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Parental Control and the Child's Right Not to be Hit.

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Abstract

This thesis is an examination of the Crimes (Substituted Section 59) Amendment Act 2007 with respect to children's rights, specifically the right not to be hit. New Zealand's journey towards the abolishment of physical punishment was fraught with public concern and misunderstanding. Consequently, a full repeal of s59 of the Crimes Act 1961 was abandoned in favour of a substitution provision that would do away with physical punishment but allow parents to use some degree of force against their children. However, the failure to completely remove the legitimised use of force against children means that children still do not enjoy the same level of protection from assault as adults under the law. Furthermore, the Parental Control provision has created ambiguities in the law that never existed in the past.

Chapter one outlines competing rights arguments. This chapter is designed to give a theoretical and jurisprudential foundation for the conclusion that children have the same right not to be hit as adults.

Chapter two explores the history of New Zealand's domestic discipline legislation, and the consequences of ratifying the United Nations Convention on the Rights of the Child. This chapter also briefly highlights the reasons behind public resistance to the repeal of s59.

Chapter three is an assessment of the new Parental Control provision. The problems with the provision are highlighted, and its impact on children's rights is explored.

Chapter four contains a case analysis to compare the new Parental Control provision with its predecessor. In this chapter, real and hypothetic cases are put through three tests: The old s59, the new s59, and the complete repeal of s59.

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Introduction.

In 2007, Section 59 of the Crimes Act 1961 was amended to replace the 'domestic discipline' defence with a new defence of 'parental control'.[1] The effect of this amendment was to remove the justification of reasonable force for the purposes of correction,[2] and to fill an existing gap in the law concerning the parental use of force for purposes other than correction.[3]

In its original form, the Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill[4] was a bid for a full repeal of s59. However, severe public resistance to, and political interest in, the Bill meant that amendments were made to its content to ensure that it could be passed into law. Section 59(1)(a)-(d) now sets out the situations where parents or persons in the place of a parent may still use reasonable force. Subsection 4 affirms the police discretion not to prosecute inconsequential cases of force used against a child.

This thesis explores how the amendment to s59 has failed to address the inequality between children and other members of society with respect to physical integrity. Physical integrity is a fundamental human right, and as it stands children still do not enjoy the same level of protection from invasion of this right as adults. Section 59 qualifies children's rights by creating a new defence of reasonable force for parents. Specifically, despite abolishing the

[1] Section 5 Crimes (Substituted Section 59) Amendment Act 2007.
[2] Section 59(1) Crimes Act 1961, prior to amendment.
[3] Section 59(1)(a)-(d) Crimes Act 1961.
[4] 2005, no 271-1

use of reasonable force for the purposes of correction, s59 has failed to recognise an important part of physical integrity: the right not to be hit.

Adults enjoy the right not to be hit. There are certain situations where an adult's right to physical integrity can be justifiably invaded, for example, restraining a person who is about to commit suicide,[5] or patting someone on the back,[6] however *hitting* is not tolerated.[7] Hitting requires intention. It requires the person administering the blow to intend to make physical contact with another person, and perhaps cause them some degree of pain. The definition of assault in the Crimes Act[8] is:

> "the act of intentionally applying or attempting to apply force to the person of another, directly or indirectly, or threatening by any act or gesture to apply such force to the person of another, if the person making the threat has, or causes the other to believe on reasonable grounds that he has, present ability to effect his purpose; and to assault has a corresponding meaning."

The Shorter Oxford English Dictionary defines 'hit' as: "strike (a person or thing) with a blow or missile; deliver (a blow or stroke); strike (a person etc. a blow etc.)".[9] 'Smack' is defined as "strike (a person, part of the body, etc.) with an open hand or something having a flat surface; slap."[10] Smacking or hitting as a form of corporal punishment in our culture might best be described through the Straus and Donnelly definition:

---

[5] Section 41 Crimes Act 1961.

[6] *Collins v Wilcock* [1984] 1 W.L.R. 1173 suggests that the common law might excuse "all physical contact which is generally acceptable in the ordinary conduct of daily life".

[7] The existing police guidelines give police discretion not to prosecute minor cases of assault, where prosecution would not be in the public interest.
Prosecution Guidelines, Crown Law Office, March 1992, para 3.

[8] Section 2 Crimes Act 1961.

[9] Brown (ed) *Shorter Oxford English Dictionary* (5th Edition, Oxford University Press, 2002) Volumes 1 at page 1248.

[10] Ibid, volume 2 at page 2883.

> The use of physical force with the intention of causing a child to experience pain but not injury, for the purpose of correcting or controlling the child's behaviour.
>
> The phrase "pain but not injury" helps to distinguish corporal punishment from physical abuse: our subject is socially acceptable and legal corporal punishment. The phrase "with the intention of causing a child to experience pain" distinguishes corporal punishment from acts that have other purposes but may also cause pain, such as putting antiseptic on a cut. It also makes explicit the fact that causing pain is intentional, not incidental. This point may seem obvious, but is salutary to emphasise, since our culture leads people to focus on why the child was hit, rather than the fact that hitting hurts.[11]

'Hitting', 'smacking', 'spanking' or even 'punching', and 'kicking' are not specifically referred to in the definition of assault, nor is the intention behind the use of the force. Technically, any intended application (or threat of application) of force on another can amount to assault. In chapter four I will demonstrate that the reasons *why* a child is hit are relevant under our current law, and how this has resulted in a failure to ban smacking.

The parental control provision reads intention into the justifiable and prohibited uses of force against children. It specifically prohibits the use of force *for the purposes of correction*, and this is what the 'smacking' debate was largely focused on. Parents can no longer *smack* a child as a disciplinary technique, however, the wording of the Act means that they cannot apply any other form of force either, when their intention is to correct the child.[12]

Before s59 was amended, uses of force *other* than for the purposes of correction technically amounted to assault. Prior to 2007, parents had a defence for smacking[13] if the smack was

[11] Straus, M. A. & Donnelly, M., "Theoretical Approaches to Corporal Punishment" in Straus, M. A. & Donnelly, M. (Eds.) *Corporal Punishment of Children in Theoretical Perspective*, Yale University Press, London, 2005, page 3.
[12] For example, picking a child up and putting them in time out.
[13] Where the force used was considered to be reasonable in the circumstances.

administered for the purpose of correction, but they had no statutory protection from prosecution for other uses of force that technically amounted to assault.[14] The Justice and Electoral Committee drafted subsection 1(a)-(d) to fill this gap in the law in an attempt to calm a nervous public, despite the fact it had never caused any ridiculous outcomes.[15]

The amendments to the bid for a full repeal of s59 answered a completely different issue to the one that was concerning the New Zealand public. The public were (and still are) concerned with the parental right to *smack* or hit their children as a form of discipline. The amendments to the bill were designed to address these concerns, but instead made provision for an entirely different set of circumstances, where the use of force is *not* for the purposes of correction.

What is widely misunderstood, however, is that this law is not 'anti-smacking'. The Parental Control provision continues to grant parents the use of reasonable force against their children, and even though it sets out the situations in which reasonable force may be used, it does not prohibit smacking. Reasonable force is left undefined, therefore *any* use of force could potentially be used against a child, whether it be hitting or restraint, so long as it comes within the parameters on subsection (1)(a)-(d). Furthermore, subsection (1)(a)-(d) is drafted in such an imprecise manner (presumably to cover the maximum number of potential situations where legitimate force can be used) that loopholes are created for the use of force

[14] For example, restraining a child to put a seatbelt on, or snatching a child's hand away from a hot element.
[15] Just because a statute is silent on an area of law, does not mean there is no protection from ridiculous prosecutions. In chapter 3 I will discuss the common law alternatives to the parental control provision, and in chapter 4 I will demonstrate how the law would be more effective, and better promote children's rights if s59 had simply been repealed.

for the purposes of correction. Prosecution for smacking rests on the ability of the prosecutor to prove the intention behind the smack. Was it to discipline the child, or was it to prevent the child from engaging in offensive or disruptive behaviour? Arguably, this will be a near impossible task, and therefore the hitting of children, for whatever purpose, can legitimately continue under New Zealand law.

The decision to amend s59 rather than to repeal it means that children are still inferior to other groups in society with respect to basic physical integrity. The fact that s59 exists at all separates children from adults in the eyes of the law. While it might be practical for parents to be able to use force against children to protect them from harm or to carry out normal parenting tasks, it is unnecessary to codify this power in the Crimes Act, as the lack of statutory protection never existed in the past, and its absence never caused any problems. Codification in this case has failed to protect children from hitting or smacking through a lack of definition, and has set children apart as a group in society who are less deserving of basic human rights. A simple repeal of s59 would have better addressed children's rights, and ironically, the law surrounding the use of force against children would have been clearer if it was silent on the issue. Children would have held the same status as adults with respect to their bodily integrity: hitting would not be tolerated, and all other uses of force could be dealt with under common law, just as they were before the amendment.

This thesis justifies children's rights, specifically the right not to be hit. In chapter two I will examine the history of domestic discipline in New Zealand, the impact of the United Nations Convention on the Rights of the Child, and some of the factors that formed the public resistance to the Crimes (Substituted Section 59) Amendment Act 2007. In chapter three I

will look at the short comings of the Act, particularly the ways in which it failed to meet its original purpose. In chapter four I will put the Parental Control provision through some hypothetical tests to see whether it has significantly improved the situation for children with regards to protection from assault.

Chapter One: Children's Rights to Physical Integrity.

In this chapter, I will explore children's rights and the human right to physical integrity. 'Physical integrity' has a number of facets, including restraint and the application of force in situations that do not amount to discipline or correction. However, the central theme of this thesis is smacking.[16] Do children have the same right not to be *hit* as other members of society?

1. The claim of a right to physical integrity.

In New Zealand, the s59 defence of domestic discipline, prior to amendment, arguably infringed upon children's basic human rights because it effectively defined them as a group in society that could be legally assaulted. As I will demonstrate in chapter four, the new Parental Control defence has not improved the situation significantly with regard to the right not to be hit. Under the new provision, children can *still* be hit by their parents, but for different reasons.

The Universal Declaration of Human Rights (1948) has three basic principles: respect for human dignity, right to physical integrity and equal protection under the law. These are *human* rights. The New Zealand defence of Parental Control means that these three principles do not apply to a defined group of the population who can still be legally subjected to physical assault, despite the abolishment of the defence of domestic discipline. There is still

[16] See introduction, page 10

no respect for human dignity or physical integrity and the reform definitely does not give children the same protection under the law as adults. By denying a defined group basic human rights, are we effectively saying that they do not meet the criteria of 'human' and therefore do not qualify for the associated human rights?

The European Court of Human Rights in *A v United Kingdom*[17] made it clear that children are included in the wider group of 'humans', and they cannot be made exempt from the articles of the European Convention of Human Rights. They are not excluded from human rights just because they are children. In fact, their status as children warrants *further* protection from rights violations, rather than less:

> "Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against serious breaches of personal integrity."

The right to physical integrity, specifically the right <u>not to be hit</u> is well established by law. While it might be socially acceptable to *touch* others in some circumstances, it is not generally acceptable to *hit* other people, regardless of the reason. In New Zealand, hitting another person constitutes assault.[18] We have criminalised the behaviour, which sends a clear message to citizens that it is not OK to hit. However, until recently, legally sanctioned smacking was a common parenting tool, which meant there remained one group in society who *could* actually still be lawfully hit.

In the lead up to the repeal of s59, there were many suggestions and submissions on how to repeal s59 without eliminating a parent's ability to hit their child. Amendment options

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[17] *A v United Kingdom* [1998] 2 FLR 959. The court in this case found that the physical chastisement defence under UK law breached article 3 of the convention: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

[18] Section 2 Crimes Act 1961. Section 196 is the offence of common assault.

generally sought to define "reasonable force", so as to make smacking safer, and to narrow, but not do away with, the range of legitimate assaults against children.[19] The rationale behind defining the use of force that can be used against a child is not to promote children's rights, but rather to eliminate the possibility that more severe cases of child-beating can no longer slip through the 'reasonable force' test.[20] Advocates of the 'gentle smack' are able to separate themselves from child abusers, and manage to distinguish smacking from child abuse.[21] Legislating a defence that covers the lightest of smacks but nothing more might have achieved their purpose, however it still does not address the fundamental physical integrity issue: A defence that allows hitting, regardless of the degree, sets children apart from other humans in society who enjoy the human right not to be hit, and therefore in this regard, children are regarded as sub-human.

The Parental Control provision, which eventually replaced the old s59, was meant to do away with the use of force for the purposes of correction, and at the same time plug a gap in the law which technically deemed *other* use of parental force as assault. However, the Parental Control provision has failed to adequately address the most significant problem with the old s59. It has failed to completely criminalise hitting. Its nickname, the 'anti-smacking

[19] See chapter 2. The options proposed to limit the use of disciplinary force to smacking below the shoulders, or smacking without an implement for example.
[20] For example, the proposed amendment to section 59 put forward by Chester Burrows, which was considered as "option 2" by the law commission. Palmer, G., *Section 59 Amendment: Options for Consideration*, Report of the Law Commission for the Justice and Electoral Committee, 8 November 2006
[21] Maxim Institute, *Maxim Institute written submission on the Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill,* 1 February 2006, http://www.maxim.org.nz/index.cfm/policy___research/article?id=618

legislation', is misleading, because it has not banned smacking, it has merely re-labeled it.[22] Children are *still* the only people in society who can be legally hit. As a society, we have not yet managed to appreciate that "hitting people is wrong, and children are people too".[23] In that sense, children are seen as sub-human.[24]

Peter Newell suggests that the level of protection given to children directly reflects how we hold them in our esteem:

> "One measure of how society regards groups within it is the comparative degree of protection afforded to them. Over the years in the UK there has been a growing yet gradual acceptance of the wrongness, and also the ineffectiveness and dangers, of hitting people as punishment. Thus our society has moved away from treating as acceptable the hitting of wives, servants and apprentices; more recently, away from the acceptance of corporal punishment in the armed forces and judicial corporal punishment; and most recently, away from allowing children to be hit in schools and child care institutions."[25]

In the New Zealand context, the abolishment of the use of force *for the purposes of correction* might raise children's rights in the eyes of society. However, the retention of a reasonable force defence for parents means that there will forever be a glass ceiling for children's rights. We, as a society, cannot claim to recognise children as full human rights bearers, with the right not to be hit, while our criminal code undermines this right with the Parental Control provision.

---

[22] See Chapter 4 for an analysis of situations where the legitimate force used against a child under the parental control provision includes hitting or smacking.
[23] Newell, P. *Children are People Too. The case against physical punishment,* Bedford Square Press, London, 1989, page 12.
[24] "[t]he issue of smacking is unavoidably a question of rights. It is a human right not to be hit and children are humans." Hodgkin, R. Why the 'Gentle Smack' Should Go (1997) 11 *Children and Society,* page 203.
[25] Supra No. 23, at page 13.

For all the effort, debate, blood, sweat and tears that went into abolishing hitting as a form of punishment in New Zealand[26] it is hypocritical that the end result is a new defence that still allows hitting. Perhaps this was unintentional, an unfortunate by-product of bad drafting. However, it is more likely that our new Parental Control provision was borne out of a reluctance to recognise children as people deserving of human rights. Instead of repealing s59 outright, the legislature bowed to public and political pressure to retain smacking, and opted to create a defence of reasonable force, claiming that it was necessary to codify an empty area of the law. Even smacking in its common sense (as a disciplinary practice) was not completely removed under the "anti-smacking" legislation, because at the last minute, the police discretion not to prosecute was affirmed within the words of the Act[27] to "give parents confidence that they will not be criminalised for lightly smacking their children."[28] In fact, as it stands, it will be very difficult for police to prosecute parents for disciplinary smacking, because they will have to be able to sufficiently prove that the child was smacked for the purposes of correction, and not for one of the four legitimate purposes in the new section 59(1).[29] If a law is too difficult to enforce, then the contemplated behaviour really has not been banned at all, and the point of the law is just to pay lip-service to the idea that children's rights exist.[30]

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[26] See Wood, B., Hassall, I., Hook., G, *Unreasonable Force. New Zealand's journey towards banning the physical punishment of children,* Save the Children New Zealand, 2008 for an overview of New Zealand's journey towards abolishing physical punishment, specifically the role of the media in fuelling the public debate.
[27] See chapter 3, The Effect of Affirming Police Discretion.
[28] Key, John, *Some sense on smacking - at last!* Newsletter: Keynotes No 9, http://johnkey.co.nz/index.php?/archives/101-NEWSLETTER-KeyNotes-No-9.html, May 2 2007.
[29] See chapter 4. The analysis of the Parental Control provision shows that a disciplinary smack can easily be reclassified as legitimate hitting under s59(1).
[30] See Cairns, L. "Participation with purpose" In Tisdall, E. K. M, Davis, J. M., Hill, M., &

2. Do *children* have the right to physical integrity?

Rex Adhar and James Allan[31] are critical of the child's equal right to physical integrity argument put forward by authors such as the Ritchies,[32] Michael Freeman[33] and Peter Newell, who contends:

> "if children are to have the status they deserve, as individual people, it is their right to physical and person integrity – to protection from all forms of inter-personal violence – which must be upheld. This is not demanding extra protection, or special laws – merely the protection that the rest of us take for granted."[34]

Adhar and Allan suggest that there is no consistency in the children's rights arguments. They contend that advocates for children's rights can conveniently claim that children are equal to adults in some circumstances, but then highlight their incapacity in others:

> "Children's rights advocates appear to turn on and off their paternalism as the situation suits. At times we hear that children are different from adults, that they need extra guidance and attention and even that they cannot be considered fully autonomous. Then, when it comes to smacking, we hear from them that children are identical to adults."[35]

They distinguish between smacking and violence,[36] and contend that smacking is legitimate if everyone, including children, embraces it.

Prout, A. (Eds.), *Children, Young People and Social Inclusion.* Policy Press, Bristol, 2006. The fact that a mechanism exists to give children rights does not mean that children's participation rights are necessarily being promoted. Cairns suggests that instruments such as UNCROC have been adopted to give the *impression* that children have rights, but if in reality they are not observed then "it is reasonable to question the depth of the commitment to the human rights of children." (page 217).

[31] Ahdar, R. and Allan, J., Taking Smacking Seriously: The case for Retaining the Legality of Parental Smacking in New Zealand [2001] *New Zealand Law Review* 1, 1-34

[32] Ritchie, J. & J. *Spare the Rod,* George Allen and Unwin, Sydney, 1981.

[33] Freeman, M. Children are Unbeatable (1999) 13 *Children and Society*, 130-141.

[34] Newell, P. "Why we must stop hitting children" in Bainham, A., Pickford, R., & Pearl, D. (Eds.) *Frontiers of Family Law* Chichester, New York, 1995, page 245.

[35] Supra, No. 31, page 31.

However, as Woods, Hassall and Hook state, "it is a fundamental right that all humans are entitled to equal protection under the law. Children are humans, therefore they too are entitled to equal protection... Human rights are universal and are not subject to the whim of the majority."[37] If rights acts as 'trumps' as Ronald Dworkin[38] would suggest, this right cannot be overridden just because the public want to retain smacking. John Stuart Mill illustrates this point with reference to the right to free speech:

> "If all mankind minus one were of one opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be in silencing mankind."[39]

The Adhar and Allan criticism of children's rights looks at paternalism, but fails to examine major children's rights theories, and therefore is too simplistic. Children, by definition, are limited in their capacities, so of course general rights theories are not going to adequately contemplate them.[40] However, this does not preclude them from having rights. There is not one set policy or way to best respect children's rights, and different situations demand different approaches to be taken.[41] A paternalistic approach is most appropriate in situations

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[36] Hon. Alastair Nicholson remarks that it is troubling when people are unable to characterize the hitting (including smacking) of children as child abuse. Nicholson, A. Choose to hug not hit (2008) 46 *Family Court Review* 1, 11-36.
[37] Wood, B., Hassall, I., Hook., G, *Unreasonable Force. New Zealand's journey towards banning the physical punishment of children,* Save the Children New Zealand, 2008, page 139.
[38] Dworkin, R. "Rights as Trumps" in Waldron, J. (Ed.) *Theories of Rights,* Oxford University Press, Oxford, 1984, 153-167.
[39] Mill, J. "On Liberty" (1859) reprinted in Collini, S. (Ed.) *On Liberty and Other Essays,* Cambridge University Press, Cambridge, 1989, page 20.
[40] See below, under Children's Rights. Children's rights are necessarily different from adults due to their immaturity, but this does not preclude them from basic human rights that do not require capacity to be held.
[41] The articles in UNCRC recognize that sometimes autonomy for children is paramount, and other times it is more important to promote protection for children. Henaghan, M. "New

where the child's limitations clearly prevent them from acting in their own best interests, for example, feeding and clothing an infant. In other situations, where rights are in issue, a different approach can be taken, one that does not discriminate against the child by virtue of his incapacities. This blend of rights theories is not restricted to children. A mixture of paternalistic and rights based approaches is taken with adults as well. For example, everyone is required to wear seat belts in cars for their own best interests, harmful drugs have been prohibited, and no one may drive while intoxicated.

Children are human first and foremost, and their age status simply puts them in a human subcategory, just like other human characteristics such as gender and race further define us into subcategories. We would not deny human rights to those who happen to be female or black, because that would qualify as gender or race discrimination. Similarly, we would not deny elderly people their basic human rights on the basis of their age, so why would we discriminate against children on the basis of *their* age? Discrimination against children is often distinguished from other forms of discrimination on the basis that children lack mental capacity. However, even this is not a universal test for denying the right to physical integrity, because other groups in society who lack capacity, such as mentally handicapped persons, enjoy the right not to be hit. Capacity is not what separates children from adults in the smacking debate, it is *age*.

Zealand and the Convention on the Rights of the Child: A Lack of Balance" in Freeman, M. (Ed.) *Children's Rights. A Comparative Perspective,* Dartmouth Publishing Company Ltd, Aldershot, 1996.

a) Human Rights.

"The young are denied rights because, being young, they are presumed to lack some capacities necessary for the possession of rights."[42] However, in the context of *human* rights it is natural to assume their 'humanness' is enough to qualify them for basic, fundamental rights.

i) Fundamental human rights

The right to life is a fundamental human right that is widely accepted, and applies to all people in New Zealand,[43] regardless of whether they are young or old, male or female, black or white. It is a fundamental social guarantee that one does not have to qualify for. Furthermore, cultural and religious differences do not affect this fundamental right. For example, some cultures demand that a woman be put to death for adultery,[44] but in New Zealand she has a fundamental right to life. This is not because she is a woman, or an adult, and not even because we take a different stance on adultery. The woman has the right to life because she is a human being, and therefore all fundamental human rights are available to her.

The right to physical integrity is a fundamental right, affirmed in the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966), the

[42] Archard, D. *Children: Rights and Childhood,* Routledge, London, 1993, page 58.
[43] The New Zealand justice system does not use capital punishment, and there is no provision for assisted suicide or euthanasia. Section 8 of the New Zealand Bill of Rights Act 1990 states that no one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice. Our current law does *not* establish any grounds for the deprivation of life, therefore every one has the right to live.
[44] In Pakistan, adultery is a crime under the Hudood Ordinance. The Ordinance sets a maximum penalty of death.

New Zealand Bill of Rights Act 1990,[45] the United Nations Convention Against Torture and Other forms of Cruel, Inhuman or Degrading Treatment or Punishment (1984)[46] and the United Nations Convention on the Rights of the Child (1989),[47] to name a few.

Children are humans in the first instance, and sub-*adults* because of their developmental stage, not sub-human. The fact that they are children does not divorce them from other human variables such as gender, class, ethnicity, age and mental capacity. All humans have combinations of these variables, but they are still humans. *Age* is just another variable.[48] We do not deprive other human beings of rights just because they display other variables like race or class. In the context of physical chastisement, we used to discriminate on the basis of gender (a husband could chastise his wife), race (a white person could chastise his black slave) and status (an employer could chastise his employee) because all of these subordinate groups were considered to be just that: subordinate. Arguably some rights must be age discriminative, (e.g. right to vote) but fundamental rights should not. It seems absurd that we should take fundamental rights away from people that are too old, or too young. In fact, we

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[45] Section 9 states that everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment. Arguably, this does not apply to 'everyone' when there is a group in society who can be legally hit. The words 'cruel and degrading' are strong, however they match other international documents that promote physical integrity.

[46] The United Nations Committee Against Torture and Other forms of Cruel, Inhuman or Degrading Treatment or Punishment recommended that New Zealand repeal the old section 59. *Conclusions and Recommendations of the Committee against Torture: New Zealand.* United Nations (2004) paragraph 7(e).

[47] The United Nations Committee on the Rights of the Child also criticized New Zealand's domestic discipline defence. See chapter 2.

[48] James, A. "Understanding childhood from an interdisciplinary perspective: Problems and potentials" in Pufall, P.B., & Unsworth, R.P. (Eds.) *Rethinking Childhood,* Rutgers University Press, New Brunswick, 25-37.

do not take the right to bodily integrity away from the elderly, even though, like children, they are often physically weak, and for those who have dementia, lack adult mental capacity.

ii) Capacity and age discrimination.

Children and elderly people with dementia are different from other adults because they lack mental capacity, and therefore require different levels of protection and cannot exercise the same decision-based rights. Elderly people might assign a power of attorney to make decisions for them that require capacity, and children have their parents or guardians. The difference is of course that a power of attorney cannot hit an old person, or give consent for that person to be hit.

Mental capacity cannot be said to be the defining factor that prevents children being entitled to physical integrity, because others who lack capacity enjoy this right.[49] Why do we not hit other people who lack full adult mental faculties? Surely it is because it is ridiculous to claim that a person needs an adult mental capacity to deserve the right not to be hit.

Mentally handicapped persons and some elderly are unable to function as an adult. Like children, they need guidance and protection where they cannot look after themselves. We do not age discriminate when it comes to basic human rights- we do not hit elderly people when they turn 80 and appear to have lost the ability to function like a rational adult. Like children, they are at a different developmental stage to most adults, but that still does not take away from the fact that they are *humans*. Elderly people and children are in the same subset of humans with the following characteristics:

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[49] Breen, C., The Corporal Punishment of Children in New Zealand: The Case for Abolition [2002] *New Zealand Law Review* 3, 359-391.

- both are at developmental stages where their capacity is not that of an adult's.
- both are at physical stages where they are weaker than an adult and therefore are more vulnerable.
- both are humans.

Imagine a person who is physically small and weak, cannot fully comprehend adult language, concepts and behaviours, and is making a scene in a supermarket for which their guardian gives them a smack. I could be describing a two year old, in which case the guardian (parent) would be justified in his actions under current law, because the Parental Control provision bestows these special powers to parents.[50] I could equally be describing a mentally handicapped person, but in this case, a guardian who hit him would have no such safeguard, because that person has the same right to be protected by the law from assault as everyone else.

In New Zealand discrimination on the basis of age is prohibited by the Human Rights Act 1993.[51] In 2005 the Human Rights Commission released the New Zealand Action Plan on Human Rights[52] which "fully recognises children as human beings entitled to rights."[53] The

[50] See chapters 3 and 4 for an explanation of how the Parental Control provision still allows hitting for certain purposes.
[51] Section 21(1)(i)
[52] Human Rights Commission, *New Zealand Action Plan on Human Rights*, retrieved 4 March 2008 from http://www.hrc.co.nz/report/actionplan/0foreword.html
[53] Supra, No. 37 page 62

report recommend the repeal of the old s59, in "respect for children's rights to human dignity and physical integrity."[54]

iii) Capacity and consent

The right to bodily integrity is a fundamental right and fundamental rights are general by nature. They apply to everyone, despite their individual needs. A person might consent to having their physical integrity invaded,[55] however this consent can only extend so far. One cannot consent to assault that causes actual bodily harm.[56] This demonstrates how much our law values bodily integrity, even when it infringes on individual interests.

In some circumstances a child is deemed to lack the necessary capacity for consent,[57] therefore surely cannot consent to being assaulted.[58] Consequently, an argument for smacking that rests on the notion that children are not equal to adults because they lack adult capacity is flawed in the fact that children also lack adult capacity to consent to assault. Children *are* different to adults. We do not give them the right to vote or drink because they lack the requisite mental faculties to carry out these rights. So if children are so different, why do smacking advocates conveniently ignore their inability to consent to being hit, and replace it with the more drastic inability to have physical integrity? Provisions like Parental Control are

[54] Supra, No. 32 chapter 2.4
[55] *A-G's Reference* (No 6 of 1980) [1981] QB 715; [1981] 2 All ER 1057 (CA)
[56] *R v Brown* [1992] 2 All ER 552; *R v Donovan* [1934] 2 KB 498
[57] Eg, for participation in research, refusing medical treatment, etc. Supra No. 31.
[58] Children are deemed unable to consent to sex or sexual acts, therefore the fact that someone under the age of consent might have given their permission does not serve as a defence to a charge of sexual conduct with child under 12 for example. (s132 Crimes Act 1961). *Inglis v Police* (1986) 2 CRNZ 463

enacted to get around this, because hitting children is the exception to the general rule that you can only hit those who consent to it.

b) Children's Rights.

Some rights for children must necessarily be different to those for adults, because children *are* different to adults. They are deemed to lack the mental capacity and maturity to exercise certain rights, such as making the decision to marry, or to smoke cigarettes for example. However none of the various general rights theories nor the theories specific to children's rights necessarily deny children basic, fundamental human rights.

i) The Will Theory

The Will Theory of rights (also known as the 'choice theory') states that "the holder of a legal right is normally permitted and empowered in law to choose whether or not on any given occasion he should avail himself of his right by insisting on performance by another party of the relevant duty."[59] Will theorists argue that a rights holder has the ability to control whether others must or must not act in particular ways, and there is no such thing as an unwaivable right. According to this theory, rights can only be held by people who are capable of waiving them, hence they cannot apply to children.[60] Obviously our society does not subscribe to this theory of rights when talking about fundamental rights, rather than political rights for example. The right to life is unwaivable, and, as mentioned above, people other

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[59] MacCormick, N., "Children's Rights: A Test-Case for Theories of Rights" (1976) in Freeman, M. (Ed) *Children's Rights Volume I,* Aldershot, Ashgate Dartmouth, 2004, page 314.

[60] Cruft, R. Rights: Beyond Interest Theory and Will Theory? (2004) 23 *Law and Philosophy*, 347–397. Also see Hart, H. L. A. Are There Any Natural Rights? (1955) 64 *Philosophical Review* 2, page 181.

than children who lack mental capacity are not denied the fundamental right to physical integrity.

While the will theory is unhelpful in determining fundamental rights entitlements, it is useful in determining children's entitlements to activities that require capacity, such as voting. Voting is a right that requires capacity to exercise or waive, and because children lack this capacity they are not entitled to this right.[61] In New Zealand, a person must be 18 before they are eligible to vote.[62] While it is true that some children at age 17 might be better equipped to make political choices than their 18 year old counterparts, the letter of the law must be set somewhere in the interests of consistency and application. It is a far simpler electoral system where persons over a certain age are generally deemed to be competent to vote, than to have to assess every voter individually. Elderly people with dementia are included in the "competent" category for this reason. This is not to say that children under 18 are universally deemed too immature to vote. In Austria and Brazil the voting age is 16, and in New Zealand Green Party MP Sue Bradford announced in June 2007 that she intended to introduce her Civics Education and Voting Age Bill which would lower the voting age to 16. However, she later abandoned the Bill, due to an adverse public reaction.[63]

[61] Some children's rights theorists argue that the right to participate and have a political voice is a fundamental right, and therefore children should be entitled to vote. See Cairns, L. "Participation with purpose" In Tisdall, E. K. M, Davis, J. M., Hill, M., & Prout, A. (Eds.), *Children, Young People and Social Inclusion.* Policy Press, Bristol, 2006.
[62] Section 12 New Zealand Bill of Rights Act 1990.
[63] Radio New Zealand News, "Green MP abandons voting age bill", 26 July 2007, Retrieved 13 August 2008 from http://www.radionz.co.nz/news/latest/200707261310/green_mp_abandons_voting_age_bill

ii) The Interest Theory

The interests theory of rights[64] was developed by Joseph Raz. "According to Raz, a person may be said to have a right if and only if some aspect of her well-being (some interest of hers) is sufficiently important in itself to justify holding some other person or persons to be under a duty."[65] The purpose of a right, according to this theory, is to further the right-holder's interests. An owner has a right, "not because owners have choices, but because the ownership makes the owner better off."[66] The interest theory is more versatile than the will theory because it recognises that some rights are unwaivable, and it also recognises that people who lack capacity can still have rights.

Neil MacCormick[67] discusses this theory with reference to children and the right to care and nurture. He concludes that this right exists not by virtue of a parent's duty to provide care and nurture, rather the duty exists because of the right. If there was no parent, the child's right would still exist. Under the interests theory, "when a right to T is conferred by law on all members of C, the law is envisaged as advancing the interests of each and every member of C on the supposition that T is good for every member of C, and the law has the effect of making it legally wrongful to withhold T from any member of C."[68] If we insert 'the right not to be hit' as the right 'T', and 'children' as group 'C', then this statement makes perfect sense: It is in the interests of all children to have the right not to be hit, and it would be wrong to withhold this right from them, therefore they have this right. Of course, there are smacking

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[64] Raz, J. *The Morality of Freedom* Oxford, Clarendon, 1986
[65] Waldron, J. Rights in Conflict (1989) 99 *Ethics* 3, page 504.
[66] Stanford Encyclopaedia of Philosophy, retrieved 26/6/08 from: http://plato.stanford.edu/entries/rights/#2.2
[67] Supra. No 59
[68] Supra No 59, page 311

advocates that claim that the right not to be hit is *not* good for children, i.e. that smacking is good for children, however this is a highly contentious position, with little scientific support.[69] Research seems to show that there is a slippery slope between mild physical punishment and child abuse.[70] Empirically this is supported by the dramatic decrease of child deaths in Sweden due to maltreatment, after a total ban on physical punishment was introduced in 1979.[71]

A brief summary of the research into the effects of physical punishment.

Anne Smith points out that most studies agree that when corporal punishment is employed, parents are aiming for short-term effects, in the form of immediate compliance with a request or direction.[72] Similarly, Gershoff carried out a meta-analysis of 92 studies of corporal punishment, and found that it was only associated with one desirable behaviour: immediate compliance.[73] She also suggests that parents not only seek instant obedience, but also want the obedience to be ongoing, which is not usually the case. In fact, physical punishment can lead to an increase in non-compliance as well as other behavioural problems.[74]

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[69] Caldwell, J. L. Parental Physical Punishment and the Law (1989) 13 *New Zealand Universities Law Review*, 370-388.

[70] Wilson, S., & Whipple, E., 'Communication, discipline and physical child abuse'. In Socha, T., & Stamp, G. (editors) *Parents, Children and Communication: Frontiers of therapy and research,* 299-317, Lawrence Erlbaum

[71] Smith, A. B. *The Discipline and Guidance of Children: A summary of research,* Children's Issues Centre, University of Otago, and the Office of the Children's Commissioner, June 2004

[72] Ibid. *The Effects of Physical Punishment.*

[73] Gershoff, E. T. Corporal Punishment by Parents and Associated Child Behaviours and Experiences: A meta-analytic and theoretical review (2003) 128 *Psychological Bulletin*, 4, 539-579

[74] Kalb, L. M., & Loeber, R. Child Disobedience and Non-Compliance: A Review (2003) *111 Pediatrics,* 3, 641-652.

Gershoff's analysis has been criticised by several researchers who believe the inclusion criteria for the studies were incorrect, and the findings were consequently based on correlational research. Larzelere suggests that mild physical punishment is a suitable avenue for achieving short-term compliance, and studies that find otherwise have focused on severe physical punishment at the other end of the scale.[75] Larzelere suggests that within the following guidelines, corporal punishment is acceptable and effective for immediate obedience:

> "-Not too severe;
>
> -the punisher is under control (i.e. not punishing in anger);
>
> -the age of the children is from two to six years;
>
> -it is accompanied by reasoning;
>
> -it is done privately;
>
> -it is motivated by 'concern for the child'"[76]

This appears to be an attempt to draw the line, and illustrate an area where smacking is acceptable. However, the area that Larzelere has defined is intensely restricted by very specific guidelines, which are probably more often than not breached. This prompts the question: is there really much point in defining situations when corporal punishment is effective if it is such a narrow window that is difficult to stay within? Advocates for abolishment of *all* physical punishment suggest that alternative methods (for example, 'time out') work just as well, even in the short term, so there is no real need to identify circumstances where physical punishment may or may not be effective. Straus points to

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[75] Larzelere, R. E. Child Outcomes of Non-Abusive and Customary Physical Punishment by Parents: An updated Literature Review (2000) 3 *Clinical Child and Family Psychology Review,* 4, 199-221

[76] Ibid.

studies where non-physical alternatives were just as effective at achieving immediate compliance.[77]

On the other side of the debate, Crittenden argues that non-physical punishment can sometimes not only be ineffective, but can be entirely inappropriate.[78] She gives the example of a toddler running out on to a busy street, and says that the child will remember a spanking and the intense anger and fear of the mother, but will not remember a gentle telling off or explanation of the consequences, because toddlers have a limited capacity to process verbal information. This is consistent with the Larzelere's guidelines, but comes from a slightly different reasoning. Crittenden suggests that abusive behaviour is in fact a protection mechanism, in that parents are cued to dangerous situations, and children learn from the violence that is associated. She illustrates this point with the higher incidences of violence in dangerous neighbourhoods. There is also an evolutionary spin off:

> "Species evolve in a way that promote the good of the many, whereas individuals adapt to promote individual well-being within the constraints of specific contexts. It may be that injury of children is an unfortunate outcome of evolved processes selected because they more often promote safety."[79]

Short-term effectiveness is not the only concern for those advocating a ban on smacking. Research shows that there can also be several long-term effects, often undesired and unforeseen by the punisher.[80] Smith says long-term effects may include aggression,

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[77] Straus, M. A., "Corporal Punishment and Academic Achievement Scores of Young Children: A Longitudinal Study" In Straus M. A., (Ed.) *The Primordial Violence: Corporal Punishment by Parents, Cognitive Development and Crime*, AltaMira Press, Walnut Creek, CA, 2004

[78] Crittenden, P. M., "Dangerous Behaviour and Dangerous Contexts: a 35 year perspective on research on the developmental effects of child abuse" In Tricket, P. K., & Schellenbach, C. J., (Eds.) *Violence against children in the Family and the Community,* American Psychological Association, Washington, 2002

[79] Supra, No. 78.

[80] Ibid.

behavioural problems, delinquency, cognitive and intellectual development, mental health problems and difficulty establishing relationships.[81] The idea is that excessive use of power assertive discipline threatens secure attachment. Secure attachment comes from warm, positive parenting which helps children internalise rules. Physical punishment, on the other hand, models aggressive behaviour and can work to suppress the development of moral internalisation.

Naturally, since this is a sensitive and controversial topic, there are limitations on gathering empirical evidence, and much of what is known about the effects of physical discipline comes from retrospective reports and limited outcome studies. Furthermore, causality can be disrupted with confounding variables, and there cannot be randomly assigned children or control groups. Benjet and Kazdin suggest that causality can be effectively measured if a baseline point is set in time in a longitudinal study, and it can be shown that one event occurred prior to another.[82]

A recent Dunedin study looked at a cohort of 26 year olds and the lasting effects of physical punishment. The study concluded that not only was non-physical punishment more effective in creating long term compliance, there were also lasting emotional effects from being physically punished. Eighty per cent of the participants reported receiving physical punishment as a child or adolescent, but when asked what the most effective punishment they ever received was, *most* of them reported that it was non-physical. The authors admit that the result could be explained by the recency effect- the participants were 26 years of age and

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[81] Ibid.

[82] Benjet, C., & Kazdin, A. E. Spanking Children: The Controversies, Findings and New Directions (2003) 23 *Clinical Psychology Review*, 2, 197-224

therefore more likely to recall events in their adolescence, a time when there was a lesser incidence of physical punishment. However, it is more likely that the results simply show that non-physical punishment, such as privilege loss, has a more pronounced effect and sticks in the mind in the long term.[83] This has implications for parents, especially for punishment in late childhood or adolescence.

Crittenden's research agrees. She suggested that toddlers would not learn from reasoning due to their limited verbal capacity,[84] but this is not to say that they would respond to a loss of privilege (for example a toy) any less than a smack.

The Dunedin study also reported that nearly a quarter of those giving accounts of physical punishment in an interview became emotionally distressed, which further indicates that it has lasting negative effects.

Smacking brings about an array of emotions within children including sadness, hurt, fear and resentment, none of which is intended when attempting to produce immediate compliance with a direction.[85] From a child's perspective, it is confusing that adults cannot hit each other, but they can hit children. Straus suggests that mental health problems can arise later in life due to suppression of childhood anger about being hit by the adults whom they are dependent on for love and protection.[86]

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[83] Millichamp, J., Martin, J., Langley, J. On the receiving end: young adults describe their parents' use of physical punishment and other disciplinary measures during childhood (2006) 119 *The New Zealand Medical Journal*, 1228.

[84] Supra. No. 78.

[85] Willow, C., & Hyder T. *It Hurts You Inside: Children talking about smacking,* National Children's Bureau/ Save the Children, London, 1998. See also Dobbs, T. *Insights: Children and young people speak out about family discipline,* Save the Children, Wellington, 2005.

[86] Straus, M. A. Is it Time to Ban Corporal Punishment of Children? (1999) *Canadian Medical Journal* 161(7), 821-822.

iii) Positive and Negative Rights

Rights are sometimes described as 'positive' or 'negative'. A positive right entitles the right holder to be provided with something, from another person or from the state. A negative right entitles the right holder to be free from interference. The right not to be hit is a negative right, because it simply requires that no one interferes with the right holder's physical integrity.[87] An example of a positive right might be the right to receive state health care or education. Arguably, negative rights are easier to respect, because they do not require anybody to do anything, other than refrain from interfering with one another.

The right not to be hit only becomes a positive right when enforcement is required.[88] In other words, to enforce the right not to be hit, the state must *do something*. The state already takes positive action to respect an adult's negative right not to be hit, but it has only undertaken to criminalise parental hitting against children when the motive is correction, or when the force used is more than is considered to be reasonable.[89]

The right to *enforcement* is a peripheral issue to whether the right not to be hit exists in the first place. The difficulty (or perceived difficulty) in enforcing a right should not mean that the right does not exist. The negative right not to be hit is fundamental. It does not impose any burden onto anyone, and does not belong exclusively to people who have adult capacity. Some theorists argue that children, by virtue of their incapacity and dependence, have a

[87] Narveson, J. *The Libertarian Idea,* Broadview, Ontario, 2001.
[88] Holmes, S., & Sunstein, S. *The Costs of Rights,* W.W. Norton, New York, 1999.
[89] Section 59 Crimes Act 1961.

greater claim to the *positive right of protection* than adults.[90] This is affirmed in article 19 of UNCRC.[91] Vulnerability and dependence means that children have special safeguards that are not available to other citizens who are capable of caring for themselves. We see this in our domestic law in guardianship provisions[92] and in the criminal code, which sets out a mandatory duty for parents or guardians to provide the necessaries of life.[93]

iv) Best Interests and Paternalism.

Some entitlements for children are given to them in their 'best interests', which is an example of paternalism as Adhar and Allan point out.[94] Paternalism means that the state (or perhaps a parent) can override a person's autonomy or freewill because the person would be better off or protected from harm if decisions are made for them.[95] However, paternalistic conditions do not just apply to people who lack capacity. The requirement that everybody wear a seatbelt in a car is an example of paternalism.

The welfare principle, or the principle of 'best interests' for children, requires that any action taken on behalf of a child is done to maximise the best outcomes for that child.[96] There are many different ideas about what constitutes the best outcome for the child, but a popular line of thought is that of Rawls:

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[90] See Tamar, E. A positive right to protection for children (2004) 7 *Yale Human Rights and Development Law Journal,* 1-50 for a comprehensive analysis of a child's positive right to protection in the corporal punishment context in America. The author claims that this right is rooted in dignity.
[91] See chapter 2.
[92] Care of Children Act 2004
[93] Section 151 Crimes Act 1961.
[94] Supra. No. 31, page 31
[95] Fotion, N. Paternalism (1979) 89 *Ethics* 2, 191-198.
[96] Buchanan, A., & Brock, D. *Deciding for Others: The Ethics of Surrogate Decision Making,* Cambridge University Press, Cambridge, 1998.

> 'We must choose for others as we have reason to believe they would choose for themselves if they were at the age of reason and deciding rationally.'[97]

The idea of welfare, or 'best interests' is a common theme in discourse surrounding children's rights. Micheal Freeman's theory of 'liberal paternalism' best outlines this. He suggests that we need to balance nurture with self-determination, and develop laws that respect children's rights while at the same time protecting them from harm.[98]

The welfare principle is well accepted in our society. Article 3 of UNCRC makes the child's welfare a primary consideration:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

Section 4 of the Care of Children Act 2004 goes one step further than making best interests a 'primary consideration' and instead makes it a *paramount* consideration in decisions made about children.[99]

Most of the time, what is in the best interests of a child will be in line with the child's rights.[100] In the context of smacking it is arguably in the best interests of a child not to be hit *and* they have a right not to be hit, therefore there is not a problem. However, difficulty can

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[97] Rawls, J. *A Theory of Justice, Revised Edition*, Oxford University Press, Oxford, 1999.
[98] Freeman, M., 'Taking Children's rights more seriously (1992) 6 *International Journal of Law and the Family* 52, page 69
[99] Fisher J in *Sharma v Police* High Court Auckland A168/02, 7 February 2003 pointed out that the old Domestic Discipline provision was at odds with New Zealand's family law jurisdiction.
[100] Herring, J. Farewell Welfare? (2005) 27 *Journal of Social Welfare and Family Law* 2, 159-171.

arise when the right is the autonomy to make decisions, for example when a child wants to do something that harms them,[101] such as refuse to undergo a medical procedure.[102]

v) Autonomy

"Individual autonomy is an idea that is generally understood to refer to the capacity to be one's own person, to live one's life according to reasons and motives that are taken as one's own and not the product of manipulative or distorting external forces."[103] To have autonomy is to have the ability to decide matters for oneself, and to bear the responsibility for one's own choices, therefore people who lack capacity necessarily lack full autonomy.[104] Some theorists argue that children cannot have full autonomy, and any attempt to bestow it upon them causes a breakdown in the family institution.[105] However, respecting a child's autonomy does not have to mean giving them full adult rights and responsibilities. It is possible to acknowledge that a child has developing autonomy[106] while at the same time acknowledging their vulnerabilities and protecting them from harm.[107] This is especially relevant in discourses surrounding the child's right to participate in decisions that affect

[101] Eekelaar, J. The interests of the child and the child's wishes: the role of dynamic self-determinism (1994) 8 *International Journal of Law and the Family,* 42-63.
[102] See below for a potential autonomy and best interests conflict in the smacking debate.
[103] Supra. No. 66
[104] Dworkin, G. *The Theory and Practice of Autonomy*, Cambridge University Press, New York, 1988.
[105] Morita, A. Family Dissolution and the Concept of Children's Rights: A Historical and Culture-Comparative Analysis, retrieved 16/3/07 from http://www.fww.org/articles/congres1/amorita.htm.
[106] Woodhouse, B., "Re-visioning Rights for Children" in *Rethinking Childhood,* Pufall et al, eds. Rutgers Press 2004.
[107] Supra. No. 98

them.[108] However it is not so important when discussing rights that do not require capacity to be held, such as the right not to be hit.

vi) Needs based rights and dignity based rights

Children *are* different to adults with respect to their capacities and capabilites, therefore discussion of rights for children must necessarily take into account children's immaturity, vulnerability and dependency. However, none of these things should be considered handicaps, they are merely human variables and should not preclude a person from holding rights, especially rights that do not require full adult capacity. Michael Freeman suggests that the argument for children holding rights despite their inherent dependency comes from feminist theory:

> "Dependency should not be a reason to be deprived of choice and respect. An important contribution of feminist moral theory has been to question the firmly embedded assumption that moral agency and citizenship rights require as a pre-condition that a person be independent, totally autonomous... Dependency is a basic human condition. The United Nations Convention, using largely an autonomy model, would as much as possible give children the opportunity to be independent. But it is also possible, as is argued within feminism,[109] to accord respect and participation rights in decision-making to those who are dependent."[110]

The right to participate in decision making that Freeman mentions is a positive right, because it requires others to include the child and facilitate his or her views. Negative rights do not demand anything from anyone, therefore are easier to respect. If children can hold positive

[108] Morrow, V. "We are people too": Children's and young people's perspectives on children's rights and decision making in England (1999) 7 *The International Journal of Children's Rights*, 149-170.
[109] "For example, V. Held, 'A Non Contractual Society' in M. Hanen and K Neilson (eds.), *Science, Morality and Feminist Theory* (Calgary, University of Calgary Press, 1987)."
[110] Freeman, M., The Sociology of Childhood (1998) *The International Journal of Children's Rights* 6, page 440.

rights and still be dependent, they can definitely hold negative rights. The right not to be hit is a negative right, and one that can be held by children, despite the fact that they are dependent.

Barbara Bennet Woodhouse[111] suggests that rights can be divided into two categories to reflect dependence and autonomy: needs-based rights and dignity-based rights. Rights that do not require capacity to be held are known as 'dignity-based' rights, and belong to everyone. Children's needs-based rights "would include the positive right to nurture, education, food, medical care, shelter and other goods without which children cannot survive let alone develop into autonomous adults and productive citizens."[112] This formulation of rights is very simple, and applies to everyone, not just children, but is especially useful in children's rights discourses because it highlights how some rights apply in some situations and not in others:

> "[c]hildren's ability to reason and understand evolves over time, but their dignity-based rights are fully present at birth. Dignity-based rights remind us that children, despite their lack of capacity, do have rights based on their present humanity as well as on their potential for autonomy... Thinking realistically about children's rights involves integrating children's needs with their capacities and acknowledging that dependence and autonomy are two sides of the same coin. A scheme of rights that focuses exclusively on one or the other will be incomplete, whether applied to adults or to children."[113]

The right not to be hit is not a needs-based right because children's dependence does not require us to do anything special in this area. The right not to be hit is a dignity-based right, and belongs to *everyone.* A child's dependence might invoke a needs-based right to *protection* however. Just as a child has a right to goods and services to meet their needs until they can develop sufficiently to meet their own needs, they also have a right to be protected

[111] Supra. No. 106
[112] Ibid, page 233.
[113] Ibid, page 234.

from hitting until they reach a stage where they can protect themselves. In that sense, a child's right not to be hit is stronger than an adult's, because the need is stronger.[114]

By definition, children are children because they have not developed fully into adult humans yet.[115] The United Nations Convention on the Rights of the Child (1989) (UNCRC) declares that children need *extra* rights over and above their basic human rights, *because* of the fact they are immature and dependent. In the preamble it says, "due to the physical and mental immaturity" of children, they need "special safe guards and care including appropriate legal protection". Physical punishment is contrary to the articles of UNCRC[116] because the right not to be physically assaulted is a *human* right, and applies to all people equally, even children. In fact, it applies *especially* to children. The rights set out in UNCRC are there to promote children's welfare, not to undermine adults' ability to care for the children. Taking away the ability to hit a child is not impinging on a parent's right because this right never

[114] Supra, No. 100.

[115] The relevant dictionary definitions of '*child*' and '*childhood*' are:
1. a foetus; an infant
2. A boy or girl… a youth approaching on or entering on manhood.
3. A person who has (or is considered to have) the character, manner, pr attainments of a child, esp. a person of immature experience or judgement.
4. A pupil at school/
'*childhood*':
The stage or stage of life of a child; the time during which one is a child; the time from birth to puberty.
Brown (ed) *Shorter Oxford English Dictionary* (5th Edition, Oxford University Press, 2002) Volume 1, pages 393-394.

[116] Article 19. See chapter 2 for an analysis of how the UN Committee specifically proclaims the use of physical punishment as inconsistent with UNCRC.

existed. Rather, by propping up children's entitlements to protection, UNCRC acts as an "essential counter to the *misuse* of adult power."[117]

vii) Is there a parental right to hit a child?

To give children rights could potentially impact on the rights of parents to raise children the way they see fit. In 2003 this was a hot topic in the UK, with a proposed law change. Health Secretary Liam Fox said: "Outlawing smacking would be an outrageous intrusion by the state into parents' legitimate rights and duties."[118] Similarly, Woods, Hassell and Hook suggest that in the lead up to the amendment of s59 in New Zealand, parents were worried that the "imposition of children's rights upon families through legislation would compromise parental autonomy and authority.[119] Banning physical punishment would mean that parents could be prosecuted for smacking their children. To some, this seems outrageous and overzealous, and they feel that the criminal prosecution should be left for cases of serious assault.

Article 5 of UNCRC recognises that State parties should respect the guidance and direction that guardians give to their children, however the Committee has unequivocally stated that this article does not open the door for the child's right to physical integrity to be invaded.[120] Parents do not have the *right* to hit their children, however the Parental Control provision creates a legal *privilege*. Caldwell best describes this, with reference to the old s59, Domestic Discipline:

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[117] Stainton Rogers, W. "Promoting better childhoods: constructions of child concern" in Kehily, M. J. (Ed.) *An Introduction to Childhood Studies,* Open University Press, Maidenhead, 2004, page 137.
[118] 'Pressure grows over smacking law', BBC news, http://news.bbc.co.uk/1/hi/uk/3015226.stm
[119] Supra. No. 37, page 56
[120] See chapter 2.

> "Although parents are often loosely said to have a legal "right" to physically punish their children (and this is the term used in section 38 of the Infants Act 1908), it may be more accurate, adopting a strict Hohfeldian analysis, to state that they enjoy, under both section 59 and the common law, a legal "privilege". If corporal punishment were indeed a parental "right", it would be necessary to find, on the Hohfeldian analysis, that a child was under a correlative duty to submit to the use of force.[121] That would constitute "a somewhat remarkable proposition"[122].[123]

If anything, a parent has a duty *not* to hit their child. In the past, before the damaging effects of hitting children were known, it may have been possible to conclude that physically chastising children was part of a parent's duty.[124] The duty comes from the child's entitlement[125] to a good upbringing, not from a parent's right to hit.[126] But now, since the dangers of hitting are known, the concept of what is good for a child has changed. The parent's duty to provide that still exists, and this means they now have a duty not to hit.[127] Parents do not own their children, and "guardianship does not override an individual's right not to be abused."[128]

[121] "See the comments by Wallington, "Corporal Punishment in Schools" 1972 N.S. 17 Juridicial Review 124 at 125."
[122] Ibid. page 125.
[123] Supra. No. 69, page 372
[124] Ibid.
[125] John Locke has a vastly different approach, which contradicts the modern theory of children's rights. Instead, he emphasizes the duties that children have to their parents. Locke, J. Lock on Parental Power (1989) 15 *Population and Development Review* 4, 749-757.
[126] "parental rights to control a child do not exist for the parent. They exist for the benefit of the child and they are justified only insofar as they enable the parent to perform his duties toward the child." Lord Fraser in *Gillick v West Norfolk and Wisbench Health Authority* [1986] AC 112 at 170.
[127] A parent's duty to provide necessaries is codified in the Crimes Act 1961, section 152. Arguably, if a parent has a duty not to hit, then they must not hit to abide by this section. If they fail in their duty to the extent that the child dies, the child's life is endangered or the child's health is permanently injured, the parent faces imprisonment of up to 7 years.
[128] Hall, M. Child Abuse vs. Domestic Discipline (1998) *Youth Law Review,* November, 10-12.

viii) An instance where rights might clash: Best interests v autonomy in giving evidence.

Even before smacking for the purposes of correction was abolished, instances of assaults against children were an area of serious underreporting. Only a tiny proportion of abusers are actually convicted, compared with the number of abuse-centered assaults committed on children.[129] In New Zealand there are specific legislative provisions surrounding the reporting of abuse:[130] anyone can report it, and the police or social workers have a duty to follow it up. This does not necessarily mean that a conviction will be sought however. *Working Together*, a UK Department of Health report on how agencies and professionals should work together to promote children's welfare and protect them from abuse and neglect, suggests that there are three factors to be taken into account when deciding to initiate criminal proceedings: whether or not there is sufficient evidence, whether it is in the public interest to prosecute, and whether or not prosecution will be in the child's best interests.[131]

The 'best interests' argument does not produce a straightforward result in this context of enforcing the child's right not to be hit. The decision to prosecute might be made because it would be in the child's best interests to be taken away from an abusive parent. Conversely, it might be in the child's best interests not to prosecute because of the damaging effects of trial and process.

In England, it is presumed that children are competent to give evidence in criminal trials no matter how young they are, unless they cannot understand the questions asked of them or

[129] Fortin, J. *Children's Rights and the Developing Law*, 2nd Ed. 2003, page 520
[130] Section 15-17 Children, Young Persons and their Families Act 1989
[131] Department of Health (1999) in Fortin *Children's Rights and the Developing Law*, 2nd Ed. 2003, page 523.

they cannot answer them in a way that is understandable by the court.[132] In Australia there is a specific piece of legislation dedicated to children's evidence.[133] In New Zealand, the Evidence Act 2006 provides children with alternative methods of giving evidence in sexual assault cases, however there are no rules that say that children cannot be compelled to give evidence at all. The court has discretion to take into account the immaturity of the witness, and can make allowances to ensure that the child is comfortable and can give their testimony freely. Section 4 of the Care of Children Act 2004 says that the child's welfare and best interests should be paramount in a situation such as this. However, it must be remembered that the purpose of a trial is to get to the truth, and to allow the defendant a fair, due process.[134]

When children are in court, there are two sets of competing rights-[135] do we protect them by virtue of their vulnerability, or do we recognize their autonomy as individual citizens with the same rights as everyone else? Some judges have expressly said that children owe a duty to society as a whole, just like adults, to give evidence,[136] which resembles the interest theory, that along with rights come responsibilities.[137]

When children are in court as defendants, this dichotomy is even more evident. A classic example is the Bulger case in England, where the process was dampened because the boys

[132] s53(1) and (3) Youth Justice Criminal Evidence Act 1999
[133] Evidence (Children) Act 1997
[134] Law Commission, *The Evidence of Children and Other Vulnerable Witnesses: A discussion paper*, Wellington, 1996.
[135] See Falk, Z. W. "Rights and Autonomy- or the Best Interests of the Child" in Douglas, G. & Sebba, L. (Eds.) *Children's Rights and Traditional Values,* Dartmouth Publishing Company Ltd, Aldershot, 1998.
[136] Lord Donaldson MR in *Re R (minors)* [1991] 2 All ER 193 at 198
[137] Supra. No. 59

were so young, yet they were being tried as adults for a serious crime. On one hand they were deemed capable of committing a crime, but on the other, incapable of answering it in the same way as adults. The European Court of Human rights in that case said that the court must take into account the age and maturity of the child when dealing with him or her in court.[138]

Unlike sexual assault cases, there are no specific statutory rules allowing children alternative methods of giving evidence in cases of common assault, and this could be potentially problematic. In sexual cases, a defendant is prohibited from directly examining the child victim,[139] and it is arguable that a vulnerable witness should have the same protection in cases where the s59 defence is raised, since this defence is only applicable to the parent or care giver of the child witness. The legislature has recognised that cross examination by the child's abuser would be traumatic and likely to compromise evidence in sexual assault cases,[140] however it has not recognised that it would be equally hard for a child to give evidence against his or her own mother and/or father for physical assault. Perhaps this is because New Zealand has seen only a few cases actually go to court, and require the child to give evidence. However, to further New Zealand's commitment to the United Nations Convention, the paramouncy of the child's best interest needs to be considered in cases such as this, so perhaps more needs to be done to protect children as vulnerable witnesses in non-sexual assault trials, while at the same time ensuring a fair and just process for the accused.[141]

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[138] T v UK; V v UK[2000] Crim LR 187, ECtHR,
[139] Section 23F Evidence Act 1908
[140] Zajac, R., Hayne, H. I don't think that's what *really* happened: The effect of cross-examination on the accuracy of children's reports (2003) 9 *Journal of Experimental Psychology: Applied*, 3, 187-195.
[141] Davies, E., Seymore, F. Child Witnesses in the Criminal Courts: Furthering New Zealand's commitment to the United Nations Convention on the Rights of the Child (1997) 4 *Psychiatry, Psychology and Law*, 1, 13-24

3. How child-centred policy is influenced by our understanding of children's rights.

Literature on the sociology of childhood and children's rights can help to explain how policies concerning children are developed. How policy makers view children and their place in society will shape the way they formulate strategies and procedures for dealing with children's issues.[142]

The common concepts of 'children' or 'childhood' can be said to be socially constructed. This means that the way we understand these concepts is influenced by attitudes and assumptions, so that rather than being simple realities, "they are always the products of human meaning-making."[143] The social construction of children that a policy maker might be working with will vary depending on whether the discourse is needs or rights based, or focused on the child's quality of life.[144]

In addition to this, the concept of children's rights has changed over time, "from child-saving (protecting children) to propagating the personhood, integrity and autonomy of children (protecting their rights)."[145] This is evident in the historical development of international children's rights declarations. In 1959 the United Nations Declaration on the Rights of the Child purported to be about children's rights, however it was more clearly framed in terms of

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[142] Supra. No. 33
[143] Ibid, page 126.
[144] Ibid.
[145] Supra, No. 110, page 434

children's *needs.*[146] In comparison, UNCRC, which was created some 30 years later, uses largely "an autonomy model, which would as much as possible give children the opportunity to be independent."[147]

As mentioned before, the concept of children's rights can be broken down into two major sub groups: needs-based rights and dignity-based rights. Children should not be denied basic human rights or 'dignity-based' rights by virtue of their incapacity. These rights recognise their status as individual persons. Dignity-based rights are different from 'needs-based' rights which recognise that children are different from adults, and require protection and nurture. UNCRC recognises this arrangement to some extent. The rights that it promotes fall within three main categories:

> "• *provision* of appropriate support and services for healthy development;
> • *protection* from exploitation and abuse;
> • *participation* in decisions made about their upbringing and care."[148]

New Zealand's ratification of the UNCRC in 1993 was a significant step towards the recognition of children as bearers of human rights. While it does not necessarily advocate full autonomy for children,[149] the various articles set out fundamental rights which, by virtue of article 4, state parties are required to promote, and where necessary, amend domestic law to accommodate. Therefore, ideally, the children's rights principles from UNCRC would influence domestic policy, however this is not always the case.[150]

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[146] Supra. No. 33
[147] Supra No. 110, page 441.
[148] Supra No. 117, page 135
[149] Supra No. 110
[150] Breen, C. "The role of New Zealand's international obligations in the development of national strategies: Investing in and protecting the 'whole child'" in Breen, C. (Ed.) *Children's needs, rights and welfare: Developing Strategies for the 'Whole Child' in the 21st Century,* Thomson Dunmore, Southbank, Australia, 2004.

One of the most pertinent examples of this in New Zealand is the abolishment of corporal punishment. It is a policy concerning children's rights, yet one that appears to have been influenced by other social constructions, namely relationships.[151] Children are seen in the context of their relationships with their parents, and the issue of parental rights may have influenced the policy development of corporal punishment of children. New Zealand has been reluctant to change this policy, and defended it in its periodic reports to the Committee, despite the Committee's numerous criticisms and recommendations of repeal.[152]

When other policies concerning children are developed in New Zealand, it is possible to see which particular theory of children's rights influenced the formulation. Cheyne *et al*[153] suggest that policy and theory are inextricable. Policy formulation depends on theory, and not simply a set of facts that require practical solutions.

The Ministry of Social Development, in its 2002 Agenda for Children (the Agenda), demonstrated that theory impacts on strategy. The 'whole child approach' is heavily advocated in the Agenda, which is a movement away from viewing children as dependants in need of adult protection, control and guidance by virtue of their immaturity. The 'whole child approach' reflects the needs and dignity based rights described by Woodhouse, and the autonomy of children described by Freeman. However, as Breen points out, having a policy is one thing, implementing it is another.[154] To get any of the policies advocated in the Agenda off the ground, specifically the "key action area" of addressing violence in children's lives,

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[151] Supra No. 110
[152] See chapter 2.
[153] Cheyne, C., Obrien, M., & Belgrave, M. *Social Policy in Aotearoa New Zealand: A critical introduction, 3rd ed.* Oxford University, Auckland, 2005.
[154] Supra No. 130

there needed to be substantial government funding. Having a policy that *recognizes* children's rights is not really useful unless there is the ability to actually *implement* those rights.

The Parental Control provision is a good example of a policy that is not based on children's rights theory. Theoretically, children should have the same right not to be hit as every one else (arguably they should have *extra* rights to protection) but this provision sets them apart from other members of society and still justifies parental hitting.

In chapter two I will look at the lead up to the amendment of s59 and the creation of the 'Parental Control' provision. There were several reasons why New Zealand struggled to simply recognize a child's right not to be hit and implement it into domestic law.

Chapter 2: Changing the law.

In this chapter I will explore the events that led up to the introduction of the Crimes (Abolition of Force as a Justification for Child Discipline)[155] Amendment Bill, and the reasons behind the massive public resistance to it.

1. A brief New Zealand history of domestic discipline legislation.

The common law and statutes governing the parental use of force against children has undergone several developments since the New Zealand legal system was established. One of the major influences on the most recent change was the United Nations Convention on the Rights of the Child 1989.

a) The development of legislation

The British settlers to New Zealand brought with them their legal traditions from which our system of law was ultimately based. The New Zealand system of law, in its earliest stages, reflected the statutes and common law of England.[156] The common law principle in relation to physical punishment of children was that parents, caregivers and teachers could use force to correct children, and the standard of 'reasonableness' was eventually read into this:

> "In an oft-cited passage, Blackstone simply noted that a parent "may lawfully correct the child, being under age, in a reasonable manner."[157] It has rightly been assumed, *sub silento*, by later courts that the "correction" referred to was correction by way of physical punishment."[158]

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[155] 2005, no 271-1.
[156] Supra No. 37, page 23.
[157] 1 *Bl. Comm.* 452.
[158] Supra No. 69, page 371.

The settlers to New Zealand were accustomed to using physical chastisement on children, however there is evidence to suggest that the Maori population was not. Tariana Turia, Maori Party co-leader, in the lead up to the 2007 law change blamed colonisation and Christianity for this learned behaviour, stating, "Our people did not hit their tamariki.[159] That only came about through colonisation and through Christianity actually."[160] Wood, Hassall and Hook describe Maori life before the settlers consistently with Turia's comment:

> "The early nineteenth century missionary the Revd Samuel Marsden of the Church Missionary Society wrote thus of Maori domestic life:
> *I saw no quarrelling while I was there. They are kind to their women and children. I never observed either struck with a mark of violence upon them, nor did I ever see a woman struck.*[161]
> Early Maori writers, recalling life in the days before the European influence became so pervasive, also described a peaceful domestic scene that contrasted strongly with the violence of customary intertribal conflict. They suggest that Maori never beat their children but were always kind to them, and that this seemed to strengthen the bond of affection which remained among Maori throughout life...[162] But as the European presence in Aotearoa became more pervasive, Maori began to adopt the child rearing advice of the Christian missionaries or imitate the practices of the Pakeha settlers. Physical punishment of Maori children became more common[163]."[164]

Historical accounts of indigenous cultures in other parts of the world also show that physical chastisement was an introduced phenomenon:

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[159] 'Tamariki' means children.
[160] *"Turia says colonisation and Christianity to blame for smacking"*, New Zealand Herald, 30 April 2007. Retrieved 8/5/08 from: http://www.nzherald.co.nz/section/1/story.cfm?c_id=1&objectid=10436914&ref=rss
[161] Salmond, A. *Two Worlds: First meetings between Maori and Europeans 1642-1772,* Viking, Auckland, 1991, page 422.
[162] Makereti, "The way it used to be" in: Ihimaera, W (Ed.), *Growing up Maori,* Tandem Press, Auckland Press 1998, page 24.
[163] Metge, J. *New growth from old: The whanau in the modern world,* Victoria University press, Wellington, 1995, page 265.
[164] Supra No. 37, pages 21-22.

> "On the North American continent, when the white people arrived, there were both peaceful and warrior cultures that did not endorse hitting children. Their leaders were shocked when they observed white men hitting children. There is a story of a great Nez Perce Indian chief who was on a peace mission to meet with an American General. While riding through the settlement he observed a soldier hitting a child. The chief reined in his horse and said to his companions, "There is no point in talking peace with barbarians. What could you say to a man who would strike a child?"[165]

Irwan A. Hyman suggests that our acceptance of hitting children is not ingrained, it is a cultural phenomenon which we learn, and therefore can unlearn. Hyman goes on to say that the Native Americans were eventually indoctrinated with Western theology and were convinced to beat the devil out of disobedient youths. He points out that cultures who traditionally never hit children now have high rates of child abuse, and cites this as evidence of a connection between the mere cultural acceptance of hitting children and the eventual escalation into abuse.

Section 68 of the Criminal Code Act 1893 was the first codification of the common law right to use force for the purposes of correction in New Zealand:

> **Section 68 Domestic Discipline.**
>
> (1) It is lawful for every parent or person in the place of a parent, or schoolmaster, to use force by way of correction towards any child or pupil under his care:
> Provided that such force is reasonable under the circumstances.
>
> (2) It is lawful for the master or officer in command of a ship on a voyage to use force for the purposes of maintaining good order and discipline on board of his ship:
> Provided that he believes on reasonable grounds that such force is necessary:
> Provided also that the force used is reasonable in degree.
>
> (3) The reasonableness of the force used, or any of the grounds on which the force was believed to be necessary, shall be a questions of fact and not law.

This provision was maintained in the Crimes Act 1908 as section 85. The wording of the provision was not updated until the Crimes Act 1961:

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[165] Hyman, I. *The Case Against Spanking. How to discipline your child without hitting*, Jossey-Bass Publishers, San Francisco, 1997, page 4.

59 Domestic discipline

(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.

In 1990, Section 59 was amended to recognise the abolishment of corporal punishment in schools. Subsection 3 was added:[166]

[(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 1989.]

In June 2007, section 59 underwent a transformation and was replaced with the 'Parental Control' provision:[167]

s59 Parental Control.

(1) Every parent of a child and every person in the place of a parent of the child is justified in using force if the force used is reasonable in the circumstances and is for the purpose of—

(a) preventing or minimising harm to the child or another person; or

(b) preventing the child from engaging or continuing to engage in conduct that amounts to a criminal offence; or

(c) preventing the child from engaging or continuing to engage in offensive or disruptive behaviour; or

(d) performing the normal daily tasks that are incidental to good care and parenting.

(2) Nothing in subsection (1) or in any rule of common law justifies the use of force for the purpose of correction.

(3) Subsection (2) prevails over subsection (1).

(4) To avoid doubt, it is affirmed that the Police have the discretion not to prosecute complaints against a parent of a child or person in the place of a parent of a child in relation to an offence involving the use of force against a child, where the offence is considered to be so inconsequential that there is no public interest in proceeding with a prosecution.]

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[166] Subs (3) inserted by 1990 No 60 s (28)(3) 23 July 1990.

[167] Section 5 Crimes (Substituted Section 59) Amendment Act 2007.

It is interesting to note that the language in subsection 1 has not changed since the original domestic discipline provision from 1893. The 1893 provision would seem outrageous by today's standards: it would be unconscionable to give ship masters the ability to assault their crew to maintain discipline, yet virtually the same words are still in effect in the 2007 Act with respect to children. The only differences between the historical provision and the current one are the terms "correction" and "discipline". The idea prevails that one person is justified in using reasonable force against another, subservient person, in certain circumstances.

b) The United Nations Convention on the Rights of the Child 1989 (UNCRC).

UNCRC was adopted by the United Nations General Assembly in 1989, and to date has been ratified by 191 states.[168] New Zealand ratified the Convention in 1993. UNCRC is "the first binding universal treaty dedicated solely to the protection and promotion of children's rights."[169] The convention covers "not only civil and political rights, but also social, economic, cultural and humanitarian rights."[170]

Article 4 of the convention requires that state parties "undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention." The articles relevant to physical punishment are 19 and 37. Article 19 requires state parties to take measures to ensure that children are protected from abuse and

[168] *Status of Ratifications of the Principle International Human Rights Treaties, as at 9 June 2004,* Office of the United Nations High Commissioner for Human Rights, retrieved 8/5/08 from: http://www.unhchr.ch/html/menu3/b/k2crc.htm

[169] Fottrell, D. 'One Step Forward or Two Steps Sideways? Assessing the First Decade of the Children's Convention on the Rights of the Child', page 1, in Fottrell, D. (Ed.) *Revisiting Children's Rights* (2002) Great Britain, Kluwer Law International.

[170] McGoldrick, D. The United Nations Convention on the Rights of the Child, (1991) 5 *International Journal of Law and the Family,* I33.

neglect. This includes physical and mental violence, physical and sexual abuse, neglect, and maltreatment.

The second part to Article 19 states that countries should put in place programmes to support children and to prevent abuse. Programmes should include procedures for reporting, referral, investigation, intervention and treatment for children.

Article 19 is closely linked to Article 37, which requires state parties to ensure that children are not subjected to torture or other cruel, inhuman or degrading punishment. This article deals with slightly more extreme forms of violence, and sets out standards for deprivation of liberty, life imprisonment and capital punishment. However, it is still related to the general violence provision because it promotes the inherent dignity of children and their right to be treated with the same respect that is afforded to adults.

Neither article 19 nor article 37 specifically refer to smacking, chastisement, or physical discipline.[171] Attempts have been made to read legitimate physical punishment into the Convention under Article 5, which requires state parties to respect the guidance and direction that guardians give to their children. However, the United Nations Committee on the Rights of the Child's (the Committee) response was unequivocal:

> It must be borne in mind, however, that article 19 of the Convention required all appropriate measures, including legislative measures, to be taken to protect the child against, inter alia, physical violence. A way should be found of striking a balance between the responsibilities of the parents and the rights and evolving capacities of the child that was implied in article 5 of the convention. There was no place for corporal

[171] McLeod, R. "The United Nations Convention on the Rights of the Child: Implications for Domestic Law" *LLM Research Paper,* Victoria University, Wellington, 1995. See also Freeman M. "Children's rights ten years after ratification" in Franklin, B. (Ed.) *The New Handbook of Children's Rights: Comparative Policy and Practice,* Routledge, London, 2002.

> punishment within the margin of discretion accorded in article 5 to parents in the exercise of their responsibilities.[172]

Article 19 unambiguously states that children shall be protected from "all forms of physical and mental violence". The obvious response from advocates of corporal punishment is that reasonable discipline is not violent,[173] however this is not the position taken by the Committee. The Committee have made it explicitly clear, through guidelines, reports and general comments that it regards physical punishment as contradictory to the principles of the Convention.

i) Guidelines

The Committee has set guidelines for State parties to follow when making their periodic reports.[174] The guidelines require the reports to include relevant information on "[t]he right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment, including corporal punishment (art. 37 (a))".[175] These guidelines are an updated form of those adopted by the Committee in 1996,[176] which "required reports to include 'whether legislation

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[172] United Nations Committee on the Rights of the Child (1995) *Concluding observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland*, 8th Session, CRC/C/15 Add 34.
[173] Newell, P. "Respecting children's right to physical integrity. 'What the world might be like...'" in Franklin, B. (Ed.) *The Handbook of Children's Rights, Comparative Policy and Practice,* Routledge, London, 1995.
[174] United Nations Committee on the Rights of the Child (2005) *General Guidelines Regarding the Form and Content of Periodic Reports to be Submitted by States Parties Under Article 44, paragraph 1(b), of the Convention,* Adopted by the Committee at its thirty-ninth session on 3 June 2005, CRC/C/58/Rev.1
[175] Ibid at para 25
[176] United Nations Committee on the Rights of the Child (1996) *General Guidelines Regarding the Form and Content of Periodic Reports to be Submitted by States Parties Under Article 44, paragraph 1(b), of the Convention,* 343rd meeting, CRC/C/58

(criminal and/ or family law) includes a prohibition on all forms of physical and mental violence, including corporal punishment'."[177]

ii) Reports

The Committee has criticised state parties for maintaining corporal punishment laws that are contrary to Article 19.[178] In 1995 New Zealand reported to the Committee on corporal punishment:

> "187. Corporal punishment of children and young people within government institutions is prohibited. It is not permissible to use physical punishment in the form of discipline on children or young people within institutions under the jurisdiction of the Department of Social Welfare or the Ministry of Education.
>
> 188. An amendment to the Crimes Act 1961 in 1990 outlawed the use of force to discipline children in early childhood centres or registered schools. Parents are legally justified in using force by way of correction towards a child provided the force used is reasonable in the circumstances. However, the use of unreasonable force against a child is a criminal offence and extensive measures are in place for the protection of children from abuse and maltreatment.
>
> 189. The Commissioner for Children has promoted the idea of alternatives to physical punishment for disciplining children and has advocated the repeal of section 59 of the Crimes Act. Also, as part of its activities in focusing on family relationships, the Committee for the International Year of the Family ran a campaign for a "Smack-free Week" to show parents how to be effective in disciplining their children without having to resort to physical punishment."[179]

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[177] Supra No. 33
[178] Ibid, page 135
[179] United Nations Committee on the Rights of the Child (1995) *Initial reports of States parties due in 1995 : New Zealand.* 12/10/95, CRC/C/28/Add.3. (State Party Report)

The Committee responded by asking whether New Zealand was considering repealing s59 of the Crimes Act as had been suggested by the Commissioner for Children.[180] The Committee then recommended that New Zealand review s59 of the Crimes Act.

> 29. The Committee recommends that the State party review legislation with regard to corporal punishment of children within the family in order to effectively ban all forms of physical or mental violence, injury or abuse. It further recommends that appropriate mechanisms be established to ensure the physical and psychological recovery and social reintegration of children victims of such ill-treatment and abuse, in the light of article 39 of the Convention.[181]

Later, in 2003, New Zealand reported to the Committee again. New Zealand had been criticized by the United Nations Committee on the Rights of the Child for failing to bring corporal punishment legislation in line with principles of the convention. Until recently, s59 of the Crimes Act 1961 allowed parents or guardians to use reasonable force for the purposes of disciplining their children. New Zealand did not review the law, and justified this to the Committee by stating that s59 did not sanction the use of violence against children, and that there was other legislation available to protect abused children. Instead of repealing s59, New Zealand opted for an education campaign, to teach parents alternative methods of discipline to smacking:

> "79. Section 59 of the Crimes Act 1961 has not been reviewed during the reporting period and it continues to provide a defence for parents to use force that is reasonable in the circumstances to discipline their children. New Zealand believes it provides sufficient protection through:
>
> • the fact that section 59 does not sanction any form of violence or abuse against children

[180] United Nations Committee on the Rights of the Child (1996) *Implementation Of The Convention On The Rights Of The Child, List of issues to be taken up in connection with the consideration of the initial report of New Zealand,* 14th session, CRC/C/28/Add.3
[181] United Nations Committee on the Rights of the Child (1997) *Concluding observations of the Committee on the Rights of the Child: New Zealand.* 24/01/97, CRC/C/15/Add.71

• the provisions of the Children, Young Persons and Their Families Act 1989 provides protection when abuse is substantiated.
(Please see paragraphs 187 to 189 of New Zealand's *Initial Report.*)

80. Submissions criticised Government for not reviewing section 59 of the Crimes Act. One argument was that physical abuse of children will remain unreported in the community because hitting is seen as "standard parental discipline". Others thought that removing it would lead to loss of parental control. The opponents of corporal punishment recognised parents do need to be "effectively" educated and supported if the law is changed. Reference was made to educational material on alternatives to corporal punishment produced by non-government organisations, especially EPOCH and the Peace Foundation.

81. In October 2000 the Government directed officials to report as soon as possible on how other comparable countries (particularly in the European Union) have addressed the issue of compliance with UNCROC, including the education campaigns that preceded legislative change."[182]

New Zealand justified the failure to review s59 of the Crimes Act by highlighting existing legal 'safeguards' and an education campaign that was launched to raise awareness of the alternatives to physical punishment amongst the public:

"**Legal Safeguards**

Corporal punishment

497. Education campaigns on alternatives to smacking have been developed. However, the legal framework for corporal punishment has not changed. (See paragraphs 187-189 of the *Initial Report.*)

498. Section 59 of the Crimes Act 1961 does not sanction child abuse or protect a parent from the consequences of using excessive force. The legislation is clear in its requirement that physical force may only be administered to a child where it is done for the purpose of correction and where the degree of force used is "reasonable".

499. The Court considers a number of factors to decide if the degree of force used by a parent was reasonable, including:

• the age and maturity of the child
• other characteristics of the child, such as physique, sex and state of health

[182] United Nations Committee on the Rights of the Child (2003) *Second periodic reports of States parties due in 2000: New Zealand.* 12/03/2003, CRC/C/93/Add.4, pages 20-21

• the type of offence
• the type and circumstances of punishment.

500. The section does not sanction uncontrolled punishment carried out in anger. Nor does this section make it acceptable for a parent to apply an unreasonable degree of force in disciplining a child.

501. The Government is reviewing other countries steps to address this issue, including the education campaigns that have preceded legislative change (see paragraphs 79-81).

502. New Zealand uses education as the primary means to encourage parents to find alternatives to corporal punishment of children. In September 1998, Child, Youth and Family launched the "Alternatives to Smacking" campaign, the fourth stage in the Breaking the Cycle programme that commenced in 1995. The main objectives are to raise awareness of the alternatives to smacking and encourage parents and caregivers to think about using them. This campaign focused on television as the key medium, supported by posters, an 0800 freephone help line and pamphlet distribution (Annex 46).

503. Results show the campaign was successful in raising awareness of the alternatives to
smacking. It also found a positive attitudinal shift and a significant behavioural shift from
pre-contemplation to contemplation of the alternatives to smacking.

504. A submission stated that physical abuse of children will continue to happen unreported in the community because hitting is seen as "standard parental discipline". Other people thought that to do away with it will mean loss of parental control. Opponents of corporal punishment recognised that parents do need to be "effectively" educated and supported if the law is changed. Reference was made to educational material on alternatives to corporal punishment produced by EPOCH and the Peace Foundation."[183]

The committee was pleased with this effort, however deemed that it was not enough. New Zealand's policy on physical punishment still lay outside the perimeters of the convention, which requires state parties to protect children from *all* forms of violence, including corporal punishment. Section 59 was doing nothing to promote a child's right to human dignity and physical integrity. The Committee again asked New Zealand why s59 had not been reviewed:

[183] Ibid, pages 99-100

> Please provide information on the reasons some of the recommendations contained in the Committee's previous observations (CRC/C/15/Add.71) have not yet been fully implemented, in particular those related to the harmonization of domestic legislation with the Convention including ... the prohibition of corporal punishment and establishment of mechanisms to ensure the recovery of victims of ill-treatment and abuse (para. 29).[184]

The Committee urged New Zealand to ban corporal punishment, and was critical of the fact New Zealand had done nothing about earlier recommendations:

> "...the Committee notes with concern that some recommendations have been insufficiently addressed. The Committee is particularly concerned about the recommendations relating to the harmonization of domestic legislation with the Convention, including the age of criminal responsibility and minimum age of employment (para. 23), and the prohibition of corporal punishment and the establishment of mechanisms to ensure the recovery of victims of ill-treatment and abuse (para. 29)"[185]

> "29. The Committee is deeply concerned that despite a review of legislation, the State party has still not amended section 59 of the Crimes Act 1961, which allows parents to use reasonable force to discipline their children. While welcoming the Government's public education campaign to promote positive, non-violent forms of discipline within the home, the Committee emphasizes that the Convention requires the protection of children from all forms of violence, which includes corporal punishment in the family and which should be accompanied by awareness-raising campaigns on the law and on children's right to protection.

> **30. The Committee recommends that the State party:**
> **(a) Amend legislation to prohibit corporal punishment in the home;**
> **(b) Strengthen public education campaigns and activities aimed at promoting positive, non-violent forms of discipline and respect for children's right to human dignity and physical integrity, while raising awareness about the negative consequences of corporal punishment.**" [186] (Committee's emphasis)

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[184] United Nations Committee on the Rights of the Child (2003) Implementation Of The Convention On The Rights Of The Child, List of issues to be taken up in connection with the consideration of the second periodic report of New Zealand , 34th session, CRC/C/93/Add. 4
[185] United Nations Committee on the Rights of the Child (2003) *Concluding observations: New Zealand,* 27/10/2003, CRC/C/15/Add.216, page 2
[186] Ibid, page 6

In 2007, there was an attempt to repeal s59,[187] which would have answered the Committee's recommendations, however there was so much opposition to the Bill that there was a risk that it would not pass into law.[188] Instead, a compromise was reached, and s59 was amended into a very complex provision that attempts to clearly set out situations where reasonable force can be used against a child.[189] Physical force for the purposes of discipline was abolished.[190]

It is possible that the Committee will still not be satisfied with New Zealand's efforts. They may commend the removal of corporal punishment, but criticise the new Parental Control provision, which still does not promote a child's right to human dignity and physical integrity, because it lays out all of the circumstances where are child's rights *can* be breached.[191] Children are still unequal rights bearers in the context of physical integrity and protection from assault. "*All* forms" of violence have not been eliminated if the legislation retains an avenue for the hitting of children.

iii) General Comments

In the 2006 the Committee released its General Comment No.8[192] on corporal punishment. The purpose of issuing the comment was to "highlight the obligation of all States parties to move quickly to prohibit and eliminate all corporal punishment and all other cruel or

[187] Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill 2005, no 271-1.
[188] See below, "what went wrong.'
[189] See chapter 3, The Problem of Parental Control.
[190] Section 59(2)Crimes Act 1961 as substituted by section 5 Crimes (Substituted Section 59) Amendment Act.
[191] See chapter 3, The Prescriptive Quality of the Parental Control Defence.
[192] United Nations Committee on the Rights of the Child (2006) *General Comment No. 8,* The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia), 42nd session, CRC/C/GC/8, Geneva, 15 May-2 June 2006

degrading forms of punishment of children and to outline the legislative and other awareness-raising and educational measures that States must take."[193] 'Corporal punishment' or 'physical punishment is defined as:

> "...any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light. Most involves hitting ("smacking", "slapping", "spanking") children, with the hand or with an implement - a whip, stick, belt, shoe, wooden spoon, etc. But it can also involve, for example, kicking, shaking or throwing children, scratching, pinching, biting, pulling hair or boxing ears, forcing children to stay in uncomfortable positions, burning, scalding or forced ingestion (for example, washing children's mouths out with soap or forcing them to swallow hot spices). In the view of the Committee, corporal punishment is invariably degrading. In addition, there are other non-physical forms of punishment that are also cruel and degrading and thus incompatible with the Convention. These include, for example, punishment which belittles, humiliates, denigrates, scapegoats, threatens, scares or ridicules the child."[194]

The Committee makes it clear that corporal punishment is a form of violence, which Article 19 specifically prohibits with the words "all forms of physical and mental violence." It is also made clear that corporal punishment "directly conflicts with the equal and inalienable rights of children to respect for their human dignity and physical integrity."[195] The Committee reiterated that State parties have an obligation to take legislative measures to prohibit corporal punishment, and also to take measures to implement that prohibition by raising awareness and putting in place reporting, referral, educational and monitoring mechanisms.

It seems strange that as a party to an international treaty, New Zealand can have domestic legislation contrary to the clear principles in the treaty. However, as Michael King[196] points out, the procedures for implementing children's rights advocated in UNCRC lack 'structural

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[193] Ibid, at para 2.
[194] Ibid, at para 11.
[195] Ibid, at para 21.
[196] King, M., *A Better World for Children: Explorations in Morality and Authority*, Routledge, London, 1997.

coupling'. Basically, this means that UNCRC lacks teeth when compared to other Conventions because it has no Court to enforce legal processes. A Court's decision that a country's policy is contradictory to a Convention not only puts political pressure on that country to change, but legal pressure as well.[197] Consequently, "[r]esponsibility for any unpopular changes in domestic legislation and administrative practice can be passed from the national government to the Commission or Court. Where no such structural coupling exists, as in the case of the UNCRC, this displacement of political responsibility is not possible."[198] In the case of corporal punishment in New Zealand, deferment of responsibility for a seemingly unpopular law change to the Convention and international law would have prevented political issues getting in the way of children's rights advancement. The s59 issue in New Zealand became a political 'hot potato', and the focus of the Bill was lost.

King has made a prediction, an accurate one in New Zealand's case, that without structural coupling, governments will at most make 'cosmetic' changes to legislation to fulfil international obligations, so long as they do not compromise their political objectives:

> "In the absence of any structural coupling between law and politics, therefore, complaints from legal or quasi-legal international organizations about violations of children's rights become reconstructed not as legal duties but as threats to national government and seen as unjustified and ill-informed criticism that the government is unable or unwilling to fulfil its international or constitutional obligations. The obvious political response of governments is to defend themselves against these charges by denying them, thus undermining the authority of their accusers. Only where absolutely necessary do they respond by complying with their international obligations. But even

[197] King provides the example of the European Human Rights Convention: "The terms of the convention ensure that the Court's decision or the settlement between the parties results in an 'irritation' for governments, imposing a political and legal obligation on the government found to have committed a human rights violation to change its laws in order to avoid future violations. This obligation provides for the co-evolution of legal and political programmes around the decisions of the European Human Rights Court and Commission."
Ibid, page 179.

[198] Ibid, pages 179-180.

> here the changes that they introduce are likely to take the form of cosmetic reforms in the law, which are unlikely to affect the government's political objectives. What they are least likely to do is take substantive measures to improve children's lives (even if this were possible), where these would conflict with their political programmes or compromise the ideological stance that won them the confidence of the electorate or those pasts of the electorate on which they rely for their support."[199]

Despite the fact that the Committee has urged New Zealand to review its domestic discipline legislation, the lack of legal obligations and sanctions within UNCRC meant that the impetus for change had to come from within New Zealand. This meant that the issue was a hotly contested domestic issue, with two sides to be taken. King's predictions were accurate: politics got in the way of reforming the legislation as consistent with UNCRC. Rather than completely fulfilling its obligations to UNCRC, the New Zealand government made 'cosmetic' changes to s59, so as to protect their political agendas at the same time. Consequently, the substance of the complaint, children's rights, has been undermined. In other words, had UNCRC been a legally enforceable international treaty, children's rights would have been better promoted. A full repeal of s59 would have been a matter of course in order to comply with our international legal obligations, rather than being a domestic political issue, available for compromise.

The changes New Zealand made to 59 were merely cosmetic in that that they did not fully ban parental hitting of children.[200] To fully recognise children as individual social actors with equal rights to protection under the law, all forms of assault that are not justified for other members of society should have been done away with. By doing away with the use of force for the purposes of correction, but not all uses of force, it seems like New Zealand is trying to hit two birds with one stone: Avoid international embarrassment after mounting pressure

[199] Ibid, page 180
[200] See chapter 4.

from the UN to abolish corporal punishment while at the same time appeasing the distressed domestic population by not removing all uses of force. New Zealand appears to be talking the talk as far as children's rights are concerned, but is it really walking the walk[201] if the provision that replaced Domestic Discipline does nothing to promote children's rights, and might actually violate them even *more*?[202]

2. The lead up to the amendment of Section 59 of the Crimes Act 1961.

When Sue Bradford introduced her Bill, it had a specific purpose, which was to repeal s59 and respect the child's right not to be hit. The repeal of s59 of the Crimes Act 1961 was not only about correcting a children's rights injustice, but also precipitating social change, by guiding society's attitudes and behaviours away from violence. However, by the time the Bill was passed into law, this purpose seemed to have morphed into something completely different, due to widespread hysteria and misunderstanding.[203]

a) What the initial Bill was about.

The Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill 2005 (the Bill) was a simple bid for a full repeal of s59 of the Crimes Act 1961. The explanatory note to the Bill described its purpose as:

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[201] Supra No. 130.
[202] See chapter 4 for an explanation of how the Parental Control provision actually allows *more* justifiable invasions of children's physical integrity.
[203] See below, 'What went wrong?'

> "… to stop force, and associated violence being inflicted on children in the context of correction or discipline. Presently, section 59 of the Crimes Act 1961 acts as a justification, excuse or defence for parents and guardians using force against their children where they are doing so for the purposes of correction and the force used is reasonable in the circumstances. The Bill will repeal that provision.
>
> The effect of this amendment is that the statutory protection for use of force by parents and guardians will be removed. Children will now be in the same position as everyone else so far as the use of force (assault) is concerned. The use of force on a child may constitute an assault under section 194(a) of the Crimes Act, a comparatively new provision in the criminal law, and the repeal of section 59 ought not revive any old common law justification, excuse or defence that the provision may have codified."[204]

In the first reading[205] of the Bill, Sue Bradford made several points very clearly about the intentions behind the proposed law change:

1) That the Bill is about bringing children's rights to bodily integrity and protection from assault in line with other members of society:

> "It is about giving children and young people the same legal protection from physical assault that adults have. I do not understand at all why it is illegal in New Zealand to beat my spouse, another adult, a policeman, or even an animal harshly with a horse crop or a piece of wood, but it can be legal to do the same thing to my child. It seems to me that section 59 of the Crimes Act is a relic of English 19th century law and thinking, which said that children were simply the property of their parents and were subject to their total control and to harsh physical discipline. At that time the same applied to wives, servants, and horses. Strangely, it is only children to whom this quaint but dangerous law still applies."

2) That the Bill is about fulfilling New Zealand's obligations to UNCRC:

> "It is high time we lived up to our commitments as a signatory to the United Nations Convention on the Rights of the Child. We are currently in breach of the convention, despite paying lip service to it, because we allow State-sanctioned force here. I believe that Government has a responsibility to lead the way on this."

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[204] Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill 2005, no 271-1. See Appendix 1.
[205] (2005) 627 NZPD 22086

3) That the Bill is about changing attitudes towards children's rights, and curtailing violent behaviours:

> "In practice, section 59 conveys the message to all New Zealanders that the State thinks it is legitimate and OK to use so-called reasonable force against those who, at least until they grow up, are smaller, weaker, and less mature than we are."
>
> "Our country has an all-pervasive culture of violence against children that leads to us having one of the highest abuse and child mortality rates in the developed world. People coming to this country for the first time, even from places like Israel, are shocked by the culture of violence we have here in the household and in the family."
>
> "I welcome the national debate that my bill has opened up about how, as a society, we regard and treat our children."

4) That the Bill is *not* about banning light smacking:

> "What I am not doing is proposing a new law that might, for example, make it a crime to lightly smack a child or to physically restrain a child when such restraint is manifestly necessary, such as when a toddler is closing in on a power point with a fork in hand."
>
> "This bill is not about imposing penalties on parents who currently use light physical discipline. It is about giving children and young people the same legal protection from physical assault that adults have."

5) The Bill is *not* about criminalising parents:

> "I am not seeking in any way to criminalise ordinary parents. I just want to remove a legal defence that is used when some people seriously hit or beat their children."
>
> "It is a nonsense to say that, as so many of my political opponents are doing at the moment, should repeal of section 59 happen, parents will suddenly be subject to arrest, prosecution, and conviction if they lightly smack their child. There is no way the Department of Child, Youth and Family Services will abruptly abandon its huge current caseload to remove children from parents who smack them, as United Future ridiculously alleges; nor will police, all at once, start arresting parents who put their child in a room for a bit of time out. It is patently ridiculous to think that all of a sudden the removal of the defence of reasonable force will lead to police all over the country arresting people for such actions. Goodness knows, they have enough other work to do. The aim of this repeal is not to subject parents to prosecution for trivial assault. In other countries where laws like this have been changed, there has not been a marked increase in such arrests. I certainly would not expect it to happen here, where the climate of public opinion is so manifestly not ready for a ban on smacking."

b) An exercise in social change.

Repealing the defence of reasonable force for the purposes of correction can be seen as an exercise in social change.[206] When the State, through its legislation, no longer endorses the hitting of children and begins to recognise children as individual citizens deserving of equal rights, then gradually the public attitudes should follow. Prior to the amendment of s59, the Crimes Act legitimised assault against children, which sends a very clear message to the New Zealand public, that this is a socially acceptable behaviour. Polls have shown that the majority of New Zealanders believe that smacking *is* a socially acceptable behaviour.[207] Ideally, by removing this endorsement and justification, people will gradually change their attitudes and eventually physical chastisement will become socially unacceptable, just like some practices of our ancestors that shock us or make us cringe now.[208] Removing the defence forces people to change their behaviour, which in turn causes a shift in attitude.[209]

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[206] Keating discusses the UK corporal punishment scenario and how the government has failed to encourage attitudinal changes. Keating, H. Protecting or punishing children: physical punishment, human rights and English law reform (2006) 26 *Legal Studies* 3, 394-413.

[207] 73% percent of those polled opposed the Bill in March 2007. Nine months after the Parental Control provision was passed "74% of New Zealanders believed parents should be able to smack their children, contrary to the repeal of Section 59 of the Crimes Act". The maximum margin of error is +/- 4.7 % (at the 95% confidence level).
Kiwis remain opposed to "anti-smacking" legislation, Research New Zealand, Media Release, 20 February 2008.

[208] "...we are rightly appalled by the previous legal privileges accorded to husbands to beat their wives, and to masters to beat their apprentices and servants. Our descendants will probably be equally appalled by the existing legal privilege accorded to us to beat our children." Caldwell, J. L. Parental Physical Punishment and the Law, (1989) 13 *New Zealand Universities Law Review*, 387.

[209] "Often behaviour change precedes attitude change... In time they will develop attitudes supportive of their new behaviour." Katz, D. The Functional Approach to the Study of Attitudes (1960) 24 *The Public Opinion Quarterly* 2, 163-204.

As Sue Bradford pointed out, New Zealand has done away with legislation that legitimised assault in the name of chastisement on other groups in society, including students and seamen.[210] The only group that was left was children:

> "Some of our ancestors brought with them, unfortunately, a culture and law that said that women, wives, servants, and children were the property of the master, the man, and the husband. With that attitude came a law that said it was OK to beat the wife, the servants, and the children.
>
> We have got rid of those laws. We used to have them, but we have got rid of the laws that allowed the husband to beat the wife. We got rid of the laws that said it was OK for a master to beat a servant, or an employer to beat an employee. But the relic of those laws is section 59 of the Crimes Act, which allows all of us as parents to beat our children in the name of child discipline."[211]

Social attitudes towards women's rights to physical integrity have changed with the abolishment of legislation that made their rights subservient to their husbands. For example, spousal immunity to rape has been relatively recently abolished,[212] along with the social attitude that a woman's body belongs to her husband. Similarly, it is no longer socially acceptable for a man to physically chastise his wife for bad behaviour.[213] A comparable attitude shift surrounding violence against children might happen if children are no longer singled out as the only group in society against which the state endorses the use of force.

Evidence that social attitudes can change regarding physical punishment of children has been found in studies of attitudes in Sweden, which banned corporal punishment in 1979:[214]

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[210] Taylor, N. Physical punishment of children: international legal developments (2005) 5(1) *New Zealand Family Law Journal* 14
[211] (2007) 638 NZPD 8432
[212] Crimes Amendment Act (1985) No.3
[213] See government website, 'Family violence, it's not ok'. Accessed 14/5/08 from http://www.areyouok.org.nz/home.php
[214] "The goal of the ban was to alter public attitudes and to acknowledge children's rights as autonomous individuals..." The Swedish ban came under the Parent's Code rather than the

> "Public support for corporal punishment has declined markedly. Whereas in 1965 a majority of Swedes were supportive of corporal punishment, the most recent survey found only 6 per cent of under 35-year-olds supporting the use of even the mildest forms. Practice as well as attitudes have changed; of those whose childhood occurred shortly after the ban, only 3 per cent reported harsh slaps from their parents, and only 1 per cent report being hit with an implement (contrast the position in the UK and other countries where a quarter or more of young children are hit with implements). Child abuse mortality rates are extremely low in Sweden; for 14 years from 1976 to 1990 no child died as a result of abuse."[215]

Joan Durrant has found that the change in attitude about corporal punishment in Sweden is "too dramatic to be attributable solely to forces that somehow alter cultural norms regardless of legal structures."[216] Sweden was in similar position to New Zealand, in that before the ban on corporal punishment, most of the public supported its use, however the Swedish case has demonstrated that law reform and attitude change can resemble the chicken and the egg; neither one necessarily presupposes the other:

> "Certainly, as cultural beliefs evolve they can, in turn, contribute to the reform of the law. But as the Swedish experience has shown, this is not a necessary condition for legal reform or for the attitude shifts that can follow it. When Sweden's corporal punishment defence was removed from the Penal Code, at least half of the population believed that physical punishment was necessary in childrearing. It was *after* the law was changed that these attitudes shifted rapidly. In fact, in only one of the countries (Finland) that have explicitly abolished physical punishment was the majority in favour of abolition before the law was changed (Boyson, 2002[217])."[218]

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criminal code, and read: "Children are entitled to care, security, and a good upbringing. Children are to be treated with respect for their person and individuality and may not be subjected to physical punishment or other injurious or humiliating treatment."
Durrant, J. E. "The Swedish Ban on Corporal Punishment" in de Gruyter W. *Family Violence Against Children: A Challenge for Society,* Berlin, New York, 1996, 19-25.

[215] Newell, P. "Global progress towards giving up the habit of hitting children" in Franklin, B. (Ed.) *The New Handbook of Children's Rights, Comparative Policy and Practice,* Routledge, London, 2002, page 384.

[216] Durrant, J. E. Legal Reform and Attitudes towards physical punishment in Sweden (2003) 11 *The International Journal of Children's Rights,* page 169
See also, Ziegert, K.A. The Swedish Prohibition of Corporal Punishment: A Preliminary Report (1983) 45 *Journal of Marriage and the Family,* 917-926.

[217] Boyson, R. *Equal Protection for Children: An Overview of the Experience of Countries that Accord Children Full Legal Protection from Physical Punishment,* National Society for the Prevention of Cruelty to Children, London, 2002.

[218] Supra No. 216, page 169.

3. What went wrong? How the purpose behind the Bill was lost.

Just like in Sweden, there was a massive public resistance to the Bill in New Zealand.[219] In the time between the Bill being introduced and the Parental Control provision being passed, the focus of the repeal became less about children's rights and more about child abuse, criminalisation of parents and religion. As a result, the debate turned into a "political hot potato", and to avoid failure, the Bill had to meet some of these concerns by undergoing major restructuring. Consequently, the whole essence of the Bill was lost.[220]

a) Child Abuse

Opponents of the Bill claim that reasonable physical punishment and child abuse are not the same thing.[221] In essence, they argue that the domestic discipline defence did not protect abusers, so to remove it would make no difference, and instead it would make good parents criminals for using light physical punishment. This argument not only requires an analysis of what constitutes 'abuse', it also reinterprets the purpose of the Bill. It supposes that the Bill was intended to combat child abuse.

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[219] For a comprehensive summary of the public resistance to the Bill, see chapter 7: "Public Attitudes" in Wood, B., Hassall, I., Hook., G, *Unreasonable Force. New Zealand's journey towards banning the physical punishment of children,* Save the Children New Zealand, 2008. Chapter 8 is an insightful analysis of the role of the media in fuelling the debate.

[220] See chapter 3 for an analysis of how the amendments to the original Bill changed its very essence and purpose.

[221] "It is clear that physical abuse leads to long-term problems, but physical abuse is not currently permitted by section 59... There is a qualitative difference between moderate physical discipline and abuse, such that there is a divide between the two behaviours" This statement was made as part of a submission to the Justice and Electoral Committee on the Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill, by the Maxim Institute, Auckland.

Sue Bradford herself has said, "The epidemic of child abuse and child violence in this country continues, sadly. My bill was never intended to solve that problem."[222]

The connection between child abuse and physical discipline was strengthened by the media, with the portrayal of the two issues becoming increasingly intertwined.[223] Many of the submissions made to the Justice and Electoral Committee sought to distinguish legitimate smacking of children from severe beatings and cases of child abuse that had managed to slip through the 'reasonable force' test in the past. Such options were put forward by MP's and the Auckland District Law Society,[224] and considered by the Law Commission,[225] however Sue Bradford was adamant that her Bill would never be compromised on hitting for the purposes of correction.[226]

While the Bill was not about addressing New Zealand's child abuse problems, it *was* intended to do away with socially accepted physical practices against children.[227] The Swedish experience has shown that there is a low rate of child deaths by abuse in a country

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[222] National Radio, 21 December 2007. Family First quoted this in a full page Sunday Star Times Advertisement against the "Anti-Smacking" law. The advertisement cited examples of cases where parents had been investigated for using force against their children in various "trivial matters", and stated, "meanwhile the unacceptable rate of child abuse continues". *Please Don't Take my Daughter,* Sunday Star Times, 27/1/08.

[223] See Chapter 8, Wood, B., Hassall, I., Hook., G, *Unreasonable Force. New Zealand's journey towards banning the physical punishment of children,* Save the Children New Zealand, 2008. Editorial comment and coverage of child homicides in the media enhanced the assumption that child abuse is liked with physical punishment.

[224] Auckland District Law Society, *Criminal responsibility for domestic discipline: the repeal or amendment of Crimes Act 1961, section 59,* Public Issues Committee, Auckland New Zealand, 2005.

[225] Supra No. 20

[226] Supra No. 37

[227] See above, An exercise in social change. Also, Sue Bradford's comment, "Our country has an all-pervasive culture of violence against children that leads to us having one of the highest abuse and child mortality rates in the developed world. People coming to this country for the first time, even from places like Israel, are shocked by the culture of violence we have here in the household and in the family" (2005) 627 NZPD 22086

that does not support the use of force against children.[228] One of the oft-cited reasons for disallowing smacking is that when an avenue for hitting is open, people will abuse it, often unintentionally.[229] The saying, "give them an inch and they'll take a mile" rings true in cases where what started out as discipline ended up as severe child abuse:

> "Most parents who punish their children to death claim that they didn't mean to kill them. Few think of hands as deadly weapons, but in a way, a severe spanking might be analogous to an accidental shooting. There are many cases where children get shot accidentally because guns were available. Hitting the kids is an available procedure for parents, and there are cases where it "accidentally" leads to death, too.
> Of course I have heard the argument that it is not guns that kill people, it is people who kill people. But if you accept this reasoning, shouldn't it apply to spanking? It is not their hands, fists, electrical cords, whips, or other instruments that kill the children, it's the parents who do it. Sounds somewhat silly to me. But as is demonstrated in many other countries such as Japan and Singapore, it is possible to limit gun ownership and therefore reduce death by guns. In the same vein you could eliminate severe spankings by eliminating the acceptance of spanking. If no child was spanked, none would be spanked severely, thereby reducing deaths of children in their homes."[230]

The Bill was about establishing children as equal rights bearers with equal protection from assault. This eventually would bring about social attitude change regarding physical force against children, which in turn would eventually curb the use of violence. The Bill was not a tool for dealing with child abusers directly, but the abuse focus meant that the public lost sight of the bigger picture.[231]

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[228] Between 1976 and 1990 no child died in Sweden as a result of abuse.
Newell, P. "Ending corporal punishment of children" in Fottrell, D. (Ed.) *Revisiting Children's Rights,* Kluwer Law International, Great Britain, 2000.
[229] Many instances of child abuse are simply corporal punishment gone too far. Freeman, M. *The Rights and Wrongs of Children*, Francis Pinter, London, 1983. For specific New Zealand examples see Coddington, D. Disciplined to Death, *North and South,* February 2000, 32-44.
[230] Supra No. 163, page 31.
[231] For an assessment of the connection between child abuse and physical punishment see, Straus, M. A. Corporal Punishment and Primary Prevention of Physical Abuse (2000) 24(9) *Child Abuse and Neglect,* 1109-1114.

b) The Criminalisation of Parents.

One of the biggest reasons for opposition to the Bill was the fear that parents were going to be criminalised for lightly smacking their children, or even for applying any force at all.[232] This fear was rife despite reassurance from Sue Bradford, the Police,[233] the Justice and Electoral Committee[234] and other legal experts[235] that inconsequential or minor uses of force are very unlikely to be prosecuted. The editor of the Press commented that the "claim that parents would become criminals is simply scare-mongering, because the Police would become involved only if there was a serious fear of child abuse occurring."[236] Nevertheless, the concern was widespread.[237] In chapter 3 I will discuss how the Bill was amended to address these concerns and to give parents further protection from prosecution.

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[232] See Chapter 3 for a discussion on the gap in the law prior to the 2007 amendment that meant uses of force *other* than for the purposes of correction technically amounted to assault.
[233] *Police Practice Guide*, http://www.police.govt.nz/news/release/3149.html, 19 June 2007 (Appendix 3) and Pope, R. *Three month review of Police activity following the enactment of the Crimes (Substitued section 59) Amendment Act 2007,* http://www.police.govt.nz/resources/2007/section-59-activity-review/
[234] Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill, As reported from the Justice and Electoral Committee
[235] for example, see Nick Davidson QC's comments in "Supernanny Busted" (2006) 65 *Investigate* 28.
[236] Editor, "Ban the rod", *Press,* 14 March 2007.
[237] A sample of media headlines demonstrates how prevalent this issue became: "Please don't take my daughter", *Sunday Star Times* 27/1/08; "CYFS files on smackers" *NZ Herald,* 28/6/07; "Toddler's tantrum brings three cops knocking" *NZ Herald,* 14/8/07; "School dobs mum to CYF for hand smack" *stuff.co.nz,* 28/10/07; "Mother reported for smacking child's hand" *NZ Herald, 28/10/07.*

c) Religion.

Religion played a significant role in the debate leading up the amendment of s59. Religious advocates of corporal punishment find support for their position from the Bible,[238] with statements such as "spare the rod and spoil the child" and proverbs such as "Those who spare the rod hate their children, but those who love them are diligent to discipline them" (13:24) and "Withhold not correction from the child: for if thous beatest him with the rod, he shall not die" (23:13). New Zealand has no state religion, and many proponents of disciplinary smacking did not rely on religious arguments to support their position.[239] However it has been suggested that age-old habits of using smacking as a disciplinary tool are related to religious assumptions that exist in our culture:

> "Most secular issues involving punishment cannot escape the enduring assumptions and perspectives generated over the centuries by American and European religious rationales. So embedded are these assumptions in our minds and culture, and so familiar are they to most of us, that it is often almost impossible to discern their actual influence on us."[240]

Some religious arguments state that smacking is a "biblical mandate" and to ban it would equate to a breach of parents' rights to practise their religion.[241] However, in *The Queen on the application of Williamson v Secretary of State for Education and Employment*[242] Judge Elias pointed out that *corporal punishment* is not a religious conviction in its own right:

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[238] For a comprehensive analysis of the religious foundations for corporal punishment arguments, see Greven, P. *Spare the Child/ The religious roots of punishment and the psychological impact of physical abuse,* Vintage Books, New York, 1992.
[239] Supra, No. 37
[240] Supra No 238, page 97.
[241] "Christian schools' smacking plea fails" *Daily Telegraph*, London, 16 November 2001. See also Drake, M. *By Fear or Fallacy. The repression of reason and public good by the anti-smacking lobby in New Zealand,* Wycliffe Christian Schools, Auckland, 2006.
[242] [2001] EWHC Admin 960, [2002] 1 FLR 493, [2002] ELR 214

> "Corporal punishment is not being invoked for its own sake but in order to help secure the religious convictions that underpin the Christian convictions of these families. Accordingly I do not accept that the belief in the desirability of corporal punishment, even although it is derived from the Christian convictions held by these parents, can properly be defined as a religious conviction in its own right."[243]

The judge in this case also pointed out that a ban on smacking in schools does not infringe the human rights of any of the claimants, because not all Christians believed in corporal punishment and it could not be considered an integral part of the religion.

In the New Zealand debate, not all religious groups were resistant to the Bill. The Bishops of Aotearoa New Zealand released a statement in May 2007 in favour of repeal of s59, stating that Biblical assertions must be read in the light of Christ's teaching, which places children in a position of respect.[244] The two major groups in New Zealand who have actively campaigned for the right to smack, and a referendum on repealing the new s59 base their positions in Judeo-Christian values.[245]

Whatever the reason behind the public resistance to the Bill, it was obvious that the New Zealand public struggled with the change. A study of the massive amount of submissions (1716) made to the Justice and Electoral Committee showed that many people were concerned with parental rights and viewed children as 'human becomings' rather than 'human beings'[246] It is not surprising then that this, coupled with the public's

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[243] At para 45.
[244] For the full statement, see Woods, Hassell and Hook, Supra. No. 37, pages 96-97.
[245] Family First www.familyfirst.org.nz and the Kiwi Party www.thekiwiparty.org.nz. See also www.casi.org.nz
[246] Debski, S., Buckley, S., Russell, M., *Just who do we think children are? An analysis of submissions to the Justice and Electoral Committee* (2007) Health Services Research Centre, University of Victoria.

misunderstanding about the outcomes of physical punishment,[247] resulted in widespread resistance. To change the law would mean that people would have to view children differently. Children would go from being small, voiceless extensions of their parents to being accepted as human beings with equal rights. Arguably, this scared a lot of people, perhaps because children with rights are threatening,[248] in that a parent has less control over them and they have the potential to get parents into trouble with the law. Irwin A. Hyman gives a classic example of parental fear and loathing of the plight to ban smacking, in the form of callers on talk back radio:

> "She claimed that we should return to the good old days when children respected their parents and teachers... I was stunned by the vehemence of the majority of the callers who had a field day accusing me and all other child psychologists and fellow travelers of poisoning the minds of American parents. Somehow, we were the Commie, pinko, liberal elements in our society that fostered permissiveness so that our country would lose the cold war."[249]

Comparing anti-smackers to communists demonstrates how people are *scared* of giving children rights. Communism was something that people were afraid of and it seems that people are just as afraid to give up the power they have to hit their children. However, removing the power to smack is not taking away a parental right, we are giving children an equal right. The right to hit did not belong to parents in the first place, it was a negative discrimination against children that is being levelled. Likening anti-smacking to communism suggests giving people equal rights where they are not deserved or earned, and this speaks volumes about the way people view children.

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[247] Taylor, A. Section 59: Crimes Act 1961: The Impact of Corporal Punishment on Children and Young People (2005) 3 *Te Awatea Review* 1, 14-16. Taylor examines the place of physical punishment in the law (in 2005) and the outcomes for children. She concludes that the research is not reflected in public opinion, and there remains a gap between what is known from studies, and what the public understands.
[248] Ritchie, J. & Ritchie, J. *Spare the Rod,* George Allen and Unwin, Sydney, 1981.
[249] Supra No. 163, page XI

Hyman proposes that everyone considers himself to be an expert on the topic:

> "Why? Because almost everyone has either been spanked, observed someone being spanked, read about it or heard or saw it in the media. I quickly discovered that most Americans whom I encountered were deeply and emotionally enmeshed in their beliefs whether they were for or against spanking… These deeply held beliefs about what to do when children misbehaved, based on personal experiences, religious assumptions, family and regional patterns of child rearing, and political orientation, needed to be challenged."[250]

The intense debate over the Bill to repeal s59 of the Crimes Act meant that peripheral issues managed to disguise the main purpose, which was to recognise children as citizens in society, deserving of the same human rights as everyone else in the context of bodily integrity and protection from assault. The message behind the Bill got lost, and amendments were made to it that changed its very essence and effect.

[250] Supra No. 163, page XIII. See also Pritchard, R. *Children are Unbeatable. 7 very good reasons not to hit children*, Office of the Children's Commissioner, UNICEF New Zealand and the Families Commission, New Zealand, 2006.

Chapter 3: The Problem of Parental Control.

Under the old s59, a parent, or person in the place of a parent, was justified in using force by way of correction towards a child if the force used was reasonable in the circumstances.[251] In its initial stages, the Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill (the Bill), or as it came to be known, the 'anti-smacking bill', proposed to simply remove the s59 defence to assault from the Crimes Act 1961.[252] By the time it reached its third reading however, the Bill had been amended to represent a political compromise, in the wake of intense debate and public concern. The Amendment removed the justification for using force against children in circumstances where the force is used for the purposes of correction,[253] however it created a fresh justification for parents to use force on children in other specified circumstances.[254]

The amendments made to the Bill have compromised its original purpose by replacing one form of justification for the use of force against children with another. They were drafted to placate resistance to the Bill, but failed to address the issue that the public was most concerned about, which was 'smacking.' Instead, in an attempt to fill the gap in an already unproblematic area of the law, the amendments have created ambiguities and loopholes that could potentially disguise the use of force for the purposes of correction. Ironically, the law

[251] Section 59 'Domestic Discipline', Crimes Act 1961, prior to the 2007 amendment.
[252] Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill 2005, no 271-1.
[253] Section 59(2)Crimes Act 1961 as substituted by section 5 Crimes (Substituted Section 59) Amendment Act 2007.
[254] Current Section 59(1)(a)-(d) Crimes Act 1961.

would be clearer if it was silent on the use of force against children, and children would have achieved an equal status with adults with respect to bodily integrity.

1. Section 59 of the Crimes Act: Parental Control

Part 3 of the Crimes Act 1961 sets out the situations that qualify as 'matters of justification or excuse'. The Amendment has transformed the justification for the use of force in s59 from "Domestic discipline" to "Parental Control", essentially removing the powers of parents to physically chastise their children and replacing them with powers to use force in other specified circumstances.

s59 Parental Control.

(1) Every parent of a child and every person in the place of a parent of the child is justified in using force if the force used is reasonable in the circumstances and is for the purpose of—

(a) preventing or minimising harm to the child or another person; or

(b) preventing the child from engaging or continuing to engage in conduct that amounts to a criminal offence; or

(c) preventing the child from engaging or continuing to engage in offensive or disruptive behaviour; or

(d) performing the normal daily tasks that are incidental to good care and parenting.

(2) Nothing in subsection (1) or in any rule of common law justifies the use of force for the purpose of correction.

(3) Subsection (2) prevails over subsection (1).

(4) To avoid doubt, it is affirmed that the Police have the discretion not to prosecute complaints against a parent of a child or person in the place of a parent of a child in relation to an offence involving the use of force against a child, where the offence is considered to be so inconsequential that there is no public interest in proceeding with a prosecution.]

New Zealand's ratification of UNCRC[255] in 1993 was a significant step towards the recognition of children as bearers of human rights. While the convention doesn't necessarily advocate full autonomy[256] for children, the various articles set out fundamental rights which state parties are required to promote, and where necessary, amend domestic law to accommodate.[257] The Convention supports the premise that the right to bodily integrity, or more specifically, the right not to be hit, is a fundamental human right.[258] This right is innate in every human,[259] and does not require capacity to be exercised.[260] The United Nations Committee on the Rights of the Child has expressly disapproved of the legal use of corporal

[255] The Convention was adopted by the United Nations General Assembly on the 20th of November 1989.

[256] Dependency and capacity are often regraded as the necessary elements that disqualify children from being treated as fully autonomous. Freeman remarks that the convention hasn't done enough to reduce the idea that being 'dependent' means being deprived of basic rights. Supra No. 110

[257] Article 4 of the Convention requires that state parties "undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention."

[258] Specifically, Article 19 requires that state parties "protect the child from all forms of physical or mental violence, injury or abuse, neglect or neglectful treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has care of the child." Article 37 requires that state parties ensure that "no child shall be subjected to cruel, inhuman or degrading treatment or punishment." While the words of these articles do not specify corporal punishment, the Committee has expressly denounced it in its definition of physical punishment. See below at No. 261

[259] Judge von Dadelszen comments that the Care of Children Act 2004 was built on the premise that children are legitimate citizens, therefore they deserve the same protection from assault as adults. He remarks that the existence of the right of parents to use corporal punishment is inconsistent with this.
Von Dadelszen, P. Judicial Reforms in the Family Court of New Zealand (2007) *New Zealand Family Law Journal* 267

[260] Children should not be denied basic human rights or 'dignity-based' rights by virtue of their incapacity. These rights recognise their status as individual persons. Dignity-based rights are different from 'needs-based' rights which recognise that children are different from adults, and require protection and nurture.
Supra No. 106

punishment[261] as it disregards a child's right to be free from violence[262] and the right to physical integrity and basic human dignity.[263]

New Zealand's attempt to abolish corporal punishment has answered the Committee's concerns in one respect, however the defence of reasonable force that replaced the domestic discipline section has not properly addressed the child's right to physical integrity, human dignity, or equality before the law. The Committee clearly states that the child's right to human dignity and bodily integrity in the Convention was built upon principles in international human rights law, which state that these rights belong to *everyone*:

> "Before the adoption of the Convention on the Rights of the Child, the International Bill of Human Rights - the Universal Declaration and the two International Covenants, on Civil and Political Rights and on Economic, Social and Cultural Rights - upheld "everyone's" right to respect for his/her human dignity and physical integrity and to equal protection under the law. In asserting States' obligation to prohibit and eliminate all corporal punishment and all other cruel or degrading forms of punishment, the Committee notes that the Convention on the Rights of the Child builds on this foundation. The dignity of each and every individual is the fundamental guiding principle of international human rights law."[264]

The effect of codifying the circumstances where parents can use force has, on one hand, reassured parents that they can still legally use force on their children, however, on the other hand, it has once again set children apart from other groups in society as the group who can still be legally assaulted. Although it would be absurd and impractical to assert that parents

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[261] The Committee defines "corporal" or "physical" punishment as any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light. Most involves hitting ("smacking", "slapping", "spanking") children, with the hand or with an implement - a whip, stick, belt, shoe, wooden spoon, etc.
United Nations Committee on the Rights of the Child (2006) *General Comment No. 8, The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia),* 42nd session, CRC/C/GC/8, Geneva, 15 May-2 June 2006
[262] Ibid at (4).
[263] Ibid page (26).
[264] Ibid at (16).

should not have the ability to use force against their children in emergency situations, the fact that it has been spelt out in the criminal code, where it was never needed before, says something about the way we view children as rights bearers. It tends to show that as a society, while we *liked* the idea of bringing a child's right to bodily integrity to the level of an adult's, we were not ready to do so, preferring a "compromise" instead. Leaving the law silent on this issue would not have prevented parents being justified in using force against their children to protect them. The common law already protects the use of force against adults in similar situations.

The codifying of the parental control justification was unnecessary for several reasons:

a) The non-existence of the defence prior to June 2007

Before the Amendment, parents could be found guilty of assaulting their children in two ways. Firstly, if the force used for the purpose of correction was considered *not* to be reasonable in the circumstances[265] and, secondly, if the force used was not for the purposes of correction.[266] The Amendment has removed the first situation, and has tried to clear up the second by codifying it.

Where there is no statutory justification for the use of force, an action technically amounts to assault under the Crimes Act 1961.[267] Section 2 defines assault as:

> "the act of intentionally applying or attempting to apply force to the person of another, directly or indirectly, or threatening by any act or gesture to apply such force

[265] *Y v Y* Unreported, High Court Auckland, HC 122/97, 27 February 1998, Baragwanath J.
[266] *Ausage v Ausage* [1998] NZFLR 72, 80. See also, Ahdar, R. and Allen, J., Taking Smacking Seriously: The case for Retaining the Legality of Parental Smacking in New Zealand [2001] *New Zealand Law Review* 1, page 3.
[267] Section 196. An assault provision specific to children and male assaults female exists under section 194.

> to the person of another, if the person making the threat has, or causes the other to believe on reasonable grounds that he has, present ability to effect his purpose; and to assault has a corresponding meaning."

Before the Amendment, s59 provided a defence for parents to use reasonable force for the purposes of *correction* only.

> **59 Domestic discipline**
>
> (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 1989.]

This does not include for the purposes of changing a nappy, for example, or other normal parenting tasks. Technically, before the law change parents could legally smack their children for the purposes of correction, but uses of force for other purposes, e.g. holding a child down to change a nappy, could have amounted to assault.

The Crimes Act itself does not include a definition of correction. The relevant definitions from the Shorter Oxford English Dictionary[268] are:

> "(1) The action of putting right or indicating errors
>
> (2) Reproof of a person for a fault of character or conduct
>
> (3) Chastisement, disciplinary punishment; esp. corporal punishment..."

The Justice and Electoral Committee, in recommending the amendments to Sue Bradford's bill, stated that the provisions under the new Parental Control defence would address the gap in the law:

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[268] Brown (ed) *Shorter Oxford English Dictionary* (5th Edition, Oxford University Press, 2002) Volume 1, 523.

> "The new section 59 clarifies that reasonable force may be used for other purposes such as protecting a child from harm, providing normal daily care, and preventing the child doing harm to others. We consider that this amendment provides for interventions that are not for the purpose of correction by parents and every person in the place of a parent. Additionally it will address a gap in the law, as under the current wording of section 59 the application of force from any motivation other than correction may amount to an offence." [269]

However, in attempting to legislate for parental uses of force in situations that would technically amount to assault, the amendments to the original bid for a full repeal have undermined one of its crucial purposes, to give children equal protection from assault under the law.[270] Sue Bradford's bill intended for children to be equal citizens in the eyes of the law with equal rights to bodily integrity.[271] The inclusion of a new defence of reasonable force has not achieved this. While the removal of corporal punishment brought children's rights in line with adults', the defence of Parental Control has set them apart again.

Prior to 2007, the "gap in the law" did not present itself as a problem. The absence of this defence in the past never caused any ridiculous outcomes, because checks and balances already existed in common law[272] and the ability of police to exercise prosecutorial discretion.

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[269] Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill, As reported from the Justice and Electoral Committee, page 2.

[270] In the explanatory note to Sue Bradford's Members Bill (Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill 2005, no 271-1) it states that the effect of the amendment is that parents and guardians will be "in the same position as everyone else so far as the use of force against children is concerned."

[271] In the first reading of the Bill, Sue Bradford said about its purpose, "It is about giving children and young people the same legal protection from physical assault that adults have. I do not understand at all why it is illegal in New Zealand to beat my spouse, another adult, a policeman, or even an animal harshly with a horse crop or a piece of wood, but it can be legal to do the same thing to my child." (2005) 627 NZPD 22086.

[272] See below, 'the availability of alternative defences.'

In recommending the changes to the original Bill, the Justice and Electoral Committee conceded that the purpose of the amendments is clarity in the wake of widespread misunderstanding, rather than a genuine need to have the gap in the law filled.

> "We consider that there is widespread misunderstanding about the purpose and possible results of the bill as introduced. We do not consider that the repeal of section 59 will lead to the prosecution of large numbers of parents and persons in the place of parents in New Zealand. Nevertheless, for the sake of clarity, we have recommended amendments to the bill to clarify that parents may use reasonable force in some circumstances, but not for the purpose of correction. We note that there are several potential offences directly related to the care of children that are rarely prosecuted. Such an example is if a caregiver sends a child to its room against its will, this technically constitutes kidnapping under section 209 of the Crimes Act. However, the police are not regularly prosecuting parents for this. We consider that logic dictates the police will adopt a similar approach to parents who use minor physical discipline following the changes to section 59."[273]

However, in attempting to achieve clarity, the amendments to the Bill have caused two main problems. Firstly, children's rights to bodily integrity and equality under the law, the original purpose behind seeking repeal of s59, have been compromised. Secondly, over-legislating the point has created new ambiguities[274] and fails to cover a circumstance involving force that parents were perhaps the most concerned about.[275]

The committee acknowledges that there are everyday occurrences in child rearing that technically amount to an offence, however the reality of the situation means that parents will not get prosecuted. They illustrate this point with the kidnapping example above. By the same token, a parent doing any of the things contemplated by s59(1)(a)(d) would be unlikely to be prosecuted if the statutory defence did not exist, because the current police guidelines

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[273] Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill, As reported from the Justice and Electoral Committee, no 271-2 page 7.

[274] See below, 'the prescriptive quality of the parental control defence.' The parental control defence has created loopholes for the use of force for the purposes of correction, by framing legitimate uses of force very widely.

[275] See below, 'putting a child on the naughty step.'

recommend that there should be public interest in proceeding with a prosecution.[276] Obviously, there is little public interest in prosecuting a parent for the use of force against a child intended to protect them from harm, or holding a child down while changing a nappy.

b) The availability of alternative defences

The lack of statutory defence for a particular action does not leave a "gap in the law" if an existing common law defence adequately covers it. Peter McKenzie QC points out that the defence of necessity would have potentially covered some of the situations in s59(1), making their codification somewhat unnecessary.

> 13. The Law Commission in para.8 of its report, expressed the view that the non-disciplinary interventions which parents are permitted to make under subclause (1) cover a gap in the law that needed to be addressed, *"because, on the wording of section 59, the application of force from any motivation other than correction* ***is an offence currently"*** (the Law Commission emphasis). I doubt that the gap is as wide as the Law Commission suggests. The common law defence of necessity which is preserved by s.20 of the Crimes Act is likely to cover interventions which are needed in order to prevent harm to the child or prevent the child from engaging in criminal activity or disruptive behaviour. In my opinion, the defence of necessity would under the present law cover interventions such as restraining a child from walking in front of traffic and removing an offensive weapon or seriously harmful drugs from a child.
>
> 14. The Courts have recognised in cases such as *Kapi v. Ministry of Transport* (1991) 8 CRNZ 49 (CA) and *Police v. Kawiti* [2000] 1 NZLR 117 that the defence of necessity may be available not only if there are grounds of imminent peril of death or serious injury to the accused, but also danger to another person where "necessity of circumstances" justifies the accused breaking the law. [277]

In addition to the defence of necessity for the actions described above, the Crimes Act 1961 already provides justification for the use of force to prevent suicide or certain offences in s41.

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[276] Prosecution Guidelines, Crown Law Office, March 1992, para 3.3.1 (See Appendix 4)
[277] McKenzie, P. *Crimes (Abolition of Force as a justification for Child Discipline) Amendment Bill- Effect on Parental Corrective Action*, legal opinion prepared for Gordon Copeland MP, 21 March 2007, page 5. Reference to Palmer, G., *Section 59 Amendment: Options for Consideration*, Report of the Law Commission for the Justice and Electoral Committee, 8 November 2006.

41. Prevention of suicide or certain offences[278]

Every one is justified in using such force as may be reasonably necessary in order to prevent the commission of suicide, or the commission of an offence which would be likely to cause immediate and serious injury to the person or property of any one, or in order to prevent any act being done which he believes, on reasonable grounds, would, if committed, amount to suicide or to any such offence.

Arguably, this defence would have been sufficient to cover the sorts of situations contemplated in s59(1)(b). However, it is strange that the words "criminal offence" were used rather than "crime", which is defined in Section 2 of the Crimes Act 1961.[279]

Adams on Criminal Law points out that s59(1)(a) is unnecessary because it closely resembles self defence:[280]

> "Subsection 1(a) is self-explanatory and largely replicates self-defence/defence of another [s48] ...However it confers a somewhat narrower defence than s48 insofar as the accused's belief in the circumstances justifying their actions falls to be tested by an objective standard."[281]

While it would be difficult to establish that children impliedly *consent* to everyday uses of force upon their bodies, Lord Justice Goff in *Collins v Wilcock*[282] suggests that the common law might excuse "all physical contact which is generally acceptable in the ordinary conduct of daily life". This might include parental uses of force that have always been generally accepted in New Zealand before we felt the need to codify them.

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[278] Crimes Act 1961.

[279] Adams suggests that the word "criminal" is unhelpful, and that the power conferred on parents in s59(1)(b) extends to the prevention of *any* offence by virtue of the fact it is not restricted to "crime" only.
Adams on Criminal Law, para CA 59.03, accessed 6 March 2008

[280] Crimes Act 1961, s48.

[281] Adams on Criminal Law, para CA 59.03, accessed 6 March 2008

[282] [1984] 1 W.L.R. 1173. In this case it was held that everyday jostling does not constitute assault.

Finally, judges have the power to discharge without conviction[283] where the indirect consequences of a conviction would be out of proportion to the gravity of the offence.[284] This would be one more safeguard against parents being prosecuted for uses of force that technically amount to assault, in the absence of the unnecessary parental control provision. *R v Hende*[285] illustrates this point, where a crèche worker was discharged without conviction for smacking a child on the bottom:

> "There was no justification for treating the incident as involving anything more than a pat on the bottom. Although technically assault, it did not merit the stigma of a conviction..."[286]

A similar case involving a parent would not have had the same result under the new Parental Control provision, because the use of force for the purposes of correction is explicitly prohibited. If, as Sue Bradford's original Bill intended, the s59 defence of Domestic Discipline had simply been repealed, the trivial uses of force for *any* purpose would have been caught by the safeguards that we already have in our law, as demonstrated above.

2. The prescriptive quality of the Parental Control defence

The amended s59 has three purposes. Firstly, it removes the justification for the use of corporal punishment. Secondly, it affirms the police discretion not to prosecute cases that are not in the public interest or are inconsequential. Thirdly, it sets out the circumstances where parents or persons in the place of a parent *can* invade a child's bodily integrity, in what amounts to a fresh defence of reasonable force.

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[283] Sentencing Act 2002 Section 106
[284] Sentencing Act 2002 Section 107
[285] [1996] 1 NZLR 153
[286] At 158

Section 59(1)(a)-(d) is intended to fill the gap in the law, to provide a statutory defence for parents in situations where technically their use of force would amount to assault. However, by setting out all of the situations in which a child's bodily integrity can be legitimately invaded, the amended s59 has developed a prescriptive quality. In essence, by listing all of the circumstances where children do *not* have the right to bodily integrity, it demonstrates that children are not equal citizens deserving of equal rights. Before the amendment, children enjoyed the same right to bodily integrity as adults in the Crimes Act, except of course when the force used on them was for the purposes of correction. Now that the correction defence has been removed, it would be logical to think that children would be *completely* equal to adults, however the amendments have prevented that from happening. What we are left with is an exhaustive, unnecessary and largely ambiguous list of ways parents can use force against their children. For example, subsection (1)(c) allows parents to use force to prevent the child from engaging in offensive or disruptive behaviour. Woods, Hassell and Hook suggest that this provision seeks to cover the situation of a child having a tantrum in a supermarket, to allow a parent to remove or restrain the child, as opposed to smacking to stop the anti-social behaviour.[287] However, there is no requirement in s59(1)(c) that the behaviour be public, or that any person needs to be disturbed or offended by it.[288] The term is deliberately vague to cover a whole host of situations, but the sorts of situations contemplated by this provision would probably be such minor instances of assault, there would be no public interest in prosecuting them anyway.[289]

[287] Supra No. 37, page 85.
[288] Adams on Criminal Law, para CA 59.03, accessed 6 March 2008
[289] Supra No. 276, para 3.3. (Appendix 4)

The justification of parental force in s59(1) has presumably been drafted in such a way as to maximise the cover for potential situations where parents use force. However, the lack of specificity, and failure to define terms has perhaps blurred the boundary[290] between force used to *correct* a child and the listed 'legitimate' uses of force.[291]

The terms "child",[292] "person in the place of a parent", "reasonable force" and "correction" have still not been defined by this amendment, which is strange seeing as the Justice and Electoral Committee was trying to clear up the law in this area. The Police Practice Guide (Appendix 3) highlights the lack of formal definitions, and consequently there is an attempt to fill the gap, which in itself is problematic. For example, the guideline for "force used is reasonable in the circumstances" reads:

> "No definitions are offered about what constitutes reasonable force. In using force parents must act in good faith and have a reasonable belief in a state of facts which will justify the use of force. The use of force must be both subjectively and objectively reasonable.
>
> Any force used must not be for the purposes of correction or punishment; it may only be for the purposes of restraint (s 59(1)(a) to (c)) or, by way of example, to ensure compliance (s 59(1)(d))."[293]

[290] The difference between legitimate uses of force in s59(1)(a)-(d) and the uses of force for the purposes of correction lies in the motive of the parent, and this may often be difficult to establish. The section is so vague that it would be relatively easy to reclassify a corrective use of force within one of the four situations set out in s59(1). See example on page 93.
[291] Adams on Criminal Law, para CA 59.01, accessed 6 March 2008
[292] "Child" means a person 17 years of age or under in the Care of Children Act 2004, but means a person of 14 years of age or under in the Children, Young Persons and Their Families Act 1989. The practice guide suggests that the age of the child will impact on the reasonableness of the force used. The older the child gets, the less justifiable the uses of reasonable force listed in s59(1) will become.
[292] Police Practice Guide for new Section 59, 19 June 2007, page 2 (Appendix 3)
[293] Ibid, page 3

This definition reads into s59(1)(d) the legitimate use of force *to ensure compliance.* Arguably, the definitions of 'ensuring compliance' and 'correction' are interchangeable, and in some cases it would be difficult to assess whether the force used was to ensure compliance, or whether it was for the purposes of correction. Too much responsibility is left with the prosecutor to distinguish the purpose behind the use of force, that in some circumstances may be indistinguishable.[294] This problem would not exist if s59 had simply been repealed, because the police would not have had to assess the motive behind each use of force, in addition to its inconsequentiality.

This ambiguity in an amendment which is meant to provide clarity means that the justifications in s59(1) could potentially be used as a 'loophole' to the prohibition of force for the purposes of correction in s59(2). The above example of the police definition illustrates this point. Similarly, consider the scenario where a child is talking back to his parent at home; if the parent picks the child up and puts him in his room as punishment for his behaviour, there has technically been an assault (see below, 'putting the child on the naughty mat'), however a parent could reasonably justify the action under s59(1) as preventing the child from continuing to engage in offensive or disruptive behaviour. This justification does not require the behaviour to be public, or for it to be established that anyone was actually offended or disturbed. By the same token, if the parent gave the child a small smack on the hand instead of taking him to his room, the same justification could be raised, and it makes a difficult task for the prosecutor to establish the motive behind the force. Reasonable force is

[294] Supra No. 277, page 8 Peter McKenzie QC expressed a concern for the amount of discretional responsibility entrusted in the police. He felt that there was a danger in leaving the police with too much discretion, because invariably the outcomes would be inconsistent.

not defined in s59, therefore 'smacking' is not specifically banned. Parents may still use any form of reasonable force against their children, so long as the intention behind the force is not discipline. Of course, this kind of situation is so inconsequential that it would be very unlikely to be prosecuted. However it demonstrates that the amendments have not sufficiently clarified matters to a degree that warrants their existence in the first place.

The Law Commission highlights the fact that the requirement that motive is established may cloud the issue:

> "We need to emphasise that, in any given case, the parental motive will be a question of fact that varies in the circumstances of each case. This means that it is impossible for us to provide a blanket reassurance that prosecution will never be appropriate when force has been used to achieve "time out". It will be a matter for prosecutorial discretion and, ultimately (if the discretion is taken to prosecute) the decision of a jury.
>
> However, in this regard, there is a very important point to note. The "Solicitor-General's Prosecution Guidelines" require prosecutors, in the exercise of their discretion, to assess the likelihood of achieving a conviction. We suggest that, in the vast majority of "time out" cases, parents will be prompted by a mix of motives, which may include prohibited correctional purposes, but in all likelihood will also include other permitted purposes. It is thus questionable whether in such cases a jury could ever properly convict a parent beyond reasonable doubt, which in turn may tell against the likelihood of prosecution."[295]

In other words, the differentiation between the use of force for the purpose of correction and the legitimate use of force is often difficult, and might preclude prosecution in contentious cases. It is difficult to see then how the amendments to the Bill added further clarity or how they have helped to achieve successful abolition of all uses of force for the purposes of correction.

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[295] Palmer., G., Law Commission, *Crimes (Substituted Section 59) Amendment Bill: Opinion of Peter McKenzie QC,* Table in Parliament on 13 March 2007, (2007) 637 NZPD 7871.

3. The effect of affirming police discretion.

Section 59(4) affirms the police discretion not to prosecute certain offences.

> (4) To avoid doubt, it is affirmed that the Police have the discretion not to prosecute complaints against a parent of a child or person in the place of a parent of a child in relation to an offence involving the use of force against a child, where the offence is considered to be so inconsequential that there is no public interest in proceeding with a prosecution.

The inclusion of this affirmation was to further address public and political anxieties about the Bill.[296] It was the work of Prime Minister, Helen Clark, and former Prime Minister, Geoffrey Palmer, who then gained the approval of the bill's creator, Sue Bradford. The Amendment was also approved by the leader of the opposition, in a political about-turn to support the Bill. Affirmation of the police discretion, while it did nothing to change the current practical situation, seemed to be the magical cure for the major discord in the House of Representatives. Following an historic press conference where the Prime Minister and leader of the opposition formed a united front, the House voted overwhelmingly in favour of the amendment. There were speeches applauding the cooperation of people who worked to resolve the 'impasse'.[297] It appeared that a simple recognition of something that already existed was enough to reassure those who feared a change in the law would bring the worst.

However, the inclusion of an affirmation that the police have discretion not to prosecute inconsequential offences is unusual and unnecessary.[298] The purpose of its inclusion was to ensure that the Bill made it through its final reading, by calming the nerves of those who

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[296] Supra No. 37, page 183.
[297] Ibid, 183-184.
[298] Supra No. 259. Judge Paul von Dadelszen remarks that the addition of the affirmation of police discretion is "a little superfluous, as the Police have this discretion in any case."

feared the prosecution of parents was going to be widespread and out of control. In that sense, its inclusion is more of a political tool than a necessary element of the parental control provision. While it was successful in getting the law passed, its overall effect is perhaps the most damaging to our perception of children in New Zealand and their status as equal rights bearing citizens. The motivation for including an additional point to a piece of legislation should never be getting it passed in to law, rather it should be because it is necessary to achieve the original purpose. In this case, the inclusion of an affirmation of police discretion actually does more damage than good, because it seriously compromises the entire purpose and essence of the Bill. The fact there was a perceived need to make explicit mention of police discretion as it applies to child discipline and abuse cases is indicative of the classification of children into a subset of human beings. Seemingly, the public were unwilling to apply the same laws to children as are applied to adults, despite the fact that the end results are the same. This goes against the essence of the Bill, which sought to remove distinctions between adults and children with respect to bodily integrity.

The damage is not confined to children's rights. The affirmation of police discretion dilutes the perception of children as equal rights bearers, but its inclusion in statute might also be problematic for judicial review of police discretion.

a) Police discretion already exists

The existing prosecuting guidelines assist the police with the decision of whether or not to prosecute an offence. Two major factors must be taken into account when making the decision to prosecute or not to prosecute. The first is evidential sufficiency, which requires the prosecutor to ask whether there is sufficient reliable and admissible evidence that an

offence has been committed by a particular person, and additionally whether a properly directed jury could find the person guilty beyond reasonable doubt. The second is whether there is public interest in proceeding with prosecution. The guidelines set out 16 additional factors to be considered when assessing the public interest in prosecution. Some of the more relevant factors in a child assault decision might be:

a) the seriousness or, conversely, the triviality of the alleged offence; i.e. whether the conduct really warrants the intervention of the law;

b) all mitigating and aggravating circumstances;

e) the degree of culpability of the alleged offender;

f) the effect of a decision not to prosecute on public opinion;

i) the availability of proper alternatives to prosecution;

j) the prevalence of the alleged offence and the need for deterrence;

k) whether the consequences of any resulting conviction would be unduly harsh and oppressive;

n) the likely length and expense of the trial;

p) the likely sentence imposed in the event of conviction having regard to the sentencing options available to the Court.[299]

The fact that this discretion already exists was considered by the Justice and Electoral Committee when they recommended the amendments to the original bill.

> "As with any other offence, the prosecution of parents and every person in the place of a parent for the use of force against children for the purpose of correction will be a matter for police discretion, although private prosecutions remain a possibility. We were advised that all prosecution decisions are guided by the Solicitor-General's Prosecution Guidelines. The guidelines state that police must decide whether a prosecution is required in the public interest. They also state that ordinarily a prosecution will not be in the public interest unless it is more likely than not that it

[299] Supra No. 276, para 3. (Appendix 4)

> will result in a conviction... There are safeguards in the criminal justice system to minimise the likelihood of parents and every person in the place of a parent being prosecuted for minor acts of physical punishment. Various options other than formal prosecution are available to police, including warnings and cautions. Under the Solicitor-General's Prosecution Guidelines, a prosecution should proceed only where it is in the public interest and there is sufficient evidence".[300]

This recognition of existing police discretion supported their belief that a change in law would not lead to a significant increase in prosecutions. The Justice and Electoral Committee did not recommend an affirmation of police discretion within the words of the Act, and remarked "We do not believe that the changes we have proposed to section 59 of the Act will lead to a large increase in convictions or the removal of children from their families for the use of minor physical discipline."[301]

b) How s59(4) effects the underlying message of the provision

Repealing s59 was supposed to put children's right to bodily integrity on an equal level with adults. In the second stage of the Bill the Justice and Electoral committee deviated from that purpose by creating amendments that would legitimise certain forms of force used against children but not adults. At least, however, in the second stage the message was very clear about the use of force for the purposes of correction. Subsection 2 specifically prohibits this use of force, and subsection 3 reinforces the importance of this message by making it prevail over anything in subsection 1. Unfortunately, by the third stage of the Bill even the message about the use of corrective force was weakened, by the inclusion of an affirmation of police discretion. John Key, leader of the opposition party, in explaining his support for the

[300] Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill, As reported from the Justice and Electoral Committee, page 5 (Appendix 2)
[301] Ibid page 7.

addition of subsection 4, effectively hit the nail on the head when he stated that the purpose of the affirmation was to:

> "give parents confidence that they will not be criminalised for lightly smacking their children. It makes it clear that police have the discretion not to prosecute complaints against a parent where the offence is considered to be 'so inconsequential' that there is no public interest in the prosecution going ahead."[302]

Mr Key succinctly implied that the intention of s59(4) is to undermine the whole purpose of the Act, which is to abolish the use of parental force for the purposes of correction.[303] He has affirmed that smacking is acceptable, so long as it is not more than inconsequential. If this was the *actual* intention of the Bill, then the integrity of the Act would have been better served by being clear about its purpose.[304]

Even though this discretion exists for every offence, the fact that it is reiterated *only* in s59 weakens the strength of the purpose of that section. To make a comparison, s219 of the Crimes Act 1961, 'Theft or Stealing' does not affirm the police discretion not to prosecute inconsequential cases within the words of the section. The message about theft is clear, that it is wrong to steal. If this section were the *only* section in the whole of the Crimes Act to include an affirmation of police discretion, the message would become compromised. The

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[302] Key, John, *Some sense on smacking - at last!* Newsletter: Keynotes No 9, http://johnkey.co.nz/index.php?/archives/101-NEWSLETTER-KeyNotes-No-9.html, May 2 2007.

[303] Section 4 Crimes (Substituted Section 59 Act) Amendment Act 2007

[304] The Law Commission actually reviewed two options for the Justice and Electoral Committee, one being the narrowing of the scope of 'reasonable force', put forward by Chester Burrows MP. This option would resemble the s59 equivalent in England, by providing a non-exhaustive list of conduct which is to be considered unreasonable (e.g. use of a weapon or tool; causes injury that is more than transient or trifling), rather than abolishing corporal punishment altogether. This is obviously not the option the Committee chose. Palmer, G., *Section 59 Amendment: Options for Consideration*, Report of the Law Commission for the Justice and Electoral Committee, 8 November 2006.

message might instead be that it is wrong to steal in general, but minor thefts are not so bad. This is not ideal. The Criminal code of a country should be able to be relied upon to tell the people what is expected of them, without vague qualifications. In the context of children's rights, s59 does not properly convey that children have the right to bodily integrity, or even that they are completely deserving to be free of the use of force for the purposes of discipline. The underlying message of the Bill was originally intended to be, 'children are the same as adults with respect to bodily integrity and assault'. The amendments and the unnecessary inclusion of the affirmation of police discretion have transformed this message into, 'Here are the ways children are not equal to others and their bodily integrity can be invaded. Do not use force against them for the purposes of correction, but if you do, make sure it is sufficiently inconsequential so as to avoid prosecution'.

c) Integrity of the Crimes Act and immunity from review

The police discretion not to prosecute is affirmed in only one section of the entire Crimes Act, s59. In practice, police have discretion not to prosecute *any* offences if they do not have sufficient evidence or if it would not be in the public interest. The fact that this discretion is affirmed in only one section of the statute not only undermines that section, it undermines the Act as a whole by implying that it is somehow different from the other sections. It suggests that this section really only has face value, or that perhaps police have *extra* discretion in these cases because the discretion has not been affirmed anywhere else even though this was probably not the intention of the legislature.

This could potentially cause problems if a police decision not to prosecute an offence is challenged. Traditionally, the courts have been reluctant to review the exercise of

discretion,[305] however it is debateable whether the inclusion of the discretion in statute brings its application within the judicial realm. In *Polynesian Spa Ltd v Osborne*[306] it was held that while review of discretion cannot be completely ruled out, "it will only be in rare cases",[307] that is "if it were established that the prosecuting authority acted in bad faith or brought the prosecution for collateral purposes."[308] The judge in the case found that the decision *not* to prosecute is also amenable to review:

> "*Hallett*[309] is authority for the proposition that judicial review is only likely to be obtained in such a case where there has been a failure to exercise discretion, such as by the adoption of a general policy that in certain classes of cases, prosecutions will not be brought. There may be other grounds but it is likely only to be in exceptional cases that a court would intervene where a decision has been taken not to prosecute in a specific case not affected by factors such as the adoption of a general policy."[310]

It is possible the courts will remain reluctant to review the exercise of discretion, except in cases of bad faith, despite it now being affirmed within the Act.[311] Before the discretion was included in statute, it was difficult, yet possible, to challenge it by way of judicial review, However now that it has been codified to form a substantial part of s59 it could potentially be open to more direct review in a criminal prosecution. It is difficult to predict whether the legislative reference to police discretion will allow the courts will find *more* legitimacy in reviewing it in s59 cases. Some theorists believe that the affirmation will not further fetter the discretion to, or not to prosecute, because the statute itself does not confer the discretion,

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[305] *Fox v Attorney General* [2002] 3 NZLR 62
[306] [2005] NZAR 408
[307] Ibid at 62
[308] Ibid at 64
[309] *Hallett v Attorney-General (No.2)* [1989] 2 NZLR 96, 100.
[310] *Polynesian Spa v Osborne* at 69
[311] Knight, Dean, *Crimes (Substituted Section 59) Amendment Bill,* Laws 179 Elephants in the Law, http://www.laws179.co.nz/2007/06/crimes-substituted-section-59-amendment.html, June 20 2007

it merely recognises it.[312] Regardless, the inclusion of the affirmation in the section has permitted people to feel entitled to a fair and *transparent* exercise of discretion,[313] which was not the purpose of the Bill. The Criminal code should set society's minimum standard of behaviour, without qualification.[314] The practical application of the code should be kept quite separate.

To avoid the implication that police have extra discretion in s59 cases, or that s59 is not to be taken too seriously, the affirmation should either have been left out altogether, or made a general provision, applicable to the whole Act. The words of s59(4) are clear about the purpose of its inclusion, which is 'to avoid doubt'. This purpose could have been achieved by affirming a *general* police discretion not to prosecute, without setting s59 apart. By making the affirmation a general provision of the Crimes Act, the underlying message in s59 and the consistency of the statute would not have been compromised.

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[312] Ibid at 5. Knight points out that the court has existing power to control prosecutions to prevent abuse, and to discharge without conviction. He concludes that prosecutorial discretion is irrelevant in the eyes of the court.

[313] See *Smacking Crimes "Inconsequential"- Yet Police Still Prosecuted,* Press Release: Society for the Promotion of Community Standards, 7 May 2007, http://www.scoop.co.nz/stories/PO0705/S00121.htm for an example of how people will expect the application of the "inconsequential" standard to be transparent. It shows a sense of entitlement to be free from prosecution for uses "benign" corrective force after John Key's promise that the inclusion of subsection 4 protects parents from criminalisation for light smacking.

[314] Supra No. 37, page 87.

4. Putting a child on the 'naughty step'[315]

The purpose of amending s59 was to make better provision for children to live in a safe and secure environment free from violence by abolishing the use of parental force for the purposes of correction.[316] Parents today are being discouraged from raising their children in a context of discipline and punishment, and instead are being persuaded to use positive encouragement techniques and child guidance.[317] The introduction of the Crimes (Substituted Section 59) Amendment Act meant that parents in New Zealand can no longer resort to the use of physical force for the purposes of correction and have to learn new ways of dealing with problem behaviour. The task of explaining the new law and assisting parents to find alternatives to physical discipline has, at this point, been left with non-governmental organizations (NGO's).[318] The Families Commission website[319] recommends several positive reinforcement techniques, and provides links to other NGO's with advice on alternatives to smacking. The use of 'time-out" is recommended by "Littlies",[320] specifically, the picking up and removing a child to a room, corner, or step for bad behaviour.[321]

In a legal opinion for Gordon Copeland MP, Peter McKenzie QC concludes that the application of force to carry a child to a "naughty mat" or another room for the purposes of

[315] The 'naughty step' was an alternative to smacking advocated by Supernanny, TV2's popular parenting show. Supernanny, Jo Frost, recommended physically putting misbehaving children on the naughty step or naughty mat as a form of time-out. http://www.supernanny.co.uk/Advice/-/Parenting-Skills/-/Discipline-and-Reward/The-Naughty-Mat.aspx

[316] Section 4 Crimes (Substituted Section 59) Amendment Act 2007

[317] *Child discipline and the law*, Bardardos Information Sheet No.61, July 2007; *Choose to Hug, not to Smack,* Office of the Commissioner of Children and EPOCH, 2001.

[318] Supra No. 37, page 87.

[319] http://www.nzfamilies.org.nz/parenting/positive-discipline.php

[320] http://www.littlies.co.nz/page.asp?id=246&level=3

[321] Taylor, J., & Redman, S. The smacking controversy: what advice should we be giving parents? 46 *Journal of Advanced Nursing* 3, 311-318.

"time-out" amounts to use of force for the purposes of correction, and therefore constitutes assault.

> The "justifications" for parental intervention set out in s.59(1) which is proposed to be inserted into the Crimes Act by clause 4 of the Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill, do not provide any justification for parental intervention for the purpose of correction. Any use of force for the purpose of correction is expressly excluded by reason of clause 3 and the proposed s.59(2) and (3). In my opinion, the carrying of a child against the child's will to a "naughty mat" or another room in order to provide correction or discipline to the child cannot be justified under the proposed Bill and would, therefore, come within the meaning of an assault under the Crimes Act.[322]

The definition of assault in the Crimes Act 1961 does not provide for varying degrees of force used, or the motivation behind the application of force. The force used to put a child in time out would be considered inconsequential, and therefore would be unlikely to be prosecuted, however it raises the question, if a gap in the law still exists, what then was the point in making the amendments?

a) Is this another "gap in the law"?

The media fuelled public hysteria and concern around the repeal of s59 was focused on *physical punishment,*[323] not on non-disciplinary uses of force.[324] When the amendments were

[322] Supra No. 277 page 9

[323] In an analysis of the submission made to the Justice and Electoral Committee on the Bill, it was found that "in general those submitters who advocated physical punishment would oppose the Bill and those who supported the Bill would oppose the use of physical punishment... none who opposed the Bill opposed physical punishment and only five who supported the Bill clearly stated that they also supported physical punishment." Debski, S., Buckley, S., Russell, M., *Just who do we think children are? An analysis of submissions to the Justice and Electoral Committee* (2007) Health Services Research Centre, University of Victoria.

[324] The Family First petition for a referendum had, at 29 April 2008, gathered approximately 269,500 signatures. One of the questions they aim to have a referendum on is, "Should a smack as part of good parental correction be a criminal offence in New Zealand?" Clearly, the focus is still on the use of force for the purposes of correction, not on other uses of force.

made by the Justice and Electoral Committee after considering over 1700 submissions, the uses of force for non-disciplinary reasons were legitimised, but the non-violent uses of force for the purposes of correction, such as picking a child up for time out were not. People and politicians[325] seemed to be reassured that this gave them further protection, but in reality *it changed nothing.* People felt further relieved when the police discretion not to prosecute was affirmed,[326] but again, in reality, *it changed nothing.* People wanted to be reassured that they were not going to be made criminals for disciplining their children, but the focus on 'smacking' meant that less attention was paid to the fact that *any* use of force for the purposes of correction amounts to assault, not just hitting or smacking.

b) What was the point in the amendments? Why not just repeal s59?

The Justice and Electoral Committee felt there was a gap in the law that needed to be addressed, and that widespread misunderstanding about the effect of the bill would be cleared up by spelling out the law regarding the use of force against children.[327] However, there is still a gap, and it is the one that people were concerned about. It is the gap concerning physical punishment.[328]

Smacking petition falls short, retrieved 29 April 2008 from http://stuff.co.nz/print/4501944a19715.html

[325] See above No. 273. The Justice and Electoral Committee state that they have drafted the amendments to achieve clarity amongst widespread confusion about the purpose and possible results of a law change. Implicit in this, is the also the attempt to reassure those who misunderstand the Bill, by legislating further protections for them.

[326] The Police Guidelines specifically refer to time out situations, classifying them under either s59(b)(c) and (d). This lends further support for the notion that the use of force for the purposes of discipline can easily be reinterpreted to fit within the four legitimate uses of force in s59.

[326] Police Practice Guide for new Section 59, 19 June 2007 (Appendix 3)

[327] See above No. 273.

[328] The Law Commission suggests that to legislate for the 'timeout' scenario would have created a loophole in the law for parents to use force for the purposes of discipline.

When Sue Bradford introduced her Bill, it quickly became known as the "anti-smacking bill" despite the fact that Bill sought to abolish *all* uses of force against children for the purposes of correction, not just smacking. Wood, Hassall and Hook suggest that this label originated from opponents of the bill, who wanted to alarm the public with the notion that good parents would be made criminals for light smacking.[329] The amendments were introduced, especially in the final stages, to create enough reassurance that there would not be widespread criminalisation in an effort to get the law passed. It was meant to be a compromise, a less severe form of Sue Bradford's original bid, but all the amendment did was answer a completely different issue.

The issue of the use of force was split in two by the time the Bill reached its third reading:
Issue 1. Physical force for the purposes of correction.
Issue 2. Physical force for purposes other than correction.
The amendments made to the bill answered the second issue, but this was not what was concerning the New Zealand public. The proposed law change was still as severe as Sue Bradford's original bill in the context of physical force for the purposes of correction, therefore there was no reason for people to feel reassured by the amendments. The addition of the affirmation of the police discretion was meant to further reassure people, but again, it did nothing to change the current reality, because police discretion has always existed.

Palmer., G., Law Commission, Supra No. 295.
[329] *Unreasonable Force. New Zealand's journey towards banning the physical punishment of children,* Save the Children New Zealand, 2008, page 140. As result, the public's attention turned toward smacking, despite the fact that the concern for this issue stemmed from the successful application of the s59 defence in cases where the force used was far more severe than smacking.

The amendments have done nothing to change the current reality concerning the use of non-disciplinary force against children, nor have they softened the blow with respect to abolishing corporal punishment, because there are still gaps in the law. However, the vague drafting of the section means there is potential for corrective uses of force to be disguised as one of the legitimate uses in s59(1). We would be in a better, clearer position if we had simply repealed s59 and simply left it at that. The fact that a defence has been legislated to appease the concerns for something completely different is illogical, especially since it has done nothing to change the current reality.

Sweden successfully banned corporal punishment almost 30 years ago. By framing the ban in terms of children's rights and respect for children they managed to avoid the problems that New Zealand has created with the Parental Control provision. The Swedish Parents Code, as amended in 1983 states:

> "Children are entitled to care, security and a good upbringing. They shall be treated with respect for their person and their distinctive character and may not be subject to corporal punishment or any other injurious or humiliating treatment) (Children and Parents Code, ch. 6, §1.)"[330]

New Zealand was not trying to achieve something different from Sweden, but did so, by virtue of the way the abolishment was phrased. The Swedish code makes a point of establishing children's rights. This conveys to the people that children are valued citizens, deserving of the right not to be hit, just like everyone else. Sweden lists all of the things that children are entitled to, but New Zealand lists all of the ways children are not entitled to physical integrity instead. Although they are designed to achieve the same purpose,

[330] Surpa No. 33

(abolishing the use of force for the purposes of correction) the messages the two laws send are completely different, and Table One shows.

Table One: Comparison between Sweden's and New Zealand's legislation.

Sweden's Parental Code	New Zealand's section 59
Positive wording. Children are entitled to respect.	Nothing mentioned about children's rights, the treatment of children or respect.
The aim and purpose is to remove corporal punishment	*The aim and purpose is to remove corporal punishment*
The overall message is that children are humans and humans do not deserve to be hit.	The overall message is that parents cannot hit for correctional purposes, but can hit or use other force for situations X, Y and Z.
It does not go into other situations where force can be used.	It does go into situations where force can be used.

Chapter 4: Putting Parental Control through the tests.

The 2007 amendment[331] to s59 of the Crimes Act 1961 fails to recognise children's human right to bodily integrity, and does not provide children with the same protections from assault that every other member of society enjoys. In chapter 3 I examined the problems that the new Parental Control[332] provision presents, and suggested that the law would have been clearer on this issue if it were silent. In other words, the amendment has done more damage than good because having a statutory direction actually confuses the situation more than it clarifies it. In this chapter, I will demonstrate that the Parental Control provision has not improved the Domestic Discipline[333] provision sufficiently to warrant its existence, and that children's rights and protection would have been better advanced if s59 had simply been repealed. To do this, I will run various scenarios through three tests:

1. The old law: Domestic Discipline, Section 59 of the Crimes Act 1961, prior to the 2007 amendment.

59 Domestic discipline

(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 1989.]

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[331] Crimes (Substituted Section 59) Act 2007

[332] Section 59(2) Crimes Act 1961 as substituted by section 5 Crimes (Substituted Section 59) Amendment Act.

[333] Section 59 'Domestic Discipline', Crimes Act 1961, prior to the 2007 amendment.

2. The new law: Parental Control, Section 59 of the Crimes Act 1961, after the 2007 amendment.

s59 Parental Control.

(1) Every parent of a child and every person in the place of a parent of the child is justified in using force if the force used is reasonable in the circumstances and is for the purpose of—

(a) preventing or minimising harm to the child or another person; or

(b) preventing the child from engaging or continuing to engage in conduct that amounts to a criminal offence; or

(c) preventing the child from engaging or continuing to engage in offensive or disruptive behaviour; or

(d) performing the normal daily tasks that are incidental to good care and parenting.

(2) Nothing in subsection (1) or in any rule of common law justifies the use of force for the purpose of correction.

(3) Subsection (2) prevails over subsection (1).

(4) To avoid doubt, it is affirmed that the Police have the discretion not to prosecute complaints against a parent of a child or person in the place of a parent of a child in relation to an offence involving the use of force against a child, where the offence is considered to be so inconsequential that there is no public interest in proceeding with a prosecution.]

3. The position if Section 59 had simply been repealed.

In its original form, the Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill[334] (the Bill), proposed to simply remove the s59 defence to assault from the Crimes Act 1961. If this had occurred, there would be no specific statutory justification for the use of force for parents or persons in the place of parents. In essence, children would have, in the eyes of the law, the same protection from assault[335] as everyone else. Existing common law defences and police prosecutorial discretion would act as the safeguards to

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[334] 2005, no 271-1

[335] Section 2 of the Crimes Act 1961 defines assault as: "the act of intentionally applying or attempting to apply force to the person of another, directly or indirectly, or threatening by any act or gesture to apply such force to the person of another, if the person making the threat has, or causes the other to believe on reasonable grounds that he has, present ability to effect his purpose; and to assault has a corresponding meaning."

ensure that a lack of statutory direction for the trivial uses of parental force would not result in widespread prosecution.

The scenarios that I will run through these tests all involve the parental use of force against children. The use of force can be divided into two main areas:

a) The use of force for the purposes of correction

b) The use of force for purposes other than correction.

Within these groups I will also examine the outcomes for different forms of force used:

a) When the force used is 'hitting' or similar striking actions.[336]

b) When the force used does not involve hitting, for example, restraint.

The factual scenarios for the following analysis are simple, yet more relevant to the smacking debate than the more the extreme forms of physical punishment that dominated the debate surrounding the legislation. In the lead up to the Bill, smacking supporters made a distinction between *light smacking* for the purposes of discipline and more extreme forms of corporal punishment[337] that passed the s59 test, and were used as evidence in support of repeal.[338]

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[336] See introduction. 'Hitting' encompasses all striking actions that are commonly understood to be forms of corporal punishment: smacking, slapping, whacking, or any form of blow. The public debate that surrounded the amendment of section 59 of the Crimes Act focused on 'smacking', which is only one form of invasion into physical integrity. Section 2 of the Crimes Act does not restrict assault to blows or similar actions, therefore *all* applications of force technically can amount to assault, including those that are not generally associated with corporal punishment.

[337] In a 2001 survey it was found that "80% of the public agreed that a person parenting a child should be allowed by law to smack them with an open hand if they are naughty. The use of objects to smack a child and smacking them in the head and neck area drew an overwhelmingly negative response from the public, indicating that only using an open hand was acceptable to most people."

Therefore, this analysis will focus on the type of physical force that caused so much debate: smacking.[339]

1. The use of force for the purposes of correction.

The parental use of force against a child for the purposes of correction was justified prior to the 2007 amendment to s59, so long as the force used was reasonable in the circumstances. The Parental Control provision now prohibits *any* use of force for the purposes of correction. The scenario I will use for this analysis is the situation in which a parent punishes a child for swearing by either smacking him across the bottom with an open hand or putting him in time out.

Carswell, S. *Survey on public attitudes towards the physical punishment of children*, Ministry of Justice, 2001.

[338] Sue Bradford, in support of her Bill, referred to some extreme cases that had successfully raised the s59 defence, despite causing injury or using implements: "At the moment, judges and juries have it within their power to find parents not guilty of assault when, for example, they beat their children with things like belts, canes, hosepipes, jug cords, pieces of wood, and horse crops." (2005) 627 NZPD 22086
See: *R v Wilson* Unreported, CA 216/01, 24 October 2001; *R v Newell* Unreported, High Court Palmerston North, 12 September 2002, France J.

[339] Wood, Hassall and Hook suggest that the focus on *smacking* came from the Bill's nickname, and clouded the real issue: "The popular label became 'the anti-smacking bill'. The use of this term continued in spite of the fact that the cases which had aroused public concern were ones in which parents had successfully used section 59 as a defence for prosecutions for assaults that involved much more than what is usually meant by the term 'smacking'. A more fitting title might have been 'the anti-child assault bill', although this does not have quite the same populist ring."
Supra No. 37, page 140.

a) Force used for the purposes of correction, when the force used is 'hitting' or striking actions- smacking the child as punishment for swearing.

i) The old law: Domestic Discipline, Section 59 of the Crimes Act 1961, prior to the 2007 amendment.

The parent in this scenario would be warranted in using force against the child to punish him for swearing. Hitting a child, by way of a smack or slap, for disciplinary purposes, was justified under the old s59, so long as the force used was reasonable in the circumstances.[340] In *Re I, T, M and J*[341] Moss J suggested that anything beyond this would not fall within the realm of s59:

> "The use of a weapon will generally render the punishment unreasonable. Similarly, punishment leading to bruising or injury will usually be physical abuse rather than physical discipline."[342]

ii) The new law: Parental Control, Section 59 of the Crimes Act 1961, after the 2007 amendment.

Under the new law, *any* use of force is prohibited if its purpose is to correct the child. Smacking a child as punishment for swearing would not be defensible under the current s59,[343] and the action would amount to assault. However, police have the discretion not to prosecute minor inconsequential instances of assault,[344] if it is deemed not in the public interest to proceed with prosecution.[345] In this instance, a smack across the buttocks would probably not be enough to trigger a prosecution:

> "The use of objects/weapons to smack a child, strikes around the head area or kicking would not be inconsequential assaults... In addition, while smacking may, in some circumstances, be considered inconsequential, a prosecution may be warranted if such

[340] *Re the Five M Children* [2004] NZFLR 337 at [43]
[341] [2000] NZFLR 1089
[342] at [3]
[343] s59(2) specifically prohibits the use of force for the purposes of correction.
[344] This is affirmed in s59(4), however adds nothing to the existing powers of police to exercise prosecutorial discretion. See chapter 3.
[345] Prosecution Guidelines, Crown Law Office, March 1992. See Appendix 3

actions are repetitive or frequent, and other interventions or warnings to the offender have not stopped such actions."[346]

If prosecution were to proceed however,[347] it would have to be proved that the purpose behind the smack was correction, and not one of the legitimate purposes set out in s59(1). This means that prosecution is precluded if it can not be established that the motive behind the smack was correction, and not for example, preventing the child from engaging or continuing to engage in offensive behaviour.[348] As the Police Guidelines point out, "offensive" is not defined in the Act, and therefore it is open to interpretation:

> In *Ceramalus v Police* (1991) 7 CRNZ 678 Tomkins J adopted the following as a helpful description of "offensive behaviour":
>
> > "[The behaviour] must be such as is calculated to wound the feelings, arouse anger or resentment or disgust or outrage in the mind of a reasonable person."
>
> The Shorter Oxford English Dictionary defines "offensive" as:
> "1. Pertaining or tending to attack; aggressive; ...
> 2. Hurtful, injurious ...
> 3. Giving, or of a nature to give, offence; displeasing; annoying; insulting ..."[349]

Arguably, using swear words is offensive, displeasing, annoying and insulting to some people. This means that the action of smacking a child for the purposes of correction for

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[346] Police Practice Guide. See Appendix 3.
[347] Even cases that do not fall within the inconsequential criteria set out by the police guidelines might not make it to prosecution, and will instead be met with a warning. For example, a Christchurch man who flicked his child on the ear.
Hamilton, P. "Father warned for disciplining boy, 3" *The Press,* 14 January 2008.
This man was later charged after police had reviewed the evidence.
"Dad charged with assault for flicking son's ear" *The Press,* 29 January 2008
In the three months following the amendment, there had been no prosecutions. Police had attended 111 child assault events and "all of the 15 child assault events involving "smacking" or "minor acts of physical discipline" were determined to be "inconsequential" by either the attending and/or investigating Police Officer."
Pope, R. *Three month review of Police activity following the enactment of the Crimes (Substitued section 59) Amendment Act 2007,*
http://www.police.govt.nz/resources/2007/section-59-activity-review/, 20 December 2007.
[348] S59(1)(c)
[349] Police Practice Guide. See Appendix 3

swearing could potentially be reinterpreted as a justified act of preventing the child from continuing to engage in offensive behaviour, i.e. swearing. Section 59(1) has provided a loophole, because s59(2) rests on the ability of the prosecutor to prove the *intention* behind the use of force.

iii) The position if Section 59 had simply been repealed.

If s59 was repealed, a smack to a child would be the same as a smack to any other person: it would amount to assault. There would be no special defence for persons acting in a parental control capacity, and therefore no loopholes for acts of smacking to slip through.

However, as mentioned earlier, police have the discretion not to prosecute minor inconsequential instances of assault, if it is deemed not in the public interest to proceed with prosecution. If s59 had simply been repealed, this task would be more straight forward for police, as they would not have to first establish whether the smack was intended for the purposes of discipline. A smack would be a smack, regardless of the motive. After the repeal of s59, the Police Commissioner could have released a practice guide similar to the one released for the Parental Control provision in 2007,[350] to detail what sorts of uses of force against children would be considered sufficiently serious to prosecute, and which uses of force should be considered inconsequential. However, in the absence of confusing and ambiguous statutory language (as is the case with the new s59), this sort of guidance would be largely superfluous. The existing prosecution guidelines[351] provide ample guidance on the factors to be taken into account when deciding whether to proceed with a prosecution.

[350] See Appendix 3
[351] See Appendix 4

For example, in the current scenario, the prosecutor might choose to classify the smack as inconsequential, taking into account, among other things:

> a) the seriousness or, conversely, the triviality of the alleged offence; i.e. whether the conduct really warrants the intervention of the law;
>
> b) all mitigating and aggravating circumstances;
>
> i) the availability of proper alternatives to prosecution;
>
> j) the prevalence of the alleged offence and the need for deterrence;
>
> k) whether the consequences of any resulting conviction would be unduly harsh and oppressive;
>
> p) the likely sentence imposed in the event of conviction having regard to the sentencing options available to the Court.[352]

Ironically, it seems like the likelihood of being prosecuted for the use of force for the purposes of discipline would be *higher* under the amended s59, because this action is *specifically* prohibited. If s59 had simply been repealed, children would be in the same position as adults, and police would be able to assess the force used on a case by case basis, without having to worry about whether a smack is administered for correction or for some other purpose.

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[352] Prosecution Guidelines, Crown Law Office, March 1992, para 3. (Appendix 4)

b) Force used for the purposes of correction, when the force used is not 'hitting' or striking actions- putting the child in time out as punishment for swearing.

In this scenario, instead of hitting the child to punish him for swearing, the parent picks him up and puts him in time out, which could be either a room or a corner or a step. The main point is that the parent forcibly removes the child to that place.

i) The old law: Domestic Discipline, Section 59 of the Crimes Act 1961, prior to the 2007 amendment.

Under the old law, the use of force for the purposes of correction was justified, so long as the force used was reasonable in the circumstances. Picking a child up and moving him is an application of force, and so long as the intention was correction, the defence would cover this action.

Not all of the cases that were successful in raising the old s59 defence involved hitting or similar actions. In *R v Giles*[353] a father chained his 14 year old daughter to himself after she had run away, and was found not guilty of cruelty, kidnapping and unlawful detention after raising the domestic discipline defence.

ii) The new law: Parental Control, Section 59 of the Crimes Act 1961, after the 2007 amendment.

Under the new law, *any* use of force is prohibited if its purpose is to correct the child. This means that if the intention behind picking the child up and putting him in time out is to discipline him, then the action is prohibited by s59(2).[354] Technically, this is an application of

[353] Unreported, High Court Palmerston North, T42/99, 16 November 1999, Wild J.
[354] See chapter 3: Putting a child on the naughty step.

force, and if there is no justification it amounts to assault under s2. Therefore, in an attempt to ban smacking and violent forms of corporal punishment, the new law created a specific statutory ban on every other disciplinary use of force as well.[355]

Again, police have the discretion not to prosecute inconsequential cases, and again it is easy to reclassify this action under one of the legitimate uses of force in s59(1). The police practice guide actually reclassifies this action for us:

> "...a parent may send or take their child to, by way of example, their room against the child's will at the time the intervention is required. Force may be required to perform such a task and the use of reasonable force in such circumstances may be justified under this subsection i.e. to prevent the child from continuing to engage in the behaviour (s 59(1)(b) or (c)) or to restore calm. However, if the child is detained for a period or in a manner that is unreasonable in the circumstances, this subsection will not provide a defence to such action."[356]

iii) The position if Section 59 had simply been repealed.

If s59 had been repealed, any application of force would technically amount to assault. However, again, the police have always had a discretion not to prosecute inconsequential cases. Additionally, alternative defences for the application of disciplinary force might better succeed when the force used does not involve hitting.[357] While the intention behind the force is still to discipline, it lacks the necessary element that hitting has- the intention to cause a degree of pain. It is not really relevant how transient or trifling the pain from a smack might be, the intention to cause pain is what separates hitting as a form of discipline from other, less violent applications of force for the purposes of correction.

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[355] Section 4 of the Crimes (Substituted Section 59) Amendment Act 2007 states its purpose: "The purpose of this Act is to amend the principle Act to make better provision for children to live in a safe and secure environment free from *violence* by abolishing the use of parental force for the purpose of correction."
[356] See Appendix 3.
[357] See chapter 3: the availability of alternative defences.

In the explanatory note to Sue Bradford's original Bill, it was made explicit that "the repeal of section 59 ought not revive any old common law justification, excuse or defence that the provision may have codified."[358] This means that in the event that s59 was completely repealed, a common law defence of domestic discipline could not be raised in its place. However other defences that are already in existence might apply. They are distinguishable from domestic discipline because they are not specific to children, or a parent's prerogative to hit their child for whatever reason.

2. The use of force for the purposes other than correction.

The parental use of force against a child was justified prior to the 2007 amendment to s59, so long as the force used was reasonable in the circumstances, and was for the purposes of correction. The use of force for any other reason technically amounted to assault. The new parental control provision now prohibits the use of force for the purposes of correction, and legitimizes the use of force for other reasons. Because 'reasonable force' is left undefined, it means that smacking or striking actions have not been abolished by the amended s59. Technically, a child can still be hit, so long as the reason behind the hitting is not correction.

a) Force used for purposes other than correction, when the force used is 'hitting' or striking actions.

The scenario I will use for this analysis is the situation where a parent smacks a child on the hand to stop him touching a hot element. I will also look at how the situation differs when the

[358] Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill 2005, no 271-1.

child is hit on the hand to stop him touching things in a shop, and when he is hit on the hand out of the parent's anger or frustration.

i) The old law: Domestic Discipline, Section 59 of the Crimes Act 1961, prior to the 2007 amendment.

As mentioned in chapter 3, the only use of force against a child that was permitted by statute before the 2007 amendment was force used for the purposes of correction. Technically, the application of force for any other purpose amounted to assault, therefore when parents were picking a child up, or holding a child down to change a nappy, their actions were not protected by s59. *Technically* under the old law, a smack on the hand for the purpose of protecting the child from a burn would have constituted assault, however the common law defence of necessity would almost certainly have justified the action.[359]

Smacking a child on the hand to stop him touching things in a shop is slightly different, because the motive is not necessarily to discipline the child, nor to defend them from harm, but rather to stop the child breaking objects that do not belong to the parent or child. A smack on the hand for this could not have been covered by the domestic discipline defence if the intention was not correction, and it is not the sort of situation where necessity could be properly raised because there is no real imminent threat or danger. It is possible that s41[360] could be raised, which is a justification for the use of force for the prevention of suicide or certain offences. In that section, a person is justified in using force that is reasonably necessary in order to prevent the commission of an offence which would be likely to cause

[359] *Police v. Kawiti* [2000] 1 NZLR 117. Also see legal opinion on Peter Williams QC in chapter 3.
[360] Crimes Act 1961.

immediate and serious injury to the person or property of any one, or in order to prevent any act being done which he believes, on reasonable grounds, would, if committed amount to any such offence. Taken literally, this section might justify the use of force to stop a child breaking the shop keeper's property. However, the fact that suicide is the focus of the section implies that the sorts of situations contemplated in 'certain offences' would be more serious than breaking objects in a shop.[361] Furthermore, the force used in these situations must be 'reasonably necessary' to prevent the offence from happening. A smack might not satisfy this test, because there are alternative, less violent ways of preventing a child from touching things, for example, leaving the shop, or picking the child up. Undoubtedly this sort of situation would have occurred when the old s59 was current, but there were no prosecutions, presumably because police have always had the discretion not to prosecute minor offences.

Smacking a child out of frustration or anger was not permitted under the old domestic discipline provision. Section 59 could not be raised to defend the use of force that was vindictive or stemming from malice.[362]

[361] S41 has been raised in cases where self-defence is the alternative justification. "If a person claims to have acted in self-defence, but crime prevention may also have been a distinct purpose, each possibility may have to be considered: *R v Kelbie* [1996] Crim LR 802;... *R v Hebert* (1996) 107 CCC (3d) 42; 135 DLR (4th) 577 (SCC)."
Adams on Criminal Law
http://www.brookersonline.co.nz/databases/modus/criminal/adams/toc?si=15
[362] *R v Drake* (1902) 22 NZLR 478; *R v Accused* (1994) DCR 883

ii) The new law: Parental Control, Section 59 of the Crimes Act 1961, after the 2007 amendment.

The amendments in subsection 1 of the new Parental Control provision are specifically designed to address the issue of parental force in circumstances such as a child reaching for a hot element.[363] Nothing in s59 prohibits *smacking* as the type of force used. The 'reasonable force' test has survived the amendment, and there is no guidance as to what amounts to 'reasonable'. The Justice and Electoral Committee, in considering options for the s59 amendment, intentionally did not specify that the force used must be in the form of restraint or the like, and not smacking:

> "[a]lternative language that was suggested to us, such as "restraint" would not necessarily be apt for some of the parental interventions in issue (e.g. knocking a child's hand away from a boiling pot on the stove, pushing or pulling a child out of the path of an oncoming car, carrying a child out of the supermarket or to his bedroom.)"[364]

Therefore, a parent *might* be justified in smacking a child's hand as he reaches for the element, depending on the fact finder's particular construal of what is reasonable in the circumstances. This test has been notoriously inconsistently applied in the past, in the context of domestic discipline,[365] and it has been suggested that the success of the defence was intrinsically linked with decision maker's individual moral position on the issue of corporal punishment of children,[366] making the test entirely subjective and inconsistent across cases.

[363] Specifically s59(1)(a)
[364] Supra No. 20, para 11
[365] Hancock, J., (2004) *The Application of Section 59 of the Crimes Act in the New Zealand Courts*, Children's Issues Centre Seminar- "Stop it, it hurts me": Research and Perspectives on the Physical Punishment of Children- 18 and 19 June 2004, Wellington.
[366] Action Children and Youth Aotearoa (inc), *Parental Corporal Punishment of Children in New Zealand,* Report for UN Committee on the Rights of the Child, CRC/C/93/Add.4, 28 August 2003.

One person's light smack is another person's strong whack. As Judge Inglis said of s59 in *Kendall v Director-General of Social Welfare:*[367]

> [w]hat is "reasonable" must be a matter of degree and will depend in large on what can be perceived to be the current social view at the time.

The lack of statutory definition in the Parental Control provision will potentially lead to the same problem.

Smacking a child's hand to stop him touching objects in a shop might be justifiable under s59(1). The action could be defined as preventing the child from engaging in offensive or disruptive behaviour, insofar as it would cause disruption for the child to break the shop owner's property. The police practice guide loosely describes what amounts to disruption as "yelling and screaming or throwing objects or food".[368] This means that the child does not even necessarily need to be touching things to warrant a smack, he need only be yelling. Section 59(1)(b) could also potentially be raised, as a justification of preventing the child from engaging "in conduct that amounts to a criminal offence." Adams suggests that the conduct that the child is engaging in might not necessarily need to be criminal. The provision is unclear on this, but it might be sufficient that the parent merely has a reasonable belief that the conduct amounts to a criminal offence.[369]

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[367] (1986) 3 FRNZ 1 at 12
[368] See Appendix 3
[369] Adams on Criminal Law
http://www.brookersonline.co.nz/databases/modus/criminal/adams/toc?si=15
The Police Practice Guide permits the use of force for this reason: "[a] parent of a child and every person in the place of a parent of the child can use reasonable force to prevent their child, by way of example, from damaging or stealing property, or assaulting other people or themselves. See Appendix 3

A justification for smacking a child out of anger or frustration might be found under the new Parental Control provision. Exemplifying the use of force to prevent the child from engaging in offensive or disruptive behaviour might have opened the door for parents to smack for reasons that they previously were not allowed to, namely when the child is being annoying or irritating. The provision itself does not define 'offensive' or 'disruptive', so the Police Practice Guide has attempted to do so:

> "The Shorter Oxford English Dictionary defines "offensive" as:
>
> "1. Pertaining or tending to attack; aggressive; ...
> 2. Hurtful, injurious ...
> 3. Giving, or of a nature to give, offence; displeasing; annoying; insulting ..."
>
> The Shorter Oxford English Dictionary defines "disruptive" as:
>
> "1. Causing or tending to disruption..."
>
> Examples of behaviour that may amount to offensive or disruptive behaviour, depending upon the specific circumstances, could include, by way of example, yelling and screaming or throwing objects or food."[370]

Following this guide, it is enough to satisfy s59(1)(c) if the child is being 'annoying' or 'displeasing' or if they are yelling. Therefore, if a child is yelling in a public place[371] or even at home, a parent might be justified in giving him a smack, not as discipline, but because his yelling was annoying.

[370] See Appendix 3

[371] The provision does not require the behaviour to be in any way public. I have used a public place in this example to heighten the 'annoyance factor' for a parent.

iii) The position if Section 59 had simply been repealed.

If s59 had simply been repealed, the situation regarding the use of force for purposes other than correction would not have changed. *Technically* the use of force on a child would amount to assault, however common law justifications might cover some circumstances.[372] It is possible that if s59 was repealed, it might be harder to resort to common law defences for the application of force for purposes other than correction, when the force used is hitting or smacking. Similarly, police might more readily prosecute smacking cases, because smacking, as a behaviour, was abolished in the repeal. The fact that the legislature went to the effort to remove a defence for smacking indicates that smacking is not to be tolerated, for whatever reason. Under this regime, there would be no loop hole for parents to hide behind when hitting their children. Hitting per se would have to stop.

b) Force used for purposes other than correction, when the force used is not 'hitting' or striking actions

This analysis is looking at the application of force that is *not* hitting and is *not* for the purposes of correction. A common scenario is that of a parent restraining a child before he runs onto the street, or restraining a child while changing his nappy.

i) The old law: Domestic Discipline, Section 59 of the Crimes Act 1961, prior to the 2007 amendment.

Under the old law, this type of force still technically amounted to assault, because its purpose was not correction, however the common law defence of necessity would have been available

[372] See above analysis: The use of force for purposes other than correction when the force used is hitting or striking actions: *i) The old law: Domestic Discipline, Section 59 of the Crimes Act 1961, prior to the 2007 amendment.*

to justify the use of force to stop a child running on to a street. The justification for "physical contact which is generally acceptable in the ordinary conduct of daily life"[373] might have covered nappy changing or similar situations, if they ever made it to prosecution. Police had a discretion not to prosecute minor cases, and thus there were never any ridiculous prosecutions for assault in situations of normal parental contact that did not involve hitting.

ii) The new law: Parental Control, Section 59 of the Crimes Act 1961, after the 2007 amendment.

Arguably, the amendments to s59 were specifically designed to legitimise the kind of force considered here: Non-violent, everyday uses of parental force for purposes other than correction. When considering the current Parental Control provision as a possible amendment to s59, the Justice and Electoral Committee said that it would "offer protection for 'good parenting' interventions, short of correction."[374] Section 59(1)(a) allows a parent to apply force in the form of restraint to protect the child from harm as he runs out on to the street. Section 59(1)(d) would justify the force used to change a nappy, as this is arguably a normal daily task that is incidental to good care and parenting.

'Performing the normal daily tasks that are incidental to good care and parenting' describes such a wide range of behaviours, it is difficult to imagine the sorts of contact that this justification *would not* cover. Adams suggests s59(1)(d) is intended to cover the applications of force against children in the infant stage, and would be unlikely to be applied to older children. The age of the child is therefore relevant in determining the reasonableness of the

[373] *Collins v Wilcock.* Supra No. 6
[374] Supra No. 20, para 10

force. It is also suggested that cultural values may impact on what is considered to be "normal" daily tasks of "good" parenting:

> "[a]ny assessment of the use of force to be justified under this head may have to take into account relevant cultural and, perhaps, religious understandings."[375]

Cultural values were taken into account in assessing the reasonableness of the force used in some domestic discipline cases, however in *Ausage v Ausage,*[376] Judge Somerville avoided this reasoning, preferring a uniform test for all cultures, since New Zealand had become a party to UNCRC. If religious and cultural factors were brought back into the reasonableness test, it would seem like a step back in time. It would be unfortunate if the amendments to s59, intended to update its purpose, meant that old legal tests were revived.

iii) The position if Section 59 had simply been repealed.

Again, if s 59 had been repealed, the situation regarding the use of force for purposes other than correction, regardless of its form, would not have changed, because there never existed a defence in the past. *Technically* the use of force on a child, even restraint, would amount to assault, however common law justifications would cover most circumstances.[377] There were never any problems with nappy changing and child restraint in the past, and it is unlikely that a complete repeal of s59 would have changed that.

c) Summary of Analysis

The following table is a summary of the three options discussed above,

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[375] At CA59.03.
[376] Supra No. 266
[377] See above analysis: The use of force for purposes other than correction when the force used is hitting or striking actions: *i) The old law: Domestic Discipline, Section 59 of the Crimes Act 1961, prior to the 2007 amendment.*

Table Two. **Summary of Analysis.**	**Hitting or smacking for the purposes of correction**	**Other uses of force for the purposes of correction, e.g. time-out.**	**Hitting or smacking for a purpose that is NOT correction.**	**Other uses of force for a purpose that is NOT correction.**
Domestic Discipline **(old section 59)**	ALLOWED As long as the force used was reasonable in the circumstances *Re the Five M Children* *Re I, T, M and J*	ALLOWED As long as the force used was reasonable in the circumstances *R v Giles*	NOT ALLOWED *R v Drake* *R v Accused* • Police discretion means that inconsequential cases are unlikely to be prosecuted.	NOT ALLOWED • Existing common law defences might cover situations that do not involve hitting. • Police discretion means that inconsequential cases are unlikely to be prosecuted.
Parental Control **(new section 59)**	NOT ALLOWED However... • Might be able to be reclassified as a legitimate use of force under s59(1) • Police discretion means that inconsequential cases are unlikely to be prosecuted.	NOT ALLOWED However... • Might be able to be reclassified as a legitimate use of force under s59(1) • Police discretion means that inconsequential cases are unlikely to be prosecuted.	ALLOWED As long as the force used was reasonable in the circumstances.	ALLOWED As long as the force used was reasonable in the circumstances.
Repeal **(no section 59)**	NOT ALLOWED However... • Police discretion means that inconsequential cases are unlikely to be prosecuted.	NOT ALLOWED However... • Police discretion means that inconsequential cases are unlikely to be prosecuted. • Existing common law defences might cover situations that do not involve hitting.	NOT ALLOWED However... • Police discretion means that inconsequential cases are unlikely to be prosecuted.	NOT ALLOWED • Existing common law defences might cover situations that do not involve hitting. • Police discretion means that inconsequential cases are unlikely to be prosecuted.

Perhaps the most pertinent point to be taken from the analysis is that the new Parental Control provision *has not banned smacking.* On the contrary, it has opened the door for smacking in situations that never existed before. Now a parent may smack a child for a whole host of reasons, except correction. There is no definition of reasonable, so there has been no solution to the problem of inconsistent application that existed under the old law.
Table Two demonstrates how the situations in the new Parental Control provision in which force (hitting and non-hitting) may be applied to a child are a complete mirror image to those in the old Domestic Discipline provision. This is not necessarily a good thing, because while the new provision has banned hitting children for the purposes of correction, it has legitimised the use of force, including *hitting,* for all other purposes. This did not exist under the old law, and would not exist if s59 had simply been repealed. Creating a brand new defence for hitting children cannot be said to have furthered children's rights to bodily integrity. Bringing children's rights up to the level of adults with respect to bodily integrity and protection from assault would have involved the prohibition of all hitting. It is not acceptable to hit adults, and it should not be acceptable to hit children. Legislating an amendment that allows children to be assaulted in this way may not have been intentional, but it is poor law making nonetheless.

The law would have been clearer, and safer, if s59 had been repealed altogether. As Table Two demonstrates, repealing the section achieves the same purpose as the Parental Control provision insofar as the use of force for the purposes of correction is concerned. A repeal would have abolished this defence.

Regarding the use of force for purposes *other* than correction, a simple repeal would have been much more effective, and would have abolished hitting or smacking. It would not have changed the current reality, because the old Domestic Discipline provision never contemplated anything other than corrective force anyway. But most importantly, a simple repeal would not have opened all sorts of loopholes for the use of force that involves hitting. The Parental Control provision has not only failed to improve anything in this area, it has made things *worse.*

3. Furthering children's rights beyond repeal.

A straightforward repeal of s59 would not only have placed children on an equal footing with adults and all other members of society with regards to bodily integrity and assault,[378] it would also have recognised a child's *right to protection.* In chapter one I explored rights that are specific to children, by virtue of their immaturity and vulnerability. The Domestic Discipline provision was completely at odds with the notion that children should be protected from harm, because not only did it not give them special protection from assault, it actually gave them *less* protection than everyone else. Arguably, the Parental Control provision has not done any better.

To really recognise a child's right to protection, the law needs to be more than just neutral. It needs to give *extra* protection from assault to children. It seems like common sense that we should guard our smallest and most vulnerable citizens the most, to recognize their underlying human rights first and foremost, and then respect their dependency.

Repealing s59 would not have left children in a neutral position insofar as assault is concerned, because recognition of their inherent vulnerability and need for protection already

[378] Nicholson, A. Choose to hug not hit (2008) 46 *Family Court Review* 1, 11-36

exists in the Crimes Act, in the form of a special provision dedicated to assaults against children. Therefore, if s59 had been simply repealed, children's rights to protection from assault would have naturally fallen into place.

Figure One: Continuum of children's right to protection from assault:

No physical integrity ⇩ ———————————————— ⇩ **Full physical integrity**

Domestic Discipline and Parental Control. Children have *less* rights to protection from assault. Children, unlike other citizens, can be legally hit.	Neutral position. Children and adults enjoy equal protection from assault.	Repeal of section 59. Children have *extra* rights to protection from assault.

Under the Crimes Act, smacking a child under the age of 14 would technically amount to assault under s194,[379] which carries a heavier penalty than for common assault under section 196.[380] Therefore, assault against children is more serious than assault against other citizens. It is unlikely that for smacking, police would prosecute under s195, cruelty to a child, which

[379] Assault on a child, or by a male on a female.
[380] The maximum penalty for assault is 2 years, compared with a maximum of one year for common assault.

carries a maximum penalty of five years, because the assault provision is more likely to result in conviction.[381]

As mentioned above, if s59 had been repealed the police commissioner could have released practice guidelines to aid in prosecution decisions for smacking and other child assault cases. However, the existing Solicitor General's prosecution guidelines[382] should have been sufficient to fully recognize children's rights to protection. Furthermore, the age and vulnerability of the victim could be added to the list of factors to be considered under 3.3.2. The youth, old age, physical or mental health of the *offender* is currently taken into account. The victim's age and vulnerability is already a relevant consideration in sentencing legislation. For example, when deciding whether the minimum non-parole term for murder should be extended beyond ten years, one of the factors to be taken into account is the victim's vulnerability due to age.[383] This indicates that the crime is more culpable if the victim is vulnerable. Similarly, assaults against children, who, by virtue of being children, are vulnerable and in need of protection, should be treated as more serious than assaults against adults. Having this factor incorporated into the prosecution guidelines would mean that police would be more inclined to prosecute an assault if the victim was a child.

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[381] "The case law on s195 generally involves more serious and sustained ill-treatment. For example, *R v Mead* [2002] 1 NZLR 594 (CA) involved a step father beating children, placing them in cold baths, forcing them to eat rotten food, and in one case, forcing the child to eat cloves. *R v Murphy* unreported, CA 18/83, 2 August 1893, Cooke J, involved a mother hitting the child with a rolling pin and twisting the child's arm behind her back, consequently breaking her arm."
Pickford, S. (2006) *The Anti-Smacking Bill: Implications for Parents*. LLB (Honours) dissertation, University of Otago, page 23
[382] See Appendix 4
[383] s104(g) Sentencing Act 2002.

Conclusion.

Children have a right not to be hit. This is not some special right afforded to them by virtue of the fact they are children, nor is it something extraordinary that imposes an extra duty on parents or the state. It is a fundamental human right, and since children are humans they are entitled to this right.

The 2007 amendment to the Crimes Act to abolish domestic discipline went some way towards recognising children's rights. Repealing this section would have meant that children would cease to be the only group in society who could legally be hit. However, the substitution of 'Parental Control' for 'Domestic Discipline' means that the advancement of children's rights in this area was purely cosmetic. Children are *still* the only people in society who can be legally hit: the Parental Control provision is drafted in such a way that hitting for purposes other than correction is still permitted. Hitting for disciplinary purposes has been banned *on the face of it*, however the inclusion of an affirmation of police discretion serves to undermine the abolition. Furthermore, the provision has created fresh avenues for hitting that never existed before. The message about children's right to bodily integrity has been diluted to such an extent that the new provision cannot possibly be said to have improved children's rights.

Appendix 1

Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill

Member's Bill

Explanatory note

The purpose of this Bill is to stop force, and associated violence and harm under the pretence of domestic discipline, being inflicted on children. Presently, section 59 of the Crimes Act 1961 acts as a justification, excuse or defence for parents or guardians using force against their children where they are doing so for the purposes of correction and the force used is reasonable in the circumstances. The Bill will repeal that provision.
The effect of this amendment is that the statutory protection for use of force by parents and guardians will be removed. They will now be in the same position as everyone else so far as the use of force against children is concerned. The use of force on a child may constitute an assault under s194(a) of the Crimes Act, a comparatively new provision in the criminal law, and the repeal of section 59 ought not revive any old common law justification, excuse or defence that the provision may have codified.

Clause 4 simply repeals section 59

Clause 5 makes consequential amendments to section 139A of the Education Act 1989 to remove the exemption for guardians in the prohibition of corporal punishment in schools.

Sue Bradford

Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill

Member's Bill

Contents

1. Title
2. Commencement
3. Purpose
4. Domestic discipline
5. Consequential amendments to Education Act 1989

The Parliament of New Zealand enacts as follows:

1 Title

(1) This Act is the Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Act 2005.

(2) In this Act, the Crimes Act 1961 is called "the principle Act".

2 Commencement

This Act comes into force on the day after the date on which it receives Royal assent.

3 Purpose

The purpose of this Act is to amend the principle Act to abolish the use of force by parents as a justification for disciplining children.

4 Domestic Discipline

Section 59 of the principle Act is repealed.

5 Consequential amendments to Education Act 1989

(1) Section 139A(1) of the education Act 1989 is amended by omitting the words ", unless that person is a guardian of the student or child".

(2) Section 139A(2) of the Education Act 1989 is amended by omitting the words ", unless that person is a guardian of the student or child".

Appendix 2

Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill

Member's Bill

As reported from the Justice and Electoral Committee

Commentary

Recommendation

The Justice and Electoral Committee has examined the Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill and recommends by majority that it be passed with the amendments shown.

Introduction

Section 59 of the Crimes Act 1961 provides a statutory defence for parents and every person in the place of a parent who use force against their children for the purpose of correction. The bill as introduced repeals this provision. In the absence of section 59 parents and every person in the place of a parent would be in the same position as any other person. If charged with any offence that involves the use of force against a child, correction would no longer be a defence.

The first part of this commentary sets out the amendments to the bill the majority recommends. We would like to emphasise that we made every endeavour to reach consensus on the bill. We are disappointed that, despite our best intentions, agreement was not reached. The remainder of the commentary details some of the issues we considered as a result of submissions on the bill.

Amendments

Title

We recommend that the title of the bill be amended, as it does not adequately reflect the effect of the bill as amended, and suggest the bill be renamed the Crimes (Substituted Section 59) Amendment Bill.

Purpose

We recommend that clause 3, which states that purpose of the bill, be amended to better reflect the intention of the bill. The purpose of

this bill is to amend the principal Act to make better provision for children to live in a safe and secure environment free from violence by abolishing the use of parental force for the purpose of correction.

Parental control
We recommend that section 59 of the Crimes Act be repealed and replaced by a new section 59. This new section will effectively remove the defence of using "reasonable force" against a child for the purpose of correction. The new section 59 clarifies that reasonable force may be used for other purposes such as protecting a child from harm, providing normal daily care, and preventing the child doing harm to others. We consider that this amendment provides for interventions that are not for the purpose of correction by parents and every person in the place of a parent. Additionally it will address a gap in the law, as under the current wording of section 59 the application of force from any motivation other than correction may amount to an offence.

This amendment will require a consequential amendment to sections 139A(1) and (2) of the Education Act 1989.

Committee consideration

Summary of submissions
The committee received 1,718 submissions on the bill. The majority (1,471) came from individuals. Of these, 385 submitters identified themselves as parents or caregivers, and 76 as children or young people. We received 247 submissions from organisations.

Opposition to the bill
The majority of submitters who opposed the bill commented on child discipline and associated matters generally, rather than on specific provisions of the bill. Opponents of the bill raised a number of concerns, including the following:

· that repeal of section 59 would lead to the prosecution of parents and the removal of children from their homes as a result of minor acts of physical discipline

· that the rights of parents to discipline their children or simply to raise them as they see fit would be eroded by a form of statutory control

· that the use of physical discipline, which they argued is an effective tool for raising children, would be prohibited

· that the repeal of section 59 would lead to children being raised poorly with no conception of discipline or boundaries

· that the repeal of section 59 would remove the right to discipline children according to specific belief systems.

A number of submitters predicted various detrimental effects on parents, children, and society if section 59 were repealed.

Support for the bill
Submitters who supported the bill raised the following arguments:

· that physical discipline on children is ineffective compared with other forms of discipline

· that there is a connection between the physical disciplining of children and child abuse

· that section 59 provides less protection against assault for children than adults

· that physical discipline is linked with longer-term psychological and developmental problems

· that is was not the intention of the bill to criminalise parents and that fears of prosecution for trivial use of physical discipline are unfounded

· that repealing section 59 would send a strong anti-violence message to society and encourage behavioural change.

A number of supporters of the bill argued that, while repealing section 59 would send a positive message, it would need to be reinforced with Government support and ongoing public education.

Proposed amendments
A number of submitters suggested specific amendments to the bill, most of them defining ''reasonable'' and ''unreasonable'' force. They were often illustrated with examples of acceptable and unacceptable forms of, and reasons for, physical discipline.
Other submitters illustrated the difficulties of defining ''reasonable'' and ''unreasonable'' force, and the possible consequences. They noted the following issues in particular:

· It would be very difficult to draft a definition that captured the desired behaviour with sufficient certainty and provided adequate protection to children (since, for example, a lack of

visible injury may not necessarily mean no harm has been done).

· Difficulties are likely to arise in applying any definition in individual cases, particularly if terms such as ''minor'', ''trivial'', and ''harm'' are used, which are relative or open to interpretation and argument.

· ''Reasonable force'' is not defined anywhere in statute, so it would be out of line with the rest of statute law to define it here.

· Health professionals are averse to providing guidelines on the use of physical force against children.

· Such amendment could be seen as sanctioning or legitimising the use of force against children.

We were advised that most of the amendments proposed by submitters were fraught with difficulties both in practice and in principle, and would prove unworkable in terms of legal interpretation.

Public education

We recommend that if the bill is enacted the appropriate agencies should conduct public awareness and education campaigns about the effect of the recommended changes to section 59 and alternatives to physical discipline. We received positive feedback about the Strategies with Kids—Information for Parents (SKIP) programme. This programme has been adopted by thousands of parents, community groups, and educational groups throughout the country. We consider that the extension of the SKIP programme and similar parental educational programmes would be most beneficial in conjunction with the recommended changes to section 59.

Prosecution practice under the new section 59

We were advised that any impact on the rate of prosecution of parents and every person in the place of a parent for the use of force against their children will depend on police practice in such cases, as well as the public response to the law change (regarding, for example, the reporting of incidents to the police). As with any other offence, the prosecution of parents and every person in the place of a parent for the use of force against children for the purpose of correction will be a matter for police discretion, although private prosecutions remain a possibility.

We were advised that all prosecution decisions are guided by the Solicitor-General's Prosecution Guidelines. The guidelines state

that police must decide whether a prosecution is required in the public interest. They also state that ordinarily a prosecution will not be in the public interest unless it is more likely than not that it will result in a conviction. The likely success of section 59 as a defence in a particular case is therefore a relevant factor in a decision whether to prosecute. Therefore, the recommended changes to section 59 would remove the "correction" justification, which was one obstacle to prosecutions of assaults against children. Factors, unrelated to section 59, such as failures to detect or report assaults, would continue to limit prosecutions following repeal.

We were advised that the police will not actively solicit reports of the use of force against children. The police are obliged to investigate any reports they receive, but such reports may not require significant investigation, other than, for example, follow-up with the adult concerned and witnesses. While police may investigate (or make inquiries about) reports of alleged assault, not all such cases will require prosecution or other action.

There are safeguards in the criminal justice system to minimise the likelihood of parents and every person in the place of a parent being prosecuted for minor acts of physical punishment. Various options other than formal prosecution are available to police, including warnings and cautions. Under the Solicitor-General's Prosecution Guidelines, a prosecution should proceed only where it is in the public interest and there is sufficient evidence.

Judges have an inherent power to control proceedings that are an abuse of the court's processes. Vexatious or trifling matters are an abuse of the court's processes. We would not expect prosecutors to bring trifling matters before the court.

The police advised us that the discretion to lay charges lies with the investigating officer, after considering any advice that they may receive from a supervisor or other person such as Police Prosecution Services or Legal Services.

Advice from the Department of Child, Youth and Family Services

The Department of Child, Youth and Family Services told us that it has various policies for dealing with situations that endanger children. It told us that it would expect the thresholds at which it removes children to remain the same if section 59 were repealed. If section 59 were repealed, Child, Youth and Family told us that it would expect a greater volume of reports, but that the legislative principle that intervention in family life should be the minimum necessary to ensure a child's or young person's safety would remain. Child,

Youth and Family is concerned with child abuse and neglect but will consider removing children only if they are at serious risk. It told us that if section 59 were repealed it would look at developing operational guidelines in conjunction with all affected agencies, especially the police.

We acknowledge that the police and Child, Youth and Family need to maintain their professional discretion when dealing with complaints regarding physical force used against children. We expect the police and Child, Youth and Family to develop effective operational guidelines and protocols and to maintain a close working relationship.

Conclusion

While considering this bill we noted the high level of public interest stimulated by the possible repeal of section 59 of the Crimes Act. The submissions we received demonstrated a range of views about the use of physical discipline in New Zealand. Submissions were received from a wide variety of individuals and organisations, and often expressed strong views on the matter.

We consider that there is widespread misunderstanding about the purpose and possible results of the bill as introduced. We do not consider that the repeal of section 59 will lead to the prosecution of large numbers of parents and persons in the place of parents in New Zealand. Nevertheless, for the sake of clarity, we have recommended amendments to the bill to clarify that parents may use reasonable force in some circumstances, but not for the purpose of correction. We note that there are several potential offences directly related to the care of children that are rarely prosecuted. Such an example is if a caregiver sends a child to its room against its will, this technically constitutes kidnapping under section 209 of the Crimes Act. However, the police are not regularly prosecuting parents for this. We consider that logic dictates the police will adopt a similar approach to parents who use minor physical discipline following the changes to section 59.

We do not believe that the changes we have proposed to section 59 of the Act will lead to a large increase in convictions or the removal of children from their families for the use of minor physical discipline.

2005/25 Petition of Barry Thomas and 20,750 others

We considered the issues raised by this petition, which supports the bill. We have no matters to bring to the attention of the House in respect of the petition.

New Zealand National minority view

In the best interests of children, the New Zealand National members of the committee believe it is imperative to lower the usage of section 59 of the Crimes Act 1961 as it is being used as a shield to conviction by some parents and guardians who have obviously abused their children.

Some high-profile recent cases involving severe beatings with implements are seen as obvious examples of child abuse, yet no convictions have resulted when the accused have successfully used the ''reasonable correction'' justification offered by section 59 in jury trials.

There is less concern about interpretation of the language of section 59 by Judges.

Alongside the need for lowering the threshold of violence against children in this country is the often-confirmed position that 80% of New Zealanders believe, and the New Zealand National members agree that parents should not be rendered liable to prosecution (criminalised) for smacking their children.

Firm statistics as to the use of corporal punishment in New Zealand are not readily available. There is a blurring of the lines as many researchers place child abuse on a continuum from the least application of force by way of ''smacking'', through to child homicide. The New Zealand National members agree with most New Zealanders who do not place ''smacking'' in the same category as ''child abuse''. The difficulty also remains that ''smacking'' itself is ill defined and has various meanings to various people. What may seem an acceptable ''smack'' to one parent is not to another and can be described as ''the bash'' by the child, and ''abuse'' by others.

In the course of hearing submitters, those in favour of repeal were told that a win all/lose all scenario would occur if there was no suggested amendment. Submitters were also asked to discuss and suggest compromise positions that could be included in an amendment, which would operate as a ''fall-back'' position to offer better protection for children while not achieving their first choice of full repeal. The National Party members were disappointed that few submitters would consider any other option than full repeal.
The New Zealand National members believe that this ''all or nothing'' approach fails to accurately reflect current thinking of the vast majority of New Zealand parents.

The New Zealand National members of the committee believe that the fundamental rules of law are certainty and clarity. The repeal of section 59 but retention of some protection for parents by way of

guidelines for practise or commentary on this bill are insufficiently precise for parents to have confidence that they live within the law. The New Zealand National members of the committee intend offering amendments to the bill to ensure the three common objectives of both sides of the debate (a) to send a message that child abuse is wrong; (b) to prevent child abusers from hiding behind section 59; (c) to prevent good parents from being criminalised; are achieved.

The New Zealand National members of the committee believe that there needs to be a common-sense approach to the issues around child assaults in New Zealand and that Parliament should only enact laws that work.

Appendix

Committee process
The Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Bill was referred to the Justice and Electoral Committee on 27 July 2005. The closing date for submissions was 28 February 2006. We received and considered 1,718 submissions from interested groups and individuals. We heard 207 submissions and held hearings in Wellington, Auckland, Hamilton, and Christchurch. We received advice from the Ministry of Justice, the Ministry of Social Development, the New Zealand Police, and the Department of Child, Youth and Family Services. We sought additional advice from the Law Commission.

Committee membership
Lynne Pillay (Chairperson)
Christopher Finlayson (Deputy Chairperson)
Russell Fairbrother
Ann Hartley
N´andor T´anczos
Nicky Wagner
Dr Richard Worth
Chester Borrows and Sue Bradford were replacement members for this item of business.
The committee appointed a subcommittee for the consideration of this bill.
Subcommittee membership
Lynne Pillay (Chairperson)
Chester Borrows replacing Christopher Finlayson
Ann Hartley
Sue Bradford replacing N´andor T´anczos
Nicky Wagner

Key to symbols used in reprinted bill

As reported from a select committee

Struck out (majority)
Subject to this Act, Text struck out by a majority

Struck out (unanimous)
Subject to this Act, Text struck out unanimously

New (majority)
Subject to this Act, Text inserted by a majority

<*Subject to this Act,*> Words struck out by a majority
(*Subject to this Act,*) Words struck out unanimously
<Subject to this Act,> Words inserted by a majority
Subject to this Act, Words inserted unanimously

Sue Bradford

Crimes ((*Abolition of Force as a Justification for Child Discipline*)Substituted Section 59) Amendment Bill

Member's Bill

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The Parliament of New Zealand enacts as follows:

1 Title
This Act is the Crimes ((*Abolition of Force as a Justification for Child Discipline*) Substituted Section 59) Amendment Act

2005.

2 Commencement

This Act comes into force on the day after the date on which it receives the Royal assent.

2A Principal Act amended

This Act amends the Crimes Act 1961.

3 Purpose

The purpose of this Act is to amend the principal Act to *<abolish the use of reasonable force by parents as a justification for disciplining children>* <make better provision for children to live in a safe and secure environment free from violence by abolishing the use of parental force for the purpose of correction>.

Struck out (unanimous)

4 Domestic discipline

Section 59 is repealed.

New (majority)

4 New section 59 substituted

Section 59 is repealed and the following section substituted:

"59 Parental control

"(1) Every parent of a child and every person in the place of a parent of the child is justified in using force if the force used is reasonable in the circumstances and is for the purpose of—

"(a) preventing or minimising harm to the child or another person; or

"(b) preventing the child from engaging or continuing to engage in conduct that amounts to a criminal offence; or

"(c) preventing the child from engaging or continuing to engage in offensive or disruptive behaviour; or

"(d) performing the normal daily tasks that are incidental to good care and parenting.

"(2) Nothing in subsection (1) or in any rule of common law justifies the use of force for the purpose of correction.

"(3) Subsection (2) prevails over subsection (1)."

5 *<Consequential>* Amendments to Education Act 1989

New (majority)

(1AA) This section amends the Education Act 1989.

(1) Section 139A(1) and (2) of the Education Act 1989

are amended by omitting the words ‘‘, unless that person
is a guardian of the student or child’’.

Struck out (majority)
(2) Section 139A(2) of the Education Act 1989 is amended omitting the words ‘‘, unless that person is a guardian of the student or child’’.

Legislative history
June 2005 Introduction (271–1)
July 2005 First reading and referral to Justice and Electoral Committee

Appendix 3: Police Practice Guide

Introduction

The Crimes (Substituted Section 59) Amendment Act ("Amendment Act") comes into force on 22 June 2007 and amends section 59 of the Crimes Act.

Section 59 of the Crimes Act provided a statutory defence for every parent of a child and every person in place of the parent of a child to use force by way of correction towards the child, if the force used was reasonable in the circumstances. The purpose of the Amendment Act is to amend the Crimes Act to make better provision for children to live in a safe and secure environment free from violence by abolishing the use of parental force for the purpose of correction.

The purpose of this practice guide is to advise staff about the new section and to give guidance on the application of it. Until case law develops on the section, it is not known how it will be interpreted and applied by the Courts.

If staff require any advice about the application of section 59 to any particular circumstances, they should consult Prosecution Services, a Child Abuse Investigator, a Family Violence Co-ordinator or Legal Services.

New Section 59

Section 59 states:

"(1) Every parent of a child and every person in the place of a parent of the child is justified in using force if the force used is reasonable in the circumstances and is for the purpose of -

(a) preventing or minimising harm to the child or another person; or

(b) preventing the child from engaging or continuing to engage in conduct that amounts to a criminal offence; or

(c) preventing the child from engaging or continuing to engage in offensive or disruptive behaviour; or

(d) performing the normal daily tasks that are incidental to good care and parenting.

(2) Nothing in subsection (1) or in any rule of common law justifies the use of force for the purpose of correction.

(3) Subsection (2) prevails over subsection (1).

(4) To avoid doubt, it is affirmed that the Police have the discretion not to prosecute complaints against a parent of a child or person in the place of a parent of a child in relation to an offence involving the use of force against a child, where the offence is considered to be so inconsequential that there is no public interest in proceeding with a prosecution."

Analysis of the new section

Child

"Child" is not defined for the purpose of section 59. Because "child" is not defined, it is not clear whether it includes those persons 17 years of age and under (as it is defined in the Care of Children Act 2004), or perhaps, under 14 years of age (as it is defined in the Children, Young Persons, and Their Families Act 1989). As children get older, the use of reasonable force for the purposes listed in section 59 will become less justifiable. Factors that will need to be considered in determining whether the force used is justified under section 59 include:

- age of the child
- maturity of the child
- ability of the child to reason
- characteristics of the child, such as physical development, sex and state of health, and
- the circumstances that led to the use of force.

Person in the place of a parent

"Person in the place of a parent" is also not defined, but includes step parents and foster parents, and other persons who take on parental responsibility in the absence of a parent.

Force used is reasonable in the circumstances

No definitions are offered about what constitutes reasonable force. In using force parents must act in good faith and have a reasonable belief in a state of facts which will justify the use of force. The use of force must be both subjectively and objectively reasonable.

Any force used must not be for the purposes of correction or punishment; it may only be for the purposes of restraint (s 59(1)(a) to (c)) or, by way of example, to ensure compliance (s 59(1)(d)).

Preventing

To "prevent" is to hinder or stop something from occurring. From this it is implicit that reasonable force can only be used at the time that the intervention by the parent is required i.e. force cannot be used after the event to punish or discipline the child. This distinction is made clear in the new subsections (2) and (3) - nothing in s 59(1) will justify the use of force for the purposes of correction.

Preventing or minimising harm to the child or another person

This subsection allows reasonable force to be used to prevent or minimise harm to the child or another person. For example, to stop a child from:

- running across a busy road
- touching a hot stove
- inserting a metal object into a power point
- striking another child or person with an object.

Preventing the child from engaging or continuing to engage in conduct that amounts to a criminal offence

This subsection authorises the use of reasonable force to prevent children from committing offences. Although a child under 10 cannot be convicted of an offence (section 21 Crimes Act 1961), and a child aged 10 to 13 can only be charged with murder or manslaughter (section 272 Children, Young Persons and Their Families Act 1989), a child of any age can commit an offence e.g. theft, wilful damage or assault. Therefore, a parent of a child and every person in the place of a parent of the child can use reasonable force to prevent their child, by way of example, from damaging or stealing property, or assaulting other people or themselves (Note: the defence of self defence could equally apply in such cases).

Preventing the child from engaging or continuing to engage in offensive or disruptive behaviour

Offensive or disruptive behaviour is not defined in the Crimes Act and it is not known where the boundaries lie in the context of this subsection. While current case law can offer some insight, the analysis provided by the Courts is more particularly targeted at types of behaviour that warrant the interference of the criminal law.

In *Ceramalus v Police* (1991) 7 CRNZ 678 Tomkins J adopted the following as a helpful description of "offensive behaviour":

"[The behaviour] must be such as is calculated to wound the feelings, arouse anger or resentment or disgust or outrage in the mind of a reasonable person."

The Shorter Oxford English Dictionary defines "offensive" as:

"1. Pertaining or tending to attack; aggressive; ...

2. Hurtful, injurious ...

3. Giving, or of a nature to give, offence; displeasing; annoying; insulting ..."

The Shorter Oxford English Dictionary defines "disruptive" as:

"1. Causing or tending to disruption..."

Examples of behaviour that may amount to offensive or disruptive behaviour, depending upon the specific circumstances, could include, by way of example, yelling and screaming or throwing objects or food.

Performing the normal daily tasks that are incidental to good care and parenting

Many everyday tasks require parents to use force when interacting with their children. For example, when changing nappies, dressing or securing a child in a car seat, or applying sunscreen. The use of reasonable force in performing such tasks is permitted under this subsection.

Also, a parent may send or take their child to, by way of example, their room against the child's will at the time the intervention is required. Force may be required to perform such a task and the use of reasonable force in such circumstances may be justified under this subsection i.e. to prevent the child from continuing to engage in the behaviour (s 59(1)(b) or (c)) or to restore calm. However, if the child is detained for a period or in a manner that is unreasonable in the circumstances, this subsection will not provide a defence to such action.

Inconsequential offences where there is no public interest in prosecuting

Parliament has expressly affirmed that for minor cases of assault against children, Police have discretion not to prosecute where the offence is considered to be so inconsequential that there is no public interest in a prosecution. The Crown Law Office Prosecution Guidelines for Crown Solicitors also states that a factor that may arise for consideration in determining whether the public interest requires a prosecution includes:

"the seriousness or, conversely, the triviality of the alleged offence; that is, whether the conduct really warrants the intervention of the criminal law."

The Shorter Oxford English Dictionary defines the word "inconsequent" as:

"Of no consequence"

And the Concise Oxford Dictionary defines the word "inconsequential" as:

"Unimportant"

The use of objects/weapons to smack a child, strikes around the head area or kicking would not be inconsequential assaults. While all mitigating and aggravating circumstances would need to be considered, such assaults will generally require a prosecution in the public interest.

In addition, while smacking may, in some circumstances, be considered inconsequential, a prosecution may be warranted if such actions are repetitive or frequent, and other interventions or warnings to the offender have not stopped such actions.

Application of the Police Family Violence Policy (1996/2)

The Police Family Violence Policy outlines the principles, policy and procedures for best practice when members of Police deal with family violence within their community. The term 'family violence' includes violence which is physical, emotional, psychological and sexual abuse, and includes intimidation or threats of violence. The term 'family' includes such people as parents, children, extended family members and whanau, or other people involved in relationships.

Paragraph 19 of the Police Family Violence Policy states:

"Given sufficient evidence, offenders who are responsible for family violence offences shall, except in exceptional circumstances, be arrested. In rare cases where action other than arrest is contemplated, the member's supervisor must be consulted."

Force used on children that is not permissible under section 59 is covered by the Family Violence Policy.

It is considered good practice that assault investigations involving children be referred to Child Abuse Investigators, and investigated in conjunction with Child, Youth and Family. Where an assault on a child is witnessed by Police or where a report of an assault needs to be dealt with promptly, Police Officers will need to determine whether section 59 provides a good defence and if it does not, arrest the alleged offender unless there are exceptional circumstances.

Police investigating cases where force is used against a child, as is the case with all assault investigations, must consider the amount of force used in the circumstances, among other things, before making a decision about whether a prosecution is required in the public interest. In such cases Police need to:

- establish whether there is sufficient admissible and reliable evidence that an offence has been committed
- where and when possible, refer appropriate cases to Child Abuse Investigators where they may be investigated further
- depending upon the amount of force used, take into account whether it is in the best interests of the child/family and the public to prosecute i.e. "exceptional circumstances" will justify a departure from the requirements of paragraph 19 of the Police Family Violence Policy. Staff must apply their common-sense.

In *Attorney-General v Hewitt* [2000] NZAR 148 a full bench of the High Court held that adopting a policy to automatically arrest a suspect without allowing for exceptional circumstances was not lawful. The High Court also held that a failure to consider the discretion to arrest was unlawful and arbitrary under section 22 of the New Zealand Bill of Rights Act. Discretion must be used by staff.

Referrals and documentation

In cases where the force used is found to be minor, trivial or inconsequential, it will be appropriate to record the event on a POL400 and forward the file to the Family Violence Co-ordinator. The expected outcome for such events will be one using common sense and of offering guidance and support, dependent on the context following discussion by the Family Violence Co-ordinator.

In repeat events (where other interventions or warnings have been unsuccessful) involving the same family or more serious cases the matter should be recorded on a POL400 and consideration given as to whether prosecution may be appropriate. A Notification to Child Youth and Family must be made by faxing the POL400 to the Child Youth and Family Call Centre. The matter will also be forwarded in the usual way to the Family Violence Co-ordinator.

For clear events of abuse or neglect, the event will be recorded on a POL400 and dealt with in terms of the CAT/SAT Protocol as a Care and Protection issue. A Notification to Child Youth and Family must be made by faxing the POL400 to the CYF Call Centre. The matter will also be forwarded in the usual way to the Family Violence Co-ordinator.

Appropriate charging

If a parent of a child or a person in the place of a parent of a child uses force that is not justified under section 59, and there are no exceptional circumstances and it is in the public interest to prosecute (refer to the above guidance and commentary), the appropriate charge would be assault pursuant to section 9 of the Summary Offences Act 1981 where the offence is not overly serious. For more serious cases, the offence against section 194(a) of the Crimes Act (assault on a child under 14 years of age) would be more appropriate.

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Appendix 4

Selected paragraphs of the Solicitor General's Prosecution Guidelines, 1992

3. The Decision to Prosecute

In making the decision to initiate a prosecution there are two major factors to be considered; evidential sufficiency and the public interest.

3.1 Evidential Sufficiency

The first question always to be considered under this head is whether the prosecutor is satisfied that there is admissible and reliable evidence that an offence has been committed by an identifiable person.

The second question is whether that evidence is sufficiently strong to establish a prima facie case; that is, if that evidence is accepted as credible by a properly directed jury it could find guilt proved beyond reasonable doubt.

3.2 (in the original there is no paragraph 3.2)

3.3 The Public Interest

3.3.1 The second major consideration is whether, given that an evidential basis for the prosecution exists, the public interest requires the prosecution to proceed. Factors which can lead to a decision to prosecute or not, will vary infinitely and from case to case. Generally, the more serious the charge and the stronger the evidence to support it, the less likely it will be that it can properly be disposed of other than by prosecution. A dominant factor is that ordinarily the public interest will not require a prosecution to proceed unless it is more likely than not that it will result in a conviction. This assessment will often be a difficult one to make and in some cases it may not be possible to say with any confidence that either a conviction or an acquittal is the more likely result. In cases of such doubt it may be appropriate to proceed with the prosecution as, if the balance is so even, it could probably be said that the final arbiter should be a Court. It needs to be said also that the public interest may indicate that some classes of offending, eg driving with excess breath or blood alcohol levels, may require that prosecution will almost invariably follow if the necessary evidence is available.

3.3.2 Other factors which may arise for consideration in determining whether the public interest requires a prosecution include:

(a) the seriousness or, conversely, the triviality of the alleged offence; ie whether the conduct really warrants the intervention of the criminal law;

(b) all mitigating or aggravating circumstances;

(c) he youth, old age, physical or mental health of the alleged offender;

(d) the staleness of the alleged offence;

(e) the degree of culpability of the alleged offender;

(f) the effect of a decision not to prosecute on public opinion;

(g) the obsolescence or obscurity of the law;

(h) whether the prosecution might be counter-productive; for example by enabling an accused to be seen as a martyr;

(i) the availability of any proper alternatives to prosecution;

(j) the prevalence of the alleged offence and the need for deterrence;

(k) whether the consequences of any resulting conviction would be unduly harsh and oppressive;

(l) the entitlement of the Crown or any other person to compensation, reparation or forfeiture as a consequence of conviction;

(m) the attitude of the victim of the alleged offence to a prosecution;

(n) the likely length and expense of the trial;

(o) whether the accused is willing to co-operate in the investigation or prosecution of others or the extent to which the accused has already done so;

(p) the likely sentence imposed in the event of conviction having regard to the sentencing options available to the Court.

3.3.3 None of these factors, or indeed any others which may arise in particular cases, will necessarily be determinative in themselves; all relevant factors must be balanced.

3.3.4 A decision whether or not to prosecute must clearly not be influenced by:

(a) the colour, race, ethnic or national origins, sex, marital status or religious, ethical or political beliefs of the accused;

(b) the prosecutor's personal views concerning the accused or the victim;

(c) possible political advantage or disadvantage to the Government or any political organisation;

(d) the possible effect on the personal or professional reputation or prospects of those responsible for the prosecution decision.

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