

# WHOSE RIGHTS?

## Children, parents and discipline

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This article outlines the current state of the law on the physical discipline of children and argues the case for legal change in Australia. It also identifies the politics of the ongoing debate and its potent symbolism — claims that physical parental punishment amounts to child abuse and state-sanctioned violence, pitted against claims that parental rights and the privacy of the home will be violated by state regulation of physical punishment.

All UN member states, except the United States and Somalia, have ratified the *UN Convention on the Rights of the Child* (CRC) (1989), which requires that signatories prohibit parental violence to children. New Zealand is the only English-speaking country that has in fact prohibited parental violence to children, in controversial legislation in 2007, although 24 other countries have also done so, Sweden being the first, in 1979. The issue provokes strong views wherever it is raised, confronting well-entrenched parental entitlements with the concept of children as autonomous bearers of rights.

In New Zealand, a citizen-initiated referendum is to be held in 2009 challenging the 2007 'anti-smacking' legislation and reasserting parental rights to physically discipline their children. We argue that Australia should follow New Zealand's lead in taking seriously children's rights to protection from physical violence. At the same time Australia must address parents' concerns to manage and direct their children, and must also take seriously the potential encroachment of the state on the family. The current steps towards incorporating international human rights into a federal Bill of Rights, and the recent enactment of human rights legislation in the ACT and Victoria, explicitly introduce rights discourses into the debate, and highlight the necessity both for rethinking the current complacency towards the physical discipline of children, and confronting the politics of legislating in this area.

### Physical discipline and the criminal law

In Australia, it is lawful for a parent to discipline their child using physical force. This is so despite Australia's ratification of the CRC, article 19(1) of which requires that:

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.<sup>1</sup>

Perceptions of children's rights to be raised without physical violence, and of parents' rights to physically correct their children, are clearly in conflict here. Many would challenge the claim of either of these positions to be 'rights', but the 'interests' of parents largely subordinate those of children in this area. The interests of children are increasingly being recognized as legitimate rights with clear international status, but the role of parents in physically disciplining their children continues to be socially endorsed in a specific criminal law defence to a charge of assault.

The criminal law of assault penalises the application of physical force to anyone without lawful excuse. The general 'lawful excuses' which provide a defence to a charge of assault are consent to the usual force involved in playing a contact sport, in travelling in crowded trains and such like, legal entitlement (for example, reasonable force in arrest), self-defence, and necessity (for example, pushing someone out of the way of an oncoming train).

There is no separate 'lawful excuse' for hitting an adult partner, or an employee, or an apprentice, although physical discipline of these categories of people was accepted in earlier centuries.<sup>2</sup> There is, however, a lawful excuse where the victim of the hitting is the hitter's child, and the hitting is for the purpose of 'discipline'. This is the defence of 'reasonable chastisement' or 'lawful correction'. The defence exists in various forms in all Australian states. For example, the Code states provide for a defence of reasonable force for 'correction' (s 257 *Criminal Code WA*) or for 'correction, discipline, management or control' (s 280 *Criminal Code Qld*).

In Victoria this defence is framed in a 1955 judgment which states:

... there are strict limits to the right of a parent to inflict reasonable and moderate corporal punishment on his or her child for the purpose of correcting the child in wrong behaviour. In the first place, the punishment must be moderate and reasonable. In the second place, it must have a proper relation to the age, physique and mentality of the child, and in the third place, it must be carried out with a reasonable means or instrument. (*R v Terry* [1955] VLR 114, 116)

Since this judgment there have been moves to limit, but not prohibit, parental physical punishment. Recognition since the 1960s<sup>3</sup> of the widespread and hidden nature of child abuse, physical and sexual, has spurred change, but parental claims to the right to control their children

#### REFERENCES

1. See CRC <<http://www2.ohchr.org/english/law/crc.htm>> at 23 March 2009.
2. Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (2004) 182–3.
3. C Henry Kempe et al, 'The Battered-Child Syndrome' (1962) 181 *Journal of the American Medical Association* 17.

## *The interests of children are increasingly being recognized as legitimate rights with clear international status, but the role of parents in physically disciplining their children continues to be socially endorsed in a specific criminal law defence to a charge of assault.*

have overridden the claims of children to be raised without physical violence<sup>4</sup>.

In 2002, NSW adopted legislation to circumscribe the parental right to chastisement. It limits the defence of 'lawful correction' to 'reasonable' force and provides that force will be unreasonable if it is applied to the head or neck of the child, or if it could harm the child 'for more than a short period' (*Crimes Act 1900* (NSW) s 61AA (2) (b)). 'Short' is not defined in the legislation.

In the UK the *Children Act 2004* restricts the use of the defence of 'reasonable punishment' to minor assaults (s 58). It is no longer available in relation to any more serious injuries, for example, where the punishment caused 'grazes, scratches, abrasions, minor bruising, swelling, superficial cuts or a black eye'.<sup>5</sup>

### Competing discourses

It would generally be accepted that children need discipline:

... to set reasonable, consistent limits while permitting choices among acceptable alternatives. Discipline teaches moral and social standards, and it should protect children from harm by teaching what is safe while guiding them to respect the rights and property of others.<sup>6</sup>

The issue here is the role of *physical* discipline in parenting. A difficulty in examining the role of the criminal law and parental discipline is that participants in the debate are often addressing quite different issues. None argue that 'child abusers' should be protected from criminal prosecution, but they differ on the meanings of 'abuse' and 'discipline', and also more broadly on the effectiveness of physical discipline.

At least three lines of argument can be discerned. The first two disagree on the relationship between discipline and abuse. One argument is that the debate is in fact about child abuse: that physical discipline inevitably and dangerously blurs the distinction between the aim of 'correction' and less acceptable motivations for aggression, such as anger and retribution. Opposed to this is the argument that there is such a thing as loving correction of children, and that this can be distinguished from abusive violence. A third line of argument dismisses the previous debate and claims that even if the physical discipline is 'loving correction', it is morally wrong, as well as being harmful to the child, or at the very least is ineffective in achieving behavioural change.

### The importance of this debate in Australia now

There are at least five reasons for challenging the traditional claim that parents have a fundamental right to physically discipline their children.

1. *Children have rights.* Children are now seen to have rights to be treated with respect and accorded equal protection to that accorded adults. In addition to the CRC, international and domestic charters of rights recognise rights of children, in both the general prohibition on torture and on 'cruel, inhuman or degrading' punishment (Victorian Charter s 10; *Human Rights Act 2004* (ACT) s 10; International Covenant on Civil and Political Rights art 7), and the specific provision that 'Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.' (Charter s 17(2); see also HRA ACT s 11(2); ICCPR art 24(1)).

It can of course be argued that other rights may appear to conflict with the rights claimed for children, such as rights of the family, and protection of privacy and family from unlawful or arbitrary interference.<sup>7</sup> It is submitted here that a carefully drawn legal response to the issue (such as that of jurisdictions discussed further below) would not contravene such rights.

2. *Children are entitled to equal protection.* The only situation where physical force is now allowed as discipline is for people who are young, where the perpetrator is the child's parent or carer. Similar behaviour would be a criminal offence in any other situation. The ICCPR, ACT *Human Rights Act 2004* and *Victorian Charter* specifically provide for the equal application and protection of the law:

Every person is equal before the law and is entitled to the equal protection of the law without discrimination.<sup>8</sup>

Indeed, when given the opportunity to comment, children have questioned parental physical punishment and highlighted injustice given their perception that children and adults:

...should be treated equally the same, like one shouldn't get more than the other in ways of better treatment ... (age 10)

Just because they're small and they can't fight back, [adults] shouldn't take advantage of [children] for that reason... they have rights too... (age 12).<sup>9</sup>

3. *Physical discipline can be harmful.* Physical punishment is often reactive rather than controlled. One of the

4. See Bernadette Saunders and Chris Goddard, 'The importance of listening to children: A qualitative study on the use of physical punishment in childhood in Australia' (2007) 29 *Social Development Issues* 33.

5. See Crown Prosecution Service, *Reasonable Chastisement Research Report* July 2007. <cps.gov.uk/Publications/research/chastisement.html> at 27 January 2009.

6. Jerry Burton Banks, 'Childhood Discipline: Challenges for Clinicians and Parents' (2002) 66 *American Family Physician* 1447.

7. *Charter* s 17(1) and 13(a); *Human Rights Act* (ACT) s 11(1) and 12; ICCPR art 23(1) and 17(1).

8. *Charter* s 8(3); *Human Rights Act* (ACT) s 8(3); ICCPR art 26.

9. See Bernadette Saunders and Chris Goddard, 'Some Australian Children's Perceptions of Physical Punishment in Childhood' (2008) 22 *Children & Society* 405.

risks to which children are exposed is that physical punishment, especially when inflicted in anger, may cause serious physical harm.<sup>10</sup>

Harm may not only be physical. An influential meta-analysis of 88 studies conducted between 1938 and 2000 by Gershoff examined the links between parental corporal punishment and child behaviours and experiences. Gershoff concluded that physical punishment was related to one positive construct, immediate compliance, and was associated, but not definitively linked, with ten undesirable constructs:

... decreased moral internalisation, increased child aggression, increased child delinquent and antisocial behaviour, decreased quality of relationship between parent and child, decreased child mental health, increased risk of being a victim of physical abuse, increased adult aggression, increased adult criminal and antisocial behavior, decreased adult mental health, and increased risk of abusing own child or spouse.<sup>11</sup>

Gershoff acknowledged that the use of physical punishment may increase the likelihood of these effects, but that other factors impacting on, or related to, the child may be of equal or greater influence.

... the parent-child relationship is complex, and the mere fact that parents use corporal punishment is unlikely to be entirely responsible for how a child develops and behaves. (at 550–551)

Gershoff and Bitensky nonetheless observed that current research suggests a 'substantial risk of harm from corporal punishment' with some prospective longitudinal studies suggesting a 'causal' relationship. Further longitudinal research is needed to better understand identified negative associations, and to attempt to establish or negate causal links. The 'gold standard for establishing causality in science', however, is unlikely to be achievable as ethical considerations obviously preclude random assignment of children to parents.<sup>12</sup>

4. *Physical force may be ultimately ineffective as discipline.* Research in areas ranging from education to laboratory psychology to medicine suggests that physical punishment is both futile and harmful.<sup>13</sup> It is unlikely to encourage the development of a strong moral sense as it does not teach children why they should behave in a socially acceptable manner, it does not explain the impact of children's behaviours on others, and it may teach avoidance of getting caught rather than a desire to act responsibly. Frequent and harsh physical punishment may encourage rather than curb anti-social behaviour.<sup>14</sup> It may teach children that violence is an acceptable means to resolve conflict or to achieve self-motivated ends.<sup>15</sup> Moreover, when parents physically hurt their children it may communicate a contradictory message to children that it is acceptable for those who love them, and for those on whom they depend, to inflict pain on them. This may in turn break down trusting and warm parent-child relationships.<sup>16</sup>

Physical punishment may be effective in getting young children to respond immediately to parental commands. Indeed, arguably 'the mother who smacks a crying child... in order to stop it [sic] crying

[has demonstrated] the capacity of a large powerful person to terrify another into a state of behavioural freeze or immobility.'<sup>17</sup> Feeling physical pain and emotional anguish, children may however have difficulty understanding parents' reasons for physically punishing them. Even when parents carefully explain why they 'smack', 'reason gets lost in the feelings the punishment produces'.<sup>18</sup> As Ritchie and Ritchie pointed out,

... anxiety, fear and pain will, wherever they are present, interfere with ... learning ... reducing the chances of remembering or establishing behaviour patterns. (1981, 5)

Few parents are convinced of the effectiveness of physical punishment and many regret using it.<sup>19</sup> Arguably, non-violent methods of control and discipline are a better response.

5. *Other effective disciplinary options are available.*

Parents can learn effective, non-violent disciplinary skills.<sup>20</sup> In Sweden, where physical punishment is banned and programs for families are well resourced, hitting children sometimes still occurs but Swedish parents do not consider physical punishment to be a necessary or effective component of discipline. They generally use other disciplinary methods such as speaking to the child firmly, physically restraining the child, encouragement or praise for good behaviour, ignoring the misbehaviour, and reasoning.<sup>21</sup>

Parents therefore need a repertoire of non-abusive options from which to select an appropriate response. Positive reinforcement of good behaviour, for example by 'verbal praise, smiles, hugs, extra privileges, or material benefits' has been found to be more effective than punishment of any kind in producing well behaved children. Research suggests that even very young children can 'reason, engage in moral judgement-making and have empathy for others'.<sup>22</sup> Even parents who use and justify physically punishing their children would rather use other means of discipline.<sup>23</sup>

## International developments in prohibiting physical punishment

Sweden was the first country to prohibit the physical punishment of children in 1979 (having repealed the correction defence in 1957). The Swedish Children's Ombudsman has observed that, when the explicit prohibition was proposed, there were arguments that 'well-meaning parents would be stamped as criminals and many children would never learn to behave.'<sup>24</sup> The response of Swedish MP Sixten Pettersson has become the recognised wisdom on the ban:

In a free democracy like our own, we use words as arguments, not blows. We talk to people and do not beat them. If we can't convince our children with words, we shall never convince them with violence.<sup>25</sup>

The Swedish reform did not criminalise corporal punishment as such. Recognising that the law of assault already applied to any substantial act of violence to a child, the legislature added a provision specifying that children were entitled to be treated with respect, and that they were not to be subjected to corporal punishment.<sup>26</sup> The provision appears in the civil

10. Olav Nielsen et al, 'Child homicide in New South Wales from 1991 to 2005' (2009) 190 *Medical Journal of Australia* 1.

11. Elizabeth Gershoff, 'Corporal Punishment by Parents and Associated Child Behaviors and Experience' (2002) 128 *Psychological Bulletin* 539, 544.

12. Elizabeth Gershoff and Susan Bitensky, 'The Case against Corporal Punishment of Children' (2007) 13 *Psychology, Public Policy and Law* 231, 231 and 235.

13. Karen McCormick, 'Attitudes of Primary Care Physicians toward Corporal Punishment' (1992) 267 *Journal of the American Medical Association* 3161.

14. Susan Turner, *Something to Cry About* (2002); Murray Straus, *Beating the Devil Out of Them* (1994).

15. Joan McCord, 'Unintended Consequences of Punishment' (1996) 98 *Pediatrics* 832.

16. Anthony Graziano, 'Why We Should Study Subabusive Violence against Children' (1994) 9 *Journal of Interpersonal Violence* 412; Gershoff, above n.11, 539.

17. Jane Ritchie and James Ritchie, *Spare the Rod* (1981) 14.

18. Peter Boss, *Physical Punishment in Child Rearing* (1994).

19. Julie Lawrence and Anne Smith, 'Aotearoa/New Zealand Families' (2008) 12 *Children Issues* 17–24.

20. Sarah Stewart-Brown, 'Legislation on Smacking' (2004) 329 *British Medical Journal* 1195.

21. Elizabeth Sorbring et al, 'Boys' and Girls' Perceptions of Parental Discipline in Transgression Situations' (2003) 12 *Infant and Child Development* 53; Kerstin Palmerus, 'Self-reported Discipline among Swedish Parents of Preschool Children' (1999) 8 *Infant and Child Development* 155; Joan Durrant, Linda Rose-Krasnor and Anders Broberg, 'Physical Punishment and Maternal Beliefs in Sweden and Canada' (2003) 34 *Journal of Comparative Family Studies* 585.

22. Deana Pollard, 'Banning Child Corporal Punishment' (2003) 77 *Tulane Law Review* 624, 630.

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*Children and Parents Code* and does not carry a separate sanction. The Ministry of Justice confirmed in its public information materials that the criminal law already allowed punishment, as assault, of physical chastisement that caused 'bodily injury or pain ... more than of very temporary duration', and that the new law made no change to this. Further, it continues to be the case that 'trivial offences will remain unpunished, either because they cannot be classified as assault, or because an action is not brought.'<sup>27</sup> The rights of children were recognized and protected, without removing any right of parents to discipline their children within accepted limits.

The emphasis of the reform was on cultural change:

Information and education to alter the attitudes of parents ... is preferable to relying on penal sanctions.<sup>28</sup>

Information campaigns were initiated in the media; this extended to distribution of brochures with advice about alternative disciplinary strategies (in all major community languages) and information printed on milk cartons. By 1981, 99 per cent of Swedes were aware of the law.<sup>29</sup>

When physical punishment is forbidden, its use may be seen as evidence of poor parenting. Indeed, Durrant et al found that while both Swedish and Canadian mothers disapproved of physical punishment administered by an angry parent, Swedish mothers also firmly believed that a calm parent would find a more appropriate and acceptable alternative.<sup>30</sup>

Other Scandinavian countries followed Sweden, as have many European, and several South American, countries. New Zealand was the first English-speaking country to prohibit corporal punishment, in 2007. The *NZ Crimes (Substituted Section 59) Amendment Act 2007* abrogates the former defence permitting the use of reasonable force for the purpose of correction, but restates the right of parents to use force to protect or control their child. Section 59 headed 'Parental control' provides now as follows:

- (1) Every parent of a child ... is justified in using force if the force used is reasonable in the circumstances and is for the purpose of —
  - (a) preventing or minimising harm to the child ...; or
  - (b) preventing the child from engaging ... in conduct that amounts to a criminal offence; or
  - (c) preventing the child from engaging ... in offensive or disruptive behaviour; or
  - (d) performing the normal daily tasks that are incidental to good care and parenting.

- (2) Nothing in subsection (1) or in any rule of common law justifies the use of force for the purpose of correction.
- (3) Subsection (2) prevails over subsection (1).
- (4) To avoid doubt, it is affirmed that the Police have the discretion not to prosecute complaints against a parent of a child or person in the place of a parent of a child in relation to an offence involving the use of force against a child, where the offence is considered to be so inconsequential that there is no public interest in proceeding with a prosecution.

The legislation was highly controversial. The restatement of the common law right of police to exercise discretion not to prosecute in trivial matters was the result of amendment of the original bill.<sup>31</sup> The amended bill was, however, ultimately supported by 113 out of 121 members of parliament.<sup>32</sup>

The legislation did not create a new offence. A major aim was attitude change. The legislation removed the existing defence, whilst reaffirming the general defence of necessity, that is, the recognition that parents may need to use force to prevent harm to the child.

There were, however, claims that parents were now unable to correct or discipline their children, and that children were threatening to report parents to the police. The Director of Family First New Zealand reportedly claimed, 'We are creating a "paranoid parenting" environment... Kiwi parents' worst nightmare.'<sup>33</sup>

A major impact of the legislation would seem to have been cultural — the changed balance of rights between children and parents. There was no rush to prosecution, as had been feared, nor evidence of a significant increase in notifications to welfare agencies. It was reported that '[t]he main feedback ... is that people are more willing to report violence against children in public places.'<sup>34</sup>

The New Zealand Police conducts ongoing reviews of the legislation. Initial findings were that there had been little impact on police activity. In the first three months after enactment of the legislation, police attended 111 child assault events. Three involved smacking and 12 involved minor acts of 'physical discipline'; all were considered 'inconsequential and not in the public interest to prosecute'.<sup>35</sup>

The most recent six-monthly review, in December 2008, reported:

Police attended a total of 258 child assault events during the third review period. A total of 58 events involved either smacking (nine) or minor acts of physical discipline (49).

23. Anthony Graziano et al, 'Sub-abusive Violence in Child-Rearing in Middle-Class American Families' (1996) 98 *Pediatrics* 845.

24. See 'The Swedish Corporal Punishment Ban' <bo.se/Adfinity.aspx?pageid=90> at 10 March 2009.

25. Quoted in 'The Swedish Corporal Punishment Ban', above n 24.

26. *Foraldrabalken (Parents Code)* ch 6, s 1; Joan Durrant, *A Generation without Smacking* (1999) 7.

27. Durrant, above n 26.

28. See Barbro Hindberg, *Ending Corporal Punishment* Ministry of Health and Social Affairs (2001) 13 <endcorporalpunishment.org/pages/pdfs/ending.pdf> at 23 March 2009.

29. Durrant, above n 26, 8.

30. Palmerus, above n 21; Durrant et al, above n 21.

31. Beth Wood, Ian Hassal and George Hook, *Unreasonable Force: New Zealand's journey towards banning the physical punishment of children* (2008).

32. *Ibid.*

33. *New Zealand Herald* (Auckland), 22 November 2007.

34. *Ibid.*

35. See *Third Review of Police Activity following the Enactment of the Crimes (Substituted Section 59) Amendment Act 2007*, 18 December 2008, 1 <police.govt.nz/resources/2008/section-59-activity-review/section59\_crime\_amendment\_act\_2007.pdf> at 23 March 2009.



36. Ibid.

37. Ibid.

38. Omnibus Survey Report One Year On: Public Attitudes and New Zealand's Child Discipline Law, Report from the Office of the Children's Commissioner, 2008 November.

There has been a decline in the total number of child assault events attended by Police during this review period.... Of the 58 child assault events involving smacking or minor acts of physical discipline, 40 were referred to either the Ministry of Social Development (Child Youth and Family) or an inter-agency Case Management meeting.<sup>36</sup>

The police reported that they had prosecuted one of the nine child assault events involving smacking during this review period, but had withdrawn the prosecution when the primary witness refused to give evidence. They also prosecuted four of 49 assaults involving minor acts of physical discipline; three cases resulted in convictions and community supervision orders, and one was not decided at the time of reporting.<sup>37</sup>

After one year's operation, an independent survey of 750 adults over 18 years of age found that whilst many respondents were aware of the law reform (91 per cent), fewer understood its implications (18 per cent knew 'a lot' about the law, 54 per cent 'a fair amount'). Some 43 per cent of respondents supported the law, 28 per cent opposed it, and 26 per cent were neutral (3 per cent were unsure). There was a high level of support for the idea that children deserved equal protection from assault as adults (89 per cent). Just over one third of respondents were firmly opposed to the use of physical discipline, and support for the practice appeared to be in decline. However, 58 per cent thought physical punishment of children was acceptable in some situations.<sup>38</sup> Whilst at odds with the finding of support for equal protection, this figure was a

significant reduction on the 87 per cent response to this question in 1993.

The educational goal of the reform could therefore tentatively be said to have achieved some success, in raising the profile of children's rights, without evidence that the reform has significantly increased state intervention in appropriate parental practices.

### New Zealand democracy: the referendum process

Under the *Citizens Initiated Referenda Act 1993*, NZ citizens can initiate a referendum if they can show the support of 10 per cent of registered voters. Such a referendum is to be held in August 2009 on the 'anti-smacking' legislation.

Proponents are the Kiwi Party and leader Larry Baldock. The proponents presented their petition in February 2008, but a number of the signatures were found to be invalid, and the 10 per cent hurdle was not met until June 2008, when the petition was resubmitted with 310 000 valid signatures.

The referendum question, as settled by the Clerk of the House of Representatives following the statutory consultation process, is phrased in value-laden terms: 'Should a smack as part of good parental correction be a criminal offence in New Zealand?' An editorial in the *NZ Herald* commented acerbically on the question:

[I]f the wording had been 'should parents be allowed to get away with beating their kids so badly they require

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hospitalisation?' [the proponents] would have been less pleased. More likely they wanted one that said 'Should the Government be able to tell you how to raise your kids?'<sup>39</sup>

### The ongoing debate in Australia

Since Australia's ratification of the CRC in 1990, debate about the need for physical discipline law reform has erupted regularly, often following reports of cases of particularly violent child abuse. Media reporting of child physical abuse and murder often draws public attention to the issue, as does reporting of cases where parents' excessive use of physical discipline leads to protective intervention. With the exception of the NSW amendments, no legal reform has ultimately occurred, and governments are clearly avoiding provoking parental backlash.

We have seen the release of at least four discussion papers at state and federal level since 1995.<sup>40</sup> State Commissioners for Children have called for legislative change,<sup>41</sup> and Australia has received strong rebukes from the UN Committee on the Rights of the Child in 1996 and 2005. The Committee in its 2005 Report 'note[d] with concern that corporal punishment in the home is lawful throughout Australia under the label "reasonable chastisement"' and recommended appropriate action to prohibit corporal punishment at home.<sup>42</sup>

In 2007 the federal government funded a \$2.5 million positive parenting education program, *Every Child is Important*, run by the Australian Childhood Foundation to promote positive discipline without resorting to physical punishment. Guidelines were prepared in 16 languages, over 1 million free booklets were distributed to parents, and over 10 000 parents attended parenting seminars.

In the context of this federal government campaign, South Australia's Family First MP, Dennis Hood, introduced the Criminal Law Consolidation (Reasonable Chastisement of Children) Amendment Bill 2007 into the South Australian parliament in an attempt to codify parents' right to smack their children. The amendment would have provided that 'conduct that lies within limits of what would be generally accepted in the community as reasonable chastisement or correction of a child ... cannot amount to an assault'. The legislation was not pursued as the government would not support it. In the same year, a Queensland Labor Government MP, Dean Wells, supported by the group 'Concerned Psychologists', sought, without success, to amend s 280 of that state's

*Criminal Code* to restrict the defence of reasonable chastisement to a charge of common assault.<sup>43</sup>

In 2008, retired Chief Justice of the Family Court, Alistair Nicholson, called on state governments to follow New Zealand's move to abolish the defence of reasonable chastisement,<sup>44</sup> and attracted broadly supportive media attention with discussion of positive parenting options.<sup>45</sup> The phone-in by readers was less enthusiastic. A forum at the Australian Institute of Family Studies on corporal punishment in the same year attracted considerable media attention which again provoked polarised community views on the issue.<sup>46</sup>

In January 2009, the *Medical Journal of Australia* published a study of child homicides in NSW which concluded that 'lives could be saved by measures that reduce the incidence of child abuse, including the prohibition of corporal punishment of children'.<sup>47</sup> This was reported in the main Australian newspapers, in supportive terms.<sup>48</sup> The 'popular' press in Victoria reported the MJA research and conclusion, and invited readers to vote online on the question 'should smacking be banned'. The result? The overwhelming majority of readers who took the time to respond voted no to any ban: 93.8 per cent.<sup>49</sup>

Calls for full prohibition, particularly following legal reform in New Zealand in 2007, do not appear to have been given serious consideration in Australia despite moves towards a federal Bill of Rights and the recent enactment of rights legislation in the ACT and Victoria. Taking seriously children's rights to protection from physical violence remains a political challenge. Governments must, however, address the issue of physical discipline as children are bearers of rights, including rights to physical and emotional integrity, and protection from harm. This is an issue that will not go away until children's rights are fully respected.

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39. Editorial, 'Ask an obvious question and you get a meaningless answer' *New Zealand Herald* (Auckland), 5 October 2008.

40. Judy Cashmore and Nicola de Haas, *Legal and Social Aspects of the Physical Punishment of Children* (1995); Bernadette Saunders and Chris Goddard *Why Do We Condone the Physical Assault of Children by their Parents and Caregivers?* (1999); Chris Millfull and Louis Schetzer, *Sufficient Protection for Australian Children's Rights? Beyond the Corbett Bill* (2000); Tasmanian Law Reform Institute, *Physical Punishment of Children* (2003).

41. Anne Mather, 'Move to outlaw smacks', *The Australian* (Sydney), 11 September 2006; See, 'Tas Govt urged to ban smacking' ABC News online 2003 <abc.net.au/news/newstems/200304/s828768.htm> at 23 March 2009; See Office of the Commissioner for Children (Tasmania), *Value Children Now*, Annual Report (2001–2002) <childcomm.tas.gov.au/docs/200102ar.pdf> at 23 March 2009; See 'Government non-committal on call for smacking ban', ABC News online, 30 April 2008 <abc.net.au/news/stories/2008/04/30/2231943.htm> at 23 March 2009; See 'Smacking children is not assault', says police' *The Advertiser* (Adelaide), 28 February 2008 <news.com.au/story/0,23599,23289320-421,00.html> at 23 March 2009.

42. UN Committee on the Rights of the Child (CRC), UN Committee on the Rights of the Child: Concluding Observations, Australia, 20 October 2005. CRC/C/15/Add 268 paras 35 and 36.

43. Darrell Giles, 'Anna Bligh backs tough love as right to smack upheld', *Courier Mail* (Brisbane), 23 November 2008.

44. Alistair Nicholson, 'Choose To Hug, Not Hit' (2008) 46 *Family Court Review* 11.

45. *Herald Sun* (Melbourne), 21 February 2008.

46. Susie O'Brien, 'Make smacking illegal' *Herald Sun* (Melbourne), 11 December 2008.

47. Nielssen et al, 'Child homicide in New South Wales from 1991 to 2005' (2009) 190 *Medical Journal of Australia* 1, 7.

48. 'Call for ban on hitting children' *Herald Sun* (Melbourne), 5 January 2009; 'Child Homicide rate twice UK's' *The Australian* (Sydney), 5 January 2009.

49. *Herald Sun* (Melbourne), 6 January 2009; 2064 responses were received.