CORPORAL PUNISHMENT IN SOUTH AUSTRALIA

A Memorandum by the South Australian Branch of the Howard League for Penal Reform

[This memorandum was issued in Adelaide in October, 1961, by the Howard League. The League feels that official and public reaction to it has been negligible. It is obvious that this is a matter not only of the greatest interest in the administration of justice, but it is also clear, by the action taken in other countries, that it is considered widely to be a suitable subject for law reform. The editorial board feels that the matter merits discussion, and it is in the hope of provoking discussion and perhaps inducing contributions in support, that the present report, which appears to make the case against corporal punishment very well, is published.]

1. Under the criminal law of South Australia there are not less than forty-one distinct offences for which corporal punishment may be imposed upon males in addition to a sentence of imprisonment. They vary from attempted murder, which carries a maximum sentence of life imprisonment, to the unlawful and malicious uprooting of a growing turnip, which carries a maximum sentence of six months' imprisonment and a fine of five pounds. They include an offence specially created for uncivilised aborigines or mixed bloods who make false statements in connection with legal proceedings. The exact number of offences for which corporal punishment may be imposed is open to argument because many sections of the principal statute, the Criminal Law Consolidation Act, 1935-1957, create a multiplicity of crimes under one heading; but the number is certainly large enough for it to be clear that the South Australian Legislature has considerable faith in corporal punishment as a deterrent to criminal behaviour.

2. Before discussing this state of the law it is desirable to make clear what "corporal punishment" means. In South Australia it almost invariably means, in the case of males of sixteen years of age or over, flogging on the bare back with a cat-o'-nine-tails, and in the case of juveniles, caning on the bare buttocks. The following description of the practice in England until corporal punishment was abolished in 1948 is probably true in all essentials of the present practice in South Australia:

> "A prisoner who is to undergo corporal punishment is strapped to an apparatus, known as a triangle, which is best described as a heavier and more solid form of the easel used to carry a blackboard in a school-room. His feet are strapped to the base of the front legs of the triangle. If the cat is to be administered, his hands are raised above his head and strapped to the upper part of the triangle. If he is to be birched, he is bent over a pad placed between the front legs of the triangle and his hands are secured by straps attached to the back legs of the triangle. In

> both cases he is screened, by canvas sheeting, so that he cannot see the officer who is administering the punishment. The birch is administered across the buttocks, on the bare flesh. The cat is administered across the back, also on the bare flesh, so that the ends of the tails fall on to the right shoulder-blade. When the cat is to be administered, a leather belt is placed round the prisoner's loins and a leather collar round his neck, so as to protect these parts from any injury which might arise from a mis-directed stroke. Both the Governor and the Medical Officer of the Prison must be present throughout the execution of a sentence of corporal punishment. The punishment is administered by a prison officer selected for this purpose by the Governor of the Prison, and Governors always take care to select for this duty a steady and experienced officer, who can be relied upon to administer the punishment dispassionately. This officer receives a special allowance . . . for this duty. The strokes are delivered at deliberate intervals—the normal rate is not faster than ten or fifteen strokes a minute—the time being counted by the Chief Officer of the Prison. The Medical Officer stands in a position where he can see the prisoner's face, and he has a complete discretion to stop the punishment at any time, if he considers that on medical grounds it is undesirable that it should be continued. If a punishment is so stopped, the remainder of it is remitted. At the conclusion of the punishment local dressings are applied, and the Medical Officer gives any other treatment which may be required. In practice, it is only on very rare occasions that the prisoner needs any attention from the Medical Officer; and there have been very few cases in which he has not been able to walk back to his cell without assistance."

Juveniles are caned by being bent over a table and held down. The caning must be carried out in the presence of a justice of the peace or an inspector of police, and is performed by officers of the Prisons Department. Canings can also be ordered to be carried out by a relative of the juvenile in the presence of a police officer.

3. Whenever corporal punishment may be imposed, the court, if it decides to sentence the prisoner in this way, must specify the number of strokes when pronouncing sentence. Adult males may be whipped on not more than three separate occasions and not more than fifty strokes may be given on each occasion. The maximum possible sentence is therefore 150 strokes. Juveniles may also be caned on not more than three occasions and not more than twenty-five strokes may be given on each occasion. The maximum possible sentence is therefore seventy-five strokes. It is believed that in practice offenders are not normally sentenced to more than twelve strokes.

4. In the past ten years seventeen adults have been whipped and five juveniles caned under these laws. This figure for juveniles refers only to canings carried out by officers of the Prisons Department. Apparently no record is kept of canings ordered to be carried out by a relative in the presence of a police officer.

5. It is believed that in practice corporal punishment is ordered only for sexual offences and for violent assaults, in the latter case par-

ticularly if made with intent to rob. It is to be observed that although this form of sentence may be imposed for rape, for sexual offences against females under twelve years of age, for indecent assaults, for sexual offences against males and for lewd exposure of the person, it may not be imposed for attempted rape.

6. There is a body of responsible opinion in South Australia which believes in the efficacy of corporal punishment as a deterrent to certain forms of criminal behaviour, although it is unlikely that any responsible person would defend the retention of whipping as a punishment for many of the crimes to which it now theoretically applies (see Appendix 1). That this is a correct assessment of the present, and past, climate of influential opinion in this State is shown by the fact that during the past forty years corporal punishment has been confined to sexual offences and to offences involving violent assault and robbery. The only exception has been a recent caning of two juveniles for arson of school buildings. The Howard League, however, believes judicial corporal punishment to be objectionable and ineffective in all its forms. The remainder of this memorandum will be devoted to an exposition of the reasons why the Howard League holds this view.

7. It is impossible to determine from South Australian sources what degree of effectiveness as a deterrent may be claimed for corporal punishment in this State. This is because the authorities do not keep proper records. For example, of the seventeen adults flogged here in the past ten years, only one is known to have been subsequently convicted. At first sight this might seem to show that flogging has a high deterrent effect. In fact it shows nothing of the kind, partly because there is nothing to show that factors quite other than flogging did not influence the behaviour of these offenders, and partly because no record is kept in South Australia of subsequent convictions anywhere else in Australia. For all that South Australian records show, the remaining sixteen offenders may have been since convicted in other States of the Commonwealth. It would be grossly improper to argue that flogging is an effective deterrent so far as South Australia is concerned if it has the result of driving offenders to other States. Even if proper records were kept, under the present system it would be difficult to make use of them because no criminal statistics are published in South Australia. If an ordinary member of the public wants information on the incidence and treatment of crime in this State, his only recourse appears to be to cause a question to be asked in the House of Assembly, a method which suffers from obvious limitations. For information on the deterrent value of judicial corporal punishment one must look outside South Australia.

8. Fortunately, there are available the reports of two highly qualified bodies appointed by the British government in recent years to look into this very question. The first, the Departmental Committee on Corporal Punishment (known as the "Cadogan Committee") was appointed in May, 1937, and reported in February, 1938. After an exhaustively thorough investigation of the use of corporal punishment as a judicial penalty the Cadogan Committee came to the following conclusion:

> "We have been unable to find any body of facts or figures showing that the introduction of a power of flogging has produced a decrease in the number of the offences for which it may be imposed, or that offences for which flogging may be ordered have tended to increase when little use was made of the power to order flogging or to decrease when the power was exercised more frequently. We are not satisfied that corporal punishment has that exceptionally effective influence as a deterrent which is usually claimed for it by those who advocate its use as a penalty for adult offenders."

The Committee reached a similar conclusion about the caning of juveniles. It is interesting, and, in view of the law and practice in this State, of particular significance to South Australia, that in the opinion of the Cadogan Committee corporal punishment was especially unsuitable for sexual offences. (Under the law of South Australia, upon conviction of a sexual offence against a girl under twelve, the offender *must* be whipped unless in the opinion of the court there is adequate reason for *not* making such an order). The recommendation made by the Cadogan Committee was that the use of corporal punishment as a judicial penalty should be entirely abandoned. This recommendation was accepted by the government of the day and ultimately made law by section 2 of the Criminal Justice Act, 1948.

9. In the decade from 1950 to 1960 there was a disturbing increase in the number of crimes of violence committed in England and Wales. A large body of opinion grew up that this increase was linked with the abolition of corporal punishment and that if flogging were reintroduced, crimes of violence would be committed less frequently. In deference to this point of view the British government in January, 1960, asked the Home Office Advisory Council on the Treatment of Offenders "to consider whether there were grounds for reintroducing any form of corporal punishment as a judicial penalty". It may be observed that the sixteen members of the Council who discharged this task and signed a unanimous report included two members of Parliament, a bishop and an eminent criminologist, and comprised members of both sexes. The chairman was Sir Patrick Barry, a judge of the English Supreme Court experienced in criminal cases. The report of the Council (known as the "Barry Report") was strongly against the reintroduction of corporal punishment. The first paragraph of the conclusions is particularly striking:

> "In view of the great conflict of opinion on this subject, it would have been surprising if, at the outset of our enquiry, some of us had not thought that the reintroduction of judicial corporal punishment might be justified as a means of checking the growing increase in crime generally and in offences of hooliganism in particular. That was, in fact, the case, but, having studied the views expressed to us and the available evidence, we consider that the findings of the Cadogan Committee are still valid, and have come unanimously to the conclusion that corporal punishment should not be reintroduced as a judicial penalty in respect of any categories of offences or of offenders."

The Council considered that

> "The reintroduction of judicial corporal punishment could be justified only if there was a reasonable assurance that it would substantially reduce crime and afford real protection to potential victims. We think that there cannot be any such assurance. There is no evidence that corporal punishment is an especially effective deterrent either to those who have received it or to others. We recognise that in a limited number of cases a sentence of corporal punishment would deter both the offender who received it and other potential offenders; but the same could be said of many forms of drastic and severe punishment which have long since been abolished as affronting the conscience of a civilised community. We are not satisfied that the numbers likely to be deterred are sufficient to justify the reintroduction of a form of punishment that has the manifold disadvantages discussed elsewhere in this report."

Among the manifold disadvantages referred to are the following.

10. *Degradation.* The flogging of a human being, as described above, is an utterly degrading affair for both the victim and those who administer the punishment. No society has the right to call itself civilised which approves, through its official organs, the infliction of bodily suffering upon a helpless victim, however unpleasant the character of that victim may be. It must be remembered that we are not here concerned with beatings administered by parents in the course of family life, or even with discipline in schools. The law does not impose beatings of that kind because they belong to the realm of personal relationships where the law ought not to interfere. A private beating is normally administered very soon after the behaviour which called it forth by a person with whom the victim has every opportunity to become reconciled, and with whom he normally has strong ties of affection to promote reconciliation. Flogging or caning as a judicial penalty is a very different matter. In the nature of things it is administered long after the offence which calls it forth (delay is discussed below). The punishment is ordered by one stranger and inflicted by others. The sentence is carried out in circumstances with which it is difficult to believe any decent human being would be proud to associate himself. There is very little hope of reconciliation because if the victim has any further association with those who flogged or caned him, it will be in the relation of prisoner and gaoler. The moral degradation involved in judicial corporal punishment must be foremost among the reasons for rejecting it as part of our law.

11. *Ineffectiveness.* If flogging, despite its objectionableness, were an effective deterrent, it might be possible to support its retention. The reports referred to above make it quite clear that as a general penalty flogging has no special deterrent effect. In reaching this conclusion the English investigating bodies were in line with informed opinion all over the world. Many countries have now dispensed with this penalty, although faced with the same problems as England and South Australia, and it is believed that in no case has it been reintroduced. In reference to the English reports it is to be observed that the volume of crime which had to be taken into account in preparing them reduces South Australian problems almost to insignificance by com-

parison; yet even so, deterrence was firmly rejected as a reasonable possibility.

12. *Harmfulness.* There is good reason to believe that flogging is not merely ineffective as a measure of social protection but positively harmful. As was mentioned above, corporal punishment may produce the desired result on certain individual offenders. If it could be confined to those offenders, it might be argued that no harm is done, and some good. Unfortunately, it is in practice impossible to ensure in advance that any particular offender falls into the class of persons who might be deterred by a flogging. Even if a much wider use were made of expert medical and sociological advice than is customary in the courts of South Australia, there would be little gain in this particular field, for it is precisely those who know most about the psychological effects of flogging who would be least willing ever to recommend that it be imposed. It may therefore be the case that many, and probably most, of the men and boys who are judicially flogged or caned become distinctly more dangerous enemies of society after the experience than they were before.

It is of interest to record the opinion of a body of men much experienced in the hard school of personal contact with violent criminals, the American Prison Association. Speaking from vast experience, the Association in its *Manual of Correctional Standards,* published in 1954, expressed the following opinion:

> "Corporal punishment should never be used under any circumstances. . . . The use of force is never justified as punishment. The safeguards thrown around the use of force by our leading prison administrators are not put there primarily because of fear of scandal, however. They know that violence begets violence and that the use of force except when absolutely necessary has repercussions that may not be felt for a long time but almost inevitably come."

This view is not new. In 1843, the Commissioners appointed by the government of the day to report on the reform of the English criminal law observed that flogging was

> "A punishment which is uncertain in point of severity—which inflicts an ignominious and indelible disgrace on the offender, and tends, we believe, to render him callous, and greatly to obstruct his return to any honest course of life."

Experienced probation and social workers hold the same view. They know that after a flogging, reformation of character is usually impossible. Society is the loser by this.

13. *Delay.* One of the most objectionable features of judicial corporal punishment is the delay which must inevitably occur between the commission of the crime for which it is imposed and the infliction of the punishment. Apart from difficulties of detection, delay is inherent in the nature of the judicial process. After the accused man is arrested, time must be allowed for both sides to prepare their cases. After conviction the prisoner must be allowed time to appeal if he wishes to do so. If there is an appeal, and every convicted person has a constitutional right of appeal which he should not be penalised

for exercising, there will be yet more delay. All these processes will certainly add up to weeks and frequently run into months. It is absurd to maintain that there can be any effective emotional connection between committing the original offence and receiving physical punishment after so long a period. Parents and psychologists know that if a beating is going to be effective in relation to the behaviour which called it forth, it must be administered quickly. Moreover, this long delay in fact imposes upon the victim a punishment not contemplated even by those who advocate flogging, namely, a long period of uncertainty as to when the event will occur, or even whether it will occur at all. The law of South Australia requires that where corporal punishment is ordered it must be carried out within six months of sentence being passed. This does put a limit on the delay which can occur, but there is reason to believe that the law is sometimes obeyed in the letter rather than the spirit, so that a person may be flogged or caned several months after starting a term of imprisonment or reformatory treatment. It should surely be clear beyond argument, especially in the case of juveniles, that to interrupt such processes of reform as the laws of this State contemplate in order to inflict a sentence of corporal punishment imposed several months earlier is unwise in the extreme. If there is to be a flogging or a caning, both common humanity and common sense require that it be disposed of at the beginning of a term of confinement, not half way through.

14. *Modern Penal Methods.* Corporal punishment is quite out of line with modern methods of protecting society from its criminals. It has become increasingly recognised over the past two hundred years that brutality of punishment alone, far from suppressing crime, increases it. The pillory, stocks, whipping post, bridle, gag, chains, shackles, together with mutilation, amputation and branding have disappeared from civilized countries, although all of these horrors were at one time thought to inspire such fear that potential criminals would be deterred by their threat. Flogging falls into the same class. The only fear which seems to be effective is the fear of detection. Once the police have played their part by detecting the crime and apprehending the criminal, it is the experience of every country which has adopted modern penal methods that subsequent brutality is useless and harmful. The benefits of probation, of education, of humane prison conditions, of dedicated social and prison workers, go for nothing if society in effect treats the prisoner no better, and often much worse, than he treated his own victim. Revenge, not reform, is the fruit of such a policy.

15. *Human Rights.* Australia is a member of the United Nations, and in a geographical position which makes it peculiarly important that she should not lag behind other countries of European population. South Australia, although an autonomous State so far as criminal punishments are concerned, and not as such a member of the United Nations, nevertheless has very real and important obligations to the Commonwealth as a whole. Under the auspices of the United Nations there has been issued a very important document called the Universal Declaration of Human Rights, which some countries have even incorporated into their constitutions. Australia and every part of it

should adhere to the principles expressed in that document. Article five says:

> "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

The retention of judicial corporal punishment is inconsistent with adherence to this principle of human conduct.

16. For the foregoing reasons the Howard League recommends that the use of corporal punishment in any form, on any offender, for any offence, be forthwith discontinued and that the law be amended to prohibit its use in the future.

APPENDIX I

Sections of the Criminal Law Consolidation Act, 1935-1957, *creating offences for which corporal punishment may be imposed on conviction.*

Section	*Offence*	*Maximum term of Imprisonment.*
18	Attempted murder.	Life.
25	Choking or stupefying with intent to commit crime.	Life.
48	Rape.	Life.
50	Carnally knowing a girl under twelve years of age.	Life.
51	Attempting carnally to know a girl under twelve years of age.	7 years.
52	Carnally knowing a girl twelve years of age but under thirteen. (*N.B.*—In the cases of the three preceding offences under sections 50, 51 and 52, it is laid down by s. 52a that "the court shall order [the person convicted] to be whipped unless the court is of opinion that there is adequate reason for not making such an order".)	7 years.
56	Indecent assault on a female.	5 years for first offence. 7 years for subsequent offences.
62	Procuring a female under twenty-one years of age to have illicit carnal knowledge.	7 years.
69	Buggery.	10 years.
70	Attempted buggery, assault with intent to commit buggery, and indecent assault upon a male.	7 years.
89	Attempting to set fire to crops, other growing things, hedges, fences or stacks of crops or cultivated things.	7 years.
100	Inflicting damage exceeding £1 in value on growing things.	4 years.
101	Inflicting damage not exceeding £1 in value on growing things.	6 months (plus repayment of damage and fine of £5).
110	Damaging or obstructing railways.	Life.
113	Damaging works of art, science, or literature.	2 years.
120	Attempting by explosives to damage a ship.	8 years.
122	Otherwise attempting to destroy ships.	Life.
156	Assault with intent to rob.	3 years.
158	Robbery with violence.	Life.

Section	*Offence*	*Maximum term of Imprisonment.*
160	Demanding money with menaces or by force.	3 years.
161	Sending threatening letters with intent to extort.	Life.
172	Being found at night with intent to commit a felony.	7 years.
255	Lewdly exposing the person.	2 years for first offence, 4 years for subsequent offences.

By section 14 of the Evidence Act, 1929-1957, an uncivilised aborigine or mixed blood who makes a false statement in connection with legal proceedings may be imprisoned for up to two years and may also be "once, twice, or thrice publicly or privately whipped".

Matters referred to in paragraphs 2, 3 and 13 of this memorandum are regulated wholly or in part by section 308 of the Criminal Law Consolidation Act, 1935-1957. It is to be observed that whereas aborigines affected by section 14 of the Evidence Act may be publicly whipped, offenders covered by section 308 of the Criminal Law Consolidation Act may be whipped only in private.