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The Parental Discipline Defense in New Zealand: The Potential Impact of Reform in Civil Proceedings

Jennifer A. Brobst

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THE PARENTAL DISCIPLINE DEFENSE IN NEW ZEALAND: THE POTENTIAL IMPACT OF REFORM IN CIVIL PROCEEDINGS

JENNIFER A. BROBST*

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I. INTRODUCTION

In British common law nations, including the United States and New Zealand, the affirmative defense of reasonable parental discipline justifies assault on a child. The parental discipline defense contemplates innumerable methods of physical discipline, including hitting, restraining, and placing a child in “time-out,” which entails

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physically isolating the child for a period of time. Without the defense, parents may be subject to criminal charges or civil liability for assault and battery, or the acts could be grounds for removal of the child in protective order, care and protection, or custody proceedings. Although analyses of the defense have tended to focus on its use in criminal court,¹ its application in civil proceedings is equally important to the welfare of children and the accountability of adults who abuse them. New Zealand and the United States provide instructive examples of how the courts in child welfare, domestic violence, and family law cases have struggled to find a consistent approach to physical child abuse when forced to interpret the reasonableness of the use of force on children.

By either statute or case law, the elements of the defense in British common law nations generally require a showing that the use of force by a parent on a child for the purpose of correction was reasonable.² Although efforts have been made in the United States to statutorily define reasonableness, New Zealand has never had any statutory measure in place limiting a defendant from using this defense for even the most heinous of crimes.³ New Zealand's parental discipline defense is presently embodied in section 59 of the Crimes Act of 1961:

1. See Kandice K. Johnson, *Crime or Punishment: The Parental Corporal Punishment Defense — Reasonable and Necessary, or Excused Abuse?*, 1998 U. ILL. L. REV. 413; David Orentlicher, *Spanking and Other Corporal Punishment of Children by Parents: Overvaluing Pain, Undervaluing Children*, 35 HOUS. L. REV. 147, 151-152 (1998); Scott A. Davidson, *When is Parental Discipline Child Abuse?*, in DISCUSSION PAPER: LEGAL AND SOCIAL ASPECTS OF THE PHYSICAL PUNISHMENT OF CHILDREN 42 (Judy Cashmore and Nicola de Haas, eds., National Child Protection Council/Australia and Commonwealth Dept. of Human Serv. and Health, May 1995); Simon Mount, *Physical Punishment in the Home: A Private Prerogative?*, 7 AUCKLAND U. L. REV. 985, 987 (1995); Rochelle Urlich, *Physical Discipline in the Home*, 7 AUCKLAND U. L. REV. 851, 853 (1994); Douglas J. Besharov, *Child Abuse: Arrest and Prosecution Decision-making*, 24 AM. CRIM. L. REV. 315, 340-341 (1986); and Deana Pollard, *Banning Corporal Punishment: A Constitutional Analysis*, 52 AM. U. LAW REV. 447 (2002). *But see The Vagueness of Child Abuse Laws*, 34 U. LOUISVILLE J. FAM. LAW 403 (1995-96), and Deana Pollard, *Banning Child Corporal Punishment*, 77 TUL. L. REV. 575 (2003).

2. Australia: Queensland (Criminal Code Act, § 280 (1899)), Western Australia (Criminal Code Act Compilation Act 1913, § 257), and Tasmania (Criminal Code Act 1924, § 50); Criminal Code, § 43 (Can.); Crimes Act, § 61 (1969) (Cook Islands); Children and Young Persons Act, § 1(7) (1933) (Eng.); Children Act 1908, § 37 (Ir.); and Children and Young Persons Act 1937, § 12 (Scot.). State jurisdictions in the United States vary considerably in their application and statutory reform of the parental discipline defense, although originally the United States comprehensively adopted the language of the English common law justification. *See generally* Kandice K. Johnson, *Crime or Punishment: The Parental Corporal Punishment Defense — Reasonable and Necessary, or Excused Abuse?*, 1988 U. ILL. L. REV. 413; Victor I. Vieth, *Corporal Punishment in the United States: A Call for a New Approach to the Prosecution of Disciplinarians*, 15 J. JUV. L. 22 (1994).

3. On May 14, 2003, the New Zealand government announced that any final decisions about legislative change would be deferred until after a planned public education campaign beginning in 2004 has been evaluated. Office of the Commissioner for Children (New Zealand), REPORT TO THE UNITED NATIONS COMMITTEE ON THE RIGHTS OF THE CHILD (JUNE 2003). This campaign, "SKIP: Strategies with Kids — Information for Parents cam-

(1) Every parent of a child and, subject to subsection (3) of this section, every person in the place of the parent of a child is justified in using force by way of correction towards the child, if the force used is reasonable in the circumstances.

(2) The reasonableness of the force used is a question of fact.

(3) Nothing in subsection (1) of this section justifies the use of force towards a child in contravention of section 139A of the Education Act of 1989.

As a defense of justification, the parental discipline defense means that a child cannot legally resist a reasonable parental assault.⁴ Similarly, in American school corporal punishment cases, courts have held that injuries to students, including broken arms, were “self-inflicted” because the students resisted lawful, justified corporal punishment.⁵ Thus, in some parental discipline cases in which parents have been acquitted despite having inflicted bruises, welts, and worse upon children, the legal position has been that the children should have remained still and received the injuries passively because the use of force was reasonable.

Despite the increasing trend in many European nations to abolish the right of parents to corporally punish children,⁶ the parental discipline defense continues to be enforced in every state of the United States and every British Commonwealth nation. Much criticism of the defense has emerged, particularly when juries in criminal court acquit

paign,” was launched by the Minister for Social Development and Employment on May 6, 2004. The campaign provides funding for positive parenting programs. Personal communication, Nicola Taylor, Children’s Issues Centre, University of Otago Auckland Centre, March 23, 2005.

4. J.C. SMITH, JUSTIFICATION AND EXCUSE IN THE CRIMINAL LAW (Stevens & Sons, London, 1989) 19. See *Charles Co. DSS v. Vann*, 855 A.2d 313 (Md. 2004) (no right to resist); cf. *State v. Miller*, 98 P.3d 265 (Haw. 2004) (right to resist if parent provoked “misbehavior”). Also, previously in marital rape cases, the husband’s right to use violence to force his wife to engage in sexual intercourse meant that the wife had no right to protect herself from the violence. See *R v. Miller*, 2 Q.B. 282, 2 All E.R. 529 (1954). See also *Jacob v. State*, 22 Tenn. 493 (1842) (Turley J.), holding that a slave had no right to resist a physical beating by his American master, and was convicted and hung for murder after fighting back.

5. See Jerry R. Parkinson, *Federal Court Treatment of Corporal Punishment in Public Schools: Jurisprudence that is Literally Shocking to the Conscience*, 39 S.D. L. REV. 276, 276 (1994).

6. The following nations now legally prohibit parental corporal punishment: Sweden (1979), Finland (1983), Norway (1987), Austria (1989), Cyprus (1994), Italy (1996), Denmark (1997), Latvia (1998), Portugal (1999), Croatia (1999), Germany (2000), Israel (2000), Belgium (2000), Iceland (2003), Ukraine (2004), Romania (2004). Nations in the process of reforming the parental discipline defense include Belgium, Bulgaria, Canada, England, Ireland, The Netherlands, Scotland and Wales. See NEW ZEALAND CABINET, PHYSICAL PUNISHMENT: COMPLIANCE WITH UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (UNCROC) (Cabinet Office, Wellington, SEQ (01) 15, 23 March 2001) app. A “International Legal Positions on the Physical Punishment of Children”; www.endcorporalpunishment.org (last accessed 11/14/04). In Spain, the reformed civil code struck out “the power to punish” one’s children, and article 617 of the Penal Code criminalizes hitting or mistreating another whether or not injury is caused. GRACIA JUSTE ORTEGA ET AL., SPANIARDS’ ATTITUDES TOWARDS PHYSICAL PUNISHMENT IN CHILDREN (Ministerio de Trabajo y Asuntos Sociales, Madrid, 1997) 14.

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parents who have physically injured their children under the guise of reasonable corporal punishment. In June 2004, the Council of Europe called for a ban on parental corporal punishment of children, calling it a “degrading” practice.⁷

The United Nations Convention on the Rights of the Child (UNCROC) has also required member States to ensure that the parental discipline defense does not justify harm to children. Article 19 requires states to “take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, . . . while in the care of parent(s)” From the language of the instrument itself, it is unclear whether UNCROC actually requires an abolition of all or even certain forms of corporal punishment.⁸ However, the United Nations Committee on the Rights of the Child has interpreted sections of UNCROC to mean that any “reasonable discipline” defense is non-compliant, including those that protect parental and educational use of corporal punishment.⁹

International pressure has begun to have an effect on the approach of English common law nations to parental discipline. In 1998, the United Kingdom was obliged to instigate legal reform of the parental discipline defense based on international human rights violations, and chose to restrict the definition of reasonableness. The European Court of Human Rights held in *A v. United Kingdom*¹⁰ that England’s parental discipline defense, identical in substance to New Zealand’s, failed to protect children from inhumane or degrading treatment as required by Article 3 of the European Convention on Human Rights. The Court examined an acquittal of a step-father (to-be) charged with assault occasioning bodily injury. The defendant had caned his nine year old step-son, causing multiple bruises. According to England’s Department of Health, this case “has exposed that the law needs

7. For the full text of the Draft Recommendations of the June 4, 2004 Council of Europe Parliamentary Assembly, see <http://assembly.coe.int/Documents/WorkingDocs/doc04/EDOC10199.htm> (last accessed 11/13/04).

8. See Abdullahi An-Na’im, *Cultural Transformation and Normative Consensus on the Best Interests of the Child*, in *THE BEST INTERESTS OF THE CHILD: RECONCILING CULTURE AND HUMAN RIGHTS* 62 (Philip Alson ed., Clarendon Press, Oxford, 1994).

9. The sections relied on are section 3 (best interests of the child), 19 (anti-violence in the home), and 28.2 (anti-degrading treatment in schools). U.N. GENERAL ASSEMBLY, REPORT OF THE COMMITTEE ON THE RIGHTS OF THE CHILD 2000 (55th Session, A/55/41). This report recommends the prohibition of corporal punishment of children in the home in many nations, including the Democratic People’s Republic of Korea (*id.* at 18, ¶ 78), Fiji (*id.* at 24, ¶ 123), Japan (*id.* at 31, ¶ 179), and Luxembourg (*id.* at 42, ¶ 260).

10. *A v. U.K.*, Eur. Ct. H.R. 100/1997/884/1096 (1998).

modernising to make sure that children are protected from harsh physical punishment.”¹¹

In *A v. United Kingdom*, public criminal prosecution and arrest of a father garnered more high profile media attention than would the confidential proceedings of a child welfare case or the private actions of Family Court. However, any reform measures to the parental discipline defense must anticipate the impact of reform on civil as well as criminal proceedings. What follows is an examination of the application of the defense in civil domestic violence protection order, custody and guardianship, and care and protection proceedings, primarily using the jurisdiction of New Zealand as an example. However, the efforts and concerns of New Zealand’s Family Court and its child protection agency resonate with the experiences of other common law nations, including the United States, which struggle against family violence while trying to balance parental rights, child rights and popular opinion.

II. DOMESTIC VIOLENCE PROTECTION ORDER PROCEEDINGS

Physical child abuse is currently addressed in New Zealand’s Domestic Violence Act of 1995. The 1995 Act provides the Family Court with increased power to consider domestic/family violence against children when granting civil protection orders.¹² For example, the definition of psychological abuse to a child now includes causing the child to witness domestic violence.¹³ In the 1995 Act, domestic violence is defined as violence within a domestic relationship, including physical abuse and threats of physical abuse.¹⁴ A domestic relationship may be between partners or between family members,¹⁵ which would include the parent/child relationship.

In granting a protection order, the Court may impose limitations on access to children¹⁶ and require participation in programs¹⁷ such as offender treatment programs or parenting classes. While the conditions are similar to the dispositions of care and protection and guardi-

11. DEPT. OF HEALTH (ENG.), PROTECTING CHILDREN, SUPPORTING PARENTS: A CONSULTATION DOCUMENT ON THE PHYSICAL PUNISHMENT OF CHILDREN ¶ 1.4 (January 2000). See also THE SCOTTISH EXECUTIVE JUSTICE DEPT., THE PHYSICAL PUNISHMENT OF CHILDREN IN SCOTLAND: A CONSULTATION ¶ 1.4 (February 2000).

12. Domestic Violence Act, 1995, § 14 (N.Z.).

13. *Id.* at § 3(3). Cf. Audrey E. Stone and Rebecca J. Fialk, *Criminalizing the Exposure of Children to Family Violence: Breaking the Cycle of Abuse*, in 271 PRACTICING LAW INSTITUTE TAX LAW AND ESTATE PLANNING COURSE HANDBOOK SERIES 331 (November 1998) (reprinted from 20 HARV. WOMEN’S L.J. 205 (1997)).

14. Domestic Violence Act, 1995, § 3 (N.Z.).

15. § 4 (a)-(b).

16. § 27.

17. § 29.

anship proceedings, as well as some criminal sentences, the functioning of domestic violence protection orders is something of a hybrid between a criminal and civil approach. The protection order itself is civil, but violation of the order is a criminal offense.¹⁸ A domestic violence protection order is sought by individual plaintiffs, and a child victim would need an adult willing to request such an order on his or her behalf. However, these orders have been criticized as cost prohibitive, especially given that ninety-six percent of applications are made through the use of lawyers.¹⁹

To invoke the Domestic Violence Act of 1995 and obtain a protection order on behalf of child victims of parental physical abuse, an incidence of "violence" must be proven.²⁰ Violence is defined in part as "physical abuse," but also includes psychological and sexual abuse.²¹ The operative word in this definition is "abuse." Note that no specific reference is made to the corporal punishment of children under the Act. In *Bragg v. Hawea*, "abuse" under the Domestic Violence Act of 1995 was given the dictionary definition of "an improper usage; a corrupt practice or improper use, perversion."²² This broad definition provides the court with much discretion. However, if the alleged offending parent raises the equally broadly defined defense of reasonable discipline, the fact-finder has nearly unfettered discretion to determine if the child is a victim of domestic violence.

A. *The Parental Discipline Defense in DVPO Proceedings*

Without explicit guidance from the legislature, when enacting more expansive protections against domestic violence, courts have been called upon to define whether the domestic violence reforms have implicitly repealed the parental discipline defense. The Family Court of New Zealand has held that the anti-family violence provisions of the Domestic Violence Act of 1995 did not repeal the possible justification for such violence in section 59 of the Crimes Act of 1961.²³ Similarly, in Hawaii, the Hawaii Court of Appeals recently held that

18. The Domestic Violence Act, section 49, creates a summary offense for violation of a domestic violence protection order.

19. HELENA BARWICK ET AL., DOMESTIC VIOLENCE ACT 1995 PROCESS EVALUATION 10 (Ministry of Justice (N.Z.), April 2000). In the United States, state governments that access certain federal grants to enhance criminal prosecution and availability of domestic violence protective orders have assumed the cost based on federal legislation under the Violence Against Women Act (2000).

20. Domestic Violence Act, 1995, § 14 (N.Z.).

21. *Id.* at § 3(2). Note that "violence" in other criminal offenses has been interpreted to require a certain degree of injury. See *Peneha v. Police* [1996] H.C. Gisborne AP 8/96, 7-8 (robbery). This has not been the case under the Domestic Violence Act 1995.

22. *Bragg v. Hawea* [1996] N.Z.F.L.R. 874, NZFLR LEXIS 130, 16-17.

23. *Id.*; *B v. H* [1996] 15 F.R.N.Z. 275; *Ausage v. Ausage* [1997] N.Z.F.L.R. 72, NZFLR LEXIS 43, 15; *A v. A*, [1997] 17 F.R.N.Z. 13.

physical harm under the statutory definition of family violence does not preclude the use of parental corporal punishment to discipline a child.²⁴ Since the 1995 Act, the High Court of New Zealand has continued to consider section 59 when reviewing a protection order application involving a parent's alleged violence to a child.²⁵ As will be shown with respect to other civil proceedings, the Family Court has provided parents with less latitude under the parental discipline defense in domestic violence protection order proceedings than parents have received in criminal courts.

For example, deliberately attempting to discipline a child in a manner that would not leave marks, such as hitting the sole of a child's foot, has been found to be an aggravating factor indicating that discipline was unreasonable in protection order proceedings.²⁶ Use of implements is unacceptable.²⁷ Causing less severe injuries, including inflicting welts by striking a child with a jug cord,²⁸ and more severe abuse, including punching a child causing a black eye,²⁹ have both been deemed an unreasonable use of force in protection order proceedings.³⁰ A kick to the buttocks without injury "constitutes improper use of physical force beyond usually accepted disciplinary action."³¹ In this case, the kick was determined to be domestic violence in the context of "a pattern of behaviour"³² pursuant to section 14(b)(3) of the Domestic Violence Act, which states:

[W]here some or all of the behaviour in respect of which the [protection order] application is made appears to be minor or trivial when viewed in isolation, or appears unlikely to recur, the Court must nevertheless consider whether the behaviour forms part of a pattern of behaviour in respect of which the applicant, or a child of the applicant's family, or both, need protection.³³

Contrast this ruling with a kick to the buttocks that has been found to be reasonable in criminal proceedings.³⁴

Physical force, found to be justified under the parental discipline defense in protection order proceedings, includes vigorous pushes to the shoulder;³⁵ a smack to the bottom;³⁶ and a slap to the face.³⁷ No

24. *Rezentes v. Rezentes*, 965 P.2d 133 (Haw. Ct. App. 1998).

25. *Y v. Y* [1998] Auckland H.C. 122/97, 15.

26. *Kellen v. Hansen* [1997] D.C. Auckland FP 004/889/97, 15.

27. *Y v. Y* [1998] Auckland H.C. 122/97, 15.

28. *Arvidson v. Croft* [1996] N.Z.F.L.R. 741.

29. *M v. M* [2000] F.C. Wanganui FP 083/240/00.

30. *See also Lane v. Lane* [2000] F.C. Christchurch FP 326/00.

31. *Bragg v. Hawea* [1996] N.Z.F.L.R. 874, NZFLR LEXIS 130, 17.

32. *Id.* at 21.

33. Domestic Violence Act, 1995 § 14(b)(3) (N.Z.).

34. *Gerrard v. Police* [1989] H.C. Hamilton AP 96/89.

35. Pushes to the shoulder "may be acceptable discipline or are at least borderline domestic violence." *Bragg*, at 7.

case law has been found with respect to protection order proceedings, in which the Family Court has found the infliction of less severe injuries such as bruising and welts to be justified under section 59 of the Crimes Act of 1961.

In a review of case law, children generally appear to receive greater legal protection in civil protection order proceedings than in criminal trials involving the parental discipline defense. However, there is an irony inherent in the combination of section 59 and the Domestic Violence Act of 1995. While a protection order could be granted on the basis that a father allowed his child to witness him slap his wife, the father could then be legally justified under the parental discipline defense and receive no punishment under the Domestic Violence Act when he turned around and slapped his child for watching the event. Thus, the parental discipline defense also inhibits the protection of children from violence in protection order proceedings, at least protection to the same extent given to adult victims of family violence.

B. *A Pro-Prosecution Approach to Family Violence?*

Like much of the West, New Zealand has adopted an aggressive pro-prosecution approach to spousal abuse.³⁸ The objective of the Domestic Violence Act of 1995 has been termed “an interventionist approach.”³⁹ The language of the Act reflects this with its objectives of “(a) [r]ecognising that domestic violence, in all its forms, is unacceptable behaviour; and (b) [e]nsuring that, where domestic violence occurs, there is effective legal protection for its victims.”⁴⁰ Consider also the objective of “[p]roviding more effective sanctions and enforcement in the event that a protection order is breached.”⁴¹ This contrasts with the fairly non-interventionist “assistance to the family” language of the Children, Young Persons, and Their Families Act of

36. *Bragg*, at 22.

37. *Steyn v. Brett* [1997] N.Z.F.L.R. 312.

38. Chief Executive of Women's Refuge in New Zealand, Merepeka Raukawa-Tait, stated: “What we have been saying is if anyone is at risk [of domestic violence], prosecute. The sentence has to reflect that.” Geraldine Johns, *Judiciary 'gutless' says refuge head*, SUNDAY STAR TIMES, December 31, 2000, at A1. However, note that in New Zealand, while policies against spousal abuse may be aggressively pro-prosecution, actual police practice may be less so. See HELENA BARWICK ET AL., DOMESTIC VIOLENCE ACT 1995 PROCESS EVALUATION 13 (Ministry of Justice (N.Z.), April 2000); and Helene Carbonatto, *The Criminal Justice System Response to Domestic Violence in New Zealand* 10 CRIMINOLOGY AOTEAROA/N.Z. 7, 7 (1998).

39. *Bragg*, at 25.

40. Domestic Violence Act, 1995, § 5(a)-(b) (N.Z.).

41. *Id.* § 5(e). Breach of a protection order may result in summary conviction and a term of imprisonment up to six months; or, with priors, an indictable conviction and up to two years imprisonment. *Id.* § 49(2)-(3).

1989 in care and protection matters.⁴² Nowhere in the 1989 Act is “sanctions” an objective.

In some ways, the pro-prosecution stance to family violence appears to apply to both adult and child victims equally. Both “assault on a child”⁴³ and “male assaults female”⁴⁴ increase the maximum prison sentence for assault to two years, and bailable rights are limited for each of these offenses.⁴⁵ The Domestic Violence Act of 1995 applies equally to all members in a domestic relationship. The prosecution of family violence cases involving children is emphasized by the criminal sanctions available for violation of protection orders based on a child witnessing domestic violence. As argued, regarding family violence to children in the United States: “Criminal sanctions send a message to child witnesses that the violence they observe in their homes is a criminal act that brings negative consequences to the perpetrator and should not serve as a model for their future relationships.”⁴⁶

Nevertheless, government agencies and private resources in the West have typically attended to spousal abuse separately from child abuse and neglect, even when violent incidences against both a partner and child overlap.⁴⁷ The American Model Code on Domestic and Family Violence defines domestic violence as acts by a family or household member upon a minor or an adult.⁴⁸ The definition excludes acts of self-defense, but makes no mention of the parental discipline defense or the legal right of parents to strike a child. Apparently, the defenses specific to children were not contemplated.

In New Zealand, children’s programs are only now being made available under the Domestic Violence Act of 1995 because “demand was high.”⁴⁹ Seventy-five percent of applicants for domestic violence protection orders have children.⁵⁰ A number of cases reported in the

42. See Children, Young Persons, and Their Families Act, 1989, § 13(b)(ii) (N.Z.) (“[i]ntervention into family life should be the minimum necessary to ensure a child’s or young person’s safety and protection”).

43. Crimes Act, 1961, § 194(a) (N.Z.).

44. *Id.* § 194(b).

45. *Id.* § 319(2).

46. Audrey E. Stone & Rebecca J. Fialk, *Criminalizing the Exposure of Children to Family Violence: Breaking the Cycle of Abuse* in 271 PRACTICING LAW INSTITUTE TAX LAW AND ESTATE PLANNING COURSE HANDBOOK SERIES 331 (November 1998) (reprinted from 20 HARV. WOMEN’S L.J. 205 (1997)).

47. Howard A. Davidson, *Child Abuse and Domestic Violence: Legal Connections and Controversies*, 29 FAM. L. Q. 357, 359 (1995).

48. MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE § 102(1) (Nat’l Council of Juv. & Fam. Ct. Judges 1994).

49. HELENA BARWICK ET AL., DOMESTIC VIOLENCE ACT 1995 PROCESS EVALUATION 15 (Ministry of Justice (N.Z.), April 2000).

50. *Id.* at 10. Children have been present in 70% of family violence cases reported to the New Zealand Police. BREAKING THE CYCLE 7-18 (Children & Young Persons Serv. (N.Z.), July 1996).

Porirua charging study indicate an overlap between spousal and child abuse.⁵¹ More than merely being “linked” with domestic violence, physical child abuse and its manifestation as corporal punishment are an integral part of the social problem of family violence. However, New Zealand’s agencies have shown an equivocal approach to integrating child victims into family violence policies.

For example, the New Zealand Police Family Violence Policy⁵² mirrors the inclusiveness of the Domestic Violence Act of 1995 in its definition of a domestic relationship which includes parents and children.⁵³ The core principles of the policy are: “(i) Protection of victims (which includes children who witness family violence); (ii) Holding assailants accountable; and (iii) Consistent practices across agencies and groups.”⁵⁴ Nevertheless, despite the recognition that children are involved in nearly 70% of reported family violence cases,⁵⁵ the policy suggests that instead of prosecuting offenses involving child family violence victims, police should generally refer them to “a child advocacy service or agency.”⁵⁶ In a 2001 government study of physical assault cases in the criminal court system, 84% of victims were adults and only 6% were children aged 14 years or less.⁵⁷

This study provides neither the consistency suggested by policy principle (iii), nor does it hold the perpetrator accountable as suggested by principle (ii). It also conflicts with the joint police and CYF child abuse investigation protocol, which emphasizes the accountability of the offender,⁵⁸ asserting the guiding principle that “[t]he physical and sexual abuse of a child is a criminal act which should be investigated and may be prosecuted as such.”⁵⁹

In addition, the New Zealand Police Family Violence Policy discourages the use of diversion in family violence cases because it can be too much of an “easy option,”⁶⁰ when in reality family violence

51. See, e.g., app. “Year 2000 Physical Child Abuse Reports from Porirua.”

52. N.Z. POLICE FAMILY VIOLENCE POLICY (1996). See also THE NEW ZEALAND GOVERNMENT STATEMENT OF POLICY ON FAMILY VIOLENCE.

53. N.Z. POLICE FAMILY VIOLENCE POLICY (1996).

54. *Id.* Pt. 1, § 4.

55. *Id.* Pt. 1, § 9.

56. See *Id.* Pt. 1, § 12.

57. CHRISTOPHER CLARK, THE AGE OF PHYSICAL ABUSE VICTIMS AND THE SENTENCE IMPOSED ON THEIR ABUSERS 12 (Ministry of Justice (N.Z.), 2001). Police Association Wellington delegate Det. Sgt. Stuart Mills explained: “[w]e are using the resources that we have in the best way but it is disappointing that they are often not able to complete [child abuse] inquiries.” Sarah Prestwood, *Higher Police Priority Urged for Child Abuse*, THE DOMINION, 21 March 2001, at 11.

58. CHILDREN & YOUNG PERSONS SERV., NZCYPS CARE AND PROTECTION HANDBOOK VERSION 1.0 (1996) 3, ¶¶ 1.4, § 5-65, and 2.10, § 5-67.

59. *Id.* at ¶ 1.1, § 5-67.

60. N.Z. FAMILY VIOLENCE POLICY pt. 1, § 52 (1996). There is considerable debate whether the use of diversion and restorative justice devalues spousal violence, or whether

cases involving adult victims are not often diverted, while those involving child victims are.⁶¹ That diversion is granted for child cases is not the problem, because diversion can be effective in curbing recidivism.⁶² Rather, the issue is that family violence cases involving adult victims are viewed more seriously by law enforcement than those involving child victims. In the most recent governmental review of the Domestic Violence Act of 1995, no mention was made of the lack of enforcement on behalf of children while practical barriers to enforcing the Act on behalf of men and ethnic minorities were addressed.⁶³

Even New Zealand's Children, Young Persons and Their Families Service (now CYF) has expressed reluctance to join in the battle against domestic violence as it relates to children. Upon passage of the Domestic Violence Act of 1995, CYF stated:

It is important to ensure that the provisions of the Children, Young Persons and Their Families Act are not used inappropriately in the domestic violence arena and that actions under the Domestic Violence Act do not routinely flow on to actions under the Children, Young Persons, and Their Families Act.⁶⁴

Part of the concern was that no new funding had been allocated to the Children, Young Persons and Their Families Service to accommodate increased notifications based on a more aggressive approach to family violence.⁶⁵

Thus, while the New Zealand Police suggested CYF handle the physical child abuse cases, CYF suggested the police handle them. This attitude may be changing given that in 1999 CYF began to implement its own family violence prevention programs and services.⁶⁶

prohibiting their use removes a valuable and effective option for reducing recidivism in batterers and respecting the wishes of domestic violence victims. See Paula Martin, *Restorative Justice - a Family Violence Perspective*, 6 SOC. POL'Y J. OF N.Z. 56, 60 (1996); Allison Morris, *Law Reform Initiatives on Violence Against Women*, 1 CRIMINOLOGY AOTEAROA/N.Z. 5 (1994); and Helene Carbonatto, *Dilemmas in the Criminalisation of Spousal Abuse*, 2 SOC. POL'Y J. OF N.Z. 21 (1994).

61. Interviews with Sgt. Paddy Darroch, Wellington Central Diversion Coordinator and Sgt. Dean Rosson, Director of the Child Abuse Team, Wellington Central Police (23 January 2001).

62. From the beginning, the success rate of New Zealand's diversion program has been found to be "exceptionally good." D.P.H. JONES, SUMMARY CRIMINAL HEARINGS FROM ARREST TO FINAL DECISION 44 (N.Z. Law Society seminar presentation, 1989). In Wellington, the recidivism rate for diversion cases is 15% or less. Based on this success, Minister of Justice Phil Goff has denied that diversion is justice behind closed doors. *When Creating a Diversion Can Work Wonders*, THE DOMINION, March 19, 2001, at 9.

63. See HELENA BARWICK ET AL., DOMESTIC VIOLENCE ACT 1995: PROCESS EVALUATION, 13 (Ministry of Justice (N.Z.), April 2000).

64. DEPT. OF SOCIAL WELFARE, CHILDREN, YOUNG PERSONS & THEIR FAMILIES SERV. (N.Z.), SOCIAL WELFARE IN NEW ZEALAND: POST ELECTION BRIEFING PAPER 1996, 17 (1996).

65. *Id.*

66. THE OVERVIEW: POST-ELECTION BRIEFING 1999, 10 (Dept. of Child, Youth & Family Serv. (N.Z.), 1999) 10; SAFETY ASSESSMENT FORM PILOT: EVALUATION OF THE IMPACT ON CHILD, YOUTH AND FAMILY - ASSESSING RISK TO CHILDREN WHO LIVE WITH FAMILY VIO-

Also, in response to a report by the Office of the Commissioner for Children calling for more attention to children in family violence investigations, an internal review by the New Zealand Police of the Family Violence Policy was undertaken.⁶⁷

Note that some American jurisdictions are currently experiencing a backlash to the increased inclusion of child victims in pro-prosecution family violence policies. Bills have been introduced in a number of American States to statutorily ensure that family violence and care and protection abuse definitions do not include parental corporal punishment.⁶⁸ Richard Garner has criticized Ohio's criminal domestic violence statute, which addresses "physical harm" to children, because it is overbroad and fails to adequately define legal parental discipline.⁶⁹ According to Garner:

The effective impact of Ohio's broad interpretation of domestic violence and its preferred arrest policy is the creation of an enforcement scheme that gives law enforcement agencies carte blanche to arrest any parent using any kind of corporal discipline and to prosecute any such parent for domestic violence.⁷⁰

As corporal punishment inherently involves physical force, the minimum needed for prima facie proof of physical harm would be satisfied in every corporal punishment case.⁷¹ However, Garner's criticism is only applied regarding child victims. Cases involving adult family violence victims would have the same minimum level of harm required to file charges. Ohio has since resolved that its statutory scheme, including its domestic violence laws, does not repeal the right of parents to use reasonable corporal punishment.⁷²

The trend towards stronger domestic violence policies in New Zealand and the United States includes children as victims, but it has not embraced their need for protection. Instead, domestic violence proceedings, such as DVPO hearings provide more hurdles for children than adults through recognition of the parental discipline defense.

LENCE (Dept. of Child, Youth & Family Serv. (N.Z.), Wellington, 2000); Cara Elliott et al., *Protecting Women and Children*, 15 SOCIAL WORK NOW 27 (2000); Anne Caton, *The Interagency Approach to Child Protection: What is Possible Today?* 17 SOCIAL WORK NOW 28 (2000).

67. RECOMMENDATIONS FROM JAMES WHAKARURU REPORT BY THE COMMISSIONER FOR CHILDREN STATUS REPORT - FINAL REPORT (NZ Police undated) (received from the Wellington Police Dept. Child Abuse Team on January 30, 2001).

68. See SB 553 (enacted) (Nev. 1999); SB 26 (introduced) (Ga. 2001); HB 871 (introduced) (Tex. 2001); HB 499 (introduced) (Md. 2001).

69. Richard Garner, *Fundamentally Speaking: Application of Ohio's Domestic Violence Laws in Parental Discipline Cases - A Parental Perspective*, 30 U. TOLEDO L. REV. 1, 17 (1998). The applicable domestic violence statute is OHIO REV. CODE § 2919.25(A).

70. Garner, *supra* note 68, at 17.

71. *Id.*

72. See *State v. Adaranijo*, 792 N.E.2d 1138 (Ohio Ct. App. 2003) and BALDWIN'S OHIO HANDBOOK SERIES, ch. 8, § 6 (2004).

However, if a child injured through parental discipline has an adult willing and financially able to initiate protection order proceedings on the child's behalf, then at least the Family Court appears more likely than the criminal court to take action to protect the child.

III. CUSTODY AND GUARDIANSHIP PROCEEDINGS

The Family Court also addresses parental corporal punishment in custody and guardianship hearings to determine which home is safe for the child to live in. Although family law in New Zealand continues to emphasize the parental right to control the upbringing of children,⁷³ family courts are increasingly giving credence to abuse allegations as they gain a greater understanding of the characteristics of family violence.⁷⁴

In New Zealand in 1995, the Guardianship Act of 1968 was amended to more specifically address allegations of violence in custody and access applications. Previously, the general welfare of the child was to be considered in marriage dissolution hearings.⁷⁵ Custody and unsupervised access is now restricted under section 16B of the Guardianship Act if family violence has been perpetrated against a child or in the child's presence.

Violence is defined as physical abuse or sexual abuse.⁷⁶ When custody is at issue, the focus of court decision-making is on the best interests of the child, including the child's safety. "[P]unishment is no part of the function of this Court."⁷⁷ However, a custody hearing is inherently adversarial, which can inhibit full application of the paramountcy principle which protects the child's interests first:

No matter the setting, [child abuse] cases are difficult, emotionally draining, and often incomprehensible. In the family court setting, emotions, and anger from the divorce adds to the tension. Allegations of abuse serve as a catalyst to rekindle and fan the flames of earlier conflicts. Unless these cases are handled in a thorough and professional manner, the interests of the child can be lost.⁷⁸

Thus, the court may appoint a lawyer on behalf of the child in custody and guardianship proceedings.⁷⁹

If a physical abuse finding involves parental corporal punishment, then the parental discipline defense will apply. Following the determi-

73. See *Neho v. Duncan* [1994] N.Z.F.L.R. 157; *Tozer v. Newcomb* [1992] N.Z.F.L.R. 51.

74. Thea Brown et al., *Revealing the Existence of Child Abuse in the Context of Marital Breakdown and Custody and Access Disputes*, 24 CHILD ABUSE & NEGLECT 849, 850 (2000).

75. Family Proceedings Act, 1980, § 45 (N.Z.).

76. Guardianship Act, 1968, § 16A (N.Z.).

77. *M v. M* [1984] 1 F.R.N.Z. 388.

78. Henry Plum, *Proving Physical Abuse of Children*, FAM. ADVOCATE 46, 49 (1995).

79. Family Proceedings Amendment Act, 1998 (N.Z.); Guardianship Act, 1968, § 30 (N.Z.).

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nation that the Domestic Violence Act of 1995 did not repeal section 59 of the Crimes Act 1961, the Family Court has also determined that the anti-family violence provisions of the Guardianship Act have not repealed section 59.⁸⁰ This finding has not been made easily:

It is unfortunate that the legislature has not resolved the issue of whether corporal punishment by parents is appropriate in New Zealand. It does seem that by retaining s.59 of the Crimes Act and enacting s.16B, [the] legislature on the one hand is gaining the support of those in the community who do not want corporal punishment, their view being satisfied by s.16B, but at the same time retains the support of those in the community who consider . . . [corporal] punishment appropriate by retaining s.59.⁸¹

As in other civil proceedings, in custody cases, the presence of less severe injuries such as bruising and the use of implements has been held to be an unreasonable use of force in parental discipline.⁸² This determination has not been consistently applied, however. In *Teutau v. Teutau*, Judge Mather determined that a mother who hit her child causing “a limited amount of bruising” had not inflicted violence within the meaning of section 16B of the Guardianship Act.⁸³ Of course, as in criminal proceedings, nothing within section 59 of the Crimes Act 1961 prevents the Family Court from ever finding that a parent who inflicts injuries on a child used reasonable disciplinary force with no need for accountability.

IV. CARE AND PROTECTION PROCEEDINGS

The Children, Young Persons and Their Families Act of 1989 (CYPF Act of 1989) provides the authority for CYF to intervene in suspected abuse cases. Unlike protection order and custody proceedings which are initiated by private individuals, CYF is a state agency initiating proceedings based on physical child abuse allegations. CYF social workers or case managers are mandated to investigate reports of abuse and neglect.⁸⁴ A determination is made as to whether the abuse is substantiated or unsubstantiated – that is, if the investigating social worker or police officer “reasonably believes that the child or young person . . . is in need of care or protection.”⁸⁵

Under section 14 of the CYPF Act of 1989, a number of reasons are listed for which a child is considered in need of care and protection by

80. T v. T [1999] F.C. Auckland FP 004/919/90, 8-9.

81. *Id.* at 9.

82. Spence v. Spence [2000] F.C. Wellington FP 458/99; T v. T [1999] F.C. Auckland FP 004/919/90, 10.

83. *Teutau v. Teutau* [1997] D.C. Otahuhu FP 048/191/96.

84. Children, Young Persons, & Their Families Act, 1989 § 17 (N.Z.).

85. *Id.* at § 17(2).

the Family Court. The first of these is that “[t]he child or young person is being, or is likely to be, harmed (whether physically, emotionally or sexually), ill-treated, abused, or seriously deprived.”⁸⁶ In corporal punishment cases, the operative words are abuse, ill-treatment, and physical harm. Moreover, the term “using violence” is also referred to regarding the power of the Court to make a restraining order in a care and protection proceeding, which is distinct from the term “causing physical harm.”⁸⁷ Neither the CYPF Act of 1989 nor the Children, Young Persons and Their Families Amendment Act of 1994 defines the terms abuse, ill-treatment, physical harm, or violence. The “Joint NZCYPS/Police SAT Protocol” addresses “child sexual and serious physical abuse.”⁸⁸ Again, no definition of “serious” physical abuse is outlined in either the protocol or under the CYPF Act of 1989.⁸⁹

Internal agency guidelines for social workers have described physical abuse as follows:

Physical abuse is any act or acts that result in inflicted injury to a child or young person. It may include, but is not restricted to: bruises and welts, cuts and abrasions, fractures or sprains, abdominal injuries, head injuries, injuries to internal organs, strangulation or suffocation, poisoning, [and] burns or scalds. Such injury or injuries may be deliberately inflicted or the unintentional result of rage. Regardless of motivation, the result for the child, young person, or person is physical abuse.⁹⁰

Note that the infliction of pain is not listed. No court would be required to agree with these definitions of abuse, given that these are internal agency guidelines and not statutory definitions. Some in the Family Court have expressed concern that their interpretation of what is abuse under section 14 is broader than “the rather more narrow interpretations . . . made by the [Children and Young Persons] Service when the Court makes referrals to it.”⁹¹ In the United States, a lack of statutory clarity in what constitutes physical child abuse, when it is defined only in general terms, has been blamed for giving “too much discretion to judges and child protective workers, who may make deci-

86. *Id.* at § 14(1)(a). A similar definition is given for “child abuse” under section 2 of the Children, Young Persons and Their Families Amendment Act, 1994 (N.Z.).

87. Children, Young Persons, & Their Families Act, 1989, § 87(b) (N.Z.).

88. BREAKING THE CYCLE 7-3 (Children & Young Persons Serv., July 1996).

89. See Jeremy Robertson, *Research on Family Group Conferences in Child Welfare in New Zealand*, in FAMILY GROUP CONFERENCES: PERSPECTIVES ON POLICY AND PRACTICE 49, 57-58 (Joe Hudson et al., eds., 1996).

90. CHILDREN, YOUNG PERSONS & THEIR FAMILIES SERV. (N.Z.), 1997, RECOGNITION OF CHILD ABUSE AND NEGLECT: TIROHANGA TUKINO TAMARIK 14.

91. OFFICE OF THE COMMISSIONER FOR CHILDREN (N.Z.), 1996, BRIEFING PAPER TO THE MINISTER OF SOCIAL WELFARE 19.

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sions based on their own child-rearing strategies and impose their personal views on unwilling parents.”⁹²

A. *The Parental Discipline Defense in Care and Protection Proceedings*

In physical child abuse cases involving a parental perpetrator, a social worker must take into consideration whether the parent’s right to use reasonable force under section 59 of the Crimes Act of 1961 prevents the social worker from legally intervening, initiating care and protection proceedings, or reporting the case to the police. Note that most cases of physical abuse in New Zealand involve violence in the home.⁹³ Actions that might be considered abusive when committed by a stranger upon a child may be justified when committed by a parent.

Application of the parental discipline defense in care and protection proceedings requires consideration of the same elements as its application in criminal cases: the parent/child relationship, the motive of correction, and the reasonable use of force.⁹⁴ Yet, internal CYF guidelines have stated that if certain injuries, including bruises and welts, are the result of intentional force, then “[r]egardless of motivation, the result for the child, young person, or person is physical abuse.”⁹⁵ A conflict is present between statutory and agency approaches to physical abuse where motivation is relevant in one but not the other. CYF has rationalized this conflict by defining ordinary smacking, or “punishment designed to inflict physical pain,” as “inappropriate at any age,” but only abusive if used in a manner beyond “societal norms.”⁹⁶

Section 59 of the Crimes Act of 1961 overrides certain determinations of abuse, leading to the conclusion that a child is not in need of care and protection because the substantiated “physical abuse” is justified. As in all other legal proceedings, the problem of ambiguity is inherent in interpreting section 59 in care and protection proceedings. The problem is compounded by the ambiguity of defining what constitutes “abuse.”

Yet, the Family Court in care and protection proceedings may be providing a narrower interpretation of the parental discipline defense,

92. N. Dickon Reppucci & Carrie S. Fried, *Child Abuse and the Law*, 69 UMKC L. REV. 107, 109 (2000).

93. MINISTRY OF SOCIAL POLICY (N.Z.), *THE SOCIAL REPORT 2001: TE PURONGO ORANGA TANGATA, INDICATORS OF SOCIAL WELL-BEING IN NEW ZEALAND* 38 (2001).

94. Crimes Act, 1961, § 59 (N.Z.).

95. CHILDREN, YOUNG PERSONS & THEIR FAMILIES SERV. (N.Z.), *RECOGNITION OF CHILD ABUSE AND NEGLECT: TIROHANGA TUKINO TAMARIK* 14 (1997).

96. *Id.* at 56.

similar to that found in domestic violence protection order proceedings. For example, the Family Court has held that use of implements and the presence of injury, including bruising, renders a parent's physical discipline abusive.⁹⁷ As Judge Moss stated: "[T]o describe the discipline as mild and conciliatory when it left the obvious marks described is a distasteful under-statement."⁹⁸

At least one judicial decision in a care and protection proceeding has resisted allowing the defense to even be raised. The Family Court determined that there was no need to make a firm finding on whether the parental discipline had been justified because "what is relevant is how [the child] perceives her relationship with her mother to have been and whether or not the mother is capable of acknowledging that perception"⁹⁹ The Court denied the parent a defense that must be addressed if the facts warrant it, even if the parent does not wish to raise it.¹⁰⁰

If physical child abuse victims receive more sympathy in Family Court, particularly in less severe corporal punishment cases, then arguably this forum is best for such cases. Abandoning the ideal of equal criminal justice for all family violence victims is perhaps justifiable from a social context if the civil care and protection approach adequately addresses the problem of physical child abuse. After all, child victims of family violence have a separate child welfare agency to turn to, an additional resource unavailable to adult family violence victims. However, if parental perpetrators of violence regularly escaped criminal liability and the message of section 59 continued to promote the use of force against children, one would sincerely hope that the child welfare system in New Zealand could cope with the task.

B. *The Benefits of the Care and Protection Approach*

Aside from the possibly greater chance of overriding the parental discipline defense in care and protection proceedings, a number of other factors point to the advantages of Family Court over criminal court in physical child abuse cases. While the CYPF Act of 1989 emphasizes the interests of the child and the interests of a child's "family, whanau, hapu, iwi, and family group,"¹⁰¹ when these interests conflict,

97. I, T, M and J [2000] N.Z.F.L.R. 1089; NZFLR LEXIS 53, 31, ¶¶ 53-54. Case law in care and protection proceedings which approve of less severe injuries has not been found by the author.

98. *Id.* at 33.

99. *Director-General of Social Welfare v. R* [1997] 16 F.R.N.Z. 357, 361, ¶ 35.

100. See ADAMS ON CRIMINAL LAW, CA20.06, 31 (Hon. Bruce Robertson ed., 2nd student ed., Brooker's, 1998).

101. Children, Young Persons, & Their Families Act, 1989, § 5(c) (N.Z.).

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the child's welfare is the "first and paramount consideration."¹⁰² In criminal court, a victim's interests are often secondary to holding the defendant accountable for his or her actions.

The CYPF Act of 1989 provides that the State should intervene in family life as little as possible,¹⁰³ including the preference for extended family and whanau placements if the child is removed from his or her immediate family.¹⁰⁴ There are no similar statutory provisions in criminal law which protect against the dangers of disrupting family stability. Awareness of the needs of children and family members in family violence matters have arisen in criminal cases only through the training, experience and discretion of the judges and other professionals involved.

Where abuse is substantiated by CYF, the ongoing provision of services and monitoring may be provided to the family even if no court action is taken. No corresponding responsibility would attach to the police in a criminal investigation. In care and protection proceedings, if a child is deemed unsafe within the home environment, the child may be made a ward of the court and/or removed from the home.¹⁰⁵ The safety warrant providing for removal is granted when there are "reasonable grounds" that the child is "suffering, or is likely to suffer, ill-treatment, serious neglect, abuse, serious deprivation, or serious harm."¹⁰⁶ Court ordered counseling for parent and child,¹⁰⁷ services for the family,¹⁰⁸ and limits on parental access to the child through restraining orders,¹⁰⁹ custody orders,¹¹⁰ and guardianship orders¹¹¹ are more common dispositions than removal. Requirements of counseling, monitoring, and parenting classes are also common to both traditional and non-traditional criminal dispositions. The method of determining criminal restorative justice dispositions is also similar to the family group conference of the CYPF Act of 1989.

In making decisions and plans on behalf of the family and child, the Family Group Conference adds the input of family members and other non-professionals close to the child and suspected abuser.¹¹² The intended advantages of family group conferences over a court or professionally controlled environment include: a sense of belonging,

102. Children, Young Persons, & Their Families Amendment Act, 1994, § 3 (N.Z.).

103. § 13(b)(ii).

104. § 13(g).

105. Children, Young Persons, & Their Families Act, 1989, § 13(e) (N.Z.).

106. § 40(a).

107. § 74.

108. § 86.

109. § 87.

110. § 101.

111. § 110.

112. § 29.

cultural sensitivity, assumption of responsibility, increased motivation to change, meaningfulness, increased self-confidence, giving parties a voice, reparation, truth, privacy through closed hearings, and effectiveness through a more tailored proceeding and plan.¹¹³

Under the CYPF Act of 1989, the paramountcy principle allows the Family Court to consider many more factors than the criminal court in determining a proper resolution. "In proceedings where the paramount consideration is the welfare of a child, rather than the rights of litigants in a criminal or civil context, it is both important and proper that all evidence which may be of assistance should be available, it being left to the Court to assess that evidence in conjunction with all of the other evidence in the case."¹¹⁴ In the best interests of the child, the Family Court Judge can look to the overall family environment, including past incidents of abuse, when determining where the child should live.¹¹⁵

Another important distinction between civil and criminal evidentiary requirements is that children may be less likely to be required to testify in Family Court proceedings than as victim witnesses in a criminal trial.¹¹⁶ For the purpose of care and protection hearings, a Family Court has the power to receive any evidence which the Court thinks fit, whether otherwise admissible or not.¹¹⁷ Therefore, despite a tape's non-compliance with the Evidence (Videotaping of Child Complainants) Regulations of 1990 excluding its use in a criminal trial, it could be admitted in a care and protection proceeding.¹¹⁸

As in most civil cases, the burden of proof in Family Court in determining whether a child is in need of care and protection is based on the lower burden of the balance of probabilities rather than the higher criminal burden of beyond a reasonable doubt.¹¹⁹ Nevertheless, the Family Court has asserted that it is "necessary that the allegation of

113. See Ian Hassall, *Origin and Development of Family Group Conferences*, in *FAMILY GROUP CONFERENCES: PERSPECTIVES ON POLICY AND PRACTICE* 17, 31-32 (Joe Hudson et al., eds., The Federation Press, Annandale (NSW), 1996).

114. P v. B [1994] N.Z.F.L.R. 381.

115. See I, T, M and J [2000] N.Z.F.L.R. 1089; NZFLR LEXIS 53, 35, ¶ para 62 (mother testified father's physical punishment of their children was a "regular event").

116. According to David Howden, a Wellington family lawyer for over fifteen years, young children are rarely if ever called into Family Court to give evidence. Interview with David Howden (Wellington, March 2, 2001). See also Australian Law Reform Comm'n, *SEEN AND HEARD: PRIORITY FOR CHILDREN IN THE LEGAL PROCESS: ALRC 84*, 302-303 (Australian Government Publishing Serv., 1986).

117. Children, Young Persons, & Their Families Act, 1989, § 195 (N.Z.).

118. See P v. B [1994] N.Z.F.L.R. 381.

119. Re H [1996] 2 W.L.R. 8 (civil balance of probabilities applied in care and protection proceedings); Domestic Violence Act, 1995, § 85 (N.Z.) (balance of probabilities standard of proof in protection order proceedings). But see Michael Freeman, *The Convention: An English Perspective in CHILDREN'S RIGHTS: A COMPARATIVE PERSPECTIVE* 93, 99 (Michael Freeman ed., Dartmouth Publishing, 1996) (citing Re M [1994] 1 F.L.R. 59; and Re P [1994] 2 F.L.R. 751

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physical abuse is proved to a standard at the top end of the scale of the balance of probabilities."¹²⁰ However, even if the party responsible for the abuse is not determined, the Family Court may find the child in need of care and protection.¹²¹ Again, this displays the paramountcy principle that the child's best interests are of most concern.

Thus, the civil care and protection system offers a number of advantages over the criminal justice system on behalf of physical child abuse victims, including a possibly greater belief that physical injury to children should not be justified under section 59 of the Crimes Act of 1961. Also, unlike the other civil proceedings, which are matters of private litigation, the civil care and protection approach allows the State to intervene on behalf of any child at risk of parental physical abuse.

C. Lack of Resources

Despite all of the ideal benefits of care and protection proceedings and their focus on the best interests of the child, such benefits cannot be fully realized unless sufficient resources exist. Unfortunately, as is the case in much of the world,¹²² the child welfare agencies of New Zealand have indicated for some time that resources are seriously lacking.¹²³

The Child Welfare Act of 1925 led to the 1950s professionalization of social workers along with an explosion of caseloads between 1948 and 1972.¹²⁴ In 1988, Mary Todd of New Zealand's Department of Social Welfare noted that reports of abuse were increasing at a rate that put great pressure on individual social workers and training re-

(holding that the civil standard of proof was increased where child abuse was at issue in order to protect parents' rights).

120. I, T, M and J [2000] NZFLR 1089; NZFLR LEXIS 53, ¶ 55, 32.

121. Children, Young Persons, & Their Families Act, 1989, § 71(b) (N.Z.).

122. For example, in England social service departments have made repeated pleas for increased resources due to case overloads. Michael Freeman, *The Convention: An English Perspective* in CHILDREN'S RIGHTS: A COMPARATIVE PERSPECTIVE 93, 99 (Michael Freeman ed., Dartmouth Publishing, 1996). See also Christian Wolmar, *The horrific death of eight-year-old Anna Climbie provides yet more evidence of the critical state of Britain's social services*, THE INDEPENDENT ON SUNDAY (UK), January 14, 2001, at 14. For discussion of similar resource problems in the United States of America see Desmond K. Runyan, *The Emotional Impact of Societal Intervention into Child Abuse*, in CHILD VICTIMS, CHILD WITNESSES: UNDERSTANDING AND IMPROVING TESTIMONY 263 (Gail S. Goodman & Bette L. Bottoms eds., The Guildford Press, 1993).

123. For a recent, thorough review of the New Zealand agency Child, Youth and Family, including the lack of resources see Michael J. Brown, CARE AND PROTECTION IS ABOUT ADULT BEHAVIOUR: THE MINISTERIAL REVIEW OF THE DEPARTMENT OF CHILD, YOUTH AND FAMILY SERV. (Report to the Hon. Steve Maharey, Dec. 2000) available at <http://www.mosp.govt.nz/publications/docs/mickbrownreview.pdf>.

124. BRONWYN DALLEY, FAMILY MATTERS: CHILD WELFARE IN TWENTIETH-CENTURY NEW ZEALAND 163, 172 (Auckland University Press, 1998).

sources.¹²⁵ Between 1996 and 1999, care and protection notifications increased by 12%, while youth justice referrals remained steady.¹²⁶ In March 2001, approximately 4000 reports of New Zealand children at risk of abuse and neglect had not been investigated by CYF.¹²⁷ Alarmingly, the notifications have not only increased in volume, but also in “the level of complex and multiple needs presented by these clients, and hence in the cost associated with providing services.”¹²⁸ At a child rights conference in 2000, Government Minister Steve Maharey stated that “Child, Youth and Family over the last ten years has been run into the ground.”¹²⁹

In the 1980s, the Department of Social Welfare lacked resources in the provision of specialist services, such as psychological services,¹³⁰ as well as funding for foster care training.¹³¹ A 1990s analysis of services provided under the CYPF Act of 1989 indicates that funding limitations continue to hinder the adequate provision of services.¹³² CYF’s costs were 17% over their Purchase Agreement level in 1999.¹³³ In the year 2000, CYF reported a shortage of at least 2000 foster parents.¹³⁴

With regard to family group conferences, the Human Rights Commission in 1992 stated its greatest concern regarding the CYPF Act of 1989 was a lack of resources to implement the Act’s measures, including family group conferences and the monitoring and follow-up required.¹³⁵ Delays in the family group process and funding for the

125. 2 CHILD ABUSE PREVENTION IN NEW ZEALAND REVISITED 17 (Max Abbot & Dell Braun eds., Mental Health Found. of N.Z., Dec. 1988).

126. DEPARTMENT OF CHILD, YOUTH & FAMILY SERV. (N.Z.), THE OVERVIEW: POST-ELECTION BRIEFING 1999, 15 (1999).

127. Leah Haines, *CYFS defending 16 personal grievance cases*, THE DOMINION, March 24, 2001, at 2 (citing Jackie Brown, Chief Executive of Child, Youth & Family (N.Z.)). See also MICHAEL J. BROWN, CARE AND PROTECTION IS ABOUT ADULT BEHAVIOUR: THE MINISTERIAL REVIEW OF THE DEPARTMENT OF CHILD, YOUTH AND FAMILY SERV. 68 (Report to the Hon. Steve Maharey, December 2000).

128. DEPT. OF CHILD, YOUTH & FAMILY SERV. (N.Z.), THE OVERVIEW: POST-ELECTION BRIEFING 1999, 20 (1999).

129. Hon. Steve Maharey, Minister for Social Serv. (N.Z.), Address at the “Children’s Needs, Rights and Welfare: Developing Strategies for the ‘Whole Child’ in the 21st Century” conference, University of Waikato (Nov. 30, 2000).

130. 2 CHILD ABUSE PREVENTION IN NEW ZEALAND REVISITED 17 (Max Abbot & Dell Braun eds., Mental Health Found. of N.Z., Dec. 1988).

131. See *id.* at 18.

132. Ian Shirley et al., *New Zealand*, in 1 FAMILY CHANGE AND FAMILY POLICIES IN GREAT BRITAIN, CANADA, NEW ZEALAND AND THE UNITED STATES 207, 285 (Sheila B. Kamerman & Alfred J. Kahn eds., Clarendon Press, Oxford, 1997).

133. THE OVERVIEW: POST-ELECTION BRIEFING 1999, 15 (Department of Child, Youth and Family Serv. (N.Z.), 1999).

134. Mary Longmore, *Shortage desperate, says foster parent group head*, THE EVENING POST, Oct. 6 2000, at 2.

135. David Swain, *Family Group Conferences in Child Care and Protection and in Youth Justice in Aotearoa/New Zealand*, 9 INT’L J. L. & FAM. 155, 173 (1995). See Alison Morris et al.,

bureaucracy needed to organize them have led to lesser forms of “family meetings” being upgraded to the status of family group conferences.¹³⁶ In 1999, CYF confirmed that its resources were insufficient to implement the plans developed in family group conferences.¹³⁷

High turnover of social workers is an unfortunate result of some of these problems. CYF faces difficulties in both recruiting and retaining skilled staff.¹³⁸ In 1996, New Zealand’s social workers from the Children, Young Persons and Their Families Services had a 13.5% national turnover of social workers, including a 22% turnover in Auckland.¹³⁹ Nationally, these figures rose to 15.4% in January 2001.¹⁴⁰

Some schools have noted that CYF responds less and less to general neglect cases, focusing primarily on sexual and physical abuse cases.¹⁴¹ However, most physical abuse cases involve less severe injuries such as bruising,¹⁴² and one Auckland judge has recognized that CYF is unable to attend to them: “[A]ny referral under . . . [the Children, Young Persons and Their Families] Act would be completely inappropriate, if only because of the lack of resources available to the Children, Young Persons and Their Families Funding Agency to deal with a case of this sort.”¹⁴³

Regardless of its persistent need for funding, CYF is continually called upon to become even more involved while using existing resources. More preventative efforts are sought to alleviate the current pattern where social workers are only able to provide an “ambulance service” for abused and neglected children. The 1954 Special Committee recommendations to the New Zealand Parliament for legal reform relating to children included a proposed amendment to the Child

Concluding Thoughts, in FAMILY GROUP CONFERENCES: PERSPECTIVES ON POLICY AND PRACTICE 221, 231 (Joe Hudson et al. eds., The Federation Press, Annandale (NSW), 1996); GABRIELLE MAXWELL ET AL., FOCUS ON CHILDREN: REPORTS ON CONSULTATION, PHASE 1 AND PHASE 2 OF THE SOUTH CANTERBURY PROJECT 13 (Office of the Commissioner for Children (N.Z.), October 1996).

136. Swain, at 175. See Jeremy Robertson, *Research on Family Group Conferences in Child Welfare in New Zealand*, in FAMILY GROUP CONFERENCES: PERSPECTIVES ON POLICY AND PRACTICE 57, 58 (Joe Hudson et al. eds., The Federation Press, 1996).

137. DEPT. OF CHILD, YOUTH & FAMILY SERV. (N.Z.), STRATEGIC ISSUES: POST-ELECTION BRIEFING 1999, 8 (1999).

138. *Id.* at 25.

139. *Id.*

140. Leah Haines, *CYFS defending 16 personal grievance cases*, THE DOMINION, 24 March 2001, at 2 (citing Jackie Brown, Chief Executive of Child, Youth & Family).

141. GABRIELLE MAXWELL ET AL., OFFICE OF THE COMMISSIONER FOR CHILDREN (N.Z.), FOCUS ON CHILDREN: REPORTS ON CONSULTATION, PHASE 1 AND PHASE 2 OF THE SOUTH CANTERBURY PROJECT 7 (1996).

142. See app., “Year 2000 Physical Child Abuse Reports from the Porirua Police Department in New Zealand.”

143. T v. T [1999] F.C. Auckland FP 004/919/90, 14.

Welfare Act of 1925 for more preventative work.¹⁴⁴ In 1999, Jackie Brown, Chief Executive of Child, Youth and Family Services, stated that the department's focus on child protection would be on "earlier interventions . . . before a crisis point is reached."¹⁴⁵ While the ideal of prevention is worthy, considering the current lack of resources to cope with children who are already victims, particularly children who are injured by their parents' corporal punishment, one must question where the additional funds will come from.¹⁴⁶

While some speculate about the economic and political changes which may have caused this lack of resources,¹⁴⁷ and some may wonder whether the inadequacy of funding will continue, the underlying point is that the deficit does exist and has existed for decades. If CYF is not given the financial support to fully apply the CYPF Act of 1989, then only the most severe physical abuse cases are likely to result in civil legal actions. Most cases of physical abuse, where children receive bruises and welts from "less severe" physical discipline, are not likely to receive many social services even if the cases are reported. If few services and little monitoring are provided in this most common form of physical child abuse, and criminal accountability is not often demanded, then many New Zealand children injured by their parents' discipline are left without protection in either civil or criminal forums. That the civil care and protection system needs assistance while the criminal courts are increasingly sensitive to family violence issues begs the question: Why have police and social workers hesitated to consider the criminal courts a proper forum for cases of family violence against children?

V. REFORM AND REPEAL OF THE PARENTAL DISCIPLINE DEFENSE

The breadth and flexibility of the legal reasonableness standard creates a potential for longevity clearly borne out by the centuries old common law parental discipline defense to the use of force by a parent against a child. Today, however, the parental right to physically punish a child is in question throughout the world. While some judges and juries may currently hold that children deserve their bruises and welts from slaps, punches, jug cords, and belts, fewer and fewer gov-

144. N.Z. PARLIAMENTARY SPECIAL COMM., REPORT ON MORAL DELINQUENCY IN CHILDREN AND ADOLESCENTS, at 58 (RE Owen, Government Printer, 1954).

145. DEPT. OF CHILD, YOUTH & FAMILY SERV., THE OVERVIEW: POST-ELECTION BRIEFING 1999, foreword (1999).

146. Note that in June 2001, NZ\$216 million of government funds was set aside as a "rescue package" for Child, Youth and Family. Leah Haines, *\$216m rescue plan starts for Child, Youth and Family*, THE DOMINION, June 14, 2001, at 7.

147. See Ian Shirley et al., *New Zealand*, in 1 FAMILY CHANGE AND FAMILY POLICIES IN GREAT BRITAIN, CANADA, NEW ZEALAND AND THE UNITED STATES 207, 284 (Sheila B. Kamerman & Alfred J. Kahn eds., Clarendon Press, 1997).

ernments comfortably embrace the state-endorsed adage: "Spare the rod and spoil the child."

In consideration of the inconsistent application of, and human rights concerns with, the parental discipline defense, increasingly, courts and legislatures around the world are either restricting or abolishing it. Very little research is available regarding the nations that have "abolished" or are in the process of abolishing the right of parents to corporally punish children.¹⁴⁸ In addition, most discussions of these nations fail to explain what the legal impact is regarding enforcement, such as what sanctions apply and how the ban interacts with civil and criminal law.¹⁴⁹

Following a different approach, a number of British Commonwealth nations, including New Zealand, and several American states have restricted or are now considering restricting the parental discipline defense. Yet, none has repealed the defense altogether. Statutory restrictions define what is reasonable and what is not reasonable force,¹⁵⁰ such as prohibiting certain types of injuries, the use of implements, striking vulnerable areas of the body such as the head, or striking very young children.

For example, in January 2004 the Canada Supreme Court recently narrowed the defense by prohibiting corporal punishment to children under the age of two and over twelve, the use of implements, and the application of disciplinary force to the head or face.¹⁵¹ In New Zealand, Bob Simcock of the the National Party has introduced a Member's Bill to amend section 59 by excluding a parent's right to use force that would cause "internal or external bruising, swelling, cuts, burns or more serious injuries."¹⁵² However, the widest variety of re-

148. One exception is research on legal reform in Sweden, led by Joan Durrant. See Joan Durrant, *Legal Reform and Attitudes toward Physical Punishment in Sweden*, 2003 THE INT'L J. OF CHILDREN'S RIGHTS 147.

149. Susan Bitensky has provided the best research on the legal structure and effect of the "bans" on parental corporal punishment internationally. However, she focuses more on the symbolic human rights message rather than the impact on victims and perpetrators which limits her discussion on implementation of reform. See Susan H. Bitensky, *The Role of Law in Abolishing Corporal Punishment of Children* (1998) (submitted to the Ending Physical Punishment of Children in Europe conference); Susan H. Bitensky, *Spare the Rod, Embrace Our Humanity; Toward a New Legal Regime Prohibiting Corporal Punishment of Children*, 31 U. MICH. J. L. REFORM 353 (1998); Susan H. Bitensky, *Spare the Rod, Embrace Human Rights: International Law's Mandate against all Corporal Punishment of Children*, 21 WHITTIER L. REV. 147 (1999).

150. For a general summary of the arguments advocating a restricting approach see Kandice K. Johnson, *Crime or Punishment: The Parental Corporal Punishment Defense – Reasonable and Necessary, or Excused Abuse?* U. ILL. L. REV. 413 (1998); and Scott A. Davidson, *Note, When is Parental Discipline Child Abuse? The Vagueness of Child Abuse Laws* 34 U. LOUISVILLE J. FAM. LAW 403 (1995-96).

151. Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General) (2004). For the text of the decision, see www.lexum.umontreal.ca/csc-ccc/fr/pub/2004/vol11/index.html.

152. E-mail from Bob Simcock, M.P. to the author (October 16, 2001).

strictions may be found in the United States of America.¹⁵³ The impact of reform of the defense will have vast practical repercussions on civil approaches to physical child abuse, including the basic determination of what constitutes child abuse or domestic violence against a child. In addition, reform may aid governments in better aligning criminal and civil family violence policies.

A. *Types of Restrictions*

The Model Penal Code produced by the American Law Institute currently recommends a form of the defense restricted by risk of severe injury. Force by parents against minors in their care is justified if:

“(a) the force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his misconduct; and (b) the force used is not designed to cause or known to create a substantial risk of causing death, serious bodily harm, disfigurement, extreme pain or mental distress or gross degradation;”¹⁵⁴

Note that “reasonableness” is not an element in the Model Code. The reasonable purpose and the unreasonable risks have been set out instead.

In the American jurisdictions which have adopted the Code, the prohibition against serious bodily harm has had limited effect. Military court applications of the Model Penal Code approach have indicated that it “allow[s] parental conduct that causes bruising on a child’s buttocks and legs when the parent had a proper parental purpose and the bruises were unintended.”¹⁵⁵ Similarly, a Hawaiian application of the Model Penal Code found that the presence of three inch wide and five inch long bruises and welts caused by a leather belt, lasting about a week on a child’s legs, did not come “anywhere near” the risks of injury set out in (b) above nor as a matter of law did it indicate serious pain.¹⁵⁶ Nigeria’s statutory prohibition against severe injury within the parental discipline defense has also come into criticism because it continues to allow the defense in very serious cases.¹⁵⁷

153. For the most comprehensive overview of the parental discipline defenses in the United States, see Kandice K. Johnson, *Crime or Punishment: The Parental Corporal Punishment Defense – Reasonable and Necessary, or Excused Abuse?* U. ILL. L. REV. 413 (1998).

154. MODEL PENAL CODE § 3.08(1) (1999).

155. Major Barham, *Sparing the Rod: The Parental Discipline Defense in the Military*, ARMY LAWYER, Aug. 1993 at 40, 42. The article cites *U.S. v. Scofield*, 33 M.J. 857 (ACMR 1991).

156. *State v. Deleon*, 813 P.2d 1382, 1384 (Haw. 1991).

157. Criminal Code Act (1916) (Nig.) authorizes parents, teachers, and those *in loco parentis* to inflict a “blow or other force” to correct children under age 16. Nigeria’s Penal Code, section 55, states: “[a] blow or other force, not in any case extending to a wound or grievous harm, may be justified for the purpose of correcting a child by his parents” See Emeka Chianu, *Two deaths, one blind eye, one imprisonment: Child Abuse in the Guise of Corporal Punishment in*

Other restrictions have attempted to protect against a wider range of harm against children. For example, in the State of Washington, the parental discipline defense is presumed unreasonable if it involves:

[T]hrowing, kicking, burning, cutting, striking with a closed fist, shaking a child under 3, interfering with breathing, threatening with a deadly weapon, [or] any other act likely to cause and which does cause bodily harm greater than transient pain or minor temporary marks.¹⁵⁸

One of the challenges in restricting the defense by injury is that a certain degree of force must be allowed. An attempt at accommodating this, particularly when mild bruising or pain is to be protected, is a provision allowing for transient or temporary minor injuries, as seen in the Washington example above. In 2001, in New South Wales, the Crimes Amendment (Child Protection Physical Mistreatment) Act limited the common law reasonable discipline defense to the application of force, "unless that force could reasonably be considered trivial or negligible in all the circumstances," which excludes force "likely to cause harm to the child that lasts for more than a short period."¹⁵⁹ This creates concerns of vagueness and inconsistent interpretation. While the stated purpose of the Bill was to prevent excessive punishment, critics claim its ambiguity renders it an anti-smacking bill.¹⁶⁰ Regarding defining a "short period of time," Reverend the Honourable FJ Nile argued:

What does that mean? The original bill made reference to children experiencing a tingling feeling, or something like that. Someone will have to determine whether a short period is five seconds, 30 seconds or one minute. If a child experiences harm for more than five seconds his or her parents could be in trouble with the law.¹⁶¹

Non-"transient" injury could very easily be the sharp pain inflicted by a smack.

Given the complications of defining unreasonable force by statute, particularly injury, it would be tempting to simply limit the defense to common assault, and amend the parental discipline defense such that it no longer applies to criminal charges or civil liability with elements which involve the risk or infliction of injury. However, a number of

Nigerian Schools, 24(7) CHILD ABUSE & NEGLECT 1005, 1006 (2000); and Eunice Uzodike, *Child Abuse and Neglect in Nigeria - Socio-legal Aspects*, 4(1) INT'L J. L. & FAM. 83, 86-87 (1990).

158. WASH. REV. CODE ANN., § 9A.16.100 (2005). See also ARK. CODE ANN § 9-27-303(3)(A)(vi) (2005); DEL. CODE ANN. tit. 11 § 468 (2004).

159. The Crimes Amendment (Child Protection Physical Mistreatment) Act, § 61AA(2) (2001) (NSW).

160. (NSW) Crimes Amendment (Child Protection-Physical Mistreatment) Bill 2001 (the select committee reports, Second Reading) 5911, The Hon MI Jones [3.59pm].

161. (NSW) Crimes Amendment (Child Protection-Physical Mistreatment) Bill 2001 (the select committee reports, Second Reading) 5911, Rev the Hon FJ Nile [4.06pm].

cases involving injuries are currently being charged as or pled down to common assault, so this approach would have limited effect.

Another approach to allow some force but not all is to specify what methods of corporal punishment are permissible. Oklahoma recently passed legislation which added to its parental discipline defense that it is reasonable for corporal punishment to involve "the use of ordinary force, including but not limited to, spanking, switching or paddling."¹⁶²

In another approach restricting the parental discipline defense, the English government has proposed outlining by statute the factors to consider when determining reasonable force, including: "the nature and context of the treatment; its duration; its physical and mental effects; and, in some instances, the sex, age and state of health of the victim."¹⁶³ In Australia, New South Wales is reviewing a Bill that would require consideration of the "age, health, maturity or other characteristics of the child, the nature of the alleged misbehaviour or other circumstances."¹⁶⁴

England is also considering provisions which state that certain forms of punishment are *per se* unreasonable, such as the use of implements and blows to the head.¹⁶⁵ Note that in 1992, the Scottish Law Commission Report on Family Law recommended legislation prohibiting the use of implements in physical discipline and acts causing or risking injury or pain "lasting more than a very short time"; however, this approach was rejected by the Scottish Government.¹⁶⁶ Scotland has now taken a position very similar to England's, except it adds provisions against the shaking of children.¹⁶⁷ Nigeria prohibits the use of disciplinary force on children too young to understand the purpose for which the punishment is inflicted.¹⁶⁸

162. OKLA. STAT. tit. 10 § 7106(A)(3) (2005) (regarding DHS investigations of child abuse).

163. DEPT. OF HEALTH (ENG.), PROTECTING CHILDREN, SUPPORTING PARENTS: A CONSULTATION DOCUMENT ON THE PHYSICAL PUNISHMENT OF CHILDREN 13, ¶ 5.3 (2000).

164. (NSW) Crimes Amendment (Child Protection-Physical Mistreatment) Bill 2001, Sched 1[1], cl 1(b).

165. DEPT. OF HEALTH (ENG.), PROTECTING CHILDREN, SUPPORTING PARENTS: A CONSULTATION DOCUMENT ON THE PHYSICAL PUNISHMENT OF CHILDREN 14, ¶ 5.7 (2000). Note that the New South Wales Legislative Council has rejected a proposal to ban the use of implements in the parental discipline defense, but has approved prohibiting blows to the head and neck. Crimes Amendment (Child Protection-Physical Mistreatment) Bill 2001, Sched 1[1].

166. THE SCOT. EXECUTIVE JUSTICE DEPT. THE PHYSICAL PUNISHMENT OF CHILDREN IN SCOTLAND: A CONSULTATION ¶ 1.5 (2000).

167. *Id.* at ¶ 5.9. Criminal Justice (Scotland) Act, § 51 (2003).

168. Eunice Uzodike, *Child Abuse and Neglect in Nigeria - Socio-legal Aspects*, 4(1) INT'L J. L. & FAM. 83, 86-87 (1990). See also the proposal to prohibit corporal punishment on children under age five in Judge Leonard P. Edwards, *Corporal Punishment and the Legal System*, 36 SANTA CLARA L. REV. 983, 1020-1021 (1996).

Another method of restricting the defense would be to legally define what is meant by corporal punishment. Providing a definition could provide clarification to both professionals who enforce the law and the public who must abide by it. An example of a statutory definition of corporal punishment is that which relates to England's prohibition on corporal punishment within residential care facilities:

[A]ny intentional application of force as punishment including slapping, throwing missiles and rough handling. It would also include punching or pushing in the heat of the moment in response to violence from young people. It does not prevent a person taking necessary physical action, where any other course of action would be likely to fail, to avert an immediate danger of personal injury to the child or another person, or to avoid immediate danger to property.¹⁶⁹

Although it is superfluous to exclude actions that are already excluded by defenses such as self-defense, defense of property, and necessity, providing such a definition may serve as a reminder that such defenses would still apply to parents.

A wide variety of statutory restrictions on the parental discipline defense is possible. Whether they are effective in eliminating the problems of the defense, or simply compound them is a matter of concern.

B. *The Rationale for Restricting rather than Repealing the Defense*

The proposals to restrict the parental discipline defense have primarily been motivated by a desire to prevent the defense from protecting physically injurious actions against children. In the best article advocating a restricting approach, Kandice Johnson asserts that "the greatest problem emanating from the parental privilege to use disciplinary force is that in an attempt to accommodate traditional disciplinary practices, current standards hedge on the issue of whether parents can physically injure their child."¹⁷⁰ Another purpose of restricting the defense is to grant greater protections to parents for minor assaults by implying that non-injurious corporal punishment is protected because injurious corporal punishment is not. This grants greater protection to parents than a vague "reasonable" standard, which could be interpreted as either pro or anti-parental rights.¹⁷¹

However, the restricting approach to reform of the parental discipline defense may also simply be a compromise to appease both parental rights and child rights advocates. The English Government's

169. 1 CLARKE HALL & MORRISON ON CHILDREN ¶ 1809 (Butterworths, updated Sept. 2000).

170. Kandice K. Johnson, *Crime or Punishment: The Parental Corporal Punishment Defense – Reasonable and Necessary, or Excused Abuse?*, 1998 U. ILL. L. REV. 413, 418.

171. See *id.* at 475.

current position rejects consideration of a ban on all forms of physical punishment of children, in part because public opinion surveys do not support such a position.¹⁷² Similarly, the Scottish Executive's position is that "mild physical rebukes" of children are normal and acceptable in families, thus a ban on all forms of smacking would be inappropriate.¹⁷³ Moreover, according to the English Government, a ban "would be intrusive and incompatible with our aim of helping and encouraging parents in their role"¹⁷⁴ – that is, it would be too heavy handed. In addition, the Government expressed concern that there would be no guarantee that charges would not be brought in minor cases,¹⁷⁵ but failed to mention existing internal police charging policies, which filter out non-injury cases when charging assault in general.

Concern for public sentiment regarding reform options is also apparent in New Zealand. Minister Steve Maharey has stated with regard to any reform of section 59, "[B]efore we change the law, we really need . . . to lay the scene for changes in the way that other countries have done. . . . Law very seldom works if it runs ahead of the way people think."¹⁷⁶

C. *Concerns with the Restriction Approach*

Several concerns exist regarding the option of restricting rather than repealing the parental discipline defense. If the restrictions are not specific enough, then the previous breadth of the defense is maintained. One could argue setting out general factors like consideration of the "physical and mental effects" as recommended by the English proposal is one example of this. In a criticism of the 1992 Scottish Law Commission proposals for restricting the parental discipline defense, the Irish Law Reform Commission argued: "It is unclear, however, whether the Scottish proposal fully overcomes the problem of subjectivity — an 'ordinary safe smack' or 'pain lasting more than a very short time' are both subjective concepts."¹⁷⁷ Thus, the Irish Law Reform Commission in 1993, although agreeing the parental discipline

172. DEPT. OF HEALTH (ENG.), PROTECTING CHILDREN, SUPPORTING PARENTS: A CONSULTATION DOCUMENT ON THE PHYSICAL PUNISHMENT OF CHILDREN ¶ 2.14 (Jan. 2000).

173. THE SCOT. EXECUTIVE JUSTICE DEPT., THE PHYSICAL PUNISHMENT OF CHILDREN IN SCOTLAND: A CONSULTATION ¶ 1.8 (2000).

174. DEPT. OF HEALTH (ENG.), PROTECTING CHILDREN, SUPPORTING PARENTS: A CONSULTATION DOCUMENT ON THE PHYSICAL PUNISHMENT OF CHILDREN ¶ 2.14 (2000).

175. *Id.*

176. Hon. Steve Maharey, Minister for Social Services (N.Z.), Address at the "Children's Needs, Rights and Welfare: Developing Strategies for the 'Whole Child' in the 21st Century" Conference, University of Waikato (Nov. 30, 2000).

177. IR. LAW REFORM COMM'N, NON-FATAL OFFENCES AGAINST THE PERSON, 126 (1993).

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defense was outdated, decided to abandon reform because the restricting approach was unworkable.¹⁷⁸

Even when bruising is prohibited, a recent care and protection case in Massachusetts highlighted the problem of defining bruising. Striking a child with a leather belt was not abusive and did not cause a substantial risk of harm, according to the Supreme Judicial Court of Massachusetts, when the result was pink marks on the child's buttocks which faded within ten minutes.¹⁷⁹ The risk of physical injury in this case was that the statutory definition includes "soft tissue swelling or skin bruising."¹⁸⁰ Had the definition included pain, then the court may have upheld the care and protection determination that abuse had taken place.

Prohibiting grievous injury within the parental discipline defense as in the American Model Penal Code makes little practical difference in most cases if the vast majority of cases involve less severe injuries such as bruises and welts. Moreover, it makes little recognition of the humanitarian gains of Western society, where in the early 1800s in the United States of America, a slave-master could raise the reasonable discipline defense, limited only in that: "the master has not the right to slay his slave, or inflict upon him what the law calls great bodily harm, to wit, maiming or dismembering him, or such punishment as puts his life in great and useless peril."¹⁸¹

In contrast, if the restrictions are too specific, it could make parents self-conscious and confused about what they can and cannot do. As stated by the spokesperson for the National Society for the Prevention of Cruelty to Children (NSPCC) in England: "Playing around with legal definitions of how and in what circumstances children can be hit is a recipe for confusion and fear for parents and keeps children at risk."¹⁸² In Utah, Republican State Senator Glad commented when voting against a bill to restrict the parental discipline defense by prohibiting and defining injury:

I really struggled with this bill . . . I felt like if I had a child I would have to put these new parameters on the wall above their bed and then I'd have to try and figure out what they mean. I felt like we had created an almost impossible task.¹⁸³

178. *Id.* at 289, ¶ 9.214.

179. Donald R. Cobble, Jr. v. Commissioner of the Dept. of Social Serv., 719 N.E.2d 500 (Mass. 1999).

180. *Id.* at 505.

181. See *Jacob v. State*, 22 Tenn. 493 (Tenn. 1842) (master repeatedly hitting slave about the head with a stick determined to be reasonable discipline).

182. *Parents Retain Right to Smack*, (BBC News broadcast, January 18, 2000).

183. Jennifer Dobner, DESERET NEWS, February 27, 2001 <<http://nospank.org/n-h40.htm>> Utah HB 387 (amended 22 February 2001) passed in the House, but failed in the Senate.

The Scottish Executive has expressed the concern that listing unacceptable punishments is misleading to the public because it “could be taken to imply that other kinds [of inappropriate punishment] are acceptable.”¹⁸⁴ Indeed, it would be essential in such a defense to include an open-ended clause stating that any other practice, which endangers or could endanger the safety and well-being of the child, is also prohibited. Of course, this revives the concerns with the term reasonable in the parental discipline defense – that is, the vagueness of the defense risks inconsistent application and fails to protect children. This problem almost necessitates the inclusion of what is acceptable as well as what is not, which could result in unsavory statutory language: it is acceptable to strike a child on the legs and arms; it is acceptable to slap a child; it is acceptable to repeatedly strike a child as long as no marks emerge on the child’s body.

If the presence of obvious injuries and marks provides the line when the State can intervene, then children whose injuries are not immediately apparent may be at risk because social workers and police officers would be inhibited or prevented from stepping in without such obvious signs. Severe and potentially fatal injuries are not always visible.¹⁸⁵ Confirmation of the presence of fractures often requires an x-ray.¹⁸⁶ Good intentions motivate proposals to restrict the defense, but this approach is not practicable or effective. Signs of internal injuries may be merely pain or vomiting.¹⁸⁷ Head injuries, which are noted to be the most common cause of death from physical abuse, may only be detected by signs of irritability or drowsiness.¹⁸⁸

As stated by Blackstone over a century ago:

[T]he law cannot draw the line between different degrees of violence, and therefore prohibits the first and lowest stage of it; every man’s person being sacred, and no other having a right to meddle with it, in any the slightest manner.¹⁸⁹

While repeal of the parental discipline defense creates anxiety about the resulting application of the broad assault laws against parents, the assault laws are broad for a reason. The public legal statement within the offense of common assault upholds the right of everyone to be free from the use of force and violence by others. Children need and deserve to be included in its protections. Yet par-

184. THE PHYSICAL PUNISHMENT OF CHILDREN IN SCOTLAND: A CONSULTATION ¶ 5.8 (The Scottish Executive Justice Dept., Feb. 2000).

185. CHILDREN, YOUNG PERSONS & THEIR FAMILIES SERV. (N.Z.), RECOGNITION OF CHILD ABUSE AND NEGLECT: TIROHANGA TUKINO TAMARIK 19 (1997).

186. *Id.* at 43.

187. *Id.* at 44.

188. *Id.*

189. Blackstone’s *Comm.* 3, 120 cited in *Collins v. Wilcock*, 3 All E.R. 374, 378 (1984).

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ents have a right and a duty to raise and discipline their children. How can the law protect parents in their exercise of this right? Even a “time-out” in a certain location may require a degree of force to lead the child to that location.

In both criminal and civil proceedings, several important and well established defenses to assault remain available to parents, including necessity, self-defense, defense of others, and defense of property. Proof of provocation may mitigate sentencing. In addition, the maxim *de minimis non curat lex* prevents a minor non-injury technical assault, such as a push, from creating liability for assault, just as it does in adult victim cases. Guardians and caretakers of adults with cognitive and developmental disabilities who may not be willing or able to cooperate with the directions of their caretakers have long survived with such defenses to assault without the need for a specialized parental discipline defense. Hopefully, most would agree that striking an incoherent and defiant elderly adult with a belt as punishment for not eating or for wetting his or her pants would be inhumane and a criminal assault. An adult who similarly strikes a three-year-old child should be held accountable under the law.

In Texas, defenses to assault exist for both guardians of “incompetents”¹⁹⁰ and parents of children¹⁹¹ when the force is “necessary” to safeguard and promote the welfare of the person cared for. The defense of “necessity” in Texas states that conduct is justified if

(1) [T]he actor reasonably believes the conduct is *immediately necessary to avoid imminent harm*; (2) the desirability and urgency of avoiding the harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing the conduct; and (3) a legislative purpose to exclude the justification claimed for the conduct does not otherwise plainly appear.¹⁹²

As with self-defense and defense of others, the proportionality requirement of the defense of necessity includes an internal safeguard to the use of force, rather than an open-ended “right” to assault another as found in the common law parental discipline defense. Use of the overbroad discipline defense or miscellaneous restricted versions of it against children is now outmoded in an age which does not justify deliberately causing pain or injury to persons for the purposes of discipline, whether it is to an inmate, a prisoner of war, a “servant,” or a spouse.

190. TEX. PENAL CODE § 9.63.

191. TEX. PENAL CODE § 9.61.

192. TEX. PENAL CODE § 9.22 (emphasis added).

VI. CONCLUSION

Although the Family Court in New Zealand struggles with the ambiguity of the parental discipline defense, it has been shown to be willing to find the injury of children an unreasonable use of force under section 59 of the Crimes Act of 1961. CYF investigations and legal proceedings provide what many might see as the ideal approach to parental physical discipline cases. The intent of a care and protection approach is to look to the best interests of children and help families avoid the stresses that might have instigated the excessive discipline in the first place. Unfortunately, the agency's ability to effectuate these goals is severely limited by a lack of resources, particularly in physical abuse cases, which usually tend to involve less severe injuries.

Even despite the lack of resources, reliance on care and protection proceedings and the services of CYF is not ideal in every respect. With a focus on the child victim, the risk to the community is neglected. Criminal law holds the interests of community safety at the fore by making a public declaration that a perpetrator has caused a child harm. No public record of abusive behavior is made if only care and protection proceedings are instigated. In more egregious cases, the Family Court also has no power to protect the public, the victim and other potential child victims through the specific deterrence and isolation of imprisonment.

Focus on the perpetrator's accountability is also neglected in care and protection proceedings. The Commissioner for Children noted that family group conferences in care and protection proceedings tended to emphasize family interests over the child's interests.¹⁹³ While criminal proceedings would not always take sufficient account of the child's needs, they would not fail to consider that the parental defendant should be held accountable. Battered children may grow up wondering in retrospect why their cases were not taken seriously by the criminal justice system.

While criminal approaches show increased concern for rehabilitative measures such as pretrial diversion, civil approaches, such as removal from the home, are becoming recognizably punitive, even if a punitive purpose is unintended by the court.¹⁹⁴ Criminal sanctions

193. COMM'R FOR CHILDREN (N.Z.), *Report to the Minister of Social Welfare on the NZ Children and Young Persons Services Review of Practice in Relation to Craig Manukau and his Family cited in* MARK HENAGHAN, *NEW ZEALAND AND THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A LACK OF BALANCE IN CHILDREN'S RIGHTS: A COMPARATIVE PERSPECTIVE* 165, 181 (Michael Freeman ed., Dartmouth Publishing, 1996).

194. Douglas Besharov, *Child Abuse: Arrest and Prosecution Decision-making*, 24 AM. CRIM. L. REV. 315, 318 (1986).

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can also be less intrusive with regard to family stability.¹⁹⁵ For example, if an offending parent was unwilling to cooperate with Child, Youth, and Family, and termination of parental rights was too severe an option, an intermediary criminal sanction such as a term of probation would be an option.¹⁹⁶

According to Richard Posner, “[t]he conventional legal thinker draws an extremely sharp line between civil law and criminal law This tendency is due in part to failing to take a functional approach”¹⁹⁷ If the essentialist focus on ensuring a doctrinal fit limits the ability of the court system to attend to the needs of child abuse victims, then perhaps the functionalist focus on the social impact of the available remedies is the better focus. Increased enforcement of the criminal laws against assaulting children could alleviate CYF’s lack of resources, while providing more protection for physical child abuse victims and a more egalitarian approach to family violence. Ultimately, the governments of New Zealand, the United States and other English common law nations should repeal the defense and adequately explain the current availability of other more appropriate defenses to assault.

For a better use of resources to combat physical child abuse, greater flexibility in approach, and greater accountability for perpetrators, an increase in joint criminal and civil approaches to physical child abuse is therefore warranted.¹⁹⁸ To achieve this, legal reform of the parental discipline defense is necessary to achieve more consistency within both criminal and civil cases of physical child abuse and to allow the criminal justice system to effectively intervene when children are injured by parental corporal punishment.

With regard to section 59 and parental corporal punishment, the Family Court in New Zealand has stated, “If a change in the law is desired, then it is for Parliament, not the Court, to bring it about.”¹⁹⁹ A similar statement was made by the Superior Court of Justice in On-

195. See Cynthia Price Cohen, *Freedom from Abuse: One of the Human Rights of Children*, 11 U. DAYTON L. REV. 601, 614 (1986).

196. Douglas Besharov, *Child Abuse: Arrest and Prosecution Decision-making*, 24 AM. CRIM. L. REV. 315, 354-355 (1986). In the author’s experience as an Assistant District Attorney in South Bend, Indiana, Superior Court judges often required cooperation with child welfare as a term of probation for those convicted of physical child abuse.

197. Richard Posner, *Law and Legal Theory in England and America* 54, (cited in Thomas Koenig & Michael Rustad ‘Crimtorts’ as Corporate Just Desserts, 31 U. MICH. J. L. REFORM 289, 292 (1998)).

198. See generally Victor I. Vieth, *In My Neighbor’s House: A Proposal to Address Child Abuse in Rural America*, 22 HAMLINE L. REV. 143, 157. Note that a dual civil/criminal approach is permitted in New Zealand. See Appellant v. Police [1995] H.C. Hamilton AP 69/94. In this case, no abuse of process was found when criminal charges for willful neglect were filed while the child welfare agency was also acting.

199. Kendall v. Director-General of Social Welfare [1986] 3 F.R.N.Z. 1, 13, 15.

tario, Canada: "It may well be that the time has come for Parliament to give careful consideration to amending section 43 [the parental discipline defense] to provide specific criteria to guide parents, teachers and law enforcement officials. . . . Judges, however, are not legislators, nor should they be."²⁰⁰ Some in the American judiciary concur: "Refinements to the common law reasonableness standard implicate policy issues that are mainly for the legislative branch rather than the courts."²⁰¹

Legislators must then become aware of the injustice and inconsistency of the parental discipline defense, which undermines the increased legal efforts around the world to protect children from the violence of their caretakers, whether it is termed child abuse or domestic violence. Legislative and grassroots movements have made great strides to combat the maltreatment of children in the home. The number of civil and criminal legal measures to protect against physical child abuse has increased substantially in recent years, including the mandatory reporting of child abuse, mandatory arrests and no-drop prosecution in family violence cases, and the expansion of Department of Social Services policies and intervention. Nevertheless, these gains will continue to be undermined as long as parents retain the legal right to physically injure their children in the name of reasonable corporal punishment.

200. *Can. Found. for Children, Youth and the Law v. Canada*, [2000] 49 O.R.3d 662, 698. In January 2004, the Supreme Court of Canada narrowed the definition of the parental discipline defense, but did not abolish it. *Can. Found. for Children, Youth and the Law v. Canada*, [2004] S.C.C. 4. Text of the decision, available at www.lexum.umontreal.ca/csc-scc/fr/pub/2004/vol1/index.html.

201. *Newby v. United States*, 797 A.2d 1233, 1245 (D.C. 2002).

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APPENDIX: YEAR 2000 PHYSICAL CHILD ABUSE REPORTS FROM THE PORIRUA POLICE DEPARTMENT IN NEW ZEALAND²⁰²

CASE	PERPETRATOR	ALLEGED ABUSE	DISPOSITION
1	Step-father	Physical abuse, and spouse abuse	Charged, assault on a child and domestic violence to child's mother
2	Father	Kicked child	Arrested, 2 counts assault on a child, acquitted
3	Father	Pinched, pulled hair	
4	Father and girlfriend	Slapped head and buttocks of 10 and 12 year old	
5	Mother	Smacked and kicked 5 year old	
6	Unknown	Baby harmed during spousal violence	
7	Father	Violence to spouse and 11 year old	
8	Mother	Regular smacking with wooden spoon to 5 year old	
9	Father	Assaulted drunk 16 year old as discipline	Warning
10	Mother	"Hiding" to 14 year old	No charges
11	Parents	2 year old hit on hand with ruler (breaking the ruler) and hit repeatedly with wooden spoon, also hit with chair during spousal violence	Domestic violence charged but not assault on a child
12	Step-father	9 year old throttled and punched about the body	Witnesses too frightened to cooperate
13	Step-father	Ongoing physical abuse to 12 year old	No charges
14	Mother	Slapped 6 year old across the face	Warning
15	Unknown	1 year old's skull fractured	Accidental
16	Step-father	Physical abuse	
17	Father	Hit 6 year old on hand with shoe	No charges
18	Father	Punched child in face	Arrested for assault on a child, remand
19	Mother	Pushed 3 year old down steps	
20	Mother	Punched 15 year old in face, nose bled	
21	Step-father	Assault on 6 year old and spousal abuse	
22	Parents	Hit, kicked and pulled hair of 15 year old	No charges
23	Uncle	Hit defiant 15 year old	Warning
24	Mother	Pushed 15 year old against window, back pain	No charges
25	Aunt	Punched head, pulled hair, and hit 14 year old's body with flat side of knife	
26	Step-father	Ongoing physical abuse	

202. Information was manually gathered by the author on May 28, 2001. All of the statistical files of the Child Abuse Team of the Porirua Police Department in New Zealand were reviewed for the year 2000. The reports of notifications of abuse are arranged randomly. Where no disposition information is given, eventually the report may have been found to either lack probable cause or contain sufficient probable cause for charging.

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CASE	PERPETRATOR	ALLEGED ABUSE	DISPOSITION
27	Step-father	Hit, pulled ears, smashed toys, and put knife to throat of 9 year old, also spousal abuse	Protection Order, Victim recanted
28	Step-father	Hit 9 year old with broom, bruises to buttocks	Charged
29	Father	Minor bruise to leg	No charges
30	Step-father	Throttled 14 year old	
31	Father	Pulled hair, punched face of 14 year old, no marks	No charges
32	Mother	Pinched 7 year old, bruising	Charged assault on a child
33	Father	Hit head and body of 13 year old	
34	Father	Kicked 15 year old in head, bruising	
35	Mother	Threw 13 year old into car, head hit	
36	Unknown	Severe non-accidental burns to 5 year old	
37	Father	Hit child's leg with belt, bruising	
38	Unknown	Infant held by mother pushed during spousal abuse, no injuries	Charged with assault on a child
39	Mother	Three year old's arm broken, legs bruised, possible implement and pinching	
40	Father	Punched 13 year old in head, hit head with chair, minor injury	Charged, assault with a weapon, remand
41	Step-mother	Hit 6 year old, threw into bath, cuts	
42	Mother	Hit 13 year old on back with knife sharpener	
43	Father	Pulled hair, slapped, objects thrown, ongoing abuse to 7 and 10 year old	
44	Aunt	Punched 14 year old, black eye	Charged with assault on a child, Supervision
45	Father	Punched child's head, bruises, swelling	
46	Father	Hit 14 year old	
47	Mother	Hit 9 year old with metal spoon, bruises	
48	Mother	Punched 15 year old in back	Warning
49	Mother	Hit 12 year old, ankle bruised	Warning
50	Father		No charges
51	Father	Hit 16 year old in face	
52	Mother	Lifted 10 year old by hair	
53	Father	Hit 14 year old	Charged, remanded
54	Step-father	Hit 8 year old, also spouse abuse	
55	Caregivers	Historical physical abuse	
56	Mother	Punched 13 year old, hit leg with spatula. Bruising	
57	Mother	Hit 10 year old on back with jug cord, welts and bruises	Charged, remanded
58	Mother	Sore on hand of 2 year old	No charges
59	Father	Pulled 2 and 3 year old by hair, also spouse abuse	

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CASE	PERPETRATOR	ALLEGED ABUSE	DISPOSITION
60	Step-father	Face of 4 year old severely bruised	Charged, 12 months supervision
61	Father	Bruise to ear of 4 year old, handprint on buttocks, also spousal abuse	
62	Caregiver	Hit and twisted ears of 7 and 2 year olds	
63	Mother	Physical abuse to 6 year old	
64	Step-father	Hit 13 year old's face, bruising	
65	Father	Punched 9 year old and dragged him about	Charged with assault on a child
66	Adult brother	Assaulted 11 year old, thrown on floor, minor bruising	Charged with assault on a child
67	Father	Threw telephone at 4 year old, hit in head, welts and cuts	
68	Aunt	Broke bottle over 16 year old's head	
69	Mother	Black eye to 10 year old	
70	Unknown	Skull fracture to 2 year old	Insufficient evidence of intent
71	Father	Punched 13 year old in head	Recant, no charges