents and carers to use corporal punishment. Many of these organizations have given their support to the present Bill. Some favour abolition of the right of parents to chastise their children and see the present Bill as a step towards this goal; others see the Bill as clarifying the legal position so that parents will have clear guidelines and to what is and what is not acceptable. People who work with children and young people are in a position to see the consequences of harsh physical punishment.

62. Human rights agencies, lawyers and children’s rights organizations have also strongly supported abolition or restriction of the right to use corporal punishment as a means of correcting children. The Australian Institute of Criminology at a Conference *Violence in the Family* held in November 1979 passed a resolution calling upon all state governments to repeal all statutes conferring the right upon parents to use corporal punishment: *Violence and the Family*, Ed Jocelynne Stott, Australian Institute of Criminology 1980.

63. **Commentary**

Professional opinion is opposed to the use of corporal punishment and supports law reform although there is a division of opinion whether the reasonable chastisement rule should be repealed or whether it should be clarified and limited along the lines of the Corbett Bill.
Child rearing manuals

64. The most common source of information for parents on how to raise children is their own parents and their own childhood experiences. Child rearing practices are passed on from generation to generation.

Another important source of information and guidance is the child-rearing manual. The influence of authors such as Dr Benjamin Spock (United States) and Penelope Leach (England) has been considerable. Spock in his earlier writing accepted corporal punishment but urged that it be ‘avoided where possible’. In his later writing he took a clear stand against it. Leach has consistently expressed strong opposition to all forms of corporal punishment.

Carson writing in 1986 surveyed a large number of parental advice books available to parents in the United States and found that 35% said nothing about corporal punishment, 30% encouraged its use and 35% discouraged its use. The Report commissioned by the National Child Protection Council noted that an increasing majority of child care authors are opposed to the use of corporal punishment under any circumstances: Cashmore and de Haas 11. A 1999 survey by Wood of child rearing manuals available in New Zealand showed little support for corporal punishment; 56% of the books expressed a clear opinion that no physical punishment was acceptable, 13% supported some physical punishment but most urged limited or cautious use and the others did not deal with the subject.

65. Summary

There is a discernible shift away from support for corporal punishment in child-rearing manuals and other authoritative sources of advice available to parents. It is noticeable that contemporary writers are more likely to express a firm opposition to smacking children while earlier authorities tended to see it as a punishment of last resort when other methods had failed.

Corporal punishment of children as a cultural norm

66. Corporal punishment is an established part of child rearing for most Australian parents. Hitting children has been described as a ‘cultural norm’. Parents are not only permitted to hit their children; they are expected to do so if a child misbehaves. Because most Australian children experience physical punishment as a child they tend to use physical punishment as a means of dealing with the misbehaviour of their own children. There are in fact a variety of cultural norms around smacking children:

- Children who are not firmly disciplined will grow up spoiled or out of control (Spare the rod and spoil the child)
- It is more acceptable to hit boys than girls (Boys push the boundaries, are more robust and need to be kept on a tight rein).
• Corporal punishment is a parental duty. (Children have to learn who is the boss otherwise there will be anarchy)

• There is a distinction in principle between hitting children when they are naughty and child abuse (Smacking a child is a kindly action by a loving parent).

67. **Commentary**

Hitting children who behave badly is part of the cultural tapestry which strongly influences how we behave. The message tends to be passed on by one generation to the next. Studies show that many parents find hitting their children distasteful and doubt its efficacy yet they continue to adopt child rearing practices which are familiar and socially approved. Their use of corporal punishment is sometimes influenced by the views of others in the community who are critical of parents who are seen not to be controlling their children.

Some commentators have suggested that resort to violence as a means of controlling subordinates is a peculiarly Australian phenomenon and have sought to explain it in terms of Australia’s history as a convict settlement and a frontier society. There is little evidence that Australian parents use physical punishment more frequently than their counterparts in other English-speaking countries. Australians have shown a particular aptitude for embracing and adapting new ideas. Attitudes to women and towards domestic violence have undergone marked change in the last thirty years. Australians also have a strong sense of social justice. There is no reason to believe that attitudes to corporal punishment cannot and will not change.

**Legal reform or education?**

68. There is broad consensus that reduction in the use of corporal punishment requires both legal reform and community education. The law is an important means of setting and enforcing social norms, but the law itself cannot change deeply entrenched attitudes. Similarly, educational programs outlining the harmful consequences of hitting children and alerting parents and carers to alternative methods of changing children’s behaviour, may only have a limited influence unless backed up by legal sanctions.

69. The United Nations Committee on the Rights of the Child has stressed the need for both legislative and educational measures. Changing the law without changing social attitudes will have limited impact on children. The Committee has urged that the law contain ‘clear statements’ and avoid what it describes as ‘subjective elements’ (such as the reasonable chastisement rule) which are capable of a range of different interpretations: *Implementation Handbook for the Convention of the Rights of the Child* UNICEF 1998 p245.
The Swedish model combining law reform with community education programs has proved most successful. The New Zealand *Breaking the Cycle* campaign has been shown to have had an effect on community attitudes to smacking. Stickers with the message *This is a no hitting place* were given to children and parents and an intensive television and leaflet campaign promoted alternatives to smacking. In Britain a television program looking at the dangers of hitting children was backed up with an *Alternatives to Smacking* booklet available by phoning a toll free number attended for several days after the program went to air. Campaigns directed at both children and parents can give a clear message that hitting is unacceptable. In Britain and New Zealand the community education initiatives have not been accompanied by legal reform and it is far from clear that attitudinal changes persist after an educational campaign is concluded.

The NSW Department of Community Services has launched a Parenting Campaign which aims to support parents in raising their children. It offers easy-to-read, practical information on raising children and has had input from a range of experts.

The NSW Government is also promoting a *Families First* strategy which will increase early intervention and prevention services in helping families to raise healthy well-adjusted children. The focus will be on children under the age of eight and a co-ordinated network of services will be available to provide support parents and carers and help them to solve problems before these become entrenched.

These initiatives are already offer community education in the form of information and support for parents. They encourage non-violent methods of child rearing. Education as to alternatives to smacking could easily be incorporated into this existing framework.

It is important the education campaigns should be targeted not only at parents and carers but also at children. Children and young people should be consulted and involved in the planning, development and delivery of such campaigns.

**73. Commentary**

There is broad consensus that any significant law reform should be accompanied by community education pointing out the harmful effects of corporal punishment and suggesting alternatives to corporal punishment. The aim of education campaigns should not be to make parents feel guilty but to encourage them to change their child-rearing practices by understanding that there are better ways of dealing with unacceptable behaviour by their children. There are several innovative initiatives tried in other countries that could be adapted to the Australian situation.
Abolition or clarification and limitation?

74. There are two schools of thought among those opposed to the reasonable chastisement rule. One school argues for repeal of the common law rule in both civil and criminal law. The other argues for partial reform – some half-way house that would retain the right of parents to punish their children in a way which minimises the possibility of injury or harm to the child.

75. Those pressing for abolition argue that:

- Children deserve no lesser protection than adults.

- The Convention on the Rights of the Child and other international human rights instruments require that Australian abolish the right of reasonable chastisement.

- Partial reform would continue to discriminate against children on the grounds of their age.

- The only clear and unequivocal rule is that violence in all its forms is unacceptable and unlawful and any partial reform is open to varying interpretation.

- Partial reform would continue to disadvantage children because the onus of proof would mean that the benefit of any doubt was given to parents and the law would be enforced only in the most serious cases.

- If the reasonable chastisement rule is abolished at this time there can be a lead in period before the new law comes into force to allow for public education campaigns as to the smacking and its alternatives.

76. Those supporting partial reform along the lines of the amendments included in the Corbett Bill argue that:

- There must be a balance between the rights of parents and the rights of children and partial reform can strike a reasonable balance.

- A majority of Australian parents use corporal punishment as a means of disciplining their children and to criminalise mild corporal punishment would be unpopular and would cause confusion and loss of confidence in otherwise competent and caring parents.

- Partial reform would provide considerably greater protection for children than the current law and would give clearer messages to parents without provoking strong opposition.

- It is better to achieve partial reform now rather than wait until society is ready to accept total abolition.
• Partial reform will itself be educative and can be accompanied by a community education campaign.

The views of the Commissioner for Children and Young People

77. The Commissioner for Children and Young People has supported the initiative taken by Hon. Alan Corbett and has expressed support for the current Crimes Amendment (Child Protection – Excessive Punishment) Bill.

78. The Commissioner believes that children should have no lesser legal protection from physical violence than other members of the community and that the Corbett Bill if it became law would enhance the safety and well-being of children by giving them greater protection from physical assault.

79. The Commissioner acknowledges that many caring parents use mild corporal punishment as a form of discipline and that any move to criminalise their behaviour without offering realistic alternatives to smacking would engender strong opposition and might set back the reform process. It could also add to the stress of rearing children.

80. Hon. Alan Corbett has gathered broad support for the provisions of his Bill and it has the endorsement of a number of non government organizations, professional bodies, politicians and sections of the media. It would seem sensible to build on this support rather than to shift the debate to the highly contentious issue of total abolition of corporal punishment.

81. The Corbett Bill contains a clear statement of what types of physical punishment are and are not acceptable and it would give useful guidance to parents, children and the courts as to the limits of acceptable punishment. It is to be preferred to the approach being proposed in England and Scotland to qualify the right of reasonable chastisement by requiring that children not be subjected to ‘inhuman or degrading treatment or punishment’. That approach seems merely to add to the uncertainty so that courts would have to consider not only ‘What is reasonable force?’ but additionally ‘What is inhuman or degrading treatment?’.

82. It is the Commissioner’s view that some action must be taken by New South Wales and other Australian states to meet the recommendations of the United Nations Committee on the Rights of the Child. The passing into law of the Corbett Bill would indicate a willingness on the part of the New South Wales Government to give effect to the recommendations of the U.N. Committee. While it would not go as far as the Committee has recommended, it does meet the Committee’s insistence that the law give a clear statement of what is and is not permitted and avoids ‘subjective elements’.
Wording of the Bill

83. There are some aspects of the drafting of the Corbett Bill that merit further consideration:

*The Bill applies only to the criminal law*

The common law rule reasonable chastisement rule applies under both criminal and civil law. The Corbett Bill amends the Crimes Act 1900 and makes changes only to the criminal law (which would seemingly include the apprehended violence order provisions of the Crimes Act). The civil law implications of the reasonable chastisement rule are arguably more important than the criminal law implications. In interpreting terms such as ‘abuse’, ‘violence’, and ‘ill-treatment’ in child protection legislation the reasonable chastisement rule will continue to apply notwithstanding the passing of the Corbett Bill. If the Bill was passed into law in its present form a parent who hit a child with a stick or strap would be liable to criminal prosecution but the same actions would not constitute ‘abuse’ or ‘ill-treatment’ under NSW child protection legislation if no more than reasonable force was used. It is illogical that what is forbidden under criminal law should be permitted under child protection laws. Extending the Corbett Bill to civil as well as criminal law could be achieved by an amendment to the *Children and Young Persons (Care and Protection) Act 1998* or by a statement in the Corbett Bill that, ‘except as provided in the Bill, the common law rule which allows parents and carers to use reasonable force by way of correction of a child is hereby abolished’.

*Trivial or negligible exceptions (c61AA(2) & (3))*

In the latest version of the Corbett Bill the qualification ‘other than in a manner that could reasonably be considered trivial or negligible in all the circumstances’ has been added to clauses 61AA(2) & (3). There are a number of other safeguards protecting parents from unwarranted prosecution, for example police discretion, the onus of proof on the prosecution to prove the case beyond reasonable doubt and judicial discretion. It is extremely unlikely that parents would be prosecuted for a trivial or negligible action. The addition of these words to the otherwise clear criteria seems unnecessary and detracts from the otherwise clear wording. The cases referred to in paras. 12 and 13 of this submission show that there can be a considerable divergence of judicial view about what is trivial or negligible. These words introduce a subjective element which was previously absent and muddies the messages being given to children, parents and the courts.

*Definition – person acting for a parent (c61AA(5))*

While it is important to acknowledge in the Bill the role played by members of the Aboriginal and Torres Strait Islander extended families and communities in the rearing of ATSI children, the current wording would allow a non-ATSI person (for example a youth worker) to use physical discipline on ATSI children if s/he could show s/he was recognised by the ATSI community as having special responsibilities for a child. This could be avoided by replacing the words ‘is recognised by the ATSI community to which the child belongs’ with ‘who is a member of the ATSI community to which the child belongs and is recognised by that community’.
Conclusion

84. The reasonable chastisement rule was absorbed into Australian law at the time of settlement as part of a package of laws derived from Britain. It was based on the Roman law and formulated in its present form by British jurists writing in the 1700s. It has never been incorporated into New South Wales statute law and it remains in its original form despite significant changes in community attitudes towards children, an increased understanding of the need for child protection, and community disapproval of all forms of family violence. The reasonable chastisement rule has continued to be part of our law by default rather than by design.

85. Hon. Alan Corbett is to be congratulated in bringing the matter before Parliament and in presenting a Bill which has been carefully drafted and which has been amended to reflect comments and suggestions by a wide range of people. The Bill is endorsed by an impressive list of community and professional groups.

86. The Standing Committee on Law and Justice has the opportunity to consider the reasonable chastisement rule and its appropriateness in the 21st century. There is a need to review the rule in the light of current attitudes towards child protection, family violence, parental responsibilities and children's rights.

87. Physical punishment of children has been widely seen as a natural component of child rearing and has been largely unquestioned in Australia until the last two decades. If one takes an historical view one can see a pattern of corporal punishment falling out of favour as a judicial punishment, in the military, in prisons, in residential institutions and in schools. This demonstrates a growing intolerance of physical violence and a questioning of the efficacy of physical punishment in changing people's behaviour. In New South Wales, corporal punishment of children is now permitted only in the home.

88. Australia is not the only country that is having to reappraise the moral, social and legal issues around parental smacking. In Europe and in most Commonwealth countries the right to chastise children is being questioned and reviewed. Most countries that have been through this process have taken the path of total abolition. This must be the ultimate goal because children should enjoy the same or greater protection from violence than adults.

89. Other Australian states appear to have been slow to respond to the recommendations of the United Nations Committee on the Rights of the Child. It is hoped that New South Wales will take a lead in this area as it has done in child protection, youth justice and other areas of the law affecting children. New South Wales took a lead in abolishing corporal punishment in schools.

90. With new child protection laws shortly to come into force it is timely for the reasonable chastisement rule to be subjected to close scrutiny. As is the case with many other laws affecting children and as is enshrined in Article 3 of the
Convention on the Rights of the Child, the overriding consideration in considering the Corbett Bill must be the best interests of children and young people. It cannot be in their best interests to maintain the reasonable chastisement rule which:

- Is part of New South Wales law by default rather than design: para. 14
- Fails to give clear messages to parents, children and law enforcement authorities: para. 14.
- Has proved unwieldy in practice and has been subject to conflicting judicial interpretations: paras. 12, 13.
- Has led to confusion on the part of parents, carers and the community generally because of the subjective nature of the term ‘reasonable force’ and the conflict between the reasonable chastisement principle and child protection law and practice: paras. 10, 11.
- Is not needed to give parents the power to restrain their children to prevent harm because parents have this power anyway: para. 10.
- Applies to civil (including child protection) as well as criminal proceedings and means that parents and the community are receiving discordant messages: para. 25.
- Is an exception to the universally held principle that every person has a right to bodily integrity: para. 27.
- Breaches the Convention on the Rights of the Child and the Universal Declaration on Civil and Political Rights and it is likely that Australia will come under mounting pressure to abolish the reasonable chastisement rule: para. 31.
- Discriminates against children on the grounds of their age: para. 37.
- Reflects an outdated notion of the primacy of parents’ rights at a time when the emphasis of Australian law has shifted to parental responsibilities: para. 43.
- Has been abolished or is in the process of being abolished in many European countries and is being reviewed in most English-speaking countries: para. 50.
- Is seen by many children as painful, ineffective and wrong: para. 53.
• Is widely practised and is used to punish children from babyhood to late adolescence. For most children it is a daily or weekly occurrence: para. 56.

• Increases the risk of physical and psychological harm to children and if administered harshly or frequently can increase the risk of children's aggression and negative social behaviours: para. 60.

• Is opposed by a broad range of medical, legal, social work and other professional opinion: para. 63.

• Is increasingly disapproved by specialists and authors of child care manuals: para. 65.

• Has acquired the status of a cultural norm in Australia and attitudes have shown a resistance to change: para. 67.

91. The present Bill provides a unique opportunity for Parliament to review the reasonable chastisement rule and to support amendments which will enhance the safety and well-being of children in New South Wales.

Annexures
1. *Evaluating the Success of Sweden's Corporal Punishment Ban* 


3. *Public Perceptions of Parenting and Harmful Behaviours Towards Children* 
   Research Research Pty Ltd. for Department of Human Sciences and Health (1994)

4. *Physical Punishment/Maltreatment during Young Childhood and Adjustment in Young Adulthood* D.M. Fergusson & M.T. Lynskey (1997)

References:

**Books** 


**Discussion Papers** 

Physical Punishment of Children NSW Child Protection Council (1994)


Research surveys
It Hurts You Inside: Children Talking About Smacking Willow/Hyder Save the Children UK (1998)

Talking About My Generation: A Survey of 8-15 year olds growing up in the 1990s D Ghate & A. Daniels NSPCC Policy Practice Research Series (199?).

Public Perceptions of Parenting and Harmful Behaviours Towards Children Research Research Pty Ltd for Department of Human Sciences and Health (1994) Annexure 3

Journal Articles
Evaluating the Success of Sweden’s Corporal Punishment Ban J.E. Durrant Child Abuse and Neglect (1999) Vol 23 No 4 435 Annexure 1

Physical Punishment/Maltreatment during Young Childhood and Adjustment in Young Adulthood D.M. Fergusson & M.T. Lynskey (1997) Annexure 4
