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Submission to the Justice & Electoral Committee

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

28 February 2006

Part I : Sue Bradford's Bill to Repeal s. 59 of Crimes Act 1961 'Criminalises' all Parents

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1. **Summary:** Section 59 of the Crimes Act 1961 authorises "every parent of a child … and every person in the place of the parent of the child" to use "force by way of correction towards the child, if the force is reasonable in the circumstances." The Society strongly opposes the repeal of s.59. **"If section 59 was repealed in its entirety, parents would not be authorised [or "justified"] to use reasonable force by way of correction…. Smacking by way of corrective action would be [constituted] an assault".**[1] With s. 59 repealed a parent would have no defence in law against a charge of assault laid against him under ss. 194 or 196 of the Crimes Act 1961. The Society contends that the terms "reasonable" force and "reasonableness of the force" should be retained in s. 59 and do not need any further qualification other than what is already contained in that section ("reasonable *in the circumstances*"). It believes that juries are more than capable of comprehending the concept of "*reasonableness* of the force" in "domestic discipline" and that it constitutes "a question of fact"; as well as the importance of considering *all* relevant "circumstances" specified in s. 59. Furthermore, they understand the need for the firm, consistent and fair corrective discipline of children and their application of common sense when asked on the rare occasion (on average about 1.4 cases per year) to consider any s. 59 defence. Opinion polls have consistently shown that about 80% of New Zealanders completely oppose the repeal of s. 59. If the select committee recommends that s. 59 should be repealed, despite widespread opposition, the Society contends that a public referendum must be held confirming widespread support for this change, before it can become law. Repealing s. 59 would be injurious to the public good, exacerbating the current tragic breakdown in families, loss of control in schools and the generational effects of a write-down of parental control and responsibility. The special role and important God-given duty of parents to apply corrective discipline towards their children for wrongdoing, inappropriate behaviour such as bullying, open and repeated defiance and abuse, serious property damage, stealing etc. would be completely undermined by the repeal of s. 59. It would abrogate the rights of all good parents to be protected in law against spurious claims of child abuse and assault brought against them by zealots and ideologues who wish to use the law to try and take the rights of good parents away from them and impose their own narrow ideologies on them. The judgement of Judge Inglic QC (Family Court, Auckland, 2003) is highlighted to show the importance of the s. 59 defence against allegations that the *limited* use of smacking in corrective discipline, makes a parent, or in this case an *outstanding* foster parent ("Mrs C"), unfit to care for children. The judgement of District Court Judge, C.J. Doherty, involving the recent sentencing of Don and Ann Eathorne (Greymouth District Court, 30/01/06) is highlighted to illustrate the potential for serious miscarriages of justice, when a s. 59 defence is not considered or not open to the defendants. In this case it was open to them (based on the 2003 decision by Inglis J.) but was not even discussed with them by their defence counsel or raised by the sentencing judge.

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[1] Dr A. Jack, Legal Services Office of the Commissioner Of Police (NZ). Letter dated 11 August 2005 to Mr Craig S. Smith, National Director Family Integrity, Palmerston North. Full letter: www.familyintegrity.org.nz

1. When asked by TV ONE's "Eye to Eye" host, former MP Willie Jackson, "Do you accept [the use of] mild physical discipline [on children]?" Green Party MP Sue Bradford did not answer the question. However, she did make it clear that her long-term legislative goal was to criminalise smacking when she stated: "I accept that at this time it's too soon in this country to ***criminalise*** parents who lightly smack their children, therefore I'm simply wanting to repeal existing [legislation]." [Emphasis added]. This evasive yet very revealing reply led Jackson to restate the question: "But do you think it's OK to smack your kids?" Bradford replied. "Personally no, but I'd like to see the day when we no longer use that [light smacking], but I think we have a long way to go. We have a lot of education to do". [Eye to Eye: Episode 23 First broadcast TV ONE Saturday 09/07/05; Re-broadcast TV ONE Tuesday 12/07/05.]

2. Let's be clear and unmask the real Ms Bradford. She vehemently denies publicly that she is promoting what the media have dubbed the "anti-smacking bill" and would prefer instead to call it the "anti-hitting" bill, yet she actually wants the state to make laws that would "criminalise" all parents who lightly smack their kids, in order to enforce parental compliance. Even if she and her anti-smacking brigade could ensure a high degree of compliance to the non-smacking position through education, which they have failed to do so far (the anti-smacking campaign has been going since 1995 and criminal violence against children has continued to increase); they have no qualms in going further and enforcing compliance by way of legislation. What she and her supporters fail to realise is that her bill as drafted, if passed into law, would have the effect of 'criminalising' all parents who not only smack their kids, but also all parents who use any form of "reasonable force" against children, regardless of the circumstances.

3. Holding down an uncooperative baby so that his or her soiled nappies can be changed and forcefully moving an uncooperative child to a room for "time-out" as a discipline measure, both involve the use of "reasonable force" by parents and caregivers. At induction courses organised by CYFS for prospective foster care parents, staff now strongly advise foster care fathers not to change children's nappies unless there is another adult witness present, in case they are subject to allegations by the child, at a later date, of 'assault' or sexual abuse. An Anglican vicar seeking to baptise an infant who is struggling against the 'indignity' of a public sprinkling (baptism) indulges in "reasonable force" against an infant to satisfy the parents desire to complete the sacrament. Many of us have witnessed such acts of 'defiance' that require loving and measured 'violence' to control. (One wonders how Sue Bradford who is a strong supporter of a woman's "abortion rights", sleeps at night, mindful of the brutal violence of state-sanctioned and state-funded abortionists who have murdered 100,000 innocent unborn children while the current Labour government has been in office).

4. Ms Bradford is no doubt well intentioned and sincere in wanting to address the serious problem she calls "the culture of violence" against children in our country. However, the Society believes the repeal of s. 59 will do nothing to address the root causes or shocking symptoms of this violence. Instead it will have a seriously negative impact on many families whose parents seek to and effectively apply good parenting techniques in the discipline of their children. The sincerity with which one may hold a belief, does not make that belief correct. Seriously deluded people can hold beliefs very sincerely.

5. Ms Bradford and her supporters such as Ms Beth Wood, spokeswoman for UNICEF and "anti-smacking" group Epoch (End Physical Punishment of Children), Dr Cindy Kiro, Children's Commissioner and Kaye Crowther, Plunket president, are determined to remove all legal protections to good parents who choose to smack their children for serious wrongdoing as a means of corrective discipline. The Explanatory note to the bill states that "the repeal of section 59 ought not revive any old common law justification, excuse or defence [for the use of "reasonable force" including smacking] that the provision may have codified."

6. During the first reading of the bill Labour MP John Tamahere, a qualified lawyer, told the house that "as currently drafted," the bill "criminalises all parents" who use "reasonable force" (such as smacking) in correction and discipline. It actually goes further than this by making a parent a potential criminal – able to be charged with a technical assault - if they even threaten to use "reasonable force" (such as mild smacking or physical removal) to discipline a child. Neither Bradford nor any of the bill's supporters have made any attempt to directly refute this serious charge that has been made by many opponents of the bill. They merely avoid the issue by making three spurious claims in response: (1) it is not their *intention* of the bill to open the way for such parents to be charged and/or prosecuted for smacking their children. [Note: even though these are the very *effects* of the law change], (3) "in relation to parents the purpose of the bill is educative, not punitive" and (3) the police will not lay charges against parents who smack their children or use "reasonable force" following the repeal of s.59.

7. ***In response to the first claim, one must emphasise that what matters is not the intention of the bill's architect(s), but its legal effects.*** The legal *effect* of setting a speed limit for motor vehicles on the open road is to constitute all drivers who go above the limit as law-breakers who can be prosecuted, convicted and punished for the offence, if caught and ticketed. It was never the intention of lawmakers to treat or consider such offenders as something *less than* offenders, nor to have law enforcement agents turn a blind eye to offending. If promoters of Bradford's bill, who sincerely believe that all mild smacking of children by parents constitutes "violence," "assault" and "abuse" against children, as they clearly do; seek to remove the defence clause found in s. 59 and yet state that their long term goal in its removal is to move to have all parents who smack their kids criminalised; then its understandable that the bill's opponents find their political posturing and rhetoric so full of "double-speak". This is sad in view of the fact that the bill's opponents such as the Society and its supporters are **all** totally opposed to all forms of real "child abuse" as represented by those tragic cases where offenders have been convicted under present law.

8. **The second claim** that the purpose of the bill in relation to parents is "educative rather than punitive" is dishonest. It purposely misleads by its reliance on the obviously false premise that there is no justification or benefit whatsoever for physical discipline (e.g. mild smacking) applied in good parenting. Ironically, the repeal of s. 59 would be punitive in denying all good parents, who at times may find a need to use "reasonable force" in discipline etc, one of the important tools needed in good parenting as well as open the way for them to be charged for the use of reasonable force. Current evidence suggests that non-abusive smacking for a 2-6 year old is effective for acts of open and repeated defiance over the options of timeout, positive-reinforcement, reasoning and removing privileges. The 2004 research report of the Children's Issues Centre at Otago University 2004 states: "occasional physical punishment occurs in many families and may not have long-term negative effects as long as it is used in a climate of warmth and love, where the predominant mode of relating to children is positive".

9. **The third claim** by the bill's supporters is also false. Police would be duty bound to act once a complaint of "assault" or "child abuse" is laid against a parent or caregiver by someone such as a CYFS social worker (this organisation is committed to outlawing all forms of smacking). **In one sense it is irrelevant whether or not the police will prosecute for such a minor offence as mild smacking. What is more relevant is that parents who discipline their children should be allowed to do so without breaking the law and with the authorisation of a law that recognises their unique role in corrective discipline (s. 59 does that).**

10. While it is true that the police work within the guidelines and protocols set out by child abuse teams, before laying charges, these protocols, once s. 59 is repealed, will promote the idea that all physical discipline constitutes "child abuse" and "assault". Whether or not police lay charges may well depend on the level of pressure exerted by the complainant(s) and/or child advocacy agency/agencies seeking a prosecution. Critics of repeal of s. 59 point out the philosophically-driven zealots opposed to

smacking, such as many CYFS social workers, who currently foist their dogmatic views on others by informing parents that smacking constitutes a criminal offence.

11. At present, when a complaint comes to police, the child abuse team/ serious abuse team protocol between police and CYF comes into play. CYF guidelines state: "Every notification is treated seriously and sensitively and all notifiers treated with respect. Intervention under the CYP&F Act must ensure that the child or young person is protected from harm, but every effort should be made to limit the damage and disruption to the child's relationship with their family or whanau."

12. Section 59 in the Crimes Act 1961 acknowledges the special circumstances involved in the parental task of providing good domestic discipline to children and provides a freedom to parents to use common sense and apply good parenting skills.

13. Section 59 (Domestic discipline) states: "Every parent of a child and every person in the place of a 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. The reasonableness of the force used is a question of fact."

14. National MP Dr Richard Worth was quite right when he stated on the TV One programme "Eye to Eye", that the repeal of s. 59 will expose all parents and caregivers who use "reasonable force" against their children, to potential prosecution under s. 194(a) of the Act: they would be "liable to imprisonment for a term not exceeding two years" for assaulting any child under the age of 14 years. They would also be exposed, without defence, to prosecution under s, 196 of he Act – "common assault" – and be liable to a term of imprisonment not exceeding one year. With the removal of the legal defence under s. 59 all parental actions involving "force" of any kind used will be constituted as acts of "assault" in all circumstances. Dr Worth warned that private prosecution(s) could be lodged by any citizen(s) against any parent(s) or caregiver9s) who they considered to have used "force" against a child/children and the police would have to act on the charge(s).

15. With s. 59 repealed all those charged would lose the right to have the facts of the case examined by a jury of 12 of their peers to consider the defence of "reasonable force". They would face being treated in law like any other adult facing a charge of assault against another adult. The unique parental-child relationship consideration would be lost from the law while other defence provisions applying exclusively to adults 'assaulting' other adults would remain (e.g. s. 60 see below). To be consistent Ms Bradford should be pressing for the repeal of all of these on the grounds of 'discrimination'! It is ironic that the Children's Commissioner's Office agues that the repeal of s. 59 "would remove current discrimination against children" and yet the other statutory defences to "assault" benefiting adults who 'assault' other adults remain (e.g. s 60).

16. The vast majority of New Zealand parents deeply love their children, do all they can to correctly discipline their children so they learn that there are consequences to wrongdoing and abhor all forms of child abuse and violence against children. It is these outstanding loving parents who would be 'criminalised' if Ms Bradford's bill became law**. She and her misguided supporters deliberately conflate the controlled and measured use of mild smacking with "abuse" and "violence"**. **By the fallacious substitution of some pejorative noun such as "hitting", "violence", "assault" or "abuse" for "smacking", they have attempted to subvert the use of language**. **Their linguistically strained rhetoric is dishonest. They fail to make any distinction between forms of smacking that obviously do constitute child abuse (e.g. that which physically injures the child and is delivered in rage by out of control dysfunctional parents, against the will of the child) and that which is a reasonable, punitive and corrective involving willing compliance to the discipline, following full explanation of and admission to wrongdoing by the child.**

17. Children's Commissioner Dr Cindy Kiro argues that the repeal of s. 59 of the Crimes Act "would mean one group in society could no longer be legally assaulted," and this provision in law allows for "state sanctioned violence" against children. This claim is fallacious. It is deliberately misleading as it

fails to recognise the clear distinction in law between a technical "assault" and an action which is a criminal offence - due to its real nature (a criminal assault for which the offender is or could realistically be convicted after circumstances are taken into full account). The statutory and common-law defences for "assault" recognise these distinctions.

18. Under the Crimes Act the technical definition is given: "Assault" means 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.

19. Contrary to Dr Cindy Kiro's assertion, there is nothing in our law that gives a right to "one group in society", namely parents or caregivers, to legally "assault" (for which a criminal conviction could be served) any other group, including their children, or children under their care. Nor is there a law that allows for or condones children or any other group being "assaulted" by any other group. Ms Kiro deliberately misrepresents the law, conflating an act of "reasonable force," such as mild smacking applied in discipline, with those truly violent and abusive acts that have led to convictions for (criminal) "assault" under the law. The latter are inhuman acts for which s. 59 offers no real defence to the offender because jurors and judges find distinguishing between crimes of "child abuse" and criminal "assault" as opposed to the actions of parents applying "reasonable force" in circumstances involving discipline and correction, very straight-forward.

20. Section 59 does allow for a legal defence, albeit one rarely used, in those situations when charges are brought against a parent or caregiver for assaulting their child and the defendant asserts that the force used constituted "reasonable force" in "circumstances" such as those involving parental discipline. **It is not a provision in law that legalises parents or caregivers to actually commit harmful violent criminal acts on children that would be actual "assault" (such as have led to criminal convictions). Its intention is to safeguard the rights of parents and caregivers against a charge of 'assault' in those rare cases, when the facts of the case can be established to the satisfaction of a jury that the force applied was "reasonable" and appropriate in the circumstances and did NOT constitute a criminal action.**

21. Dr Kiro claims that repeal of s. 59 will simply remove a legal defence that is used when parents seriously assault their children - a defence that is not available in situations of assault against adults, animals or any other group in our society.

22. However, the Bill's supporters are absolutely wrong to suggest that s. 59 was put into the Crimes Act 1961 so that parents or caregivers who actually assault their children can take refuge in this provision to give legal support to criminal actions against children. On the contrary it is there so that allegations of actual assault against parents and caregivers are dealt with in the proper context of the adult-child relationship that may justify a "reasonable" use of "force" in "circumstances" involving for example parental correction and discipline.

23. S. 59 parallels the provision in law under s. 60 that allows for "the use of force" for specific purposes by aircraft and ship masters or officers against members of the public, including children.

24. Section 60 says: Discipline on ship or aircraft. The master or officer in command of a ship… or the pilot in command of an aircraft… is justified in using and ordering the use of force for the purpose of maintaining good order and discipline… if he believes on reasonable grounds that the use of force is necessary, and if the force used is reasonable in the circumstances.

25. NZ Law recognises that Parents, Pilots and Masters need to have the authority and powers of discipline to properly care for their charges, be they children or passengers. The "Repeal Section 59 lobby" wants to remove this authority only from the parents, not from pilots and masters. The repeal

lobby appears not to trust parents to come to the same narrow conclusions they hold: that no force at all should be applied to children. Lobby leaders like Sue Bradford MP are quite clear as to their long-term social-engineering goals: they want smacking and all forms of physical discipline abandoned by ALL parents and caregivers, even if it means legislating against it.

26. A seriously flawed survey reported on in the Dominion Post (27/7/05) carried out by The Littlies Lobby in conjunction with the Childrens Commission, is headlined as providing support for the end of smacking. "Survey supports end to smacking … Child advocates say the findings suggest support for a law change is increasing".

27. Such a headline is nonsense. The study involving a self-selecting group of participants only had one question in it that related to smacking and had none dealing with the repeal of s. 59. The finding only showed that 71% of the 1367 readers of "The Tots to Teens" magazine, who chose to take part in the survey, believed that "smacking when they [children] do things wrong" was the least effective way to guide children to behave well. However, this question failed to differentiate between the nature and level of seriousness of the wrongdoing and the commensurate use of smacking as one discipline tool used. Many opponents to the repeal of s. 59 who use smacking sparingly for certain types of "wrongdoing," would probably agree with the statement that smacking as a discipline measure to deal with ALL or MOST wrongdoing is the least effective way to guide children to behave well.

28. Plunket president Kaye Crowther is quoted in the Dominion Post as saying: "We're not talking about smacking. We're talking about belting and hitting children with implements. In recent times I am aware of at least two cases where [Section 59] has been used as a defence where the child had been really abused."

29. When challenged to identify these "two cases" by our Society secretary David Lane (who phoned her on the day of the report), Ms Crowther cited the recent case of a "Timaru woman" who Sue Bradford alluded to on national television programme ("Eye to Eye" TV ONE) as having assaulted her son using a "horse whip" (it was actually a riding crop). The woman's lawyer defended her actions in the Timaru District Court under s. 59 of the Crimes Act. Crowther also cited the recent case of a father who used what she described as a "4 by 2 wooden plank" to 'discipline' a child.

30. Both cases are inadmissible as evidence in support of Sue Bradford's s. 59 repeal bill. The Timaru woman was acquitted by the jury who had carefully examined the facts of the case - presented without the negative self-serving media spin. They established that she had used "reasonable force" in the context of disciplining her own son. The jury exonerated her after their deliberations that took only one hour and ten minutes. Mrs Crowther may disagree with the opinion of 12 jurors, but she has no right to tour the country spreading malicious lies that the boy "had been really abused". Those who stand trial in our country for child abuse and who are subsequently acquitted of charges against them, by a jury, should not be derided as "child abusers" in the media by either a Plunket president, an MP like Ms Bradford, or a Commissioner of Children. Such libellous comments made also denigrate the jurors suggesting they were incompetent and supportive of "child abuse".

31. The case heard in the Napier District Court involving the so-called "4 by 2 wooden plank", resulted in the 41-year old father being acquitted of assaulting his son. His lawyer used a s. 59 defence (reported Dominion Post 22/02/01) and referred to in a subsequent article "Smacking Laws Stay Unchanged for Now" (DP 21/12/01). The reports make no mention of a "4 by 2 wooden plank" but only to a "piece of wood". The jury had little difficulty, having examined all the facts, concluding that "reasonable force" had in fact been used for "corrective discipline" and the father's use of a piece of wood (30 cm by 2cm) did not constitute an assault.

32. S. 59 does not need to be repealed on the basis that the lawyers of a few callous child abusers have tried *unsuccesfully* to appeal to it, in order to defend their clients. Repealing s. 59 in order to supposedly close the claimed and imaginery 'escape route' it offers real child abusers, can be

compared to trying to crack open a walnut using a sledgehammer. The effect of any repeal would be to disempower good parents from all modes of discipline using reasonable force (e.g. smacking) as parents would be open to charges of criminal action for all uses of force. This is an abrogation of the rights of parents to discipline their children, for whose actions they are accountable for under law.

33. Ms Bradford's 'anti-smacking brigade' is intent on imposing their narrow ideological/philosophical view of the only options of discipline that should be open to parents, upon others who believe smacking has a place in disciplining children. They have provided no convincing examples of cases where s. 59 has been used to allow real child abusers to avoid a conviction of assault. Even if hey had, such alleged miscarriages of justice can be appealed. We are not aware of any such examples.

34. Bradford claims that her bill removes the legal defence for a parent to physically assault their child and 'reasons' that just like adults and pets, children should be protected against assault. However, children are already protected against assault under sections 194(a), 195 and 196 of the Crimes Act 1961 and s. 9 of the Summary Offences Act 1981. The task of government agencies is to promptly bring real child abusers to justice and punish them appropriately, educate parents and caregivers about how to effectively discipline and nurture their children, by supporting agencies that are doing this well, and avoid interfering in the lives of good parents who choose to apply physical discipline where required. Our Society affirms the message that there are many positive parenting strategies for disciplining children aside from smacking.

35. The anti-smacking lobby argues that abuse and violence hide behind the provisions of Section 59 of the Crimes Act 1961 and that it constitutes "state sanctioned violence". The facts do not appear to support this contention. John Hancock, a lawyer who presented a paper for Action for Children and Youth Aotearoa Inc., summarised such cases involving s. 59 in a document entitled "Parental Corporal Punishment of Children in New Zealand" for the United Nations Committee on the Rights of the Child (dated 28 August 2003). In this document he listed only 18 cases in which Section 59 featured spanning the 13 years from 1990 to 2002 (1.4 per year). Hancock has conceded that his comprehensive research was unable to provide an entirely exhaustive list of cases.

36. In 10 of those 18 cases in Hancock's paper the parent was found guilty of abuse; one needed a re-trial; in one the child was removed; and the parent was justified in the remaining six cases, five of which were trials by jury. In other words, when Section 59 cases came up before the courts, the alleged abuser was found to be guilty 56% of the time, which amounted to less than one case per year. So it appears to be a defence rarely used, and abusers don't appear to be hiding behind it very well.

The United Nations Convention on the Rights of the Child

37. Finally, we have those calling for the repeal of s. 59, such as the Children's Commissioner, claiming that s. 59 "breaches the United Nations Convention on the Rights of the Child, an international commitment that New Zealand ratified in 1993, in allowing discrimination against children, and failing to protect them from all forms of violence."

38. The United Nations Committee on the Rights of the Child is the body established under article 43 of the CRC to monitor states' progress in implementing the convention's obligations. It has criticised the retention of the right of "corporal punishment" of children in New Zealand legislation under s. 59 (see ref. 2 below). However the NZ legislation does not refer specifically to "corporal punishment" in relation to "domestic discipline". It only uses the term "reasonable force". The Convention emphasised the need for the "protection of children from all forms of violence, which includes corporal punishment in the family" and called for "the promotion of non-violent forms of discipline". It recommended an amendment to existing legislation "to prohibit corporal punishment in the home". It did not recommend the removal of the statutory defence relating to the use of "reasonable force" by parents in circumstances that did not involve discipline in the home.

39. The anti-smacking brigade has chosen to misleadingly interpret these CRC treaty to mean that it is opposed to a state's retention of the rights of parents to use any "reasonable force" in the discipline of their children because it constitutes an abrogation of the rights of children not to be subjected to physical punishment, and thereby is unlawful discriminates against children. That is why there is no mention of "corporal punishment" or "smacking" in Sue Bradford's bill. If enacted into law as drafted, it would create a legal nonsense by turning all parents who use *ANY* form of "reasonable force" in carrying out their duties with children, into law breaking criminals (the repeal of s. 59 would expose them to the full force of prosecutions under s. 194(a)).

40. For the Children's Commissioner to advance the spurious argument for repeal of s. 59 based on "discrimination against children", is a legal nonsense. The law cannot treat all persons in society equally when it comes to domestic discipline or the application of "reasonable force". Ships' captains and members of the public seeking to prevent a riot for example are treated differently under the law to 'ordinary' citizens when faced with a charge of assault in specific circumstances. They have a statutory defence in law specific to the circumstance and their defined role in physical discipline. Children are not adults. Neither are adults children. Domestic discipline and child rearing duties, by definition must involve some level of "reasonable force" at times (e.g. potty training, changing nappies, putting uncooperative kids to bed). Parents and care-givers are entitled to be protected in law with respect to their use of appropriate and "reasonable discipline"

41. **The UN Convention's preamble to its Articles states:**

"The States Parties to the present Convention [which came into force 2/9/90],

"Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community…

"Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

"Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth",

"Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child…

"Have agreed as follows:"

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42. It is a legal imperative that signatory states afford "the necessary protection and assistance so that [the family] can fully assume its responsibilities within the community". One of these responsibilities is that of disciplining children by parental and/or caregiver control, correction and punitive action. This of necessity involves some level of "reasonable force" at times. The state assumes these responsibilities by way of "Departments of Correction" or such like that imposes the decisions of the courts issued against lawbreakers. Sovereign states are free to administer appropriate punishment to law-breakers. Governments must acknowledge the reality of the rights of parents to administer loving and appropriate physical discipline and correction to their children and support them in this task. In doing so they must take "due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child".

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43. Supporters of the repeal of s. 59 of the Crimes Act 1961 such as the Children's Commissioner argue that s. 59 is in breach of Article 19.

44. Article 19 of the Convention states

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.
The Crimes Act 1961 seeks to provide protection for children against "all forms of physical or mental violence, injury or abuse." It provides "the necessary support … for those who have the care of children. etc" in part through s. 59 which sends a clear signal to them that only "reasonable force" can be used when caring for children. There is nothing in the Convention that suggests that any or all "reasonable force" used in the physical discipline of children constitutes the type of "physical violence" outlawed by the convention (e.g. the "abuse" of neglect of physical needs, sexual violence and abuse that is physically, psychologically and spiritually harmful etc.).

References:

1. Convention on the Rights of the Child

2. UN Committee recommendations to the NZ Government on Corporal Punishment. [Source Beth Wood, Advocacy Manager, UNICEF NZ (United Nations Children's Fund), Wellington]

Corporal punishment

1. 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 emphasises 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.

2. 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.

UN Committee recommendations to the NZ Government on Corporal Punishment. [Source Beth Wood, Advocacy Manager, UNICEF NZ (United Nations Children's Fund), Wellington]

3. SPCS Press Release 27/7/05. "Dishonesty in Anti-Smacking Brigade"

http://www.scoop.co.nz/stories/PO0507/S00311.htm
http://www.ohchr.org/english/law/crc.htm

4. SPCS Press Release 2/08/05
"Bradford's Repeal of S. 59 Criminalises all Parents"
http://www.scoop.co.nz/stories/PO0508/S00033.htm

Part II: CYFS Foster Parents and the 'Anti-Smacking' Bill

2. The Society points out that S. 59 of the Crimes Act 1961 authorises both parents and all those in the place of the parents of the child to use reasonable force in applying corrective disciple to children in their care, but only when it is applied in appropriate circumstances (school teachers are specifically excluded from such authorisation as a result of an amendment to the Education Act). The application of the force must be reasonable in the circumstances involving domestic discipline and in law the reasonableness of the force is a question of fact.

3. The policy prohibitions to smacking put in place by Child Youth and Family Services in relation to foster children, do not abrogate the rights in law of foster parents to smack a child when there is justification for its use, as illustrated in the case of "Mrs C" and her four foster boys that came before Judge Inglis QC in the Family Court in Auckland in July and August 2003 (see Appendix below).

4. In cases where CYFS retains custody of foster children, there is no formal contract agreement with its foster parents relating to their duties and responsibilities relating to full-time childcare. In all such cases foster parents offer their services free of charge to CYFS and assume the role of persons in loco parentis ("in the place of the parent"). They receive no payment for their 'child care services' and the only money they receive from CYFS is by way of regular reimbursements for some costs involves in providing 24 hour care for the chlordane.

5. As a recent case that came before the Greymouth District Court on 30 January 2006 involving Mr & Mrs Eathorne, illustrates, CYFS will vigorously pursue a prosecution of assault against their own foster parents who apply a "benign" smack to their nine year old foster child, even in a case where the force was reasonable, the discipline occurred over three years ago (in 2002), and the circumstances more than justified the action ($6,000 of serious wilful property damage by the foster boy which the Eathornes had to pay for). The Eathornes were convicted of assault and fined $500 each plus court costs of $150 after an 11th hour plea bargain manoeuvre. The summary of facts show that the only 'offence' committed was that Mrs Eathorne smacked the boy on two occasions in a "benign" fashion with a wooden spoon as corrective discipline for his wilful damage on other peoples'property.

6. "The Society strongly opposes the repeal of s. 59", says Society president Mike Petrus. "If S. 59 is repealed there will be no authorisation in law for parents to use any kind of force in the context of disciplining children (reasonable restraint etc.). The special role and God-given duty of parents to apply corrective discipline for wrongdoing, inappropriate behaviour such as bullying, open and defiance and abuse, serious property damage, stealing etc. will be completely undermined by the law", he says.

7. If s. 59 of the Crimes Act is repealed it is blindingly obvious that large numbers of parents and foster parents will find themselves convicted of assault under s. 196 of the Crimes Act, for benignly smacking their children as a means of correction. Foster care parents dealing with CYFS children will be far more vulnerable to malicious and erroneous allegations of assault and cruelty.

8. The Society is appalled at the serious wilful mistreatment and gratuitous violence committed by many irresponsible and callous parents against children in their care. The way to stamp out this evil is not to take away the rights of good, decent, caring kiwi parents who seek to apply appropriate corrective discipline to the children they love. The right in law to smack children will most definitely be taken away from all parents if s. 59 of the Crimes Act is repealed and parents will no longer have any defence in law against a criminal prosecution of assault for the act of smacking.

9. If the select committee recommends that s. 59 should be repealed, the Society contends that a public referendum must be held confirming widespread support for this change, before it can become law.

S. 59 of Crimes Act provides authorisation to parents and foster parents to smack their children

RE THE FIVE M CHILDREN
NZFLR [2004] pages 337-359. Quotes from pp. 337-338, 340, 350-353

Family Court Auckland
CYPF 004082-086D 01
29, 30 July, 14 August 2003

Judge Inglis QC

… Children and young persons... Caregiver admitted using corporal punishment…

The five M children were born between October 1995 and February 2002. Concerns about the parenting of Mr and Mrs M first came to the attention of the Department of Child, Youth and Family Services ("The Department") in February 1998. Mrs M was unable to cope....by November 2001, the Department had given up hope that the children could remain with Mr and Mrs M. On 29 November 2001, an interim order was made vesting custody of the children in the Chief Executive of the Department. The four elder children were placed with Mrs C…
The Department had some reservations regarding Mrs C's suitability as a foster parent given that she admitted smacking more than one of the four children in her care. The Department's policy was that no caregiver appointed by the Department was to use corporal punishment against a child placed in the caregiver's care by the Department.

Held (making orders accordingly)

(1) As a matter of law, the effect of s 59 of the Crimes Act 1961 was that a parent's action, or that of a person in place of a parent, in smacking a child for the purpose of correction was entirely lawful if the force used was reasonable in the circumstances. Reasonable force used against a child for that purpose could not in law be categorised as physical abuse of a child. Mrs C's actions did not fall outside the protection afforded by s. 59. In the circumstances of each of the three incidents, "correction" was necessary and the degree of force that Mrs C used was mild and reasonable (see pars [43] and [45]).

(2) The Judge was entirely satisfied that it was in the welfare and interests of the elder boys that they be permanently placed with Mrs C. There was no possibility of the return of any of them to their parents' home and care. Placing the welfare and interests of the four elder boys as the first and paramount consideration, the Judge considered it best for them to entrust their sole custody to Mrs C by a custody order under the Act in her favour. The four boys thrived under her care and there was no question of disrupting that placement (see paras [49] and [52]…

Proceedings

This was the disposition stage of care and protection proceedings under the Children, Young Persons, and Their Families Act 1989 in relation to five boys, four of whom were in the foster care of Mrs C…

JUDGE INGLIC QC

Introductory

[3] The third issue relates to reservations about one of he proposed foster parents. I use the term "foster parent" for want of a better term to describe a situation which is intended by the Department to be something not much less than formal adoption. The reservation which initially seemed to cause the greatest difficulty for the Department arises because the proposed foster parent was said to have smacked more than one of the four elder children, which the proposed foster parent candidly admitted and explained in the course of her oral evidence. The Department's policy is that no caregiver appointed by the Department may use any form of corporal punishment against a child placed by the Department in his or her care, regardless of the provisions of he Crimes Act 1961, s 59, which provides that "every parent" and "every person in the place of the parent" is exempt from any criminal or civil liability in respect of "using force by way of correction towards the child" if "the force is reasonable in the circumstances".

Dispositions: the four elder children

[39] A further criticism of Mrs C related to the reference in passing to the psychologist by some of the boys to Mrs C's use of corporal punishment, a method of discipline that is contrary to Departmental policy. In the course of the Department's evidence there was mention of the Department's wish to "investigate" these allegations (which came to light only because of the psychologist's reference to them) and to defer any approval of Mrs C as a permanent caregiver of the four boys until it could be known whether these allegations could be substantiated. Of course one does not have to look very far for the good reasons why the Department should have such a policy, given its responsibility for sometimes seriously physically abused children, but there was some debate during the hearing on whether in circumstances of the present case the Department's policy could be legally operative because of he provisions of the Crimes Act 1961, s 59, the relevant parts of which read as follows:

> 59. Domestic discipline… (1) Every parent of a child and … 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) ….
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> It is unnecessary to set out subs (3) because it applies only so as to exempt from s 59 corporal punishment in schools. In its application to the present case, the issues raised in s 59 are of some importance.

[40] In her oral evidence Mrs C acknowledged, with complete candour, that she had smacked one or other of the children on three separate occasions. I had no difficulty in accepting the accuracy of her evidence that all those occasions were long before the present hearing, and that once the children understood - to their surprise – that she was capable of giving them a smack, she has never had occasion to do so since. I accept her evidence about the three occasions and that they were the only occasions on which the children have been smacked in her home. The first: was when she had parked her car, with all four children in it, on a slope, and one of the children mischievously let off the handbrake so that the car rolled back and there was nearly a serious accident. After reapplying the handbrake she gave that child a smack with her bare hand. The second incident was when she found two of the boys poking pieces of paper into the electric radiator so as to start a fire. She gave each of them a smack with her bare hand. The third incident happened when it became known that one of the smaller boys had formed a habit of spreading faeces over the toilet seat and other available surfaces. She warned him of what would happen if he did it again, emphasising health risks, and when he did so she gave him a smack, again with her bare hand. I should add that the psychologist, in her evidence, wished to record that she detected no indication of excessive smacking, no signs of fear, that none of the boys appeared to be bothered about the incidents, and that there was in her opinion no question of physical abuse.

[41] The effect of the Crimes Act s 59, has recently been discussed by Fisher J in Sharma v Police [2003] NZFLR 852, one of the very few reported cases in which the Courts have been required to consider s 59. The case is of particular interest within the context of the present case because it was held that s 59, if the force used by way of correction is shown to be reasonable in the circumstances, is a complete answer to a charge of breach of a protection order by hitting a protected child: Domestic Violence Act 1995, ss 19(1)(a) and 49(1)(a). Having recorded as a first impression that the scheme and purpose of the Domestic Violence Act might have been expected to lead to a different result. Fisher J continued, at paras [10] and [11]

> [10] However the statutory wording seems to require otherwise. Where the elements of s 59 of the Crimes Act are satisfied, the Crimes Act decrees that the act of a parent or person in place of the parent is "justified". "Justified" is defined in s 2 of the Crimes Act as "not guilty of an offence and not liable to any civil proceeding". "Offence" is defined in the same section as "any act or omission for which any one can be punished under this Act or under any other enactment, whether on conviction on indictment or on summary conviction", Breach of a protection order contrary to ss 19(1)(a) and 49(1)(a) of the Domestic Violence Act 1995 is "an act for which any one can be punished under any circumstances". It seems to follow that the child discipline defence offered by s 59 of the Crimes Act is available to a defendant in a prosecution under ss 19(1)(a) and 49(1)(a) of the Domestic Violence Act.
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> [11] The conclusion is reinforced by the point that an offence is committed in terms of ss 19(1)(a) and 49(1)(a) of the Domestic Violence Act only if the defendant is responsible for "physically abusing" the protected person. So long as s 59 of the Crimes Act remains part of the general law of the country it might be difficult to categorise reasonable force for child discipline as "physical abuse" in the absence of an express provision on the point in the Domestic Violence Act.

[42] His Honour went on, in para [13], to hold as a matter of law that the expression in s 59, "by way of correction towards the child", is a reference to the subjective purpose of the parent or person in place of the parent. His Honour continued:

> So long as the force is used honestly for the purpose of correction, and not vindictively or for some other purpose, that element is satisfied .. When it comes to purpose, it does not matter what a reasonable person would have thought or intended. The sole focus is the purpose of the particular defendant.

At a later point, at para [15] Fisher J viewed "correction" as implying that the objective of the punishment is to deter repetition of improper conduct. Later still, at para [16] His Honour categorised as an objective test the question whether the force used was reasonable in the circumstances, so requiring an objective consideration of the degree of force and the context of the surrounding circumstances, essentially an issue of objective proportionality and an issue of fact.

[43] As a matter of law, therefore, the effect of s 59 is that a parent's action, or that of a person in place of a parent, in smacking a child for the purpose of correction is entirely lawful if the force used is reasonable in the circumstances. As Fisher J has pointed out, reasonable force used against a child for that purpose cannot in law be categorised as "physical abuse" of the child.

[44] It is no part of this Court's function to enter any current public controversy about whether, as a matter of principle, smacking a child by way of reasonable domestic discipline should be legally banned. Whatever personal thoughts one may have about the issue are beside the point, for the use of reasonable force by way of correction of a child by a parent or one in the parent's place is perfectly lawful. The Court is obliged to apply the law as it stands. The fact that some disagree with the law as it stands and wish to see it changed is irrelevant to present purposes.

[45] In the present case it is of course necessary to determine on the facts whether the relatively isolated acts of smacking were "by way of correction" and whether the force used was "reasonable in the circumstances". No one in the present case has attempted to argue that Mrs C's response in the three incidents mentioned came outside the protection of s. 59: understandably so, because no one who saw and heard her could have described her transparent truthfulness. Applying the law as it stands – which makes it unnecessary to consider whether in principle smacking is or is not to be discouraged – I have no difficulty in finding on the facts that "correction" was necessary and that each child was smacked in that honest – and indeed justified – belief. Moreover I am left in no doubt that each child would have clearly understood the reason why that punishment was necessary and would have seen it not as rejection by a loved and trusted adult or an arbitrary abuse of adult power, but as decisive, instant, necessary and fair correction. Nor do I have any difficulty in finding objectively in each instance that the degree of force used was mild and reasonable within the context of the circumstances as they presented themselves as true. These incidents are in an entirely different league from some of those recorded by the Department in respect of the parents, which came well outside s 59 and on any view amounted to child abuse.

[46] The only point about these incidents made on behalf of the Department was that any form of physical correction of a child in the Department's interim custody (as the relevant children may have been at the time) was contrary to Department policy. It was suggested at one stage of the hearing that the Department might need to review the placement of the four elder boys with Mrs C or at least consider the need for some therapeutic measures. It will be remembered that what turned out to be a garbled account of the smacking incidents was first revealed in the evidence of the psychologist, whose evidence was received at a relatively early stage of the hearing. One can understand the Department's initial reaction, but that was before Mrs C was called as a witness. I have already noted the impression she created as a transparently truthful witness.

[47] Fortunately the Court is spared the need to consider the legal issues which could well have arisen from any attempt to suggest a rigid application of Department policy in its relation to the complete legal protection provided by s. 59 to Mrs C (assuming, for want of clarity in the evidence, that these incidents took place after the Department had been granted interim custody of the four boys), for in the end the Department did not press the point. Indeed, by the end of the hearing some of the practical realities had become overwhelmingly apparent. One of the realities was that the four elder boys formed a single unit and that it was impossible to consider splitting them up. Another of the realities was the virtual impossibility of finding a substitute placement for a unit of four children. Yet another reality was the strong relationship that had developed between the four boys and Mrs C, in important respects an ideal foster parent for them. Finally, by making her point at an early stage of their reception into her home, Mrs C had not since needed to resort to any physical discipline but had been able easily to manage "her boys", as she lovingly called them, by other means. They are, as others have observed, well-behaved and pleasant children.

[48] I should end this discussion by reference again to the evidence of the psychologist, who made the valid point that it could be unwise to use physical discipline on children who need recovery from the psychological damage created by their previous experiences in a physically and abusive home. Indeed that reasoning could readily enough be extended by saying that any foster parent, dealing with children with that kind of past experience of neglect, deprivation and physical abuse from a person, should realise that any form of punishment could be misunderstood by such a child, and that if needed it should be seen clearly by the child as necessary correction, not a sign of dislike, indifference or rejection. There is no difficulty in accepting that Mrs C has a depth of understanding and experiences of these children so as to know exactly what is required for their recovery from past experiences and for their future positive development. She also has the humility to listen to and accept wise advice.

[49] By the end of the hearing I had become entirely satisfied that it was in the four elder boys welfare and interests that they be permanently placed with Mrs C. That remains the Court's finding. Any thought of the ultimate return of any of them to their parents' home and care is out of the question… At the end of the present hearing I made orders under the 1989 Act appointing the Department's Chief Executive

together with Mrs C as additional guardians of the four elder boys. Having already made an interim custody order in Mrs C's favour under the 1989 Act, I now determine whether that should be converted into a formal sole custody order in her favour. The Department does not consent, but neither does it object to that course….
