I would like to thank Anne McGillivray for her permission to reproduce this document.

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October 8, 1992

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Dear Professor Stuart,

Re: CBA Task Force Report, **Principles of Criminal Liability: Proposals for a New General Part of the Criminal Code**

I find myself in substantial agreement with the concerns and recommendations in regard to this report detailed in your brief of 8 September 1992. I wish to indicate my full support for the position you have outlined.

However, there is one additional matter which has not been addressed in any of the reports. This is the issue of s. 43, the corporal punishment excuse. The Law Reform Commission of Canada backed away from recommending its abolition, although a significant number of the Commission seems to have disagreed and argued for abolition.

I was told by Mr. Justice Allen Linden that the retention of the excuse would be balanced by provisions for extra punishment for excessive force, based on a breach of trust principle. This in my view is an inadequate response. Breach of trust is already an aggravating factor in sentencing child abuse cases; given the vagaries of sentencing, most evident in domestic violence cases, the difference this makes as a value statement is negligible.

The concern of the Law Reform Commission was expressed in its Working Paper on assault as fear of the engines of the state being wheeled in for every trivial slap or spanking. This seems to me specious. Complaints must be made, not an easy thing for a child to do; police and prosecutorial discretion is such that there is much presorting of cases in any event (a discretion strongly upheld in V.T.); diversion and mediation are being given increasing consideration even in cases of assault; and other recognized Code and common law defences will justify or excuse any assault committed in circumstances of necessity or protection of the person, etc. Further, the doctrine of de minimus, now in the proposed revision, should amply insulate the truly trivial assault from criminal consequences.

The corporal punishment excuse is a holdover from very old common law and earlier Roman law. Constantine forbade the killing of sons; by 560 Justinian's Code indicates that all that was left to paternal power was the right of 'private chastisement', a small fragment of the life-death powers earlier held. A version attributed to a 12th c. work, Piper's Chronik, states: "If one beats a child until it bleeds, then it will remember; but if one beats it to death, then the law applies." The rule appears to have been intended to prevent the murder of children by masters, parents and others who claimed an economic and proprietary interests in the child's person, interests supported by legal mores of the day. At most, the rule was an early limitation of parental power and hence an ancient child protection measure. It never did reflect a parental right. I am not sure when it became a justification for assault.

Being subject to corporal punishment can hardly be considered a right of children. If corporal punishment is necessary to the socialization and education of children (things actually in the interests of the child), this has not been shown. No necessary connection has been established. Any evidence to the contrary is at best contingent and anecdotal.

If its present purpose is to protect children by defining a limited range of harm which may be inflicted on them, the excuse has manifestly failed. Offenders in cases ranging from serious bodily harm to murder to sexual assault, of neonates and infants as well as older children, have claimed disciplinary motives. In interpreting the limits of the excuse, little guidance has been given by the superior courts and the interpretations of local courts vary so widely that the excuse is rendered meaningless. The Saskatchewan Court of Appeal decision in Dupperon is of limited utility and less adherence. The excuse reinforces punitive values and devalues children, rendering them fit subjects for a physical and psychological domination which does nothing to protect or educate.

Further, the constitutionality of s. 43 is highly questionable. The excuse offends both s. 7 and s. 15 of the Charter and it is unlikely to be salvageable under s. 1. It has not been (and probably cannot be) shown that corporal punishment for disciplinary purposes contributes to the state objective of healthy integrated children growing into productive adulthood. The opposite is more likely true, as studies of prisoners and young offenders have suggested. It is not a minimal impairment of a child's right to security of the person but a major interference with integrity on all levels. Its vagueness is not saved by judicial interpretation skills. The social harm of the punitive values supported by the excuse far outweighs any state interest in its maintenance.

A significant number of European states have banned corporal punishment of children outright. England has recently banned its use by anyone except a parent or kin having actual care of a child; the Scottish Law Commission is demanding further limits. In both countries there are movements toward outright abolition; and New Zealand's excuse, very similar to that of Canada's, no longer extends to teachers. Most Canadian school boards have quietly laid away the strap, although there are significant exceptions. The vast majority (I have found no minority contra) of legal commentators favour an outright ban.

I strongly recommend the abolition of s. 43.

Yours sincerely,

Anne McGillivray
Assistant Professor